SURANA AND SURANA NATIONAL TRIAL ADVOCACY MOOT COURT COMPETITION, 2016

Team Code -

Before

The Hon'ble Court of Sessions, Mavada

State of Jagutar

v.

Abhishek, Angad & Dushyant

In

S.C. No. 101 of 2016

CASE CONCERNING THE TRIAL U/S 304, R/W § 34, 107 & 186 OF THE RABAT PENAL CODE

[MEMORIAL ON BEHALF OF THE DEFENCE]

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§	Section
¶	Paragraph
A.I.R.	All India Reporter
All.	Allahabad High Court
B.P.C.	Bharat Penal Code
Cal.	Calcutta High Court
Cr. L.J.	Criminal Law Journal
Cr. P.C.	Code of Criminal Procedure
Del.	Delhi High Court
DW	Defence Witness
ed.	Edition
Guj.	Gujarat High Court
Mad.	Madras High Court
Ori.	Orissa High Court
P.	Page Number
PW	Prosecution Witness
Raj.	Rajasthan High Court
S.	Section
SC	Supreme Court
SCC	Supreme Court Cases
SCR	Supreme Court Reporter
v.	Versus

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STATEMENT OF JURISDICTION

THE HON'BLE COURT HAS JURISDICTION TO TRY THE INSTANT MATTER UNDER § 177 R/W § 184 AND § 209 OF THE CODE OF CRIMINAL PROCEDURE, 1973.

STATEMENT OF FACTS

1. Abhishek and Angad are Post Graduate students at Presidency College, Mavada. Abhishek, the leader of the Union, organized two protests at the college and Angad took part in them too. The union is affiliated to Collective Party of Rabat (C.P.R.).
2. Tanya and Natasha, students of under graduate course at Presidency College and members of the Union, complained to Abhishek that two boys regularly teased them. Therefore, Abhishek and Angad mostly accompanied them in the evening to the bus stop to ensure that they safely boarded the bus and also chased away the two boys twice, on 28th and 30th March 2016 by throwing stones at them. They found that they were Dinesh, who was the son of an MLA of the ruling party, and his friend Peter.
3. On 30 March 2016, Inspector Chaudhary came and warned Abshishek and Angad to mind their own business. They then contacted Mr. Dushyant Liko, a local leader who reassured them of his party's support.
4. On April 7, 2016, Dinesh and Peter came near the bus stop. Abhishek and Angad started pelting stones at them. Suddenly, Inspector Chaudhary who was in an inebriated state came from behind and slapped Abhishek and during the fracas, he put his hand on his belt showing the gun holster. Angad shouted at Abhishek to quickly escape as the Inspector was going to shoot him. Abhishek ran in a state of panic and in order to protect himself, 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 and fell and got hit on the head again by the stump of a tree and died. Abhishek & Angad were arrested for the murder of Inspector Amit Chaudhary. On completion of the investigation, the Police forwarded the Final Report to the Magistrate's Court. The Court took cognizance of the Report and thereafter committed the case to the Court of Sessions in Mavada, Jagutar.

STATEMENT OF CHARGES

- Abhishek Lepat has been charged under § 186 of R.P.C. for obstructing public servant in discharge of public functions and under § 304 read with § 34 of R.P.C. for the offence of culpable homicide not amounting to murder.
- Angad Lepat has been charged under § 186 of R.P.C. for obstructing public servant in discharge of public functions and under § 304 read with § 34 of R.P.C. for the offence of culpable homicide not amounting to murder and under § 107 of R.P.C. for abetment.
- Dushyant Liko has been charged under § 107 of R.P.C. for abetment of murder and under § 304 read with § 34 of R.P.C. for the offence of culpable homicide not amounting to murder.

SUMMARY OF ARGUMENTS

1. THE FAULTY INVESTIGATION SHOULD RESULT IN THE PRIMA FACIE EXONERATION OF THE ACCUSED

In the instant matter, the inability of the investigation team to give the report of the samples leads to faulty investigation because of which the trial is vitiated and therefore the accused should be exonerated. The charges have been framed on an incomplete forensic report and therefore are liable to be set aside. The sampling of the murder weapon, the blood sample from the murder weapon, the finger print on the metal rod and victim's holster have not been reported and So there is no evidence to suggest the fact that the weapon recovered was the same as the one which caused the death of the inspector. Hence it is not proven beyond reasonable doubt that the offence was committed by the accused.

2. ABHISHEK IS NOT LIABLE FOR OFFENCE OF CULPABLE HOMICIDE NOT AMOUNTING TO MURDER UNDER § 304 OF R.P.C

It is humbly contended before this Hon'ble Court that the accused is not guilty for committing the offence of culpable homicide not amounting to murder considering that the accused was acting in private-defence, the act done was an accident and there was a necessity to do the act. To establish a charge under this section, the prosecution must prove the either there was an intention to cause the death or if there was a knowledge that the act is likely to cause death. In the instant matter the act of the accused cannot be regarded as falling under any of the two criteria. Furthermore, while acting in private defence the circumstances under § 100 R.P.C were fulfilled, a reasonable force was used and § 99 was not applicable.

3. ABHISHEK AND ANGAD DID NOT VIOLATE § 186 OF THE RABAT PENAL CODE, 1860

It is humbly contended before this Hon'ble Court that Abhishek Lepat (hereinafter referred to as 'Accused 1') and Angad Lepat (hereinafter referred to as 'Accused 2') are not guilty of violating §186 of the *Rabat Penal Code, 1860.* This arises out of the fact that the police

officer was not discharging his duties as he was not in the capacity to discharge his duty because of being heavily intoxicated. This act of the police officer is in direct violation of Section 20 of the *All India Services (Conduct) Rules 1968* which renders him liable for misconduct and because of his conduct unbecoming of a member of the Police Service.

4. ABHISHEK, DUSHYANT AND ANGAD ARE NOT LIABLE UNDER § 304 R/W § 34 OF R.P.C

It is humbly submitted before the Hon'ble Court of Sessions, Mavada that Abhishek, Dushyant and Angad are not liable under Section 304 r/w Sec 34 of R.P.C. because of lack of incriminating evidence and failure of the prosecution to put the case beyond reasonable doubt A pre-arranged plan which is a pre requisite to § 34 is not present in the present case and the act being an act of private defence, corroborates that there was no common intention.

5. WHETHER DUSHYANT AND ANGAD ARE LIABLE FOR ABETMENT UNDER § 107 OF THE R.P.C

It is pertinent to note that to prove the charge of abetment it is necessary to prove that the person instigates or intentionally aids for the commitment of an offence. In the present case, there was no instigation of any sort so as to make the act qualify as abetment. In the present case as the act was done as an act of private defence there was no mens rea that could be attributed to the crime.

ARGUMENTS ADVANCED

1. THE FAULTY INVESTIGATION SHOULD RESULT IN THE PRIMA FACIE EXONERATION OF THE ACCUSED.

The counsel for the defence humbly submits that the trial is vitiated because of faulty investigation and therefore the accused should be exonerated of the charges framed against them.

The investigation into a criminal offence must be free from any objectionable features or infirmities which may give rise to an apprehension in the mind of the complainant or the accused, that investigation was not fair and may have been carried out with some ulterior motive.[1] In the instant matter, it is pertinent to note that the charges have been framed on an *inconclusive forensic report*. The sampling of the murder weapon, the blood sample from the murder weapon, the finger print on the metal rod and victim's holster have not been examined and therefore there is no evidence to suggest the fact that the weapon/rod recovered was the same as the one which caused the death of the inspector.

In the case of *Dayal Singh &Ors*v. *State of Uttaranchal*[2] it was held that if the investigation smacks of intentional mischief to withhold material evidence then that would exonerate the petitioner". It is pertinent to note that in the present case non availability of the various samples that went for testing is an act of intentionally withholding material evidence. The veracity of the fact that the weapon that was recovered was the same one which was used for the murder is important for one too many reasons. Firstly, the report would make definite the size, shape and most importantly the weight of the metal rod. This will help the court in determining the fact that whether the iron rod was thick enough to cause the deceased to lose control of his body and the imbalance of the deceased lead to a head on collision with the

[1] *Karan Singh* v. *State of Haryana,* Cr. Appeal No. 1474 of 2010

[2] *Dayal Singh &Ors* v. *State of Uttaranchal*,(2012) 8 SCC 263

stump of the tree can be attributed to the fact that he was highly intoxicated as given in the forensic report and therefore the act of the accused could just be a mere act of simple hurt which would have had no further consequences if the deceased was not drunk. Also, the conviction of the accused under § 304-Part II was struck down in the case of the *Dnyaneshwar Dagdoba Hivrekar* v. *The State of Maharashtra*[3] in which the death of the deceased happened due to the blow on the head from a stick weighing 210 grams. The inability of the prosecution to prove the fact that whether the iron rod weighed 210 grams or 1000 grams raises a reasonable doubt.

Secondly, the report would have made it definite that the rod recovered was the one by which the death was caused. The non-analysis of the blood samples or the finger prints raises the doubt that whether the rod collected was the same by which the death was caused. This becomes all the more important when we closely scrutinise the Exhibit 3A. The exhibit depicts the spot from where Inspector Chaudhary's body was seized. However, at closer scrutiny, the spot from where the murder weapon, the rod was seized is also shown. The distance between the deceased's body and the weapon is too large for it to be considered having fallen there after hitting the Inspector. This establishes reasonable doubt as to the claim of the prosecution of that rod being the murder weapon.

Thirdly, the report of the fresh finger prints from the holster of the gun would have ascertained the fact that there was a reasonable apprehension of death or grievous hurt which would have allowed for a right to private defence.

It is humbly submitted, that there was gross negligence on part of the forensic team which has attributed to faulty investigation and has given rise to reasonable doubt.The accused is entitled to the benefit of doubt if the truth of the version is not proved beyond reasonable

[3]*Dnyaneshwar Dagdoba Hivrekar* v. *The State of Maharashtra*, 1982 Cr LJ 1870 (SC)

doubt[4] and therefore grave injustice will be caused if the accused is found to be guilty in the present matter. Therefore, it is contended that all the accused be exonerated of the charges.

***Arguing but not submitting*:**

2. ABHISHEK IS NOT LIABLE FOR OFFENCE OF CULPABLE HOMICIDE NOT AMOUNTING TO MURDER UNDER § 304 OF R.P.C

It is humbly contended before this Hon'ble Court that the accused is not guilty for committing the offence of culpable homicide not amounting to murder under § 304 of the R.P.C., considering that the accused was acting in *private-defence***[2.1]**,that the unfortunate death was an *accident***[2.2]** and the accused acted out of *necessity***[2.3]**.

To establish a charge under this section, the prosecution must prove that - either there was an intention to cause the death or if there was a knowledge that the act is likely to cause death. In the instant matter the act of the accused does not under any of the two criteria. Firstly, the accused never had the intention to cause the death of the deceased. He acted merely out of private defence and threw the rod in order to put a stop to the apprehended danger of the death risk. Secondly, the accused did not even have the knowledge that the act is likely to cause death. The act of throwing the rod was a spontaneous reaction arising out of the fact that the there was an imminent danger to the life of the accused as the inspector had already made a move towards his gun and there was clear danger of the Accused being shot at considering there were threats to his life previously by the police officer.

2.1 THE ACCUSED WAS ACTING IN PRIVATE DEFENCE

The defence humbly submits that the circumstance under § 100, R.P.C is fulfilled **[A]**, reasonable force was used **[B],** and **[C]** § 99 cannot is not applicable in the instant matter.

A. Circumstances under § 100, R.P.C are fulfilled

[4]*Deonandan* v. *State of Bihar*, AIR 1955 SC 601; *Arundhati Keutuni & Anr.* v. *The State, 1968 Cri. L.J. 878*

The law does not require a law-abiding citizen to behave like a coward when confronted with an imminent unlawful aggression. As repeatedly observed by the Hon'ble Supreme Court there is nothing more degrading to the human spirit than to run away in face of danger. The right of private defence is thus designed to serve a social purpose and deserves to be fostered within the prescribed limits.[5]

The right to private defence is mentioned from §96 to § 106 in the R.P.C.§ 100 of the R.P.C.[6] establishes that a person's right of self-defence can extend to causing death if there is an assault and reasonable cause of apprehension of death arises and the second provision allows the defence if there is an assault and reasonable cause of grievous hurt arises.[7]

In the instant matter, there was a reasonable cause of apprehension of death or at least of grievous hurt. This arose from various facts. Firstly, there was a history between the accused and the victim and it was a fact that the inspector had feelings of hostility towards the accused. This could be seen by on account of the instance where the inspector had reprimanded the accused without a justifiable cause when he had approached him and threatened him by saying that "*keep your trap shut and mind your own business otherwise I will have to show you my stuff*". He had further added *"I know your kind of people who support anti-nationals, I have dealt with them"*.[8]This clearly showed mala-fide intentions of the police inspector which adds to the fact that the inspector was well known for encounter of local goons.

Secondly, at the time of the incidence the inspector had first slapped the accused from the back and then violently threatened him by saying that "*I will teach you a lesson you will*

[5]Ratanlal and Dhirajlal, *Indian Penal Code*, LexisNexis, 33rd Edition, *Pg 173*

[6]*Ram Bilas Yadav* v. *State of Bihar* AIR 2002 SC 530

[7]§ 100, R.P.C

[8] Moot Proposition, Para 14.

never forget. I have taught this lesson to many".[9] After this, the inspector started a brawl in which he caught hold of the accused. He then, put his hand on his belt containing the gun holster and during this the accused wriggled his way out and ran. His friend and the co-accused Angad, instantly observing the intentions of the Police Officer and seeing his inebriated condition alerted the accused - "*he is going to shoot you, quickly escape"*[10].

All these facts corroborate to indicate that there arose a reasonable cause of apprehension of death or at least of grievous hurt that arose in the mind of the accused.

B. Reasonable force was used

The means and the force a threatened person adopts at the spur of the moment to ward off the danger and to save himself or his property cannot be weighed in golden scales.[11]The right of self-defence is not dependent on the actual criminality of the person resisted; rather it depends solely on the wrongful or apparently wrongful character of the act attempted by the accused[12], and this right extends till such time that the offender has retreated, the property is retrieved, or until the assistance of the public authorities is obtained[13].

In such moments of excitement or disturbed mental equilibrium it is difficult to expect parties facing grave aggression to calmly determine with a composed mind as to what precise kind and severity of blow would be legally sufficient for effectively meeting the unlawful aggression.[14] In the present case, the mental equilibrium of the accused was definitely disturbed because of the physical assault and attack by the Inspector on him. The warning by his friend that the policeman was about to shoot him was also unsettling for Accused 1.

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[9] Moot Proposition, Para 17.

[10]*Ibid*

[11]Ratanlal and Dhirajlal, *Indian Penal Code,* (31st Edn., 2006 p. 174)

[12]*Rai Singh Mohima* v. *State* AIR 1962 Guj 203

[13] I, Nelson R. A. *Indian Penal Code*, p. 841 (10th Ed. 2008)

[14]*Deo Narain* v. *The State Of U.P*, 1973 AIR 473

Therefore, the accused under the impression that the policeman was going to shoot him threw a rod so as to prevent harm to his body which amounted to reasonable force being used against the policeman.

C. § 99 is not applicable

In the matter at hand, it has been wrongfully alleged that there was no right to private defence under § 99 of the R.P.C. This section stipulates the condition that if a public servant discharges his duty in good faith under the colour of his officer, then there shall be no right of private defence. But, it is conditioned to the fact that the act against which the right is exercised should not reasonably cause the apprehension of death or grievous hurt. In the present matter as highlighted above, the accused apprehended death or grievous hurt because the conduct of the inspector was had made it evident.

Therefore, it is humbly submitted that the actions of the accused were done as a right to private defence and therefore all of the accused should be exonerated of the charges framed against them.

2.2 THE ACTIONS OF THE ACCUSED WERE AN ACCIDENT

As provided under§ 80, R.P.C, a criminal act which is an accident is not punishable as it is excuses the accused from punishment due to a lack of *mens rea*, and it for the prosecution to prove requisite intention or knowledge in cases of murder[15].The amount of caution that is to be followed under this section is not that which is of the highest order, but that which is a reasonable precaution when seeing the facts of each case.[16]

In the instant matter it is pertinent to note that the actions of the accused were only to defend himself which were accompanied by a lack of mens rea against the imminent danger and the

[15]*Chakru Sattiah* v. *State of AP* AIR 1960 AP 153

[16] I, Nelson R. A. Indian Penal Code, p. 533 (10th Ed. 2008)

death of the victim was a mere accident. Also, the act of throwing of the rod at the inspector was not an aimed shot and was one which was done in haste and impulsively.

2.3 THE ACTIONS OF THE ACCUSED WERE A NECESSITY

The defence under § 81 of the R.P.C is available only if it is proven that the actions of the accused were done in good faith to prevent any other harm to the person or property of others[17] and due to an absence of *mens rea* the action or crime committed is excused.[18]

In the present matter, the actions of the accused were a necessity because there was a reasonable apprehension judging by the behaviour of the aggressive policeman and therefore could have gone to any extent to cause harm to the accused as he had already threatened the accused. The fact that the police officer was drunk amounts to a larger lacunae in the prosecution case which emphasizes the innocence of the accused. Therefore the actions taken by the accused were a mere necessity so as to prevent the harm that would have been caused to him otherwise.

3. ABHISHEK AND ANGAD DID NOT VIOLATE § 186 OF THE RABAT PENAL CODE, 1860

It is humbly contended before this Hon'ble Court that Abhishek Lepat (hereinafter referred to as 'Accused 1') and Angad Lepat (hereinafter referred to as 'Accused 2') are not guilty of violating Section 186 of the *Rabat Penal Code, 1860* (hereinafter referred to as the 'RPC'). In the instant matter, it has been wrongfully alleged that Accused 1&2 have obstructed a public servant in discharge of public functions.

The Police Officer was in dire violation of The All India Services (Conduct) Rules 1968.

The Police Officer, Inspector Amit Chaudhary, was in dire violation of Section 20(b) *The All India Services (Conduct) Rules, 1968*[19] which states that,

[17] *Dendati Sannibabau* v. *Varadapureddi* AIR 1959 AP 102

[18] *R* v. *Moganlal* 14 ILR Bom 115

"***20. Consumption of intoxicating drinks and drugs.—A member of the Service shall—***

20(b) not be under the influence of any intoxicating drink or drug during the course of his duty and shall also take due care that the performance of his duties at any time is not affected in any way by the influence of such drink or drug*;*

In the interest of justice, it is pertinent to note the fact that Inspector Amit Chaudhary had consumed high level of alcohol can be ascertained from the examination of the liver done in the Forensic Report authored by the pathologist Dr. Russell.[20]

The AIS (Conduct) Rules, 1968, provide for a general conduct for members of the service of both the Central and the State Government. A violation of this conduct, makes the violator unbecoming of a member of the Service. Inspector Chaudhary's conduct of consuming high levels of alcohol while on duty, renders him liable for misconduct and his professional behaviour, unbecoming of a member of the Police Service.

The mere fact of a public servant believing that he was acting in discharge of his duties will not be sufficient to make resistance or obstruction to him amount to an offence.[21] In the present matter it would be highly improbable and astonishing to hold that a public officer under the influence of alcohol can discharge his duty with due diligence despite the fact that he might be believing himself to be on duty.

Thus, it is humbly submitted, that while Inspector Chaudhary had attacked Accused 1 and Accused 2, his conduct was already unbecoming of a member of the Service which means he

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[19]§20, All India Service (Conduct) Rules, 1968

[20]Moot Proposition Pg 13

[21]*Lilla Singh*, (1894) 22 Cal 286; *Tulsiram*, (1888) 13 Bom 168.

was not fit for discharging his public functions as a public servant and thus, Accused 1&2 have not in any form, violated §186 of the RBC, 1860.

The act of a Police Officer being drunk while on duty amounts to misconduct

Further, it is humbly submitted that the act of heavy drinking by an on-duty Police Officer, amounts to misconduct.

In the case of *State of Punjab* v. *Ram Singh Ex-Constable*[22], the court categorically held that, "*taking to drink by itself may not be a misconduct but being on duty in the disciplined service like police service and having heavy drink, then seen roaming or wandering in the market with service revolver and even abusing the medical officer when sent for medical examination shows his depravity or delinquency due to his drinking habit. Thus it would constitute gravest misconduct warranting dismissal from service.*"

In the instant case, the medical reports show that Inspector Chaudhary was a habitual alcoholic[23] and had high level of alcohol in his liver[24] at the time of death. Furthermore, it is also submitted that he was on duty, as is evident by the fact that he was carrying his gun in his holster while he had attacked Accused 1&2. Thus, it is humbly submitted that the on-duty drunk Inspector Chaudhary's misconduct shall exonerate Accused 1&2 from the charges of violation of Section 186 of the R.P.C.

4. ABHISHEK, DUSHYANT AND ANGAD ARE LIABLE UNDER § 304 R/W § 34 OF R.P.C

It is humbly submitted before the Hon'ble Court of Sessions, Mavada that Abhishek, Dushyant and Angad are not liable under §304 r/w § 34of the R.P.C. It is a general principle of law that in furtherance of the common intention, several persons must have done several

[22] *State of Punjab* v. *Ram Singh Ex-Constable*, 1992 AIR 2188

[23] Moot Proposition, Pg 12

[24] Moot Proposition, Pg 13

acts which together constitute an offense. In such a situation § 34 provides for each to be liable for the entire act as a whole[25]. The major elements that are required to be proved while proving an individual's liability under § 34 of the R.P.C include the commission of an illegal act by several persons and that such an act was done in the furtherance of the common intention.

In view of the phraseology of § 34, existence of common intention is not enough, the criminal act impugned to attract § 34 must be committed in furtherance of common intention.[26]In *Pandurang* v. *State of Hyderabad*[27] Bose, J., summarized the position as - "*Now in the case of § 34 we think, it is well established that a common intention presupposes prior concert. It requires a pre-arranged plan because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of them.*"[28]

It is pertinent to note that there was no pre-arranged plan in the present matter. The killing of the inspector happened in the spur of the moment. There was no pre-meditation or any preparation done in furtherance of an intention as there was no intention developed in the first place. There was no evidence that prior to the incident there was any common intention shared by both the accused. Also, as the said intention did not develop at the time of the incident as well and therefore, it was held that § 34 of the Rabat Penal Code cannot be resorted to hold accused guilty of any crime.[29]

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

[26]*Ibra Akanda* v. *Emperor*, AIR 1944 Cal. 339

[27]*Pandurang* v. *State of Hyderabad*, AIR 1955 SC 216; *Bhopal Singh* v. *State of Rajasthan*, AIR 1968 Cri.L.J. 1572.

[28]*Ibid*

[29] Veer Singh v. State of U.P., 2010 (1) A.C.R. 294 (All.).

Nothing has been made out by the prosecution to establish either directly or circumstantially that there was any plan or meeting of minds of all the accused persons to commit an offence nor was it established that there was any pre-arrangement or meeting of minds on the spur of the moment before commission of the crime. It is submitted that the prosecution has completely failed to prove the existence of the common intention between Abhishek, Angad and Dushyant and hence, they must not be held liable for the offence of culpable homicide not amounting to murder r/w§ 34 of the R.P.C.

It is a well-established principle that for establishing common intention participation of all the accused is *sine qua non*. § 34 will not be attracted unless, first, it is established that a crime has been committed by several persons, second, that there was a common intention and pre-arranged plan to commit an offence and third, that there was a participation in the commission of the offence in furtherance of that common intention.[30] The common intention must be anterior in point of time to the commission of crime. It means a pre-arranged plan.[31] When there is neither pre-concert nor meeting of minds, § 34 is thus not attracted as in the instant case.[32]

The culpability of Accused 3 is arising from the fact that he has presumably instigated the other accused into the commission of the killing of the inspector. But this should be coupled with active participation. It is essential that the accused join in the actual doing of the act and not merely in planning its perpetration. Actual participation may be of a passive character such as standing by a door with the intention of assisting in furtherance of the common intention of all the accused and with a readiness to play his part when the time comes for him

[30] *Parichhat* v. *State of M.P.,* AIR 1972 SC 535

[31] *Devilal* v. *State of Punjab,* AIR 1971 SC 1444

[32] *Jarnail Singh* v. *State of Punjab,* AIR 2001 SC 1344

to act. If the accused was not present, he cannot be convicted with the aid of § 34.[33] Thus the counsel, in view of the above judgment, wants to highlight the fact the charges against A-3 (Dushyant) should be waived off prima facie. To constitute common intention it is necessary that the intention of each one of them was known to the rest of them and was shared by them. This fails horribly in the present case as there was no intention on part of Dushyant and Angad to even cause simple hurt to inspector Chaudhary.

Also, the Hon'ble Supreme Court has held that a word uttered in the fit of anger or emotion without intending the consequences to actually follow cannot be said to be instigation.[34] If this is applied to the present matter then Dushyant's alleged culpability should be struck down as the wordings which have been said to create intention were said in a fit of anger a week prior to the commission of the crime.[35] Intention is different from motive. It is not as though there was no further opportunity for the accused to cause many more injuries on the deceased so as to finish him off. Neither it is the case that there was no opportunity for him to cause injuries on the vital parts, such as, head, chest, abdomen etc. There were no other intervening circumstances. The motive is also very trivial in nature. From these facts, it can reasonably be inferred that the accused had no intention to cause the death of the deceased.[36]

The charge under § 34 of R.P.C. is not applicable in the instant case. This provision is only a rule of evidence and does not create a substantive offence. It lays down the principle of joint liability. To charge a person under this section, it must be shown that he shared a common

[33] *Mostab Ali Malitha* v. *State of West Bengal*, (2011) 4 Cal. L.T. 373; *Shyamal Ghosh* v. *State of West Bengal* 2012 (3) Crimes 97 (SC)

[34] *Ramesh Kumar* v. *State of Chhattisgarh* (2001) 9 SCC 618

[35] Moot Proposition, Para 15

[36] *Jaiprakash* v. *State of Delhi Administration*, 1991 (2) SCC 32.

intention with another person or persons to commit a crime and subsequently the crime was perpetrated.[37]The Apex Court held in a case,[38] that in the case of § 34 it is well established that a common intention presupposes prior concert. It requires a pre-arranged plan because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of them all.

The defence therefore submits that the charge under § 34 of BPC is not sustainable. There is no prima facie evidence on record to establish the sharing of common intention by the accused persons in regard to committing the killing let alone participation.

5. DUSHYANT AND ANGAD ARE NOT LIABLE FOR ABETMENT UNDER § 107 OF THE R.P.C

It is pertinent to note that to prove the charge of abetment it is necessary to prove that the person instigates or intentionally aids another person for the commitment of an offence. To meet the end of justice it would be imperative to note that charges do not stand against Abhishek as already shown above. Therefore, no offence has taken place and holding that there is any abetment is highly unacceptable in the eyes of law. The definition of abetment under § 107 includes not merely instigation which is the normal form of abetment but also conspiracy and aiding.[39]

The abettor aids the offender in the commission of the crime and when he aids him he is said to instigate him in popular parlance and to abet him in the language of law. Such aids must be something more substantial than mere advice. Advice is not necessarily abetment.[40] Not only

[37]*Garib Singh* v. *State of Punjab*, 1972 Cr LJ 1286

[38]*Pandurang* v. *State of Hyderabad*, AIR 1955 SC 216

[39]*Ramesh Sharda* v. *Smt. Neelam*, 1991 (2) Cri. L.R. 56

[40]*Pramathanath* v. *State*, A.I.R 1951 Cal. 581

acquiescence, but also some degree of active support is essential to constitute instigation.[41] But considering the definition of abetment in a strict sense, the instigation must have reference to the thing that was done by the person who is instigated. It is only if this condition is fulfilled that a person can be guilty of abetment by instigation.[42]

It is humbly contented before this Hon'ble court that the Accused is not guilty for the offence of abetment under §107, R.P.C. In order to convict a person as an accomplice, it is necessary for the prosecution to prove[43] that the Accused ***aided, abetted, counselled or prosecuted the ommission of the principal offense***; **[5.1.],** that the ***principal offence was in fact committed***; **[5.2.]** and the accused did not had ***intent to encourage the commission***[44]**[5.3.]**

5.1 ACCUSED NO. 2 AND 3 DID NOT ABET ACCUSED NO. 1

To attract the offense of abetment, mere association of the Accused person with those who are charged for an offense is not enough. Unless there is existing material evidence which enunciates the instigation by Accused No. 2, either in aiding or in the commission of the offense committed by Accused No. 1, the charge under abetment stands disproved.

In the present case, there is no material evidence which leads to the conclusion that there was any abetment for commitment of the offence. There was nothing which encouraged or provoked Accused No. 1. No material or circumstantial evidences are present so as to conclude abetment of the offense committed by Accused No. 2.

5.2 THE OFFENCE WAS ACTUALLY NOT COMMITTED

This issue is being covered under Issue IV for the sake of brevity.

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[41] *Jamuna Singh* v. *State of Bihar*, AIR 1967 SC 553

[42] *Baby John* v. *State*, AIR 1953 T.C. 251

[43] *Saju* v. *State of Kerala*, AIR 2001 SC 175

[44] Ratanlal and Dhirajlal, *Indian Penal Code*, (31st Edn., 2006 p. 518)

5.3 ACCUSED HAD NO INTENTION TO ENCOURAGE THE COMMISSION

In order to constitute abetment, the abettor must be shown to have 'intentionally' aided to the commission of the crime.[45] In the present matter Accused No. 2 just helped the main accused to defend himself when the intoxicated police officer was trying to kill the accused by alarming him to save himself as he apprehended the police officer to shoot him. He never instigated him but did just warn the accused of the foreseeable danger. Even the fact that he entered into a tussle with the police officer was an act of defending Accused No. 1 which is a right given under § 97 of the R.P.C.

The Accused No. 3 in the present matter had his last conversation with the accused a week before the commencement of the offence. This majorly dilutes the fact that he instigated the commission of the crime as the time factor reduces the mental process of the accused to a very large extent. Also, he only made a mere statement in a fit of rage and did not direct the accused to commit the crime.[46]

[45] *State* v. *Naresh Chand* AIR 1975 SC 195

[46] Moot Proposition, Para 15

PRAYER

Wherefore, in light of the facts stated, issues raised, arguments advanced and authorities cited, may this Hon'ble Court be pleased to hold, adjudge and declare that:

1. The faulty investigation should result in prima facie exoneration of the accused.
2. The accused are not guilty of culpable homicide not amounting to murder in furtherance of common intention under § 304 r/w § 34 of the R.P.C., 1860.
3. Accused 1 & 2 are not guilty of obstructing public servant in discharge of public functions under § 186 of the R.P.C., 1860.
4. Accused 2 & 3 is not guilty of abetment under § 107 of the R.P.C., 1860.

AND

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

All of which is most humbly and respectfully submitted.

Place: Mavada, Jagutar, Rabat Sd/-

Date: (Counsel for the Defence)