SURANA AND SURANA NATIONAL TRIAL ADVOCACY MOOT COURT COMPETITION, 2016

IN THE HONB'LE COURT OF SESSIONS, MAVADA

S.C. No. 101 of 2016

STATE OF JAGUTAR……PROSECUTION

V.

ABHISHEK LEPAT……...ACCUSED NO. 1

ANGAD LEPAT……ACCUSED NO. 2

DUSHYANT……ACCUSED NO. 3

FOR OFFENCES CHARGED UNDER:
§186, §304, §107 READ WITH §34 OF THE RABAT PENAL CODE

UPON SUBMISSION TO THE HON'BLE SESSIONS JUDGE

WRITTEN SUBMISSIONS ON BEHALF OF THE DEFENCE

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

§	Section
¶	Paragraph
&	And
AIR	All India Reporter
ALJ	Allahabad Law Journal
Anr.	Another
BLJR	Bihar Law Journal
Bom	Bombay
Bom.LR	Bombay Law Review
C&P	Court of Appeal of England and Wales
CLT	Cuttack Law Times
Cr.pc	Code of Criminal Procedure
ed.	Edition
ER.	England Reporter
Etc.	Etctetra
GLT	Gujarat Law Review
ex	Former
HC	High Court
Hon'ble	Honourable
i.e.	That is
Ibid	Ibidem
IPC	Indian Penal Code
Jhar.	Jharkhand
Ltd.	Limited
Mad.	Madras

INDEX OF AUTHORITIES

STATUTES

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13. *Oswal Danji v state of orissa*, AIR 1969 Ori 105
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32. *State v. Babulal Gaurishanker Misar & Ors*., (1956) 58 Bom LR 1021

33. *Zabar Singh v State of UP*, AIR 1957 SC 465

STATEMENT OF JURISDICTION

The Hon'ble Court 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 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-

commit the case to the Court of Session;(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.'

STATEMENT OF FACTS

1. A-1 and A-2 were studying Political Science in Presidency college. A-1 was very active in politics and went on to become president of his college union and he organized several programs and protests.
2. These two boys were close to Tanya and Natasha, who were under-graduate students in the same college. After one such protest, Tanya and Natasha were getting teased by two boys- Dinesh and Peter when they went to board the bus.
3. Thus, A-1 and A-2 would drop them off at the bus stop, like true gentlemen. One such day, when they went to drop off Tanya and Natasha at the bus stop, the two boys were present and Abhishek and A-2 pelted stones at their bikes to ward them off. That evening, they were confronted by Inspector Chaudhary, who threatened them. After consulting his friend – A-3, A-1 was comforted that he was safe and he shouldn't be scared of the Inspector.
4. On 7th April 2016, the boys came again to tease the girls and A-1 and A-2 stepped in to control the situation as they wanted to support their friends. Suddenly, out of nowhere, Inspector Chaudhary stormed in and slapped A-1 and threatened his safety by pointing at his service pistol. A-2, fearing for the safety of his friend, shouted at A-1 to protect himself. A-1 picked up an iron Rod that was lying around and flung it at the Inspector. Inspector Chaudhary fell and was unconscious.
5. The police were informed and rushed at the scene and took Mr. Chaudhary to the hospital where he was declared brought dead. The police arrested A-1 and A-2 and a charge sheet was filed which was forwarded to the Magistrate. The Magistrate took cognizance of the matter and committed the case to the Court of Sessions in Mavada, Jagutar.

STATEMENT OF CHARGES

Charge 1

Abhishek Lepat (A1) & Angad Lepat (A2) have been charged under Section 186 of Rabat Penal Code,1860 for obstructing a Public Servant from discharging his public duty.

Charge 2

Abhishek Lepat (A1), Angad Lepat (A2) & Dushyant (A3) have been charged under Section 304 (I) of Rabat Penal Code,1860 for causing death by an act with the intention that such an act will cause death.

Charge 3

Abhishek Lepat (A1), Angad Lepat (A2) & Dushyant (A3) have been charged under Section 34 of Rabat Penal Code, 1860 for possessing common intention to commit a criminal act.

Charge 4

Angad Lepat (A2) & Dushyant (A3) have been charged under Section 107 of Rabat Penal Code, 1860 for abetting a crime.

SUMMARY OF ARGUMENTS

Issue 1

WHETHER THE ACCUSED AND CO-ACCUSED ARE GUILTY UNDER SECTION 186

It is the submission of the defence that A-1 and A-2 are not guilty under §186 of the IPC that mentions the obstruction of a public servant in discharging his public function. Both the accused have in no manner voluntarily obstructed the discharge of duty of the police officer.

Issue 2

WHETHER THE ACCUSED ARE GUILTY OF THE OFFENCE UNDER SECTION 304 PART I OF IPC

It is the submission of the defence that the accused are not guilty under Section 304 Part I of the IPC. The accused had no intention of causing death or causing any bodily injury likely to cause death of the accused.

Issue 3

WHETHER THE SAID ACCUSED MAY BE CHARGED FOR SHARING COMMON INTENTION

The test for common intention under section 34 is whether the intention of one was known to the other and shared by the other, it is the submission of the defence that not all the accused shared the common intention which is the linchpin for this section.

Issue-4

WHETHER A-2 AND A-3 ARE GUILTY OF ABETMENT

It is the submission of the defence that the accused are not guilty of abetment, to be guilty under this offence, instigation is integral. Instigation necessarily connotes some active suggestion or

support or stimulation to the commission of the act itself. Given the factual matrix, nothing of this sort has occurred.

ARGUMENTS ADVANCED

ISSUE 1

WHETHER THE ACCUSED AND CO-ACCUSED ARE GUILTY UNDER SECTION 186 OF THE INDIAN PENAL CODE,1860

It is humbly submitted by the Defence that Abhishek Lepat, Angad Lepat and Dushyant (hereinafter referred to as A-1, A-2 & A-3 respectively) are not guilty of obstructing a public servant in discharge of his public functions.

The said provision of the Section 186 of the Indian Penal Code,1860 is stated as follows:

"Whoever voluntarily obstructs any public servant in the discharge of his public functions, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both."

1.1 Whether the due procedure of law has been followed in filing of the offence

1.1.1 Whether the provisions of 195(1)(a) of the CrPc has been followed

Section 186 of the Indian Penal Code has to be read in accordance with Section 195(1)(a) of the CrPc, which states as follows:

"(1) No court shall take cognizance

(a) (i) of any offence punishable under sections 172 to 188 (both inclusive) of the Indian Penal Code (45 of 1860), or

(ii) of any abetment of, or attempt to commit, such offence, or

(iii) of any criminal conspiracy to commit such offence, except on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate;"

It is the submission of the Defence that it can be thus concluded that it is necessary to file a written complaint under 195(1)(a) of the code of criminal procedure by the

concerned public servant or his superior officer to whom he is administratively subordinate. In the instant case, this was not done and failure to comply with the provisions of Section 195(1) (a) of CrPc can vitiate the entire trial[1].

1.1.2 Whether the court can take cognizance of the matter

The law can be summarized to the effect that there must be a complaint by the public servant whose lawful order has not been complied with. The complaint must be in writing. The provisions of Section 195 Cr.PC are mandatory. Non-compliance of it would vitiate the prosecution and all other consequential orders. The Court cannot assume the cognizance of the case without such complaint. In the absence of such a complaint, the trial and conviction will be *void ab initio* being without jurisdiction.[2]

The First Information Report attached to the factual matrix clearly charges the accused and the two co-accused under Section 186 in the report itself.[3]

The case of *P-Btiraj Vs. K-Muniyandi* held that if complainant ignored the provisions of Section 195 Criminal Procedure Code. Then the entire complaint must go and Court cannot take cognizance. In that eventuality the proceedings as a whole have to be quashed. In P-Btiraj's case complaint was filed consisting of two offences under Section 166 & 186, IPC. In the absence of a written complaint the Court opined that proceedings as a whole are liable to be quashed. [4]

1.2 Whether the Accused and the co-accused voluntarily obstructed the police officer in discharge of his public functions

1.2.1 Whether the public duty of the Public Servant was obstructed

[1] *C. Muniappan and others vs. State of Tamil Nadu*, 2010 (9) SCC 567

[2] *Ibid*

[3] Case Details, Para 21, P.3

[4] *P-Btiraj Vs. K-Muniyandi* 1995 Criminal Rulings 219

It is the submission of the defence that there must not only be an obstruction to public officer in discharge of his public function, but also such obstruction must be voluntary[5]. The word 'obstruction' connotes some overt act in the nature of violence or show of violence.[6] To constitute "obstruction", it is not necessary that there should be actual criminal force. It is sufficient if there is a show of force or a threat or any act preventing the execution of any act by a public servant[7].

In the present factual matrix, the police officer, while noticing that the A-1 and A-2 were pelting stones at the two bikes that were racing away was justified in acting in his official capacity to stop them from doing so. However, when he struck A-1, the latter showed no defence. He submitted to the authority of the police inspector and showed no overt signs of violence, the same line of argument can be employed for A-2. The latter was simply standing there and also showed no overt signs of violence or even the threat of violence. The incidents of the parts that followed are severable in nature and shall be dealt with in Issue 2.1.

1.2.2 Whether the police officer was discharging a public function

It is the submission of the defence that the police officer - Mr. Chaudhary at the time of commission of the offence was heavily under the influence of alcohol as is evident from both the Forensic Report and the Post Mortem report.[8]

Further, it is the submission of the defence that the police officer did not act in good faith of his duties as prescribed under §52 of the IPC.

Misconduct has been defined as:

[5] *Phudki v.State* , AIR 1955 All 104

[6] *State v. Babulal Gaurishanker Misar & Ors*., (1956) 58 Bom LR 1021

[7] *Abhiram Sahni v. State*, (1960) 2 OJD 401

[8] Annexure 2 & 3,Case Details, P. 11-13.

"*A transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behaviour, wilful in character, improper or wrong behaviour, its synonyms are misdemeanour, misdeed, misbehaviour, delinquency, impropriety, mismanagement, offence, but not negligence or carelessness*."[9]

Misconduct in office has been defined as:

"*Any unlawful behaviour by a public officer in relation to the duties of his office, wilful in character. The term embraces acts which the office holder had no right to perform, acts performed improperly, and failure to act in the face of an affirmative duty to act*."[10]

It is the humble submission of the defence that the Public servant, in this case the police officer was not justified in discharging his public function as he was incapacitated.

Further, In another case, it was held as follows:

"*We have absolutely no doubt that the respondent, being a gunman having service revolver in his possession, it is obvious that he was on duty; while on duty he drunk alcohol heavily and became uncontrollable. Taking to drink by itself may not be a misconduct. Out of office hours one may take to drink and remain in the house. But being on duty, the disciplined service like police service, the personnel shall maintain discipline and shall not resort to drink or be in a drunken state while on duty. The fact is that the respondent after having had heavy drink, was seen roaming or wandering in the market with service revolver. ... Thus it would constitute gravest misconduct warranting dismissal from service. The authorities, therefore, were justified in imposing the penalty of dismissal. The Courts below failed to properly appreciate the legal incidence and the effect of the rules.*"[11]

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[9] *Black's Law Dictionary*, page. 999, (6th Edition1990).

[10] *Ibid.*

[11] *State of Punjab & Ors. v. Ram Singh Ex. Constable* AIR 1992 SC 2188; *Solanki Laxmansing Kesarising v. State of Gujarat & Anr.* (1994) 2 GLR 1294.

ISSUE 2

WHETHER THE ACCUSED IS GUILTY OF THE OFFENCE UNDER SECTION 304 PART I OF IPC

It is submitted by the defence that A-1, A-2 &A-3 are not guilty of culpable homicide not amounting to murder and the act done by which the death is caused is done without the intention of causing death or such bodily injury as is likely to cause death.

The ingredients to constitute the offence under the section are as follows:

"The accused's act should have directly caused the death of the person, and the accused should have had the intention that the act is likely to cause the death of the person.[12]*"*

2.1 Whether the Acts of the Accused caused the death of the Police Inspector

The Forensic report of deceased is clear about the fact that the deceased "suffered internal bleeding which caused increased intracranial hemorrhage which led to the victim experiencing a hypovolemic shock leading to the victim's death."[13]

The defence humbly submits that the said is not possible as a hypovolemic shock by definition is:

"*A condition commonly encountered in patients who are suffering hemorrhaging from trauma or from a non traumatic source of brisk bleeding such as the gastrointestinal (GI) tract or a rupturing aortic aneurysm. The said shock may also result from a loss of body fluids from different sources.*"[14]

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[12] Ratanlal and Dhirajlal, *Indian Penal Code* (32nd Ed, LexisNexis 2013)

[13] Annexure 4, Case Details, P. 13.

[14] Jeffrey Tabas, Teri Reynolds, Saunders, page 30, *High Risk Emergencies: An Issue of Emergency Medicine Clinics*, (1st Ed., 28 January 2010).

Hypovolemic shock is further defined as , " *A reduction in circulating intravascular volume of blood which can arise from the losses of blood, plasma, electrolytes or all of the above.*"[15]

Further, hypovolemic shock has also been defined as "*The state of inadequate tissue perfusion with markedly decreased blood flow, oxygen supply and glucose supply to vital tissues and organs. The said blood loss may be anywhere between 750 ml to 2 litres of blood. In a hypovolemic shock the body redistributes blood to the 3 vital organs of the body i.e the brain, kidneys and heart.*"[16] Thus, it can be reasonably concluded that for a hypovolemic shock to occur, the body must have lost almost 20% of it's total blood or fluid.

According to the Paediatric Nurse Practitioner by Sharon M Kreiger, "Head trauma, no matter how significant, rarely causes hypovolemic shock".[17] The same is also stressed upon in the Australian Medical-Adaptive Specialty Review and Study Guide By Erin Hughes which says that the loss of 25-30% of the body's blood that is a hypovolemic shock cannot take place due to intracranial haemorrhage.[18]

It is thus the contention of the defence that there is reasonable suspicion to believe that the hypovolemic shock that occurred in the deceased just before his death could not have been triggered by the intracranial haemorrhage which led to the death of the deceased.

2.2 <u>Whether there was an intention to cause death of the deceased</u>

[15] GalvagnoTeton, Samuel M., *Emergency Pathophysiology: Clinical Applications for Prehospital Care(* 1st Ed. 15 May 2013).

[16] *United States Military's 68w Advanced Field Craft: Combat Medic Skills*, (2008)

[17] Kreiger, Sharon M, *Pediatric Nurse Practitioner*, p. 116 (1999)

[18] Hughes, Erin, *Australian Medical-Adaptive Specialty Review and Study Guide* (2015)

The act by which the death is caused is done (a) with the intention of causing death or (b) of causing such bodily injury as is likely to cause death.[19] It is the submission of the defence that the A-1,A-2 & A-3 acted under the legal provision of Section 100 of the IPC.

There are circumstances in which right to private defence can be employed against public servants, contrary to the provisions of Section 99. This section lays down that the protection given to Public servants is not absolute.

To avail the benefit of those clauses :

(i) the act done or attempted to be done by a public servant must be done in good faith;

(ii) the act must be done under the colour of his office; and

(iii) there must be reasonable grounds for believing that the acts were done by a public servant as such or under his authority in the exercise of his legal duty and that the act is not illegal.[20]

Good faith plays a vital role under this section. Good faith does not require logical infallibility but due care and caution as defined under Section 52 of the code.[21] It has been established by the defence that the officer did not act in good faith as already presented under Issue 1.1 & 1.2. It is further held that the law does not intend that a person must run away to have recourse to the protection of public authorities when he is attacked instead of defending himself.[22]

In this case, A-1 merely used as much force as necessary in order to protect himself as there was a reasonable apprehension of danger when the police inspector showed A-1 his holster. The quantum of force used was proportionate to the act and was used to repel and not cause

[19] Ratanlal and Dhirajlal,, *The Indian Penal Code,* p. 1658 (32nd Enlarged Ed. 2013)

[20]Ratanlal and Dhirajlal,, *The Indian Penal Code,* page 476 (32nd Enlarged Ed. 2013)

[21] Ratanlal and Dhirajlal,, *The Indian Penal Code,* page 478 (32nd Enlarged Ed. 2013)

[22] *Alingal Kunhinayan v.Emperor,* (1905) 28 Mad 454

harm. For the person whose life is in immediate peril the term 'objectivity' can't be used in a detached manner, in this case A-1 was in immediate peril and his life was threatened so the golden rule of proportionality can be altered.[23]

ISSUE-3

WHETHER THE SAID ACCUSED MAY BE CHARGED FOR SHARING COMMON INTENTION

The said accused have been charged under section 34 of the IPC. To attract criminal liability under Section 34 the following 3 conditions must be met as laid down in *Parichhat v State of Madhya Pradesh* [24]*:*

1. *A criminal act must be done by several persons;*
2. *There must be a common intention of all to commit that criminal act;*
3. *There must be participation of all in the commission of the offence in furtherance of that common intention*
4. *The liability of each of the said persons would be in the same manner as if the entire act was done by him alone*

Further, the test for common intention under section 34 is whether the intention of one was known to the other and shared by the other. Guilt is not to be inferred unless that is the only inference which follows the circumstances of that case and no other innocuous inference can be drawn.[25]

Sec 34 presupposes the existence of prior concert. Common intention implies acting in concert, existence of a pre-arranged plan which is to be proved either from conduct or from

[23] *Mohd. Ramazani v. State (Delhi Administration),* AIR 1980 SC 1341

[24] *(1972) 4 SCC 694)*

[25] *Oswal Danji v. State of Orissa,* AIR 1969 Ori.105

circumstances or from any incriminating facts. Section 34, thus elucidates a principle of joint liability in the doing of a criminal act and the essence of that liability is the existence of a common intention.[26]

3.1 Whether A-2 shared common intention with A-3 and A-1

The defence humbly submits that A-2 did not share the said common intention with the co accused due to the following reasons:-

i. There was no pre-arranged plan or concert as mandated by the guidelines in *State of Gujarat v. Raghavbhai and Ors*. There was no elaborate planning between the said accused as to the execution of the deceased. Even when A-1 and A-2 browsed the internet to find provisions relating to Right to Private Defence, they did not look up ways to kill the deceased but only ways to protect themselves from any form of overt aggression. There was therefore no plan to kill the deceased in place to have a said presupposition.

ii. In the case of *Chitresh Kumar Chopra v. State (Government of NCT of Delhi)*[27], the honourable Justices held:

"Instigation is to goad, urge forward, provoke, incite or encourage to do "an act". To satisfy the requirement of "instigation", though it is not necessary that actual words must be used to that effect or what constitutes "instigation" must necessarily and specifically be suggestive of the consequence. Yet a reasonable certainty to incite the consequence must be capable of being spelt out…A word uttered in a fit of anger or emotion without intending the consequences to actually follow, cannot be said to be instigation." Here, A-2 in a fit of sudden emotion warned his friend that

[26] *State of Gujarat v. Raghavbhai and Ors*., (2003) 1 GLR 205

[27] 2010 (3) SCC (Cri) 367

the deceased had a gun which is a reasonable assumption to make as the deceased did in fact have his holster on his side which, to a reasonable man, would cause apprehension.

iii. Another test as stated in *Oswal Danji v. State of Orissa*[28] is that the said common intention of one was known to the other and shared by the other. To fix constructive criminal liability to each of the several accused persons, there must be participation in action with common intention though different accused might have taken different part. [29]Here, we see that the intention of A-1 and A-2 is different and their actions are through distinct and different intentions. A-1 allegedly acted out of rage and A-2, on the other hand, acted in the private defence of his friend. The intentions are thus completely different even though the said action has been performed commonly.

iv. In the case of *Prem Sagar v. Dharambir,*[30] co accused K is supposed to have followed the deceased and to have prevented him while he was trying to run away. However, eye witness who is relative of both the parties has clearly accepted in his cross examination that it was the accused D who had caused his fall. There is no evidence against the co accused K. SC said that once the eye witness himself has said that it was not K but D, the conviction against K is not maintainable. Here, even if the prosecution stresses on the fact that A-2 did accost the police officer, he did not directly interfere in the blow to the deceased's head. He did not strike the blow and this is corroborated by the witness statements of A-2, Tanya, Natasha, A-1 and the worker at the auto garage.

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[28] *Supra,* n.45

[29] *Dileep Kumar v State of Kerala,* 1985 CrLJ 114

[30] AIR 2004 SC 21

3.2 <u>Whether A-3 shared common intention with A-2 and A-1</u>

A-3 may not be charged under the said offence of Section 34 due to the following reasons:-

i. As stated by the prosecution A-3, A-1 and A-2 all shared the common intention to kill Inspector Chaudhary. This is also mandated in *Parichhat v State of Madhya Pradesh*[31] which says that there must be several persons and the said intention must be common to all. Here, we see that the defence has proved that A-1's intention was purely self-defence, A-2 also is said to have differed in intention. The crux of the matter here is whether A-3 shared the same intention as A-1 and A-2. The common link that existed between A-1 and A-2 has been severed in issue 3.1. The defence would now like to draw attention to what the prosecution has asserted in its arguments. The prosecution has expressly stated that all the three accused shared the common intention of killing Inspector Amit Chaudhary and that all 3 wanted him dead and took adequate measures to ensure the same and thus common intention must be applied. *"Several persons can simultaneously attack a man and each can have the intention, namely the intention to kill, and each can individually inflict a separate fatal blow and yet none would have the required common intention required as there was no prior meeting of minds to form a pre-arranged plan. If the prosecution cannot prove that his separate blow was a fatal one he cannot be convicted for murder however clear an intention to kill can be proved in the said case. Care must be taken no to confuse similar intention with common intention."*[32]

We see the prosecution allege that the said intention was common to all and that A-3 played a great part in the entire crime and that A-3 shared common intention with both A-1 and A-2 throughout. The defence humbly submits that it has proven that

[31] *Ibid*
[32] Ratanlal and Dhirajlal,, *The Indian Penal Code*, p. 139 (32nd Enlarged Ed. 2013)

the intention of the accused A-1 was completely different from the intention of the co accused A-2 so even if the prosecutions allegations are to be believed, A-3's intention was the murder of Inspector Chaudhary. He wanted A-1 and A-2 to kill them because of the political nuisance that Inspector Chaudhary created for his party. A-2 and A-1's approach varies considerably from this and so does their intention. An essential ingredient of common intention as stated earlier is the presence of several person(s) and the intention common to them all. Here we see that neither A-1 nor A-2 correspond with the intention of A-3 as advocated by the prosecution. We also see that A-3 is the only man to possess such intention alleged by the prosecution and hence may not be charged effectively under S 34.

ii. Also, For the application of Section 34, it is essential that the court must find that the accused shared with others, a common intention to commit a crime and participated in its commission. If there is no clear and acceptable evidence on record of circumstances from which a previous concert between him and other persons, known or unknown, and his participation in a joint criminal act, can be reasonably inferred, conviction with the aid of Section 34 is not justified.[33] We see from the telephonic conversations in Exhibit 5 conversation 2 that A-3 clearly denied any involvement in the said crime. Also, as see in argument 3.1 (ii) we see that A-3's alleged comment cannot be held against him as stated in the case.

ISSUE-4

WHETHER A-2 AND A-3 ARE GUILTY OF ABETMENT

It is humbly contended that A-2 and A-3 are not guilty of abetment under sec. 107 of the IPC, whose essential ingredients are:

[33] *Zabar Singh v State of UP,AIR* 1957 SC 465

- *that the accused aided, abetted, counselled or procured the commission of the principal offence;*
- *that the principal offence was in fact committed; and*
- *that he had the intent to aid or encourage the commission*.[34]

The words aid and abet may be used together to charge a person who is alleged to have participated in a crime otherwise than as principal or as accessory after the crime.[35]

An act of abetment may take place in one of the three ways:

- *Instigation*
- *Conspiracy*
- *Intentional Aid*[36]

4.1 <u>Whether A-2 abetted A-1 in the commission of the offence under §304 Part-I</u>

Halsbury lays down the following in regard to presence of the abettor during the commission of the offence:

"*Mere presence at the commission of the crime is not enough to create criminal liability nor is it enough that a person is present with a secret intention to assist the principal should assistance be required. Some encouragement or assistance must have been given to the principal either before or at the time of the commission of the crime with the intention of furthering its commission. Presence without more may, however, afford some evidence of aid and encouragement. A person who is present abetting the principal when the crime is committed is liable as a secondary party even though he takes no part in the actual perpetration of the crime*.[37]"

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[34] Cross and Jones, *Introduction to Criminal* Law, para 19, p.387 (9th Ed.1980)

[35] *Re Smith*, (1858) 3 H&N 227; *Ferguson v. Weaving*, (1951) 1 KB 814

[36] *Malan v. State of Maharashtra*, AIR 1960 Bom 393

[37] XI *Halsbury's Laws of England*, para 44, p.35 (4th Ed. 1973-1987)

As per the facts of the case, during the fracas between A-1 and the inspector, A-2 shouted to A-1, "*he is going to shoot you, quickly escape.*"[38] to which A-1 reacted by running and picked up an iron rod that was lying on the floor[39] and there with at the inspector causing his death. A-2 only told A-1, to escape. There is no use of words or act that was done which would classify as abetment or aiding of an offence. The entire scenario that occurred on that day, happened in the *"heat of the moment".* A-2 only intended was to point out a grave fact to A-1 who was being confronted and held unlawfully by the inspector who, at the time, was indirectly threatening to grievously hurt A-1.

Instigation necessarily connotes some active suggestion or support or stimulation to the commission of the act itself. Given the factual matrix, we can see nothing of that sort has remotely occurred. Instigation necessarily connotes some active suggestion or support to the commission of the act itself.[40] 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, insinuation or encouragement.[41]

"*In order to constitute abetment, the abettor must be shown to have 'intentionally' aided to 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. A person may for example, invite another casually or for a friendly purpose and that may facilitate the murder of the invitee. But unless the invitation was extended with intent to facilitate the commission of the murder, the person inviting cannot be said to have abetted the murder. It is not enough that an act on the part of the*

[38] Case Details, P. 3

[39] Exhibit 2, Case Details, P.4

[40] *Nazir Ahmed v. Emperor*, AIR 1927 All 730

[41] *Baby John v State*, 1953 CrLJ 1273 Bom 44

alleged abettor happens to facilitate the commission of the crime. Intentional aiding and therefore active complicity is the gist of the offence of abetment, under the third paragraph of section 107."[42]

And to sustain conviction for abetment it is not necessary that the act abetted must be committed, abettor's guilt depends upon the nature of the act abetted.[43]

4.2 <u>Whether A-3 is Guilty of abetting A-1 & A-2 in the commission of the offence</u>

A person is said to instigate another to an act, when he actively suggests or stimulates him to the act by any means of language, direct or indirect, whether it takes the form of express solicitation, or of hints, insinuation or encouragement.[44] It means to goad or urge forward or to provoke, incite, urge or encourage todo an act.[45] It is the process of an active stimulation.[46]

Now, as the facts of the case go, A-1 and A-2, after being confronted by the inspector on March 30, 2016, went to A-3 for advice. A-3 clearly and expressly suggested that they should both kill the inspector by saying, "*iski yeh himmat, salley ko mar dalo, kam se kam hamare neta to khush honge*"[47] He also added, "*You are a hero yourself and you know what to do and how to defend yourself.*"[48]

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[42] *Shri Ram v. State of U.P.*, 1975 SCC (3) 495

[43] *Jamuna Singh v. State of Bihar*, AIR 1967 SC 553; *State of Maharashtra v. Pandurang Ramji Sanap*, 1971 Bom Lr 245

[44] *Emperor v. Amiruddin Salebhoy Tyabjee*, (1922) 24 Bom LR 534, 542

[45] *Parimal Chatterjee & Ors v. Emperor*, (1932) 60 Cal 327

[46] *Re Lakshmi Narayana Aiyer*, AIR 1918 Mad 738

[47] Case Details, P.2

[48] *Ibid*

A-1 admits that he was given the advice of killing the deceased by A-3 in the telephonic conversation 1(*7 April 2016*)[49] and telephonic conversation 2(*7 April 2016*).[50] However, both A-2 and A-3 deny this claim of A-1 in the aforementioned telephonic conversations and telephonic conversation 3(*7 April 2016*).[51]Therefore, two in proportion to one, agree that there was no advice or instigation given to A-1 to kill the deceased, but it was merely a friendly advice on *how to handle bullies*, as DW 3 put it in his witness statement.[52]

Words uttered in the heat of the moment doesn't amount to abetment.[53] A word uttered in the fit of anger or emotion without intending the consequences to actually follow cannot be said to be instigation.[54] *mens rea* is an essential component of an abetment and there must be an overt act on the part of the accused in course of alleged instigation. It must be shown that the instigation was prior and at the point of time. It was directly or indirectly to give a suggestion to the person to do a certain act.[55]

[49] Exhibit 5, Case Details, P.7

[50] *Ibid*

[51] *Ibid*

[52] Annexure 5, Case Details, P. 16

[53] *Radheshyam v. State of U.P.* (1986) ALL.L.J 1341

[54] *Ramesh Kumar v. State of Chattisgarh*, (2001) 9 SCC 618; *State of Punjab v. Iqbal Singh & Ors*., 1991 AIR 1532; *Sonti Rama Krishna v. Sonti Shanti Shree*, (2009) 1 SCC 554 229; *Cyriac & Anr. v. S.I. of Police and Anr.*, 2005 CriLJ 4322

[55] *Smt. Sashi Prabha Devi Vs. State of Assam*, 2006 CriLJ 1762

PRAYER

Wherefore in the light of issues raised, arguments advanced and authorities cited, it is humbly requested that this Court may be pleased to adjudge and adjudicate that:

1. Accused 1, Abhishek Lepat, is not guilty of offences under § 304, 186 r/w §34 of Indian Penal Code, 1860 and hence be **acquitted.**

2. Accused 2, Angad Lepat, is not guilty of offences under § 304, 186, §107 r/w §34 of Indian Penal Code, 1860 and hence be **acquitted**.

3. Accused 3, Dushyant, is not guilty of offences under § 304, 107 r/w §34 of Indian Penal Code, 1860 and hence be **acquitted.**

And/or

Pass any order that it may deem fit in the interest of justice, equity, and good conscience.

All of which is most respectfully submitted

Place: Mavada, Jagatur Sd/ _____

Date: September 23, 2016 COUNSEL FOR DEFENCE