**D-11**

**SURANA AND SURANA NATIONAL TRIAL ADVOCACY MOOT COURT COMPETITION – NORTH INDIA ROUNDS, 2013**

**BEFORE THE COURT OF SESSIONS**

**AT MAVADA, JAGUTAR**

**S.C. No. 101 OF 2016**

**STATE OF JAGUTAR**

(PROSECUTION)

**v.**

**ABHISHEK& ORS.**

(DEFENCE)

**FOR OFFENCES CHARGED UNDER:**

SECTION **304** READ WITH SECTION **34**, SECTION**186** AND SECTION **107** OF THE RABAT PENAL CODE, 1860.

**UPON SUBMISSIONS TO THE HON'BLE SESSIONS JUDGE**

# MEMORANDUM ON BEHALF OF THE DEFENCE

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## LIST OF ABBREVIATIONS

| | |
|---|---|
| & | And |
| Insp. | Inspector |
| MLA | Member of Legislative Assembly |
| V | Versus |
| r/w | Read with |
| u/s | Under section |
| ed/edn. | Edition |
| Para | Paragraph |
| Sec. | Section |
| RPC | Rabat Penal Code |
| CrPC | Code of Criminal Procedure |
| REA | Rabat Evidence Act |
| SCC | Supreme Court Cases |
| AIR | All India Reporter |
| Cr/ Cri LJ | Criminal Law Journal |
| SCR | Supreme Court Reporter |
| ILR | Indian Law Reports |
| MPLJ | Madhya Pradesh Law Journa |
| SC | Supreme Court |
| Cal | Calcutta High Court |
| All | Allahbad High Court |
| Raj | Rajasthan High Court |
| Mad. | Madras High Court |

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## STATEMENT OF JURISDICTION

The prosecution has approached this Hon'ble Court as it has jurisdiction to try the instant matter under Section 177 read with Section 209 of the Code of Criminal Procedure, 1973.

Section 177:

**'177.** ***Ordinary place of inquiry and trial-***

*Every offence shall ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed.'*

Read with Section 209.

**'209.** ***Commitment of case to Court of Sessions when the offence is triable exclusively by it-***

*When in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the magistrate that the offence is triableexclusively by the Court of Sessions, he shall-*

*(a) commit the case to the Court of Sessions;*

*(b) subject to the provisions of this Code relating Bail, remand the accused to custody during, and until the conclusion of the trial;*

*(c) send to that Court the record of the case and the documents and articles, if any, which are to be produced in evidence;*

*(d) notify the Public Prosecutor of the commitment of the case to the Court of Sessions.'*

## STATEMENT OF FACTS

Abhishek and Angad were childhood friends, Dushyant was a local leader, they all were members of Collective Rabat Party ('CPR'). Abhishek was President and Angad was office bearer in College Union. Abhishek, Angad and his friends were constantly involved in altercations with students belonging to rival parties, they arranged a protest against arrest of KidharLepat, the leader of CPR, who was charged with Sedition; and in support of Ram a student of B.N. University, who was arrested after he protested against hanging of SafalRugu (a terrorist), such demonstrations by them lead to closing of the College, they came into bad terms with other students for this. Tanya and Natasha were their friends; they complained that two boys teased them regularly. Abhishek found that boys were Dinesh and Peter, former one being the son of a local MLA from ruling party. The boys threatened Abhishek and Angad, of some harm, when once they tried to stop them from teasing the girls. Same evening Insp. Chaudhary warned them to stop their political activities. They researched about Insp., Private Defence and Police action during riots, etc. They also visited Dushyant for advice, who on hearing the incident said *"iski ye himmaat, salleyko mar dalo, kam se kamhamareneta to khushhonge"* and said that the party would support them, come what may.

***Incident Details:*** On April 7, 2016, while Abhishek, Angad along with Tanya and Natasha were standing on the bus stop, the said boys came and said something to girls, after which Angad and Abhishek started pelting stones at them, this created an affray, to stop this Insp. Chaudhary came and grabbed Abhishek, to which Angad held him in order to prevent him from doing so, Abhishek escaped and picked up a metal rod and threw it on Insp. Chaudhary which hit him on his head, he fell instantly and hit his head on tree stump and died. Abhishek and Angad were charged for culpable homicide not amounting to murder. The Court of Sessions, after investigation framed charges against Abhishek, Angad and Dushyant.

## STATEMENT OF CHARGES

The accused have been charged under:

**I. Mr.AbhishekLepat**

(i) Section 304 r/w Section 34 of the RPC.

(ii) Section 186 of the RPC.

**II. Mr.AngadLepat**

(i) Section 304 r/w Section 34 of the RPC.

(ii) Section 107 r/w Section 34 of the RPC.

(iii) Section 186 of the RPC.

**III. Mr.DushyantLipo**

(i) Section 107 of the RPC.

(ii) Section 304 r/w Section 34 of the RPC.

## SUMMARY OF ARGUMENTS

### ISSUE 1

### WHETHER ABHISHEK IS GUILTY OF CULPABLE HOMICIDE?

It is humbly submitted before this Hon'ble Court that the accused, Abhishek Lepat is not guilty of committing culpable homicide not amounting to murder under Sec. 304 Part I, as he did not had requisite intention to cause bodily injury as is likely to cause death in normal circumstances, the acts of the accused were done under the right of private defence under Sec. 100, as he had reasonable apprehensions that his life was in danger, as he was threatened by Dinesh and Peter as well as the deceased on several occasions.

### ISSUE 2

### WHETHER ANGAD SHARED COMMON INTENTION AND IS GUILTY OF CULPABLE HOMICIDE?

It is humbly submitted before this Hon'ble Court that the co-accused, Angad Lepat did not shared the common intention with the accused, Abhishek to cause death of Insp. Amit Chaudhary. The chief requirements to bring home the charges of common intention are to show 1) a pre meditated plan and 2) participation in the transaction. In the present case Angad cannot be said to have the necessary common intention as his intention as well as acts were directed to save his friend from harm. Moreover there was no pre-arranged plan and they went to bus stop just to drop Natasha and Tanya, so that they can protect the girls from eve-teasing. Therefore it is submitted that Angad did not shared the common intention and by this implication they cannot be held guilty for culpable homicide.

## ISSUE 3

### WHETHER ANGAD AND DUSHYANT ARE GUILTY OF ABETMENT?

It is humbly submitted before this Hon'ble Court that the Angad Lepat and Dushyant Lipo did not abet Abhishek Lepat. Angad did not instigate because when he said that the deceased was taking out his revolver and going to kill Abhishek, he had reasonable apprehensions for doing so; and intentional aiding cannot be said to be completed as, when he obstructed Insp. Chaudhary to stop him drawing out the pistol, so as to provide time to Abhishek to escape, no common intention was shared. Dushyant cannot be held guilty for the same as whatever he said was in a *fit of rage* and further conversation show that the accused themselves are not clear that he instigated them or not, whereas his acts after the act show contrary to the what prosecution says. Thus, both Angad and Dushyant are not guilty.

## ISSUE 4

### WHETHER ANGAD AND ABHISHEK ARE GUILTY UNDER SEC. 186?

It is humbly submitted that when Ahbhishek and Angad were trying to flee the eve-teasers were attacked by Insp. Chaudhary. Ins. Chaudhary was highly intoxicated and slapped Ahishek from behind and was about to take out his gun from the hostler when Angad shouted and tried to stop him from taking out his gun. Section 186 requires a voluntary act to obstruct the public servant from performing his public function. It is humbly submitted that Insp. Chaudhary was not discharging his public function and was in a highly intoxicated state. Also, the prosecution has not been able to explain the charge as per requirements of Section 213, CrPC as to how the accused obstructed the public servant.

## ARGUMENTS ADVANCED

## ISSUE 1: WHETHER ABHISHEK IS GUILTY OF CULPABLE HOMICIDE?

It is humbly submitted before the Hon'ble Court that Abhishek (hereinafter referred as 'accused') is not guilty for the offence under Sec. 304 of the *Rabat Penal Code*, 1860 (hereinafter referred as the 'RPC'). In the present matter it is wrongfully alleged the accused has committed culpable homicide not amounting to murder, rather he acted well within his rights of self-defence, granted under. Sec 100 of the RPC and cannot be said to have caused death of Insp. Chaudhary (hereinafter referred to as 'deceased').

### [1.1] THE ACCUSED'S ACT IS JUSTIFIED AS AN ACT OF PRIVATE DEFENSE U/S 100.

A person has a right of private defence to protect his body from offences and if in doing so, he himself commits an offence, that offence would be pardoned.[1] Though, ordinarily, the harm caused in private defence must be proportionate to the threat,[2] just sufficient for averting the risk and nothing more,[3] yet special circumstances have been envisaged in Section 100, wherein the accused is even justified if he causes the *death* while doing so.

The counsel humbly contends that the necessary ingredients of Section 100 – namely that (a)there was a reasonable apprehension of death **[A]**and (b) the force used was reasonable **[B]** -are present in the instant case and hence accused can avail the defence under it. The defence would also remark upon the fact that the standard of proof in private defence is preponderance of probabilities and not beyond reasonable doubt **[C].**

[1]Rabat Penal Code, 1860, s 96.

[2]Rabat Penal Code, 1860, s 99.

[3]ibid.

### A. There Was A Reasonable *Apprehension Of Death.*

This comprises of two arguments.

a) There was an apprehension of death; b) Such apprehension was reasonable.

*Firstly*, when there is no apprehension of death or grievous hurt, rather *some other injury*, not mentioned in Section 100, then the right to private defense would not exceed to causing death.[4] Therefore it is imperative to prove that there was apprehension of death or atleast grievous hurt. *Secondly*, the apprehension of death must be based on reasonable grounds, i.e., it must be either real or apparent, but not illusory and imaginary.[5] While deciding the question whether the apprehension of the danger was a reasonable one or not, three things must be kept in mind:

1) It is always a *question of fact*, to be determined on the basis of facts and circumstances of that case and there is no straight jacketed formula for it.[6]No test in the abstract for determining such a question can be laid down.
2) In determining this question of fact, the Court must consider all the 'surrounding circumstances'[7] as well as the 'nature and manner of assault'[8].The word other 'surrounding circumstances' has a wide import and bear a very important role in framing the apprehension in the minds of the accused.
3) It has to be judged from the *subjective point of view of the accused*.[9]In *State of Uttar Pradesh v Niyamat*[10], the accused villagers had killed the informant and the members of

[4]*Yogendra Morarji v State of Maharashtra* AIR 1980 SC 660.

[5]Justice K T Thomas and K A Rashid, *Ratan Lal and Dhirajlal* (34th edn, LexisNexis, 2014) p 201.

[6]*Puran Singh v State of Punjab* 1975 SCR 299.

[7]*Sekar alias Raja Sekharan v State* (2002) 8 SCC 354.

[8]*Darshan Singh v State of Punjab* (2010) 2 SCC 333; *Gajey Singh v State of UP* (2009) 11 SCC 414.

[9]*Wassan Singh v State of Punjab*1996 SCC (1) 458.

police party while it was making an illegal arrest of a fellow villager. It was shown that the villagers had gathered only to rescue the arrestee and attack was launched only when the policeman fired three shots in air. The villagers were allowed the plea of self-defence on the basis that though the shots were fired in air and the police intended no harm, yet it was dark and it was difficult to make out where the shots were fired and it could have created a reasonable apprehension of death.

It is humbly submitted by the counsel for the defence that following factors clearly indicate the state of mind of the accused was such that the apprehension they got was of death:

i) All three witnesses of the defence namely accused (DW-1), Mr.Angad (DW-2) (hereinafter referred as 'co-accused-1') and Ms. Tanya (hereinafter referred as 'DW-4') have unanimously remarked the fact the deceased had attempted to draw out his gun. Had the co-accused-1 not warned and reached to his rescue, the deceased would have successfully drawn out the gun and would have killed the accused. .

ii) When the accused escaped, it is quite evident that the co-accused-1 also escaped. This can be derived from plain logic as the accused could not have risked to throw the metal rod if the co-accused-1 was still involved in the scuffle with the deceased. Now, the deceased who was earlier impeded by the co-accused-1 from taking out his gun, was now free and the accused knew that he would now draw out his gun to shoot him. This created a reasonable apprehension in him that he would be shot. Thus, before the deceased could draw out his gun, the accused hit him with the metal rod.

iii) Apart from the circumstances at the time of transactions, impressions from some previous occasions also warrant the formation of apprehension that the deceased would attempt to kill the accused. The first such occasion which has to be remarked is the brawl

[10] *State of Uttar Pradesh v Niyamat* AIR 1987 SC 1652.

between the accused and Dinesh (hereinafter referred as the 'complainant') and Peter (hereinafter referred as the 'PW-5'), that took place on March 30, 2016. DW-4 has testified that they said something like "fatal accidents can happen". Accused and the co-accused-1, state that they also pointed their hands as guns. It is pertinent to mention that both have agreed in their statements that by such words and gestures they apprehended that the motorists "threatened to kill us". The counsel humbly contends that the apprehension is reasonable because by words and gesture they not only indicated that they would kill them, but also indicated *how* they would kill/get them killed.

iv) The meeting of accused and the co-accused-1 with the deceased, as disclosed in their statements, on March 30th, finding of connection between the deceased and the motorists and the connection of all with the opposition party and finally their meeting with Dushyant (hereinafter referred to as the 'co-accused-2') to discuss the same, all these facts indicate that a reasonable apprehension has been made in their minds that some trap was being laid to kill them.

v) The police report of investigation under section 173 CrPC,1973 confirms all the above facts and concludes that the accused were 'expecting some confrontation' from the police. Even if the report is to be considered, it vehemently indicates that the state of mind of the accused had become *more prone* to apprehensions even before the time when the assault on them actually took place.

**B. The Force Used Was Reasonable.**

Sec. 99 of the RPC says that the force used must be reasonable and proportionate to the threat. The counsel hereby humbly submits that the force used (i.e. causing death) was reasonable because Sec. 100 of the RPC itself says that when the apprehension is, *inter alia*, of death or grievous hurt, force can extend to causing death of the aggressor.

### C. Standard Of Proof To Invoke Self-Defence Is *Preponderance Of Probabilities.*

According to Sec. 105 of the *Rabat Evidence Act, 1872* (hereinafter referred to as the 'REA'), the burden of proof is on the accused, who takes the plea of self-defence. Such burden of proof stands discharged by showing preponderance of probabilities[11] which can be shown either by a) adducing direct evidences or b) by assessing the prosecution evidence.[12]

Assessing the weight of probabilities on both the sides, following things can be noted:

(i) It is pertinent to mention here that the final report as submitted by the police under Sec. 173 of the *Code of Criminal Procedure, 1973* (hereinafter referred as the 'CrPC') does not give any account of the occurrence of the incident and is vague.

(ii) There is no evidence whatsoever to suggest that the accused were 'prepared' for the incident and such finding as is mentioned in the charge sheet is therefore perverse.

(iii) The statement of PW-6 is also of no avail as he has not clearly remarked upon the reason *why* the accused threw the metal rod.

(iv) However on the side of the defence, enough material is present on record as is noted point no. A, as to the fact that reasonable apprehension of death was there. Even the charge sheet confirms that.

(v) In his conversation with co-accused-1, the accused remarked *"You would have done the same thing if you were at in place"*[13]. In his conversation with co-accused-2, he remarked that he was 'afraid' and that was why he threw the rod. Both the instances show that he hit the rod in the spur of the moment in self-defence and had no pre-mediated intention to kill the accused.

[11] *Laxman Singh v Poonam Singh* (2004) 10 SCC 94.

[12] Sekar *alias* Raja *Sekharan v State* (2002) 8 SCC 354.

[13] Conversation 1, Exhibit 5, Moot Proposition.

The numerous facts and circumstances as referred above clearly show that the preponderance of probabilities are tilted in the favour of the accused and having established so he ought not to be made to prove his innocence beyond reasonable doubt.

## ISSUE 2: WHETHER ANGAD AND DUSHYANT SHARED THE COMMON INTENTION & THUS ARE GUILTY OF CULPABLE HOMICIDE

It is humbly contended before the Hon'ble Court that the co-accused-1 and 2 did not shared the common intention as under Sec. 34 of the RPC and hence the same cannot be used to hold them guilty under Sec. 304 r/w Sec. 34 of the RPC. In the present matter it is wrongfully alleged that they had the common intention to cause death of the deceased, and hence no liability can be fastened upon them.

Sec. 34 of the RPC does not create a substantive offence and is more of rule of evidence.

**Common Intention**[14]is invoked to make two or more people liable for the criminal act done by them in furtherance of a common intention of all. To establish charge under this section, the prosecution must prove following elements, beyond reasonable doubt[15]:

a) *There was common intention in sense of a prearranged plan;*
b) *The person sought to be so held liable had participated in some manner in the act constituting the offence.*

[14]Rabat Penal Code 1860, s 34.

[15]*Maharashtra State Electricity Distribution Company Ltd. v Datar Switchgear Ltd* (2010) 10 SCC 479 para 34; *Hamlet v. State of Kerala* (2003) 10 SCC 108 para 17.

**ANGAD:**

It is humbly contended that the co-accused-1 did not had prior meeting of mind of a prearranged plan or common intention **[2.1]**, mere participation is not sufficient**[2.2]**, and heavy reliance is placed by the prosecution on unreliable circumstantial evidence**[2.3]**.

**[2.1] THERE WAS NO PRIOR MEETING OF MIND OR A PREARRANGED PLAN.**

Common intention means a pre-oriented plan and acting in pursuance to the plan, thus the common intention must exist prior to the commission of the act in a point of time[16], the intention may also develop at spur of the moment[17] but the same should also be before the act is conceived. To infer common intention the *time and place of the murder, weapons used, their relationship inter se & subsequent conduct all are important.*[18]

i) It is humbly contended the fact that the incident happened at the bus stop (place of incident), where they had went to drop Natasha and Tanya,*with no other intention than to protect them from eve-teasing*. The statement made by Natasha and Tanya clearly corroborates the same. [19] ***No weapons*** were carried. It is also evident from their conversation that accused that they were even not on the same page regarding the words of co-accused-2. All this shows that accused did not have any predetermined or prearranged plans.

ii) As far developing of common intention developed at the spur of the moment is concerned, evidence may be brought in by the prosecution, for that it is pertinent to note that its origin needs to be proved[20], which in this case is absent. Moreover, the telephonic

[16]*Shyamal Ghosh v State of West Bengal* AIR 2012 SC 3539.

[17] ibid.

[18]*Lalai v State of Uttar Pradesh* AIR 1974 SC 2118.

[19]Statements ,Annexure 5.

[20]*Nagaraja v State of Karnataka* (2008) 17 SCC 277.

conversation[21] (subsequent conduct) between the accused and the co-accused-1 shows that there was no common intention in regards of the act which was done. In the first conversation the co-accused-blamed the accused for causing death.

### [2.2] MERE PARTICIPATION IS NOT SUFFICIENT.

If common intention is not proved, then even if participation is proved, Section 34 cannot be invoked.[22] Mere presence of a person at the time of commission of an offence by his confederates is not, in itself sufficient to bring his case within the purview of Sec 34, unless the community of designs is proved against him.[23]As common intention has been proved to be absent, the participation of the co-accused-1 in the transaction, in any form, is irrelevant in determining is liability under Section 34. Moreover, the charge-sheet as well as the FIR is silent on the role as well as involvement of the co-accused-1.

### [2.3] HEAVY RELIANCE ON CIRCUMSTANTIAL EVIDENCE.

It is a well settled principle that where the case is mainly based on circumstantial evidence, the court must satisfy itself that various circumstances chain of evidence should be established clearly and that the complete chain must be such as to rule out any reasonable likelihood of the innocence of the accused.[24] The common intention can be inferred from the circumstances of the case and the intention can be gathered from the circumstances as they arise even during an incident.[25]When a main link breaks away, the chain of circumstances gets snapped and other circumstances cannot in any manner establish the guilt of the accused

[21]Conversation 1.Exhibit 5, Moot Proposition.

[22]*Suresh Sankaram Nangare v State of Maharashtra* (2012) 9 SCC 249.

[23]*Parasa Raja Manikyala Rao v State of Andhra Pradesh* (2003) 12 SCC 306.

[24]*Mohan Lal v State of Uttar Pradesh* AIR 1974 SC 1144.

[25]*State of Andhra Pradesh v M. Sobhan Babu* 2011 3 SCALE 251.

beyond the reasonable doubt.[26] When attempting to convict on circumstantial evidence alone the Court must be firmly satisfied of the following three things[27]: (a) the circumstances from which the inference of guilt is to be drawn, must have fully been established by unimpeachable evidence beyond shadow of doubt. (b) The circumstances are of determinative tendency, unerringly pointing towards the guilt of the accused. (c) The circumstances taken collectively are incapable of explanation on any reasonable hypothesis except that of the guilt sought to be proved against him.

The prosecution's story, as disclosed in the charge-sheet relies heavily on inconclusive constructions to frame charges, especially on co-accused-1. The FIR and charge-sheet are silent on the role of co-accused-1 and the prosecution on the sole reason that the accused and theco-accused-1were childhood friends and co-accused-1 tried to save him from the deceased, on whom he had reasonable apprehensions, was going to hurt the accused, is trying to frame him on shaky grounds.

**DUSHYANT:**

It is humbly submitted by the counsel for defense that co-accused-2 did not share common intention**[A]**, and was not present at the place of incident **[B].**

### A. He Did Not Share The Common Intention.

The framing of charges against co-accused-2 under Sec. 34 of the RPC is solely based on the conversation which occurred between the accused, the co-accused-1 and the co-accused-2 on 30th March2016. However in the telephonic conversation between the accused and the co-accused-1, accused admits that co-accused-2 did not advise anything which later was admitted by co-accused-1 too when he says *"He did not advise you"* and what he said was in

[26] *Janar Lal Das v State of Orissa* (1991) 3 SCC 27.

[27] *Mahmood v State of Uttar Pradesh,* AIR 1967 SC 69.

the fit of rage.[28] Moreover the conversation between the accused and the co-accused-2 also points that towards what was done, co-accused-2 had no common intention.[29]

Another aspect of Common Intention is that, after the intention came into being there should not be a long lag in consummation of the offence.[30] In the present case there is a considerable gap between the alleged meeting which happened on March 30th 2016 and the act which took place on April 7th 2016.[31]

**B. No Participation On His Part In The Events.**

What is required as per Section 34 is the actual participation of the accused on the commission of the offence in some way or the other at the time when the crime was actually committed.[32]Where no participation is there, the presence of only common intention would not lead to the conviction of the non-participating accused.[33] This participation in the act may be either *overt* or *covert*, but it needs to be there.[34]

It is contented by the defense that co-accused-2 had no role to play in the events which happened, ultimately causing death of the deceased and since there is no mention of his presence at any point in the crime scene and same is corroborated by all the witness and FIR, neither is any evidence present leading to the assumption that he was remotely watching or directing the accused..

[28]Conversation 1 & 3, Exhibit 5.

[29]Conversation 2, Exhibit 5, Moot Proposition.

[30]*Ramchander v State of Rajasthan* 1969 SCC OnLine Raj 83; *Sharif Ahmad alias Achhan v State* AIR 1957 All 50.

[31]Police Report, Annexure 6, paras vii & x.

[32]*Parasa Raja Manikyala Rao v State of Andhra Pradesh* (2012) 12 SCC 306 para 11.

[33]*Virendra Singh v State of Madhya Pradesh* (2010) 8 SCC 407; *Om Prakash v State* AIR 1956 All 241.

[34]*Parasa Raja Manikyala Rao v State of Andhra Pradesh* (2003) 12 SCC 306 para 11.

When the co-accused-exhorted to kill the deceased and only one of the co-accused-shot at the victim, appellant did not do so, the Hon'ble SC has said that the accused could not be said to share common intention under Sec 34 and hence was not responsible for murder[35], same is true for co-accused-2 in the present case.

## ISSUE 3: WHETHER ANGAD AND ABHISHEK ARE GUILTY OF ABETMENT?

It is humbly contended before the Hon'ble Court that the co-accused-1 and 2 are not guilty of the charges under Sec 107 of the RPC, in the present matter it is wrongfully alleged that either one of them abetted Abhishek. It can be said that the charge lacks substance and is initiated only because the accused and others are related.

Section 107 of Indian Penal Code defines abetment of a thing. Abetment can be done in 3 ways: a) by instigating; b) by conspiracy and c) by intentional aiding.

**ANGAD:**

The counsel thereby humbly submits before this Hon'ble Court that the accused neither instigated **[3.1],** nor was involved in any kind of conspiracy **[3.2],** nor had he intentionally aided the accused **[3.3].**

### [3.1] ANGAD HAS NOT ABETTED ABHISHEK BY INSTIGATION.

Instigation is to goad, urge forward, provoke, incite or encourage someone to do "an act".[36] There are three ingredients of instigation. (a) There must be an *act of instigation* which must be *capable of instigating* to do what the accused did **[A]**; (b) There should be an *intention to instigate***[B];**

[35] *Md. Rustam v State of Bihar* AIR 2003 SC 562.

[36]Justice K T Thomas and K A Rashid, *Ratan Lal and Dhirajlal*( 34th, Lexis Nexis 2014) p 213.

### A. There Was No Act Of Instigation Which Was Capable Of Instigating.

It is not necessary in law to prove actual words in order to establish instigation.[37] A person is said to instigate another to an act when he actively suggests or stimulates him to the act by any means or language direct or indirect, whether it takes the form of express solicitation or of *hints, actions, insinuation or encouragement*.[38]

In this case, what act of the co-accused-1 can be called as 'act of instigation' is not clear from the evidences in hand. It is not clear whether or not he said or shouted something before leaping over the deceased.

i) The accused in his statement himself has not remarked that the co-accused-1 said anything before leaping over deceased. The co-accused-1 in his statement has not admitted anything about shouting before leaping.

ii) The statement of the PW-6 and the complainant are silent in this regard. In fact they contradict each other on the involvement of the co-accused-1.

iii) Only statement of DW-4 in her statement says "Angad shouted *something*". What he actually shouted is not clear from the statement.

### B. There Was No Intention To Instigate

The prosecution can only place reliance upon the call records whereby the accused in his conversation with the co-accused-2 has remarked that *"Angad shouted he is drawing his pistol"*.This statement cannot qualify as an act of instigation. It was neither a hint, nor a sign, nor an insinuation, to provoke or urge the accused to kill the deceased. In light of previous incidents, a reasonable apprehension was made in the mind of the co-accused-1 when he saw the deceased removing his gun from the holster. The accused, being entangled with the

[37] *Prem Narain v State* AIR 1957 All 177.

[38] JWC Turner, *Russel on Crimes*(12th ed., Universal Law Publisher 2001 ) p 199; *Ved Prakash v State of M P* 1995 MPLJ 458.

deceased could not have the view of him, therefore the co-accused-1 shouted, just to ***warn*** the accused so that he becomes aware of the intention of the deceased and quickly escapes. Even if we consider for an instance that he shouted and even if it did instigate the accused, he did so with the intention to warn and not with an intention to instigate. A mere word, without necessary intent to incite a person, uttered in quarrel or in a spur of the moment or in anger doesn't constitute "instigation".[39]

**[3.2] Angad Has Not Abetted Abhishek By Conspiracy.**

To prove abetment by conspiracy, there must be a combining together of two or more persons in the conspiracy, and an act, or illegal omission must take place in pursuance of that conspiracy. In the present case, there is no evidence of any pre-mediated plan regarding how to kill the deceased, and as far as search history of the accused is concerned it seems far too vague to establish any nexus between the search done and any act done in furtherance of it.

**[3.3] Angad Has Not Abetted Abhishek By Intentional Aid.**

In order to constitute abetment, the abettor must be shown to have "intentionally" aided to commission of the crime. A person abets by aiding when by the commission of an act he intends to facilitate and does facilitate the commission thereof.[40] In the present case, no as such act was done by the co-accused-1 wherein it can be established that he aided the commission of the crime, rather everything whatever they did was done in exercise of their private defence. Moreover, while PW-6 remarks that both the accused and the co-accused-were struggling with the deceased before the accused attacked with the metal rod, the

[39]*Ramesh Kumar v State of Chhattisgarh* (2001) 9 SCC 618;*Goura Venkata Reddy v State of Andhra Pradesh* (2003) 12 SCC 469.

[40]*Fagunav Kanta Nath v State of Assam* AIR 1959 SC 673.

complainant has not even mentioned about the involvement of the co-accused-1 in the whole transaction.

**DUSHYANT:**

A bare reading of section 107 of IPC makes it clear that a mere instigation is not necessary to hold someone guilty of abetment, rather the intention should be there, which should be in concurrence with the *actus reus*. When the accused and the co-accused-1 went to the co-accused-2, a political leader from opposition party, to seek his advice regarding the incidents which were happening to them. When the accused and the co-accused-1 narrated the whole incident about the warning given by the deceased to them, to the co-accused-2, he in **fit of rage** said that *"Maar do saale ko kam se kam hamare neta to khushhonge"*.Co-accused-2 said all these as a general advise and a general advise is far too vague an expression to prove abetment.[41] A mere word, without necessary intent to incite a person, uttered in a spur of the moment or in anger doesn't constitute "instigation".[42]

## ISSUE 4: WHETHER ANGAD AND ABHISHEK ARE GUILTY UNDER SEC. 186?

It is humbly contended before this Hon'ble Court that the accused and the co-accused-did not obstruct the public servant on duty as contained under Sec. 186 of the RPC because the deceased was performing no public function **[4.1]** and the prosecution has failed to properly set out the charge **[4.2].**

As per the requirements of section 186 of RPC are that (a) there must be an obstruction in course of doing a public function and (b) such obstruction must be voluntary.

[41] *Pramatha Nath v State* AIR 1951 Cal 581.

[42] *Ramesh Kumar v State of Chhattisgarh* (2001) 9 SCC 618; *Goura Venkata Reddy v State of Andhra Pradesh* (2003) 12 SCC 469.

**[4.1] THE OBSTRUCTION SHOULD BE IN COURSE OF A PUBLIC FUNCTION.**

One of the important ingredients of Section 186 is that obstruction must have offered to a public servant while he is discharging his public duties or functions **authorized by law**. Mere fact that he was discharging his public functions which not authorized by law cannot be covered under Section 186. In *Lilla Singh v. Queen-Empress*[43] , the court held that:

> *The public functions contemplated by Section 186 must mean legal or **legitimately authorized public functions**. They could not have been intended to cover any act that a public functionary **might choose to take upon himself to perform.***

Following facts are relevant:

i) On the day of the incident deceased was in an *intoxicated state* as is clear from the post-mortem report and also from his conduct as stated by DW-5, that he crashed into her.

ii) Also, he came from nowhere and lodged a criminal force on the accused from the back also saying that he would teach him a lesson. His act of attacking the accused and the co-accused-who were doing nothing but preventing DW-4 and DW-5 from eve-teasing, in such a manner, without any cogent reason and that too in the influence of alcohol was patently illegal in nature and cannot be said to be an authorized public function.

**[4.2] PROSECUTION HAS FAILED TO SET OUT THE CHARGES PROPERLY AS PER SEC. 213 OF CRPC.**

According to Section 213 r/w Sections 211 and 212 of the Criminal Procedure Code, when the charges do not give the accused sufficient notice of the matter with which he is charged, the charge must set out the particulars in which the offence must be done. The offence of Section 186 is one of such nature and when a person in accused of it, the charge must set out the *manner* in which the accused obstructed the public servant (i.e. what acts of the accused

[43] *Lilla Singh v Queen Empress* (1895) ILR 22 Cal 286.

constituted such offence).[44] The purpose framing the charges is to give notice to the accused as to what he has to defend.[45]

In this case neither the police in its charge sheet nor the court while framing of charges has mentioned the manner and particulars in which the offence is done.

[44]Code of Criminal Procedure1973, s 213,Illustration D.

[45] Justice K T Thomas and K A Rashid, *RatanLal and Dhirajlal Indian Penal Code* ( 34th edn, LexisNexis 2014) p 938.

## PRAYER

Wherefore, in the light of the issues raised, arguments advanced and authorities cited, may this Hon'ble Court be pleased to:

1. **Acquit** Mr. Abhishek Lepat for the offence of Culpable Homicide not amounting to murder under Section 304 of the Rabat Penal Code, 1860 and Obstructing Public Servant in discharge of Public function under Section 186 of the Rabat Penal Code, 1860.
2. **Acquit** Mr. Angad Lepat for the offence of Culpable Homicide not amounting to murder under Section 304 r/w Section 34 of the Rabat Penal Code; Abetment under Section 107 of the Rabat Penal Code, 1860 and Obstructing Public Servant in discharge of Public function under Section 186 of the Rabat Penal Code, 1860.
3. **Acquit** Mr. Dushyant Lipo for the offence of Abetment under Section 107 of the Rabat Penal Code.

Pass any other order that this Hon'ble Court may deem fit, in interest of Justice, Equity and Good Conscience.

***All of which is most humbly and respectfully submitted.***

S/d_____

**Counsel for the Defence**