

Team Code: 14

**SURANA & SURANA NATIONAL TRIAL ADVOCACY MOOT COURT
COMPETITION 2016 – NORTH ROUNDS**

IN THE COURT OF SESSIONS,

MAVADA, JAGUTAR, UNION OF RABAT

S. C. No. 101 of 2016

IN THE MATTER OF

STATE OF JAGUTAR

(Prosecution)

Versus

ABHISHEK, ANGAD & DUSHYANT

(Defence)

FOR THE OFFENCES CHARGED UNDER

Section 107, 186 & 304 r/w section 34 of RABAT PENAL CODE, 1860

SUBMISSION TO THE HON'BLE SESSIONS JUDGE

MEMORIAL ON BEHALF OF DEFENCE

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LIST OF ABBREVIATIONS

¶	Paragraph
¶¶	Paragraphs
A	Accused
AIR	All India Reporter
All	Allahabad High Court
RPC	Rabat Penal Code i.e. Indian Penal Code
Cal	Calcutta High Court
Cri LJ/ Cr LJ	Criminal Law Journal
Cr.P.C./ CrPC	Criminal Procedure Code
Del	Delhi High Court
DW	Defence Witness
Ed.	Edition
Mad	Madras High Court
Bom	Bombay High Court
Ori	Orissa High Court
Raj	Rajasthan High Court
n.	Foot Note No.
PW	Prosecution Witness
p.	Page No.
r/w	Read With
SC	Supreme Court
Supp	Supplementary
SCC	Supreme Court Cases
SCR	Supreme Court Report
Sec./S./§	Section
U/s	Under Section
v.	Versus

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STATEMENT OF JURISDICTION

The Hon'ble Court has jurisdiction to try the instant matter pursuant to Section 177 read with Section 209 of the Code of Criminal Procedure, 1973.

¹***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.

²***209. Commitment of case to Court of Session when 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 triable exclusively by the Court of Session, he shall-

(a) Commit, after Complying with the provisions of section 207 or section 208, as the case may be, the case to the Court of Session, and subject to the provisions of this code relating to bail, remand the accused the custody until Such commitment has been made;

(b) Subject to the provisions of this Code relating to 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 Session.

¹ Section 177, Code of Criminal Procedure 1973.

² Section 209, Code of Criminal Procedure 1973.

STATEMENT OF FACTS

BACKGROUND:

- Abhishek and Angad are Post Graduate students of Political Science and Administration at Presidency College, Mavada. They are childhood friends. They belong to the same Lepat Community. Abhishek is the president of the Student Union and Angad an office bearer.
- Dushyant is a local leader of CPR. The party is fighting against the government for the inclusion of their community in “OBC” list.
- Tanya and Natasha are also members of the Union and are close to Abhishek and Angad as they all belonged to the same Community. The girls had been repeatedly complaining to Abhishek and Angad that some boys have been teasing them so Abhishek and Angad started accompanying them to the bust stand.

CAUSE OF ACTION:

- On April 7, 2016, Dinesh & Peter came again to tease Tanya & Natasha due to which Abhishek & Angad started pelting stones at them. Suddenly, the inspector came from behind, slapped Abhishek and violently threatened him. The inspector put his hand on his belt taking out the gun from the holster. Angad warned Abhishek of the same.
- Abhishek, in a fit of rage, ran, took a rod that was lying down in the auto garage next to the bus stop and threw it at the inspector. The inspector got hit on the head, fell awkwardly on the pavement and got hit on the head again by the stump of a tree.
- The inspector was taken to the hospital where he was declared brought dead. Abhishek & Angad was arrested. The defendant claimed he acted in self defence.

STATEMENT OF CHARGES

CHARGE 1:

Mr.Abhishek (hereinafter referred as '*Accused no.1*') has been charged under section 186 (Obstructing Public Servant in Discharge of Public Functions) and Section 304 (Punishment for Culpable Homicide not amounting to Murder) r/w Section 34 (Common Intention) of the Rabat Penal Code, 1860.

CHARGE 2:

Mr.Angad (hereinafter referred as '*Accused no.2*') has been charged under Section 107 (Abetment of a Thing); Section 186 (Obstructing Public Servant in Discharge of Public Functions) and Section 304 (Punishment for Culpable Homicide not amounting to Murder) r/w Section 34 (Common Intention) of the Rabat Penal Code, 1860.

CHARGE 3:

Mr.Dushyant (hereinafter referred as '*Accused no.3*') has been charged under Section 107 (Abetment of a Thing) and Section 304 (Punishment for Culpable Homicide not amounting to Murder) r/w Section 34 (Common Intention) of the Rabat Penal Code, 1860.

SUMMARY OF ARGUMENTS

ISSUE 1. THAT THE ALLEGED ACT OF ACCUSED (ABHISHEK, ANGAD & DUSHYANT) DOES NOT ATTRACT THE OFFENCE PUNISHABLE U/S 304 r/w SECTION 34 OF THE RABAT PENAL CODE, 1860.

As per the prosecution version Abhishek hit the deceased Inspector with the intention to kill him is unacceptable suspicion against Abhishek. Conviction cannot sustain on mere conjecture, surmises or suspicion. Suspicion, however grave, cannot take the place of proof. The counsel humbly submits that the act of hitting deceased with metal rod was well within exercise of his right to private defence available to him by virtue of Chapter IV of Rabat Penal Code, 1860. Deceased Inspector Chaudhary arrived at the crime spot with intention to aid and support Dinesh & Peter for personal benefits which clearly is not his lawful function and created an apprehension of death & grievous hurt in the mind of Abhishek & Angad in doing so. Therefore accused has right to private defence available against deceased which can even extend to causing death by virtue of §.100 Rabat Penal Code, 1860 and hence act of accused is justified.

ISSUE 2. THAT ACCUSED (ABHISHEK & ANGAD) SHOULD NOT BE HELD GUILTY OF OBSTRUCTING PUBLIC SERVANT IN DISCHARGE OF PUBLIC FUNCTIONS PUNISHABLE U/S 186 OF RABAT PENAL CODE, 1860.

It is respectfully submitted that the accused should not be held guilty of an offence punishable U/s 186 of the Rabat Penal Code, 1860. That this Hon'ble Court has taken cognizance of the offence U/s 186 RPC though the requisite complaint U/s 195 CrPC has not been submitted and thus creating prejudice against the accused. Further, to attract liability under this section, it is necessary to prove that the obstruction was voluntary and that the officer was performing his legitimate public function. The counsel humbly submits that the act of the accused was involuntary since his act was without any premeditation to cause death of deceased. It was

exercised in his self-defence. Moreover, the police officer was not performing his legitimate duty rather was favoring one party in his actions just for his personal benefits.

ISSUE 3. THAT THE ACCUSED (ANGAD & DUSHYANT) SHOULD NOT BE HELD GUILTY FOR ABETMENT U/S 107 OF THE RABAT PENAL CODE, 1860.

It is humbly submitted before this Hon'ble Court that Dushyant & Angad should not be held guilty for abetment of offences punishable U/s 186 & 304 since they have not abetted Abhishek for committing any crime. General advice or words uttered in anger & a fit of rage by Dushyant did not amount to instigation. Also, mere interposition of Angad without any intention to aid Abhishek for committing an offence would also not tantamount to abetment. Moreover, the act of Abhishek is justified and is well within his ambit of private defence.

ISSUE 4. THAT THERE ARE IRREGULARITIES IN THE PROSECUTION VERSION CREATING PREJUDICE AGAINST THE ACCUSED.

It is most respectfully submitted that the prosecution version faces serious irregularities creating prejudice against the accused. Requisite Inquest has not been done by Executive Magistrate U/s 174, Code of Criminal Procedure, 1973 and there was unreasonable delay in investigating spot of crime. Further, statements of accused recorded U/s 161 without prior permission of court when the accused are in judicial custody create a reasonable doubt in the prosecution version.

ARGUMENTS ADVANCED

ISSUE 1. THAT THE ALLEGED ACT OF ACCUSED (ABHISHEK, ANGAD & DUSHYANT) DOES NOT ATTRACT THE OFFENCE PUNISHABLE U/S 304 R/W SECTION 34 OF THE RABAT PENAL CODE, 1860.

(¶.1) It is humbly submitted before this Hon'ble Court that accused (Abhishek, Angad & Dushyant) should not be held guilty U/s 304 r/w s.34 RPC since accused no.1 acted in self defence and did not intend to cause death of deceased Inspector Chaudhary. The [1.1] & [1.2] accused has right to private defence available against deceased which can even extend to causing death and [1.3] he acted lawfully in exercise of his right to private defence available to him.

1.1. THAT THE ACCUSED HAD RIGHT TO PRIVATE DEFENCE.

(¶.2) Right of private defence is available to every member of the society.³ It is available against the person or persons from whom imminent danger to life or property is apprehended.⁴ The right of private defence commences, when necessity begins, and ends when necessity ceases.⁵ It is not necessary that there should be an actual commission of the offence in order to give rise to right of private defence. It is enough if the accused apprehends that such an offence is contemplated and that is likely to be committed if the right of private defence is not exercised.⁶ In considering whether one is entitled to exercise the right to private defence, one has to place himself in the position of the accused in the midst of circumstances in which the accused stood and then form an opinion whether under peculiar circumstances, he had not the apprehension of such injuries to

³ Munshi Ram v. Delhi Administration, AIR 1968 SC 702.

⁴ Bhima v. Parmananda, (1972) CriLJ 820 (Ori).

⁵ Balbir Singh v. State, AIR 1959 Punj 332; State of Uttar Pradesh v. Ram Swarup, AIR 1974 SC 1570.

⁶ Sunil Gangrade v. State of Madhya Pradesh, (1997) CriLJ 4238 (MP); State of Mysore v. Raju Shetty, AIR 1961 Mys 74.

his body as would entitle him to exercise his right. These things can not be weighed in too fine a set of scales or as it is said in ‘golden scales’.⁷

(¶.3) It is most respectfully submitted that the sudden intervention of deceased Inspector Chaudhary between the clash of accused with Dinesh & Peter, slapping accused no.1 and threatening accused to shoot by showing them his gun holster is reasonable enough to create apprehension of imminent danger to life of the accused. Also, the accused has knowledge of some previous questionable conducts of deceased where he was charged for killing some local goons. This further triggered the apprehension in the mind of accused and he acted in his self-defence to protect his life.

1.2. THAT ACCUSED RIGHT TO PRIVATE DEFENCE WAS NOT LIMITED BY §.99 OF THE RABAT PENAL CODE, 1860.

(¶.4) It is also pertinent to mention here that right to private defence is available against police official performing unlawful action. The words of Section 99 ‘public servant acting in good faith under colour of his office though the act may not be strictly justifiable by law’ in this section have no application to a case where the power under which a public servant purports to act is without jurisdiction and is ultra vires.⁸ Where the police party were the aggressors and the accused began the attack in desperation finding a large body of police party advancing against them with loaded rifles, revolvers & lathis, their attack was taken to be in defence of their bodies and property and, therefore be protected.⁹ The immunity to public servant extends only to lawful acts performed by him in good faith. If an act is not done with due care & attention, it can not be said

⁷ Govindan Neelambaran v. State of Kerela, AIR 1960 Ker 258; Amjad Khan v. State, AIR 1952 SC 165; Ramsiya v. State of Madhya Pradesh, (1994) CrLR 107; Mohinder Singh v. State of Punjab, (1995) CrLJ 244 (P&H); Raj Singh v. State of Punjab, (1995) CrLJ 680 (P&H); Adhimoolam v. State, (1995) CriLJ 1051.

⁸ Asa v. Emperor, 14 CrLJ 512; Queen-Empress v. Jogendra Nath Mukherjee, 24 ILR Cal 320.

⁹ Pagla Baba v. State, AIR 1957 Ori 130.

to be done in good faith as criminal law is concerned.¹⁰ ‘Act not strictly justifiable by law’ does not cover an act which is wholly illegal & totally without jurisdiction. Section 99 applies to acts where jurisdiction is wrongly exercised but not where there is complete absence of jurisdiction.¹¹

Deceased, Inspector Chaudhary reached at the crime spot to aid & support Dinesh, son of MLA and his minion, who used to tease Tanya (DW4) & Natasha (DW5). To aid & support somebody teasing two girls & creating public nuisance is clearly ultravires and have no legal basis. Therefore, apprehension of imminent danger created by him to aid & support somebody for his personal benefits can not fall within ambit of Section 99 of the Rabat Penal Code, 1860.

(¶.5) Furthermore, right of private defence is available against a public servant when, though the act is done under the color of his office and the act is justified, there is a reasonable apprehension of death or grievous hurt to be caused by act of public servant.¹² In the instant matter, there was reasonable apprehension of death or grievous hurt to be caused if the police inspector shoots accused since deceased threatened accused by putting his hand on gun holster.

1.3. ACCUSED PROPORTIONATELY EXERCISED HIS RIGHT TO PRIVATE DEFENCE.

(¶.6) It is general principle that the extent of injury inflicted upon the assailant must never be greater than is necessary for the purpose of defence.¹³ If a person has a right to private defence of body under S.97, that right extends, under this section, to causing death if there is reasonable apprehension that death or grievous hurt would be consequence of assault.¹⁴ The real test to determine as to whether the right of private defence extends to cause death of aggressors would

¹⁰ Pagla Baba v. State, AIR 1957 Ori 130.

¹¹ Ramji Lal & Ors. v. State of Rajasthan, (1989) 1 Raj LR 281.

¹² State of U.P. v. Ram Sanehi, (1969) CriLJ 952 (All).

¹³ Munshi Ram v. Delhi Admn, AIR 1968 SC 702; Kartar Singh v. State, (1970) WLN 688; Khem Singh v. State of Rajasthan, (1978) CrLR 371 (Raj).

¹⁴ §.100 Rabat Penal Code, 1860; See also Piara Singh v. State of Punjab, (1979) CriLJ 498; Paramananda v. State of Orissa (1970) CriLJ 931 (Ori); Vishvas v. State of Maharashtra, AIR 1978 SC 414.

be as whether the accused party had reasonable apprehension in its mind that the death or grievous hurt would be consequence of assault on the accused party by the complainant party.¹⁵

There must be circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt would be caused to him.¹⁶ In the present matter, apprehension of death or grievous hurt was natural consequence of series of events. Firstly, the sudden intervention of deceased between the clash then secondly, being slapped by deceased; thirdly the statement by deceased, “*I will teach you a lesson you will never forget. I have taught this lesson to many*” and thereafter showing the gun holster by putting his hand on the belt. Moreover, the knowledge that deceased was suspended in an encounter case and was close to Dinesh (son of MLA) triggered the fear of being harmed by deceased.

(¶.7) Further, while exercising the right of private defence it is not possible for an average person whose to take a calm and objective view expected in the detached atmosphere of the Court, and calculate with arithmetic precision as to how much force would effectively serve the purpose of self-defence and when to stop.¹⁷ When a right of private defence accrues in favour of a person, it is hardly possibly to expect that he ought to measure his blows or select a particular part of the body or the weapon. The mental equilibrium of the person entitled to private defence cannot be weighed in goldsmith’s scale.¹⁸ Abhishek, in order to protect his life picked up metal rod lying in the auto-garage next to the bus stop and threw it at Amit Choudhary which hit him on his head.¹⁹ Also, it is clearly evident from the forensic report that liver of accused has high level of alcohol with potassium level 2.5 mmol/l which clearly infers that deceased was intoxicated that is why

¹⁵ Mohinder Singh v. State of Punjab, (1995) CriLJ 244 (P&H).

¹⁶ Arjun v. State of Maharashtra, (2012) 5 SCC 530; Anwar Mussa Sayyed v. State of Maharashtra, (2014) CriLJ 312 (Bom).

¹⁷ G.V.S. Subbrayanam v. State of A.P., AIR 1970 SC 1079.

¹⁸ Dhansingh Nath v. State of Assam, 1978 CriLJ (NOC) 10 (Gau).

¹⁹ Page 3 ¶ 17. Fact Sheet.

he fell down after the blow of metal rod though being 6 feet tall and weighing 90 Kgs.²⁰ Thus act of Abhishek is justified being well within his right to private defence.²¹ Further, §.34 of Rabat Penal Code, 1860 is merely rule of evidence & does not create a substantive offence.²² In present instance, since act of accused no.1 is justified within exercise of his right to private defence as already substantiated above and there was no intention of accused no.2 & 3 to cause death of deceased, §.34 is not applicable. Thus, all the accused should be acquitted of all charges.

ISSUE 2. THAT ACCUSED (ABHISHEK & ANGAD) SHOULD NOT BE HELD GUILTY OF OBSTRUCTING PUBLIC SERVANT IN DISCHARGE OF PUBLIC FUNCTIONS PUNISHABLE U/S 186 OF RABAT PENAL CODE, 1860.

(¶.8) It is respectfully submitted that the accused should not be held guilty of an offence punishable U/s 186 of the Rabat Penal Code, 1860 since [2.1] requisite complaint U/s 195 CrPC has not been submitted; [2.2] the act of the accused was involuntary and [2.3] the deceased Inspector was not performing his legitimate duty.

2.1. COMPLAINT UNDER SECTION 195 (1) (A) CR.P.C. NOT SUBMITTED.

(¶.9) That requisite complaint U/s 195(1)(a) Cr.P.C. to take cognizance of offence U/s 186 IPC is not submitted before this Hon'ble Court. The pre-requisites for taking cognizance under section 186 are: (a) that there should be complaint; (b) that the complaint should be in writing; and (c) that it should be by the public servant concerned, or by some other public servant to whom he is subordinate.²³ Want of such a complaint is fatal to a prosecution under this section.²⁴ A statement under sections 161 or 164 Cr.P.C. would not constitute a written complaint and cannot be

²⁰ Page 11 Fact Sheet Post Mortem Report Cl.5 & 6.

²¹ §.96, 97 & 100 Rabat Penal Code.

²² B.N. Srikantiah v. State of Mysore, AIR 1958 SC 672; Arun v. State, AIR 2009 SC 1256; Satyavir Singh Rathi, ACP v. State, AIR 2011 SC 1748; Y Venkaiah v. State of A.P., (2009) 12 SCC 126.

²³ §. 195 The Code of Criminal Procedure 1973.

²⁴ Lajja Ram v. State, AIR 1952 HP 32; Makardhwaj Sahu v. State, AIR 1954 Ori 175; Basanta Kumar Gon v. The State, AIR 1956 Cal 118; Inder Singh v. State, AIR 1960 Punj 356; Janki Prasad v. State of Bihar, (1975) CriLJ 575 (Pat); Oduvil Devaki Amma v. State of Kerela, (1982) CriLJ 11 Ker (NOC).

equated as a special complaint in writing stipulated under section 195, Cr.P.C.²⁵ Cognizance taken by the magistrate on a police-challan is illegal and is liable to be quashed.²⁶

(¶.10) Section 195 imposes a limitation on unfettered power of a Magistrate to take cognizance of an offence under Section 190.²⁷ The section engrafts an exception to the general rule that any person can set the criminal law in motion.²⁸ The provision of Section 195(1)(a) being mandatory, any private prosecution in respect of the said offences is totally barred.²⁹ The object is to prevent improper and reckless prosecutions by private persons for offences in connection with the administration of public justice and those relating to the contempt of lawful authority of a public servant.³⁰ In the absence of such a complaint, trial and conviction will be invalid³¹ and void ab-initio. Thus, it is humbly submitted that the court has wrongly taken cognizance of offence for obstructing public servant in discharge of his public functions and thus the offence being not maintainable, accused should be not guilty for charge U/s 186 on this ground alone.

2.2. THE ACCUSED ACTED INVOLUNTARY.

(¶.11) To constitute offence under Section 186, the obstruction must be intentional. It has accordingly been held that the use of word ‘voluntarily’ seems to indicate that the legislature contemplated the commission of some overt act of obstruction, and did not intend to render penal a mere passive conduct.³² Ancient maxim *actus non facit reum, nisi mens sit rea* envisages that

²⁵ Gurinder Singh v. State, (1996) 3 CCR 257.

²⁶ Basudeva v. State, (1985) CCC 97 (Del); Gurinder Singh v. State, (1996) 3 CCR 257 (Del); Jivan Kumar v. State, 2008 CriLJ 3576 (P&H).

²⁷ M.L. Shetti v. R.P. Kapoor, AIR 1967 SC 528; Yashwant V. Sanghvi v. Sahdevsinh Zala, (2006) 3 GLR 1873.

²⁸ Robind Raychowdhury v. State, (1998) CriLJ 1699 (Cal); Numa Shanker Sahay v. State of Bihar, (1998) CriLJ 2807 (Pat).

²⁹ Budhalal Chhotalal Rana v. State of Gujarat, (2009) CriLJ 163 (Guj).

³⁰ Kurien v. State of Kerala, 1988 (1) Crimes 867 (Ker); Biju v. State of Kerala & Ors., 2015 (4) KLJ 308.

³¹ Lekhraj Hira Lal v. State of U.P., (2008) CriLJ (NOC) 1118 (All) (SC).

³² Jaswant Singh v. King-Emperor, AIR 1925 Lah 139; Emperor v. Gajadhar, (1910) 11 CriLJ 721; Empress v. Somama, 15 ILR Mad 221; Santosh Kumar Jain v. State, AIR 1950 Pat 436.

no man should be convicted of a crime unless the two requirements of (i). *actus reus* physical, and (ii). *Mens rea mental* mental element, are satisfied in every crime. Whatever act a man do, it cannot make him criminally punishable, unless his doing of it was actuated by a legally blameworthy attitude of mind.³³ Motive is something which prompts a man to form an intention.³⁴ Where the essential ingredients of the offence are not established, absence of proof of motive would be a ground for acquittal of the accused. However, the evidence of motive is relevant since it throws light on the question of intention and gives clue to a crime, and though the prosecution is not bound to prove motive for a crime, absence of motive may be a factor in consideration of the guilt of the accused.³⁵

(¶.12) In the instant matter, there was no voluntarily obstruction caused by the accused. Their act was only a reflex to the illegitimate act of the deceased. Deceased, Inspector Chaudhary reached at the crime spot to aid & support Dinesh, son of MLA and his minion, who used to tease Tanya & Natasha, friends of accused. To aid & support somebody teasing two girls & creating public nuisance cannot be a legitimate public function. Further, when deceased slapped accused no.1 and then puts his hand on his belt showing holster saying some harsh words to the accused,³⁶ any prudent person under the apprehension of death would have acted the same way as the accused acted. There was no premeditation or intention to hit him with metal rod, this can be easily inferred from the fact that accused were not having any weapon with them to hit deceased and also accused no.2 advised accused no.1 to escape instead of advising him to hit.³⁷ This shows they did not premeditate to hit deceased or harm him rather acted suddenly in their self defence.

³³ Fowler v. Padget, (1898) 7 TLR 509.

³⁴ Basdev v. State of Pepsu, AIR 1956 SC 488; See also RATANLAL & DHIRAJLAL, LAW OF CRIMES, 212-221 (23rd Edn. Bharat Law House 1987) ; Ankush Shivaji Gaikwad v. State of Maharashtra, AIR 2013 SC 2454.

³⁵ State of Gujarat v. D.P. Pandey, AIR 1971 SC 866.

³⁶ Page 3 ¶.17 line 4, Fact Sheet.

³⁷ Page 3 ¶.17 line 7, Fact Sheet.

2.3. DECEASED INSPECTOR NOT PERFORMING HIS LEGITIMATE PUBLIC FUNCTION.

(¶.13) It is humbly submitted before this Hon'ble Court that deceased, Inspector Chaudhary was not performing legitimate public function. Under Section 186, it must be shown that the obstruction or resistance was offered to a public servant in the discharge of his duties or public function as authorised by law. The mere fact of a public servant believing that he was acting in the discharge of his duties will not be sufficient to make resistance or obstruction an offence.³⁸

The burden is on prosecution to show that the court or officer who issued the warrant in the execution of which the public servant was obstructed, had jurisdiction to do so,³⁹ and that the public servant was discharging public duties imposed on him by law.⁴⁰ A mere refusal to comply with the request of public servant discharging his functions, does not amount to a voluntarily obstruction within the meaning of section 186.⁴¹ The act of mere running away to escape arrest may have the effect of baulking a public servant or cheating him of his intentions, but that would not amount to obstruction within the meaning of this section.⁴² Escaping from lawful custody is not obstructing a public servant in the discharge of his public functions.⁴³

(¶.14) The public functions contemplated by this section mean legal or legitimately authorized public functions, and are not intended to cover any act that a public functionary may choose to take upon himself to perform, and the mere fact of a public servant believing that he was acting

³⁸ Subramanian Swamy v. Union of India & Ors., AIR 2016 SC 2728.

³⁹ R. Venkatkrishnan v. CBI, (2009) 11 SCC 737; Sanjiv Kumar v. State of Punjab, (2009) 16 SCC 487.

⁴⁰ Jamunadas Tharoomal v. Emperor, AIR 1940 Sind 42; Emperor v. Bhopo, AIR 1933 Sind 174; Queen-Empress v. Dalip, 18 ILR All 246.

⁴¹ Queen-Empress v. Somanna, 15 ILR Mad 221; Lilla Singh v. R, 22 ILR Cal 286; Ramlakhan Ram v. State, AIR 1950 Pat 544.

⁴² Phudki v. State, AIR 1955 All 104; Jamna Das v. Emperor, AIR 1927 Lah 708; Peeru Mahommad Lebhai v. Swaminathan Pillai (1917) Mad 182(1).

⁴³ Reg v. Poshu, 2 (Bom) HCR 128; Sheikh Nasa v. R, 37 ILR Cal 122.

in the discharge of his duties will not be sufficient to make resistance or obstruction to him amount to an offence within the meaning of this section.⁴⁴

(¶.15) The functions, discharged by a public servant would not, however, be public-functions if they fall wholly outside the jurisdiction or authority which he, as a public officer, possesses.⁴⁵

Where the police party forcibly took the petitioner to the government dispensary against his will, the petitioner has a right to resist it. If in that incident any police personal were given some beating, they invited it. No offence is committed since taking accused forcibly was not legitimately authorised public function.⁴⁶ A warrant of attachment, which does not bear the signature⁴⁷ or the seal of the court issuing it,⁴⁸ is illegal and resistance to the execution of it is no offence. So also in the case of a warrant of attachment which has expired.⁴⁹ This section does not apply to an officer who is acting wholly outside his jurisdiction or authority.⁵⁰

(¶.16) Deceased, Inspector Chaudhary reached at the crime spot to aid & support Dinesh, son of MLA and his minion, who used to tease Tanya & Natasha, friends of accused. To aid & support somebody teasing two girls & creating public nuisance cannot be a legitimate public function. His act to aid & support somebody for his personal benefits cannot be established within colour of his official duty. Therefore, since deceased was acting out of his official public function, accused cannot be held guilty U/s 186 IPC.

⁴⁴ Lilla Singh v. Queen-Emperor, 22 ILR Cal 286; Gahar Mahommad Surkar v. Pitamber Das, AIR 1918 Cal 4; Queen-Empress v. Tulsiram, 13 ILR Bom 168.

⁴⁵ Emperor v. Shivadas Onkar Marwadi (1913) 14 CriLJ 251; Emperor v. Kadarbhai Usufalli Bohsi, AIR 1927 Bom 483; Dharanidharjana v. Kedarnath Das, AIR 1945 Cal 48; Suribeshwarnath v. Emperor, AIR 1924 Cal 501.

⁴⁶ Babulal v. State of Rajasthan, (1992) CriLJ 517 (Raj).

⁴⁷ Ramdayal v. Mahtab Singh, 7 ILR All 506.

⁴⁸ Khidri Bux v. Emperor, AIR 1919 Pat 404.

⁴⁹ Kurugappa Naicker v. Emperor, AIR 1925 Mad 613; Parshottam Dass v. State, AIR 1965 Punj 264; R v. Himayat Ali, (1905) 2 CriLJ 64.

⁵⁰ Emperor v. Kadarbhai Usufalli Bhoori, AIR 1927 Bom 483.

(¶.17) It is therefore humbly submitted that since no requisite complaint U/s 195 CrPC submitted, there was no voluntary act by accused and public servant was not performing any legitimate public function, accused should be held not guilty for offence U/s 186 IPC.

ISSUE 3. THAT THE ACCUSED (ANGAD & DUSHYANT) SHOULD NOT BE HELD GUILTY FOR ABETMENT U/S 107 OF THE RABAT PENAL CODE, 1860.

(¶.18) It is humbly submitted before this Hon'ble Court that Dushyant & Angad should not be held guilty for abetment of offences punishable U/s 186 (Obstructing public servant in discharge of public functions) and 304 (Punishment for culpable homicide not amounting to murder) since [3.1] no offence was committed by Abhishek; [3.2] general advice or words uttered in anger & a fit of rage by Dushyant did not amount to instigation; and [3.3] mere interposition of Angad without any intention to aid would not tantamount to abetment.

3.1. NO OFFENCE WAS COMMITTED BY ABHISHEK.

(¶.19) Abetment must be of an offence. Three things are essential to complete abetment as a crime. There must be an abettor; he must abet; and abetment must be of an offence.⁵¹ For a conviction under this section, it must be established that the accused abetted the commission of an offence. The law only punishes abetment of an offence, and not the abetment of mere acts which are not offence.⁵² The offence of abetment is complete when the alleged abettor has instigated another, or intentionally aided another or engaged with another, in a conspiracy to commit the offence.⁵³ A child marriage celebrated outside India is not an act, punishable under the IPC, and hence its abetment is not punishable as an abetment.⁵⁴ The counsel humbly submits

⁵¹ Emperor v. Parimal Chatterji, AIR 1932 Cal 760.

⁵² M N Bhatia v. State of Uttar Pradesh, (1968) CriLJ 555 (All); Harji v. State of Rajasthan, 1977 SCC Online Raj 92; Hira Singh v. Emperor, AIR 1946 All 457.

⁵³ KishanGiri Goswami v. State of Gujrat, (2009) 4 SCC 52; Jamuna Singh v. State of Bihar, AIR 1967 SC 553; Inderjit Singh Grewal v. State of Punjab, (2011) 12 SCC 588; Trilok Chand v. State of Delhi, AIR 1977 SC 666; State of Maharashtra v. Pandurang Ramji Sanap, 1971 (73) BomLR 245.

⁵⁴ Sheikh Haidar Sheikh Attr Musalman v. Syed Issa Syed Rahiman Musalman, AIR 1938 Nag 235.

that Abhishek (Accused no.1) acted lawfully well within his right to private defence and has not committed any offence as already substantiated above. Thus no question of any abetment by accused arises thereby since no offence has been committed by accused no.1.

3.2. GENERAL ADVICE PER SE IS NOT ABETMENT.

(¶.20) General advice is too vague an expression to prove abetment.⁵⁵ The words uttered in a fit of anger or omission without any intention cannot be termed as instigation.⁵⁶ Advice per se cannot necessarily be instigation.⁵⁷ Presence of *mens rea* is the necessary concomitant of instigation.⁵⁸ An act which merely amounts to aiding the commission of an offence is not an abetment. Intention to aid the commission of the crime is the gist of the offence of abetment by aiding.⁵⁹ It is common knowledge that the words uttered in a quarrel or in a spur of moment can not be taken to be uttered with *mens rea* required to constitute instigation as they are uttered in a fit of anger and emotional state.⁶⁰ In the instant case, accused has no intention to instigate the accused no.1 to commit any offence. The statement made by Dushyant (Accused no.3) was just pronounced in a fit of rage & anger when he came to know that deceased was abusing his power and was troubling co-accused.⁶¹ He did not intend to incite or provoke accused no.1 to commit any offence. Abhishek himself admitted before Angad telephonically that Dushyant did not

⁵⁵ Pramatha Nath v. State, AIR 1951 Cal 581; See also State of Punjab v. Iqbal Singh, AIR 1991 SC 1532; Surender v.State of Hayana, (2006) 12 SCC 375; Kishori Lal v. State of M.P., AIR 2007 SC 2457; and Sonti Rama Krishna v. Sonti Shanti Sree, AIR 2009 SC 923.

⁵⁶ Praveen Pradhan v. State of Uttranchal, (2012) CriLJ 4925 (SC).

⁵⁷ Ramesh Kumar v. State of Chattisgarh, AIR 2001 SC 3837; Raghunath Dass v. Emperor, AIR 1920 Pat 502.

⁵⁸ Chitresh Kumar Chopra v. State (Govt. of NCT of Delhi), AIR 2010 SC 1446.

⁵⁹ Ranganayaki v. State, (2004) 12 SCC 521; Trilok Chand v. State of Delhi, AIR 1977 SC 666; Shri Ram v. State of U.P., AIR 1975 SC 175; KG Patel v. State of Maharashtra, AIR 1973 SC 1388; Bachchan Lal v. State, AIR 1957 All 184.

⁶⁰ See Swamy Prahaladdas v. State of M.P. & Anr., 1995 Supp. (3) SCC 438; Mahendra Singh v. State of M.P., 1995 Supp. (3) SCC 731; Ramesh Kumar v. State of Chattisgarh, (2001) 9 SCC 618; Seeta Hemchandra Shashittal v. State of Maharashtra, (2001) 4 SCC 525.

⁶¹ Page 2 ¶.18 line 8 Fact Sheet.

advised him anything. Also, extract of the telephonic conversation after the incident between Abhishek & Dushyant (Already on court file as Exhibit 5) clearly infers that accused no.3 did not intend to advise accused no.1 to commit any offence. Moreover, the act of Abhishek was lawful and did not amount to any offence as already substantiated in previous issues. Thus, there was no instigation (abetment) by Dushyant to commit any offence.

3.3. MERE INTERPOSITION CANNOT PROVE ABETMENT.

(¶.21) An association, between the person accused of abetment & principle offender, which does not measure up to an instigation, conspiracy or intentional aid in respect of the commission of the offence, does not constitute abetment.⁶² In order to constitute ‘abetment’, the abettor must be shown to have ‘intentionally’ aided the commission of the crime. Mere proof that the crime charged could not have been committed without the interposition of the alleged abettor is not enough compliance with the requirements of Section 107 RPC, 1860.⁶³ In order to secure a conviction for abetment of murder under this section, it is essential for the prosecution to prove that the accused knew that the actual murderer did intend to commit the murder.⁶⁴ The mere omission to intervene or raise an alarm on the part of a person witnessing a murder does not constitute an abetment.⁶⁵ A person witnessing a crime and not giving information is not an accomplice.⁶⁶ Likewise, mere connivance does not constitute abetment.⁶⁷ Analogically, Angad

⁶² 1, ‘R A Nelson’s Indian Penal Code’ 708 (LexisNexis, Gurgaon, 11th Ed, 2016).

⁶³ Rajat Prasad v. CBI, (2014) 6 SCC 495; State of Rajasthan v. Kesa, (2002) CriLJ 432 (Raj); Siaram v. State of Uttar Pradesh, AIR 1975 SC 175; Hemanta Kumar Mandal v. State of West Bengal, (1993) CriLJ 82 (Cal); Chinnaswamy v. State, (2005) CriLJ 488 (Mad) (DB).

⁶⁴ Re Nennur Rami Reddi, AIR 1917 Mad 351; Shrilal v. State, AIR 1953 MP 155.

⁶⁵ Upendra Chandra v. Emperor, AIR 1941 Cal.456; Kulwant Singh v. State of Bihar, (2007) 15 SCC 670; Om Prakash v. State of Haryana, (2015) 2 SCC 84; Priya Patel v. State of M.P., (2006) 6 SCC 263.

⁶⁶ Vemireddy Satyanaraya Reddy v. State of Hyderabad, AIR 1956 SC 379; State of Maharashtra v. Dashrath Lahanu Kadu, (1973) 75 BomLR 450.

⁶⁷ Shyam Bahadur v. State, AIR 1967 Pat 312; Shri Ram v. State of U.P., (1975) CriLJ 240 (SC).; Suram Kiran Kumar Reddy and Ors. v. State of A.P. and Anr., 2003 (2) RCR (Criminal) 24 (AP).

have not intentionally aided or assisted accused no.1 to commit any offence. Angad was childhood friend of accused no.1 and young leaders of same party & striving for betterment of their community together and hence, was standing beside his friend in any problem. At the crime scene, when he witnessed that deceased Inspector Chaudhary slapped his friend and was intending to shoot accused, he shouted to accused no.1 to escape.⁶⁸ This clearly states that he did not intend to cause any harm to deceased rather just wanted to save his friend from unlawful act of deceased. It is therefore submitted that accused has not committed offence of abetment and should be acquitted of all charges in the interest of justice.

ISSUE 4. THAT THERE ARE IRREGULARITIES IN THE PROSECUTION VERSION CREATING PREJUDICE AGAINST THE ACCUSED.

(¶.22) It is most respectfully submitted that the prosecution version faces serious irregularities creating prejudice against the accused. Requisite Inquest has not been done by Executive Magistrate U/s 174, Code of Criminal Procedure, 1973 and there was unreasonable delay in investigating spot of crime. Further, statements of accused recorded U/s 161 without prior permission of court when the accused are in judicial custody create a reasonable doubt in the prosecution version.

4.1. INQUEST REPORT U/S 174 OF CODE OF CRIMINAL PROCEDURE NOT COMPLIED WITH.

(¶.23) It is humbly submitted before this Hon'ble Court that the police after being informed of the incident rushed to the spot without intimating the nearest Executive Magistrate to hold inquests u/s 174, Code of Criminal Procedure. He has to sign such a report and get it signed by the other persons who concur with him and then forward it to the District Magistrate or the Sub-Divisional Magistrate. The police officer has to forward the dead body with a view to its being examined to the nearest Civil Surgeon or other medical officer appointed by the State Government if the state

⁶⁸ Page 3 ¶.17 line 7 Fact Sheet.

of the weather and the distance admit of its being so forwarded without risk of putrefaction.⁶⁹ (¶.24) The object of such proceedings is to ascertain whether a person has died under suspicious circumstances or it was an unnatural death and if so what is the apparent cause of death.⁷⁰ It is a document of vital importance as it gives an earlier version of the occurrence and has to be prepared promptly, because it has to be sent to the doctor along with the dead body when it is sent for post mortem examination.⁷¹ In the present case, with regard to holding inquests, the aforementioned legal obligations were not paid heed to by the police⁷² and thus creates suspicion in the prosecution version.

4.2. UNREASONABLE DELAY IN INVESTIGATION OF CRIME SCENE.

(¶.25) The prosecution agencies also must take a prompt step in completing their investigations and filing their final reports as contemplated under the Code as expeditiously as possible.⁷³ It is humbly submitted before this Hon'ble Court that in relation to the investigation of offence, the officer in charge of Police Station shall forthwith proceed in person or depute his subordinate to proceed to the spot without any delay.⁷⁴ The murder of Inspector Amit Chaudhary took place on 7th April, 2016 from 6:30 p.m. to 7:00 p.m.⁷⁵ whereas the investigating officer visited the crime

⁶⁹ Rao v. Public Prosecutor, AIR 1975 SC 1925; Shakila v. Nausheer, AIR 1975 SC 1324.

⁷⁰ Pedda Narayan v. State of A.P., AIR 1975 SC 1252; Suresh v. State of Bihar, AIR 2000 SC 2207; George v. State of Kerala, AIR 1998 SC 1376; Amar Singh v. Balwinder Singh, AIR 2003 SC 1164; Shambhu Das v. State of Assam, (2010) 10 SCC 374; Brahn Swaroop v. State of U.P., AIR 2011 SC 280.

⁷¹ Surjan v. State of Rajasthan, AIR 1956 SC 425; Munnalal v. State of U.P., AIR 1964 SC 28; Rameshwar v. State of U.P., AIR 1978 SC 1558; Khujji v. State of M.P., AIR 1991 SC 1853; Munshi Prasad v. State of Bihar, (2002) 1 SCC 351; Prakash Singh Badal v. State of Punjab, (2007) 1 SCC 1; Ravi v. State, (2007) 15 SCC 372.

⁷² Page 3 ¶.18 Fact Sheet.

⁷³ Elumalai v. State of Tamil Nadu, 1983 MadLW (Cri) 121.

⁷⁴ §.157 of Code of Criminal Procedure, 1973.

⁷⁵ Page 9 ¶.3 Fact Sheet.

scene outside Presidency college (near bus stop) on April 7, 2017 at 11:00 p.m.⁷⁶ This delay of 5-6 hours is unreasoned and create serious doubt in prosecution version.

4.3. OMISSION TO EXAMINE MATERIAL EVIDENCE.

(¶.26) It is further submitted that prosecution has omitted to examine material evidence seized from the investigation spot. It is the bounden duty of the Prosecution to examine the material witness. Not only does an adverse inference arise against the prosecution case but it also creates prejudice against the accused.⁷⁷ Material witness will be one whose evidence is necessary to the unfolding of the Prosecution narrative.⁷⁸ The Prosecution have failed to examine tea vendor, who is material witness since he was also present at the crime spot and also failed to provide reports with respect to finger prints & blood sample seized vide Panchnama dated April 7, 2016.⁷⁹ This omission on prosecution part has created prejudice against the accused. Failure to examine the weapon of murder for fingerprints to connect the accused with it is extremely fatal to prosecution case.⁸⁰

(¶.27) It is henceforth prayed before this Hon'ble Court to acquit accused of all the charges in the interest of justice since they acted in self defence and have not committed any of the offence charged as already substantiated above. Also, the prosecution version suffers from substantial irregularities which create reasonable doubt and they have failed to establish any offence against accused.

⁷⁶ Page 10 Fact Sheet Panchnama.

⁷⁷ Habeeb Mohd. v. State of Hyderabad, 1954 SCR 475.

⁷⁸ Sitaram v. State of M.P., AIR 1979 SC 1235.

⁷⁹ Page 10 Fact Sheet.

⁸⁰ Datar Singh v. State of Punjab, AIR 1974 SC 1193.

PRAYER

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

Acquit Mr. Abhishek, Mr. Angad & Mr.Dushyant of all the charges.

AND/OR

Pass any other order it may deem fit, in the interest of Justice, Equity and Good Conscience.

All of which is most humbly and respectfully submitted

Place: Mavada

Sd/-

Date: __ September, 2016

Counsel for Defence