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## Issuance for Commission of Examination of witnesses

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*The paper mainly focuses on the nature, scope, and objective of the 'Issuance Commission of Examination of Witnesses' in criminal law. This paper has also taken the problems and hypothesis into consideration which will be answered by the end of the topic. The focus is on the interpretation of the sections identified under this topic and how it has impacted the rulings of the court to give more rational justification on these issues. Further, the statement of problems, objectives, research questions and review of literature which are stated gives more clarity on the topic to help readers understand aspects and character. The reason for taking up this topic as a research topic is that, even though it's a short topic and except for some law books, none dive into this topic in detail. The issue of the commission under the civil procedure code has been dealt with comprehensively however in criminal law the content is inapproachable which proves that does not give parties the license to claim this as a matter of a right and the person would not be 'exempted from the appearance in a criminal court'. Also, unlike CPC, the commission under CrPC is issued to a judge, not a lawyer.*

**Keywords:** *witness, examination, criminal law.*

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### INTRODUCTION

Issuance for commission for examination of the witnesses is provided under Chapter 23 Evidence in inquiries and Trials. Part A discusses the provisions of Sections 284 to 290 relating

to commissions for the examination of witnesses, and Part B discusses the provisions of Sections 291 to 299 relating to certain special rules of evidence designed to facilitate proof and reduce the time and expense associated with the production of certain types of evidence. The focus of this paper is on Sections 284-290 of CRPC. The method for issuing commissions for the examination of witnesses, as well as the execution of such commissions, is outlined in Sections 284 to 290. These provisions apply to witnesses in the territories covered by the Code. They also apply to witnesses who are located in India but not in those regions, as well as witnesses who are located outside of India. It should be stressed, however, that these provisions must be applied with caution since, as various courts have decided, examination on commission is the exception rather than the rule<sup>1</sup>.

Under CPC, The Court can issue a Commission if it receives an application from the parties explaining the need for one or sue - moto.<sup>2</sup> The Civil Courts have discretionary power under Sections 75 to 78 of the Code of Civil Procedure, 1908, and Order 26 to create commissions for the advancement of comprehensive justice.<sup>3</sup> The purpose of issuing a commission by the court is to provide complete justice to the parties in a lawsuit. The ability to appoint commissions is entirely in the hands of the judges<sup>4</sup>. When the Court issues a commission in a case, it conducts an in-depth inquiry when the Court deems it essential.

The power to issue commissions in criminal cases is conferred on first, any court, or second, any magistrate. It is confined only to those cases where the examination of witnesses is necessary for the ends of justice, and an unreasonable amount of delay, expense, or inconvenience would be caused in procuring his attendance. The witness on Commission may be examined either on interrogatories or viva voce by the parties. The depositions so taken may be read in evidence by either party and shall form part of the record of the case. It is open to the court or magistrate to adjourn the trial or inquiry for the reception of such evidence. The provisions of this chapter for the examination of witnesses on commission are controlled by sections 246(4) to (6) and

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<sup>1</sup> R.V. Kelkar's, *Criminal Procedure* (7<sup>th</sup> Edition, Eastern Book Company 2021)

<sup>2</sup> *Bandhua Mukti Morcha v Union of India* AIR (1984) SC 802

<sup>3</sup> Civil Procedure Code 1908, ss 75-78

<sup>4</sup> *Padam Sen v State of UP* AIR (1961) SC 218

section 247. An accused person may refrain from pitting in any cross-interrogatories when the commission is first issued and may apply, at a later stage, when the charge is framed, for reissuing of the commission together with his cross-interrogatories.<sup>5</sup> Further, the paper would also discuss the difference between CrPC and CPC in issuing the commission on the part for what purposes it is issued, to whom it is issued, and what objectives are fulfilled.

This topic covers Sections 284 to 290, Section 284 talks about the circumstances when the **attendance of the witnesses can be dispensed off** which also covers the list of witnesses who are considered under this, under what circumstances this can be allowed in any cases, or only in extreme cases. We would also look into the judgements discussing the issues related to this section, the definite objectives for the same, and how this section should be interpreted in order to meet the ends of justice. Section 285 talks about the **commission to whom to be issued** which covers three categories i. When the witness is within the territories to which this code extends ii. when the witness is without such territory and iii. When the witness is in a foreign country. Section 286 talks about how the commission is executed and two steps under this would be explained further. Sec 287, Parties may examine witnesses by preparing and forwarding any interrogatories in writing which can be directed to the commission which court thinks is relevant to the issue. Section 288 talks about the **Return of Commission**. Also, the depositions taken as a commission in criminal cases may be admitted under **Section 33 of the Indian Evidence Act (I of 1872)**, if the requirements of the proviso to that section have been complied with.<sup>6</sup> Section 289 talks about Adjournment of Proceeding, this section empowers the court issuing commission to adjourn the inquiry, trial, or other proceedings for a specified time reasonably sufficient for execution and return of commission. Section 290 talks about the foreign commission. These sections are being explained in length with pertinent case laws and relevant sections as we further down in this research paper.

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<sup>5</sup> *D'Imbrain v Someshwar Chaudhury* (1934) 61 Cal 824

<sup>6</sup> *Queen Empress v Ramchandra Govind Harshe* (1895) 19 Bom 749

## **ISSUANCE OF COMMISSION UNDER THE CIVIL PROCEDURE CODE AND CRIMINAL PROCEDURE CODE**

Under CPC, Powers are given to the commission under Section 80. From the list of the lawyers, the commission is issued on the behalf of the court and the lawyer has to prepare a report and submit it to the court which further would be observed by the court. For example: In case of a property dispute regarding the demarcation of the boundary line between person A and B. Out of the list of lawyers, a name is given to the parties who would go to the parties and ask certain questions to comprehend the circumstances clearly and to prepare a report. Thereafter, that report would be submitted to the court and after proper observation by the court, it would be marked as evidence. However, in the case of CrPC, issuance of commission of witnesses is done when witnesses are not present and the witness cannot come down to the court. It is not done for limited purposes. Also, unlike CPC, the commission under CrPC is issued to a judge (always issued to a sitting judge. If a court of session is given then the subordinate judge will go for commission) not a lawyer.

## **ELIMINATING THE NEED FOR THE WITNESS' ATTENDANCE BY ISSUING A COMMISSION FOR HIS EXAMINATION**

According to Section 284<sup>7</sup>:

Whenever, in the course of any inquiry, trial, or other proceedings under the criminal procedure code, if it occurs to a court or Magistrate that the examination of a witness is pertinent for the ends of justice and that the attendance of such a witness cannot be obtained without an amount of delay, expense or inconvenience that, under the circumstances of the case, would be unreasonable, the court or Magistrate may dispense with such attendance and issue a commission for the examination.<sup>8</sup> As a general rule, every witness should be present in court when the case is being heard because of the numerous benefits that such presence provides to both the court and the accused.<sup>9</sup>As a result, while the court has the authority to issue a

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<sup>7</sup> Code of Criminal Procedure 1973, s 284

<sup>8</sup> Code of Criminal Procedure 1973, s 284(1)

<sup>9</sup> *Gulabrao v SD Raje* (1973) Cri LJ 948 Bom 950

commission for the examination of witnesses, the such authority should be exercised sparingly and only in the clearest of cases. As a general rule, essential witnesses whose testimony is required to prove the case against the accused person must be examined in court, and commissions should normally be limited to formal witnesses or witnesses who cannot be provided without an undue amount of delay or inconvenience.<sup>10</sup> The court or Magistrate's discretion in granting a commission is judicial, and it should not be exercised lightly or arbitrarily.<sup>11</sup> When the evidence against the accused is recorded in his presence and in open court, he has the opportunity to contest the testimony against him through cross-examination, and the court can see and observe the witnesses. This is something to keep in mind while deciding whether or not to issue commissions for witness examination.

A commission shall be issued for the examination of the President or Vice-President of India, the Governor of a State, or the Administrator of a Union Territory as a witness when it is essential for the ends of justice. This proviso appears to be based on the notion that the head of state should not be summoned to court. The proviso is important because if the president/head, the vice president, the governor, or the administrator wishes to come down to the court for examination, would not be possible and it cannot be done.<sup>12</sup>

Under section 284(1), the list of witnesses who can be dispensed off are:

- i. the witnesses who are daily wagers.
- ii. witnesses live far away from the court's jurisdiction.
- iii. witnesses who are unwell, paralyzed, undergoing treatment, or have other conditions which make it impossible for them to come down to the court.

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<sup>10</sup> *Dharamanand Pant v State of UP* AIR 1957 SC 594, 598

<sup>11</sup> *Ibid*

<sup>12</sup> Law Commission of India, *The Code of Criminal Procedure, 1898* (Vol. 1) (Law Comm. No.41, 1898) <<https://www.latestlaws.com/library/law-commission-of-india-reports/law-commission-india-report-no-41-code-criminal-procedure1898-vol-1>> accessed 17 September 2022

Example: In cases of the Dowry death when the wife incurs 75% burn but she is willing to give her evidence and for that, the commission can be issued who would come to her and take her statement.

The term '*inconvenience*' provided in this section has to be considered by the court that it is not only the inconvenience caused by the parties but also the inconvenience that would be caused to the witness, who is to be examined on commission, suffers would be "inconvenience" within the terms of this section. Thus, a fear of arrest or a threat to a witness' personal safety induced by threats made by the accused would be considered an 'inconvenience' in the eyes of the law. Furthermore, the potential of a foreign witness losing his job in his home country if he disobeyed his employers and came to India to testify would be considered an "inconvenience" under the rules of this act.<sup>13</sup> The term '*delay*' as used in this section "*postulates that there is the possibility of the witness being procured, though the prosecution might not be able to say when he could be procured.*"<sup>14</sup> The expression '*may issue a commission*' which states that not necessarily, the commission would be issued but at the discretion of the court. Also, "*if no particulars indicating the willingness of the witness to be examined on commission are given and even his address is also not given, the court cannot issue a roving commission to court or authority at different places.*"<sup>15</sup> When the court is satisfied with both the necessity of the evidence and the practical enforceability of the commission for witness examination, it issues an order for the commission to examine witnesses.<sup>16</sup>

The Bombay High court in the case of *Gulabrao v SD Raje* (1972) held that the provisions of this section are to be sparingly used and only when absolutely essential and necessary. It has further been held in the same case that when a witness, for all practical purposes, is a complainant in a defamation case, his attendance cannot be dispensed with by issuing a commission for his examination merely because of his being minister. In the case of *Dharmanand Pant v State of Uttar Pradesh*, The supreme court decided that, as a general rule, in criminal proceedings, important witnesses whose testimony is required to establish the case against the accused must

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<sup>13</sup> *State of Maharashtra v Rajkumar Kochhar* (1970) 72 Bom LR 797

<sup>14</sup> *Ibid*

<sup>15</sup> *Hussian Umar v Dalipsinghji* (1969) 3 SCC 429

<sup>16</sup> *Ratilal Bhanji Mithani v State of Maharashtra* (1972) 3 SCC 793

be examined in court, and that commissions should usually be limited to formal witnesses or witnesses who cannot be produced without undue delay or inconvenience. The evidence against the accused should be documented in his presence and in open Court so that the accused can successfully cross-examine the witnesses and the presiding officer can hear and note their behaviour. Witnesses should only be interviewed on commission in the most extreme conditions of delay, expense, or discomfort, and interrogatories should only be used in the direst of circumstances.

Section 282 (2) talks about the expense accrued by the accused shall be paid by the prosecution when the commission is issued for the examination of PW. *“The Court may, when issuing a commission for the examination of a witness for the prosecution, direct that such amount as the Court considers reasonable to meet the expenses of the accused, including the pleader’s fees, be paid by the prosecution.”*<sup>17</sup>

This could be understood through an example: Suppose person A sustained 80% burn, primary prosecution witnesses 1 and he needs to be examined and then the prosecution would request for postponing the examination, and the court will ask for the duration of the same. If the trial can’t be delayed or postponed then the commission may be issued. Both the parties, the prosecution, and the defence would be present and the expense born by the accused like travelling, and accommodation would be accrued by the Prosecution. Now, in the case of Defence Witness, it depends on the nature of the case if it Cognizable or Non-Cognizable offence. In case of a cognizable offence, the expense is borne by the state. In a complaint/ Non-Cognizable case, the accused would bear the expenses and in the case of prosecution witness examination whatever expense defence bears, it will come from the pocket of the complainant. The court has discretion under Statute 284(2), and it is reasonable to presume that a Magistrate is given similar authority when issuing a commission for the examination of witnesses, even if the word Magistrate is not used in the section. The court or Magistrate has the authority to order the prosecution to pay whatever expenses the court or Magistrate deems appropriate in order for the accused and his counsel to participate in the commission examination. It should be noted,

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<sup>17</sup> Code of Criminal Procedure 1973, s 282(2)

however, that such payment is limited to situations in which a commission is granted for the examination of a prosecution witness. The question of whether a complainant can be interrogated on the basis of a complaint has been answered in the negative. In one example, the court denied the complainant's request to be interviewed on commission because of his advanced age and ill health, claiming that he would not be covered by Section 284 of the Code. According to the court, the complainant's privilege as a witness must be relinquished in exchange for his duties as a complainant and the accused's rights.<sup>18</sup>

### COMMISSION TO WHOM TO BE ISSUED: SECTION 285

Section 285 talks about three scenarios:

- i. If the witness is found within the territory of India to which CrPC applies. Here the commission is directed to the Chief Judicial Magistrate or the chief Metropolitan Magistrate of the place where he is found.<sup>19</sup>
- ii. If the witness is found in the territory to which CrPC does not apply. Here, the commission is directed to such court or officer as the central government notifies.<sup>20</sup>
- iii. the witness is found outside of India and India has made arrangements with that country. Here, the commission may be issued to such court or officer and sent to such authority for transmission as specified in the notification.<sup>21</sup> These are usually seen in transnational cases.

Sections 285 and 290<sup>22</sup> of the Code contain complementary provisions for reciprocal arrangements between our government and the government of a foreign country for commissions from Indian courts to specified foreign courts for the examination of witnesses in the foreign country, and similarly for commissions from specified foreign courts for the examination of witnesses residing in our country. When it appears that reciprocal agreements,

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<sup>18</sup> *R Gopalan Nair v State* 1955 Cri LJ 723 Ker 724

<sup>19</sup> Code of Criminal Procedure 1973, s 285(1)

<sup>20</sup> Code of Criminal Procedure 1973, s 285(2)

<sup>21</sup> Code of Criminal Procedure 1973, s 28(3)

<sup>22</sup> Aparna Bhat (n1)

as defined by Section 285, have not been created, courts will not issue commissions under Section 285(3) in vain.

### **EXECUTION OF WITNESSES**

Execution of the commission is done in two steps:

- i. Summon the witness before the commission or proceed to the place where the witness is and record the evidence.
- ii. For the purpose of the issuance of the commission whichever court is issued the obligation to execute the commission will have the power of a court of the warrant case which means that the court can summon the witness, ask for documents, order for production of documents, also penalize a person but commission do not have the power of what sessions court has that it cannot take the cognizance against the person if he does not comply.

### **PARTIES MAY EXAMINE A WITNESS**

The parties to any proceeding under this Code in which a commission is issued may each submit any written interrogatories that the court or Magistrate directing the commission considers relevant to the issue, and it shall be lawful for the Magistrate, court, or officer to whom the commission is directed, or to whom the duty of executing it is delegated, to question the witness on such interrogatories. [Section 287(1)] In general, witnesses in a criminal case should not be interrogated on the spot unless there is an unavoidable delay, expense, or discomfort, and in particular, the procedure by way of interrogatories should only be used in an unavoidable situation.<sup>23</sup> Any of the parties mentioned above may appear before the magistrate, court, or officer by a pleader or, if the party is not in jail, personally, and may question, cross-examine, and/or re-interrogate the named witness as necessary. [S. 287(2)]. For the examination of the witnesses, a list of interrogatories is prepared beforehand with help of the prosecution and defense counsel and the judge finalizes these questions. These questions are recorded and

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<sup>23</sup> *Suleman v State of Gujarat* AIR 1961 GUJ 120, 123

submitted back to the court with the attestation that whatever is stated is true and has been recorded verbatim and also been read to the witnesses.

## RETURN OF THE COMMISSION

After any commission issued under Section 284 has been duly executed, it must be returned to the court or Magistrate issuing the commission, along with the deposition of the witness examined thereunder; and the commission, the return thereto, and the deposition shall be open to inspection by the parties at all reasonable times, and may be read in evidence in the case by either party, subject to all just exceptions, and shall form part of the record.<sup>24</sup> Any deposition obtained in this manner, assuming it meets the requirements of Section 33 of the Evidence Act of 1872, may be used as evidence at any subsequent stage of the case before another court.<sup>25</sup>

Depositions taken on commission in criminal cases may be admitted under section 33 of the Indian Evidence Act, 1872 (I of 1872) if the requirements of the proviso to that section have been complied with.<sup>26</sup> Section 33 talks about the Relevancy of certain evidence for proving, in a subsequent proceeding, the truth of facts therein stated.

## ADJOURNMENT OF PROCEEDINGS

In every case when the commission is given under Section 284, the trial, inquiry, or other processes might be stopped for a term adequate for the commission's execution and even its return, according to Section 289 of the CrPC.

In a number of situations, it has been established that obtaining evidence on commission in criminal cases should be utilized only in exceptional cases of delay, expense, or discomfort, as well as in the case of a sick person or a *pardanashin* woman. *In the case of Om Prakash versus the State of Rajasthan*,<sup>27</sup> the Rajasthan High Court ruled that a *pardanashin* lady is not automatically exempted from appearing in a criminal court as a matter of right. The Bombay

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<sup>24</sup> The Code of Criminal Procedure 1973, s 288(1)

<sup>25</sup> The Code of Criminal Procedure 1973, s 288(2)

<sup>26</sup> Queen-Empress (n6)

<sup>27</sup> *Om Prakash v State of Rajasthan* 2010 (2) WLN 379

high court declared in *Gulabrao v S.D. Raje*<sup>28</sup> that when a witness is a complainant in a defamation claim, his attendance cannot be made by issuing a commission for his examination just because he is a Minister.

The Court takes into account not only the inconvenience to the parties but also the inconvenience to the witness who will be questioned. Thus, a fear of arrest or a threat to a witness' personal safety induced by threats made by the accused would be considered "inconvenience" in the eyes of the law. Furthermore, the potential of a foreign witness losing his job in his home country if he disobeyed his employers and came to India to testify would be considered an "inconvenience" under the rules of this act.

## CONCLUSION AND SUGGESTIONS

The paper comprehensively explains sections 924-290 covering commissions for the examination of witnesses under CrPC. At outset, the difference between the CPC and CrPC has been covered highlighting the point that in the case of CrPC, the commission is issued for limited purposes unlike CPC, and is exclusively issued for the examination of the witnesses when they cannot be present and come down to the court. The commission is issued to a sitting judge, not a lawyer like in CPC. A list of interrogatories is prepared with the help of prosecution and defence counsel and the judge finalizes these questions to be asked to the witnesses which later is recorded and submitted to the court to be taken as evidence. The provisions of this chapter for the examination of witnesses on commission are controlled by sections 246(4) to (6) and 247. An accused person may refrain from putting in any cross-interrogatories when the commission is first issued and may apply at a later stage, when the charge is framed, for the re-issue of the commission together with his cross-interrogatories.<sup>29</sup>

In a number of situations, it has been established that obtaining evidence on commission in criminal cases should be utilized only in exceptional cases of delay, expense, or discomfort, as well as in the case of a sick person or a 'Pardanashin' woman. In the case of *Om Prakash v State of*

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<sup>28</sup> Gulabrao (n9)

<sup>29</sup> D'Imbrain (n5)

*Rajasthan*<sup>30</sup>, the Rajasthan High Court ruled that a '*Pardanashin*' lady is not automatically exempted from appearing in a criminal court. Also, the essence of section 284 is that the issuing of the commission should be restricted to formal witnesses or such witnesses who cannot be present in the court. Section 284 has been enacted with the definite object of seeing the witnesses examined in time and the matter is not delayed.

The inconvenience that has to be considered by the court on an application under this section is not only the inconvenience to the parties but also the inconvenience that would be caused to the witness who is sought to be examined on commission. The High court possesses, in cases not provided for in this section, the inherent power to make an order that it deems necessary. It has also the power to allow payment of expenses in such cases that are cases not fall within the present section. However, the section has not provided how it should have been interpreted which is a statement of problems in this paper. The landmark judgements have been provided to make it more comprehensible and clear to the reader.

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<sup>30</sup> Om Prakash (n27)