



UNDERSTANDING INTENTION : THE SETTLED - UNSETTLED APPROACH OF COURTS IN INDIA AND UNITED KINGDOM.

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ABSTRACT

The paper attempts to bring to the surface the obvious question associated with the fault element of the offence of murder and culpable homicide, regarding its unsettled position and the consequent obvious liberty of which the courts take benefit of in interpreting the presence or absence of fault element in a particular set of circumstances. The reasoning behind the importance of this interpretation is the dependency of the culpability of the accused in a given case on the presence or absence of the fault element. Therefore, understanding the importance of the fault element of intention, it is necessary to understand its anatomy. The absence of any definition of the primary fault element(s) makes the interpretation cumbersome and let the courts adopt a comfortable posture in interpreting the fault element, especially intention; in the offences of culpable homicide or murder.

The paper adopting the doctrinal research methodology, attempts to argue the above unsettled position of the courts which denies uniformity in interpretation and makes the appearance of the conclusion as to the presence or absence of fault element, and thus, the culpability or the innocence of the accused more complex. The argument is to introduce and expose the settled as well as unsettled concept of intention and its impact on the decisions of the courts, both in India as well as in the United Kingdom

Understanding intention – an introduction to the pre-eminent expression of individual autonomy

The principle of individual autonomy is one of the fundamental concept in the principles of criminal law and it clearly aims to hold every individual responsible for his/her acts or omissions. The concept of individual autonomy categorically, includes two elements; i.e; *factual* and *normative elements*.¹ Delving deeper into the concept of individual autonomy we arrive at a hypothesis that *every individual has the capacity and free will to make his/her choices regarding his/her acts or omissions*, it is determined to exclude the *background factors* that compel him/her to make such choice of actions or omissions. Law opts to take a rational posture by excluding socio-moral, and historical factors that affect the choices of individuals, to avoid complexity in law making and enforcement. What causes the actions or omissions?

¹ Andrew Ashworth, Chapter- *Criminalisation ; Principles of Criminal law* (Oxford University Press; 3rd edition; published on 1st September 1999)

Perhaps, the intention to do or omit to do such acts or omissions. What forms intention? Law excludes to ask and probe such questions. Intention is formed owing to many factors, including motive; which is not the subject matter of discussion in this piece of writing, but certainly intention is the premier expression of one's *exercise* of his/her *agency*. It is important to take into consideration that the *determinist approach*² which claims that all human behaviour is determined by causes which may be beyond the control of an individual. The mention of the above approach is important to indicate that intention may not be deliberately formed, it may be formed owing to many factors which are at work in the background to form an intention to cause an effect.

Culpability assumes the notion and exercise of free will. The legal assumption deals with the individuals on the basis of exercise of their free will and holds them culpable for an act or omission and eventually holds them liable. Culpability of an individual with respect to an offence, is firmly associated with the *fault element* which is one of the requisites for such offence. Intention is the highest degree and perhaps, the gloomiest shade of *mens rea*, which if proved immediately holds an individual liable on its concurrence with the requisite *conduct element* of such offence. Understanding so much so of intention, we lack an understanding to ascertain as to when can the intention be said to exist in a particular framework of circumstances. We have no set formula to arrive at a conclusion that *the* intention exists or there was only a mere *chance* at the end of the accused that (s)he might have intended to cause an effect, by applying the test of a *reasonable person*.³ For this assessment, we are dependent upon the interpretations of the courts that guide us to determine, whether the intention in a particular case, at the end of the accused exists. How do such interpretations take place? The interpretations of different courts are the result of observation of the deciding authorities of the circumstances of a given case. Loosely to construe, it is the act (here, act includes omission as well) which is to be observed; analysed and assessed to conclude the presence or absence of intention. It is quite plausible to be subjective in such interpretation because the analysis is of the *mental element* which is hidden beneath many layers of thoughts and other exterior settings. It is not evident explicitly. Hence, it can only be *inferred*. That is the primary difficulty that calls for intellectual labour to arrive at a definite conclusion. Can inference be given the sanctity of a *fact*? Can a subject matter of pure subjectivity be given such value to adjudicate culpability against an individual on its basis? Such questions have no answers of definite shape.

The state of intention of an individual with respect to an act is conceptually unsettled. The unsettled state of intention is evident by the approach of the courts in discussing intention in myriad of cases, both in United Kingdom and India. This work is an attempt to put forward a sample to support the above argument. Through this piece of work, an attempt is made to understand the approach of the courts in both the above stated countries regarding intention, especially in the cases of culpable homicide and murder.

² *Ibid.*

³ If it was evident that the reasonable person would have arrived at a conclusion there was intention at the time of the act or omission, while observing the acts or omissions of the accused.

INTENTION, FORESIGHT AND REASONABILITY

It is crucial to address this controversy as to what can be referred to as the *intentional act(s)* or *omissions* of an individual. Can a person be held liable for his acts only because there was no *substantial doubt*⁴ in the mind of the accused that a particular effect shall take place (while assessing the act or omission and inferring from it)? By applying the test of a reasonable prudent person, can it be concluded that an absence of *substantial doubt* is sufficient to confirm the presence of intention and hold a person culpable for his/her acts' effects, or something beyond this absence; is needed to prove the presence of the mental element of highest degree and darkest shade of the individual to hold him/her criminally responsible for the effect so caused? This perplexity is reflected through various judgements by the courts and still, the confusion remains unsettled. Is there even a necessity to distinguish intention from foresight? Are not the two similar? These questions harbingers discomfort and unsettlement to the apparently settled legal conception about intention as a fault element. The subterranean turbulence is felt and reflected in many cases where the courts encountered these confusions but were forced to take either position out of the two offered, only to settle the rationale and logical structure of the law. Before delving into the analysis of the cases of both the countries, it is incumbent on us to explore in a simplistic manner (to begin with) as to what can be termed as *intention*. *Intention* may be termed as the *purpose* of one's acts. The outcome that the person seeks to achieve through a particular act or omission. It may be stated that a person intends to do something if (s)he aims at a particular thing as his/her *direct aim* or if (s)he knows that it (effect) shall certainly come into existence by pursuing that aim or purpose.⁵ As there is no precise definition of intention, for reference the above definition may be considered.

Before addressing the confusions with respect to the understanding of *intention*, it is apt to consider the definition of *murder* in common law jurisdiction. Murder is the most heinous offence in the category of homicide provisions and regarding fault element, it requires an intention to cause death or serious bodily injury amounting to death. Hence, *intention* is the *primary fault element* for the offence of murder. The confusions surrounding the concept can be made clearer by taking an example, *Hyam v. DPP*⁶. In this case, the confusion was evident when House of Lords had to arrive at a conclusion regarding the presence of the requisite fault element for murder. The accused committed an arson with an intention to frighten the homeowner. The purpose was only to frighten the homeowner, nothing beyond that. Can the presence of *this purpose* (to frighten) rule out the *legitimate expectation of reasonability* at the end of the accused, when she was committing arson that *her acts may cause death of someone*? Can she be held liable for murder because her callous acts reflect her intention to expose any person to danger of death or because there was a presence of reasonable foresight (by applying test of reasonable prudent person) that her acts may cause death or grievous injury to any person even if her purpose was only to frighten? The confusion was what inference should be drawn from the facts of the case? Can the inference of the presence of natural or ordinary foresight of death sufficient to form the requisite fault element for murder; or should we stick firmly to the purpose of the act to ascertain what was intended? It is thus, difficult to conclude that the

⁴ Antony Duff, Chapter- *Intention revisited*; from *The Sanctity of life and criminal law* by Granville Williams.

⁵ Neil Morgan, Chapter- *The fault Elements of Offences*, from *Codification, Macaulay and the Indian Penal Code*.

⁶ [1975, AC 55]

consequences of the act of the accused cannot be attributed to her only because she did not aim the consequences. But again, will that be a proper inference. If mere foresight of the consequences (even of highest degree) be equated with the requisition of intention to constitute an offence, then the difference between intention and foresightedness get obscured.

Exposing one to the risk of death is sufficient to cause murder, if death subsequently occurs and is the consequence (direct) of the acts or omissions of the accused. In such cases, purpose cannot be the only touchstone to designate the consequences of an act intentional rather, there is no justification as to why should a person be not responsible and hence, criminally liable to the consequences of his/her acts which are reasonably within the foresight of any ordinary prudent person. How far upholding the orthodox position of calling an act intentional only when it is the ultimate purpose of one's agency is logical, is a question to deliberate upon.

Lord Hailsham in the *Hyam's case* (supra) observed that *knowledge and foresight is at best the material which entitles or compels a jury to draw the necessary inference as to intention*. But the court found no reason as to why can the accused be not held guilty of murder if she had the knowledge of causing death to the victims which enables us to infer that there is a presence of intention to cause death. The court adjudicated that the act in itself was inherently dangerous to make death a highly probable consequence and how can the accused be excused from the guilt of murder when the acts reflect *malice aforethought*.⁷

In *R v. Nederick*,⁸ a case of similar circumstances⁹ the court arrived at an absolutely different decision from *Hyam's case* (supra). The brief introduction to the facts of the case would make the comparison clearer, the accused poured paraffin through the letter box of a house and the front door and set it alight. As a result, the house caught fire and a child died. The accused confessed that he had started the fire but he did not intend to cause death of the child. The question of absence of the purpose to cause death and the imputable presence of reasonable foresight, was the *prime question* that attracted the attention of the court. The court elaborately discussed the manifest expectation of foresight regarding the act, with the accused and the actual desire which existed at the time of commission of the act which caused death. The court discussed whether the manifestly dangerous act in which there may be a possibility of death of a person be said to be intention to cause the death of the same person? Can we impute intention of causing death on the accused even when (s)he did not actually desire the outcome of the death of the victim? The accused in the present case aimed or desired only to wake up and frighten the female inhabitant of the house. For this he delved into an inherently dangerous act. The court observed the job of the jury in such cases where the purpose and the outcome of the act do not coincide. The court took the course of looking at the intention of the accused to cause or bodily injury and what (s)he could have or should have foreseen. The jury must take into consideration all the relevant circumstances including all what the accused said, meant and did. The court took into consideration the *motive* or the *desire* of the accused and associated the intention with the established *desire or motive* of the accused. The requisite mental element for murder cannot be inferred or presumed at the end of the accused only because (s)he indulged into an activity that was manifestly dangerous.

⁷ *Ibid.*

⁸ [1986] 1 WLR 102.

⁹ Similar to *Hyam v. DPP* (1975).

The court of appeal in the present case directed the jury that where the charge is of murder then the jury is *not entitled to infer intention*, unless they feel sure that death or serious bodily injury was a virtual certainty as a result of defendant's actions (barring some unforeseen intervention) *and that the defendant appreciated that such was the case*¹⁰. The court focussed primarily and more than what was required on the latter part of the above statement. Where a man realises that for all practical reasons, the cause of the death or serious harm is his/her acts or omissions then it becomes *irresistible* to conclude that (s)he did intend to cause such effect. The court found no such realisation at the end of the accused (appellant in this case) at the time of commission of an offence and hence, held him liable by affixing a diminished responsibility on him of *manslaughter* instead of murder.

It is arduous to accept the approach of the court in construing such a technical approach in a crisp manner. The decision ignored to take into consideration the theoretical foundations of the fault element intention. Taking such a mathematical course to understand and conclude the presence or absence of intention would not be a fair technique in balancing the interests of the two parties in a proceeding. It shall be susceptible to ascertain what was the aim or desire of the individual while exercising his/her agency and what outcome has actually come into existence. Why should the individual exercising his/her agency be not held responsible for his/her acts and the resultant foreseeable consequences? It shall be casual for every individual to acknowledge his/her acts but not the naturally foreseeable consequences because of the defence of absence of desire to cause such consequence. The acts or omissions shall not be given the due significance if their responsibility is not cast upon the shoulders of the actor. Discrediting the acts or omissions by not discerning their significance shall also affect the concept of criminal responsibility.

The case of *R v. Hancock*¹¹ underwent the same test, whether to perceive intention in a particular case, by *drawing inference* from the facts and circumstances and particularly from the conduct of the accused; is proper or not. The facts of the case are, the deceased was driving under the bridge on the fateful day and the two accused dropped two concrete objects just as he was passing under the bridge. The act caused death of the deceased. The motive of such act was established, the two accused were in favour of the workers' strike and the deceased did not adhere to such strike and carried on to work. In order to stop him from joining the work, they dropped the concrete objects only *to create obstacle in his path* to reach the place of work and to frighten him. The purpose of the act committed by the accused was different from the consequences that occurred (according to the accused). the court made two inquiries; *was the outcome of the act, the natural and probable consequence of the act by the accused* and *was the consequence within the reasonable foresight of the accused*. The court observed that if the two tests were qualified, keeping in mind the facts and circumstances of the case, then the accused may be held liable for murder. If there is an occurrence of a doubt in the mind of the court with respect to qualifying either of the tests by the accused, then the criminal responsibility shall be limited only to manslaughter (a diminished responsibility). The outline of the case was comfortable in treating foresightedness of an accused (by applying a reasonable person's test) as intention. It did not associate intention with desire. The classification of the above two tests itself indicate that the individual acting in a given set of circumstances is

¹⁰ [emphasis added]

¹¹ [1986 A.C. 455]

presumed to be acting according to his/her individual agency and hence, should be held responsible for all the consequences that are *probable* and can be said to be within the foresight of the accused. The court showed its disinterest in giving a thought to the element of subjectivity in understanding whether the accused actually foresaw the consequences or not. The objective posture of investigation is encouraged to arrive at a logical and prudent conclusion that the accused while acting in furtherance of the concept of liberal individualism and his/her agency and by presuming him/her to be the reasonable person of ordinary foresight, to infer the presence of intention.

Looking at the facts of the case, the purpose of the accused was only to frighten or stop the deceased from going to his place of work but the method adopted to pursue this purpose was dangerous and there is no plausible or convincing reasoning to not infer intention (to cause death) from the act and when the death occurred because of their acts. At the time of dropping (simply; according to the accused) there appears no valid and logical reason as to not infer that there was the presence of foresight of possibility of death of the deceased, at the end of the accused; keeping in mind the nature of the object that was thrown, the manner of throwing/dropping the concrete object and the consequent result of such throwing. The object was thrown in a manner that the deceased was not waiting or was not prepared for such *hindrance* in his path. He was driving his car at an ordinary speed and because he was not aware of the planning of the accused and had no opportunity to stop his car to save himself. This position and state of mind of the deceased was known or may be presumed to be known to the accused persons, yet they continued to act in an unsafe manner. The analysis of the facts of the case makes the acts of the accused persons to qualify the twin tests and hold them criminally responsible for their offensive acts.

Taking into consideration the tussle between the propriety of drawing inference to ascertain intention (especially in the offence of murder or culpable homicide) and by actually attempting to know as to what the accused intended, by analysing the purpose of the act(s) or omission(s) of the accused; it is better to take into consideration the available evidences of the facts and circumstances of the case and understand what they hint at. It is arduous to actually look into the mind of the accused to arrive at a definite conclusion of any sort. The accused's narration of purpose behind his/her acts or omissions may be different from what the evidences indicate to. Therefore, it is incumbent to observe and understand closely the inferences of the evidences.

Taking further the idea of close observation and consequent inference from the circumstances of a specific case, the case of *R v. Cunningham*¹² is imperative to mention. The accused committed the death of the deceased by constant blows from a chair or part of a chair, out of which; some were inflicted on his person when he lay *defenceless* on the ground. The accused claimed that the fault element was restricted to the causation of grievous hurt. It is important to note as to why did the accused caused such injuries on the person of the accused in an inhuman manner. The reason was jealousy, the accused assumed that the deceased had sexual intimacy with his mistress. The acts of the accused were gruesome and are undisputed at the same time. Injuries express that every injury was intentional to cause it seriously, in contradiction to the claim of the accused.¹³ The intention was to cause serious bodily injury,

¹² [1982] AC 566

¹³ Regarding *mens rea*.

(required for the offence of murder) and the court in its majority opinion upheld the conviction of the accused for murder. But, the questions in the background regarding the certainty of presence of *mens rea* for murder remains uncertain. The accused's intention has to be analysed with respect to the act which he *committed* or what he had when he started to cause injuries to the victim? Meaning thereby, is the analysis of intention to be done taking the nature of the act, the manner of causation of injuries to the deceased, nature of the weapon used, etc; holistically and at the same time ignoring the fault element with which he started to inflict injuries? Is the initial *mens rea* (when he started to act) insignificant to be considered? What if the *mens rea*, initially was only to cause hurt but gradually it escalated to the degree of causing *serious injuries*? In that case, do we have to choose for which fault element (the initial or the subsequent); the accused is to be held guilty? If holistic analysis of the acts of the accused is done, then certainly; the *mens rea* with which he started to commit an act cannot be ignored. It should be taken into consideration. It is arduous to agree that the accused, while acting in a specific manner was possessed with just one fault element of one act, which he has committed. If that is to be accepted, the term *mens rea* loses its relevance and should be substituted with *mens reum*. A person may be possessed with different nature of different mental elements at the same time. The task is to analyse whether the requisite fault element of murder (if the case of the question of presence of *mens rea* for murder) was prominent in his acts or not. If the acts of the accused proclaim the prominence of intention to cause death or serious bodily injury, then; it becomes hard to not convict him of murder. This prominence has to be analysed taking the broader picture of the acts or omissions of the accused in question. This broader picture cannot be observed by leaving the periphery of initial *mens rea* of the accused.

The quest to conclude the presence of intention in an act of the accused was further attempted to be consummated by the tests suggested by the judge in the case of **R v. Moloney**¹⁴. The test suggested was *to infer intention from an act of the accused, it is necessary to understand whether the accused desired the consequence (that occurred) of his voluntary act whether or not he foresees it to occur or not and whether he foresaw the consequence of his acts whether he desired it or not.*

When the law requires intention as a fault element in an offence it is necessary to take both the desire as well as the foresight of the consequence, while doing a voluntary act. The primary concern is not just the presence of desire or foresight but also of a *voluntary act*. The consequences should be the result of the voluntary act(s) of the accused. When it is to be analysed whether the accused was intending, the court gave preference to the inference to be drawn from the circumstances because it is not possible to look at the mind of the accused by opening up his head. Due regard has to be given to the acts of the accused which indicate that though he had no prior intention, to cause death of the deceased, but he certainly had the intention to kill when he was holding the gun (loaded) pointing at the deceased and he knew that the gun was loaded, it was a deliberate act of shooting and causing death of the deceased. The act itself was enough to indicate the presence of intention. But, the question of presence of intention arises when the accused actually framed his mind and precisely pursued the framework. Can the accused be said to have intended the causation of death when he was extremely under intoxication? The medical examination report of the accused suggested that

¹⁴ [1986 AC 905]

he had consumed alcohol so much so that his blood had more than half content of alcohol. Under these circumstances can we responsibly conclude that the accused had the requisite mental capacity to form an intention?

The criminal law has socio-moral foundations though they are never discerned, only to give a structured skeleton to the criminal law. It ousts the morality from consideration to find an individual responsible and hence, criminally liable. The topic of voluntary intoxication and acts after such intoxication brings in the discussion of moral liability against the accused when he committed an offence while he was under the arrest of intoxication which he had administered voluntarily. The individual is held liable because he had an opportunity to avoid excessive intoxication (because he could have chosen to avoid excessive intoxication, exercising his agency) and when he chose to intoxicate himself so badly, he shall be morally liable for all his acts and their consequences. The liability is because of the act and also because of the exercise of one's agency to intoxicate himself up to such an extent. The law recognises and sanctions *this* moral liability and holds an accused liable for his acts and their consequences as if he was sober. The reason behind treating the accused (under the circumstances of voluntary intoxication) sober is because of the resting of the reign of such act of administration in the hands of the accused himself.

The case of an offence committed under the influence of involuntary intoxication is excused only because the act of intoxication was not the act of the accused rather, it was of some other person. The primary concern is what causes such actus reus the intoxication or the physical act or omission of the accused. The intoxication enabled the mind to enter the subliminal state and hence, the accused became unaware of the nature of the act and the possible consequences which were probable to occur. Intoxication lessened the consciousness of the mind and hence, the individual lost his agency to choose his acts, carefully. When there was no exercise of agency at the end of the accused while acting to cause the occurrence of actus reus of the offence, is it morally correct to hold him liable of the same? Are we prosecuting the individual because of his inability to exercise his agency owing to subliminal state of his mind? The answer to this conundrum is that the law holds the individual liable because of irresponsible exercise of his agency in consuming alcohol up to such an extent that the further exercise of agency was obstructed and the offence was committed (as a result). Coming back to the discussion of the case, can we infer from the acts of the accused that he had the necessary intention that he pulled the trigger and caused death? The case opens a *pandora's box* for discussion on considering how much presence of intention can be attributed to the accused when he was committing a fatal act without the strength and capacity to rethink what did he do? By considering the presence of intention at the end of the accused, are we not imputing intention on the accused and is it proper to impute intention? Generally, knowledge is imputed on the accused but is knowledge the requisite fault element for murder in U.K.'s criminal law jurisdiction?

The statement of the accused given to the police authorities made it apparently clear that he knew very well what did he do. He made a statement that if he had not killed the deceased, the latter would have done the same act against him. He attempted to create a defence of exercise of *private defence* and was aware of all the subject matter he talked about just prior to the

fateful incident. It is hard to believe looking at the circumstances that he was unaware of the consequences of pressing the trigger pointed at the deceased. If the awareness of the accused was present since the start of the conversation between him and the deceased, it is absurd to argue that he lost this consciousness at the time of causing death to the deceased.

Lord Diplock in his dissenting opinion in **R v. Hyam** (supra) supported the above argument in his words...

“... I agree with [...] the uncomplicated view that in crimes of this class no distinction is to be drawn in English law between the state of mind of one who does an act because he desires it and the one who does the act knowing full well that it is likely to produce that consequence although it may not be the object he was seeking to achieve by doing the act...”¹⁵

The court in this case could not find the accused morally liable for murder. Reason being, that the court did not find the accused capable enough to foresee the consequence of the act of shooting owing to intoxication. The court found that death was certainly the consequence of accused's actions but because of absence of foresight at the end of the accused, he cannot be held guilty of murder but of manslaughter. The court negated the conscious working of mind of the accused, his awareness of what was he doing, that was inferred from the statement he gave to the authorities immediately after the incident and held him liable for a diminished responsibility because the absence of foresight was assumed owing to intoxication. The defence of voluntary intoxication is proper to flee from the clutches of responsibility of the acts and their consequences and consequent criminal liability, is a question that requires deliberation. Are we prepared to affix diminished responsibility and facilitate the accused from escaping the punishment (especially for murder) who voluntarily get intoxicated and behave irresponsibly?

On the similar note, the case of **Basudev v. State of Pepsu**¹⁶ finds relevance. The Supreme Court of India in the above case observed

“... so far as the knowledge is concerned, the court must attribute to the intoxicated man the same knowledge as if he was sober but so far as the intention is concerned, the court must gather it from the attending general circumstances of the case paying due regard to the degree of intoxication...”¹⁷

The court observed that it would not be possible to fix him with *requisite intention* if he was not in with his mind altogether for the time being. The court also went to analyse the *level of intoxication*. If the level of intoxication of the court was *not so deep* to make him beside his mind and the surrounding circumstances indicate that he had sense to understand the natural consequences of his acts, then it leaves no reason behind as to not infer the intention at the end of the accused. The court gives due consideration to the moral blameworthiness of the accused. If he can be found morally blameworthy of the acts and the consequences of the same, intention can be inferred. Merely being drunk does not provide a defence all together to the offence and its liability. The accused should be deprived of the capacity to know, think, and understand;

¹⁵ *Id.*

¹⁶ [17th April 1956]

¹⁷ *Ibid.*

the acts and the other circumstances, so should be the level of intoxication to avoid moral blameworthiness for the offence of murder.

Every minute detail of the incident matters. The nature of the weapon used, the manner of acting, the conduct of the accused and the resultant consequence of the act(s) along with the demeanour of the accused after the completion of the impugned act is to be considered. In the present case, it was shown in affirmative that the mind of the accused was obscured by the intoxication but not in such a manner so as to dethrone reason and make the accused incapable of forming a requisite intention for murder. The demeanour of the accused after the act also suggested that he had known the nature of the act and the consequence (death) that has occurred. Prior to the fatal act, the accused; though intoxicated was careful to choose his seat for lunch and argued with the deceased to vacate the same. On refusal of the accused to vacate the seat, he got furious and killed the deceased by shooting at him. After shooting he started to run away from the place of incident to escape and asked for forgiveness for his acts. These acts prior to the act of shooting and after the commission of murder indicate the presence of reason and prudence in the accused, though he was intoxicated. The facts along with the fact of intoxication do not prove the incapacity of the accused to understand the nature and consequences of his acts. Hence, he was held guilty of murder.

The case, *R v. Moloney* (supra) argues about the foresight of the accused at the time of commission of the offence, but do not take into consideration the acts of the accused prior to causation of death and after the commission of offence to understand and infer properly the presence of intention at the end of the accused at the time of commission of the offence of murder. The court simply brushed aside the possibility of presence of reason in the accused only at the pretext of proved intoxication, without considering the impact of intoxication on the prudence of the accused. The intoxication was in itself quite deep, but it did not lead the accused to the state of subliminal mind as he was aware of his and the deceased's state of mind owing to intoxication (prior to the death of the deceased) and made clear that had he not shot upon the deceased, he would have been lying at his place; thus, creating a defence for himself. How can the fact of intoxication outweigh the possibility of presence of reasoning and foresight at the end of the accused?

Human agency is essentially composed of motives and intentions.¹⁸ The simplified understanding of intention, as desire for a particular consequence is a result of a complex mixture of *psychological and social process*, which eventually progresses as actions of an individual.¹⁹ It is difficult to segregate motive from intention and recognise crisply as to where the motive began and where the intention ended. It is indeed a *unified process*.²⁰ The discussion to understand intention is incomplete if motive is neglected because one of the reasons to make the concept of intention, conceptually unsettled is *motive*. Motive can be understood as *ulterior intention*, the cause or the driving force behind the intention for doing a particular act. But to say that intention is the tree of the seeds of motive is difficult. At times, the motive can be the real cause behind the intended act, and in other cases it may just be a background setting. It is difficult to state whether motive has a significant role to play in formation and execution of intention or not. Motive is relevant but this cannot be made a thumb rule to observe in every

¹⁸ Alan Norrie, Chapter- *Motive and intention: desocialising individual life* from *Crime, Reason and History*.

¹⁹ *Ibid.*

²⁰ *Ibid.*

case. The prosecution cannot rest its case by caliming and proving the presence of motive to cause death of the deceased. In *Bhupinder Singh v. State of Punjab*²¹ the Supreme Court of India held that, though motive is a circumstantial relevant fact, it cannot be the saviour for the prosecution to wrap up the case without discharging the burden of proof, beyond reasonable doubt. The court held that in cases of murder by poison, it is indispensable to prove the certain questions to hold him guilty, for instance; the cause of death being the poison, was accused possessing the poison when it was administered, did accused have the opportunity to administer the poison, etc.²² Motive plays a role of a cushioning background to support the structure of prosecution's case to prove the guilt of the accused.

*Jai Prakash v. State (Delhi Administration)*²³ elaborately discusses the intention in the provision of murder u/s. 300 and particularly section 300(thirdly) of Indian Penal Code, 1860. The case discusses and owns the fact that intention, knowledge (being different from motive) are invisible state of mind and their existence is inferred from the circumstances, for example; the nature of the weapon used by the accused; the number of injuries inflicted; the manner of causation of injuries etc. According to the ratio behind the decision, the intention in a given case, is more than foresight. Intention cannot mean mere awareness. The case inclines towards the understanding of intention as *foresight of one for his/her acts directed towards the aim of such acts*. No injury can be presumed to be pre-meditated one and every injury cannot be said to be the reason of one's focussed state of mind. The approach here is, an intermixed one; it associates the presence of aim of the consequence, as an essential ingredient to conclude the presence of an intention and the presence of foresight as well. The approach is a bit similar to that of the above discussed English case of R v. Moloney (supra) where the desire without foresight and foresight without desire was the adopted composition of intention. The external factors of the case help in assuring that this complex intermixed combination of desire and foresight is present or not. If they are present, the intention is present, hence; the criminal liability should be of murder. If this complexity is absent, so is the intention from the scene. Requisite knowledge may be presumed. But intention is that shade of fault element which is complicated in its integrity to be presumed and inferred in every situation.

INTENTION AND OBJECTIVITY

Objectivity is the mathematical sort of test applied on a particular situation to arrive at a conclusion. The issue is that the subject matter over which the test is applied is often not an objective test situation. In the matter of inferring intention, the subject matter of assessment is subjective, *per se*; in nature. A mental state is without any conflict is a subjective subject matter. It is equivalent to give simple solution to a complex issue, if we are inferring intention when we conclude that there was reasonable foresight of the consequences. But, the foresight cannot be ignored. The inference of foresight along with other circumstances which hint about the presence of determination to pursue the lethal act, is sufficient to infer intention. There is no guideline regarding when to presume intention. It is subjective and hence, is best left to be determined depending upon the circumstances.

²¹ [6th April 1988]

²² *Ibid.*

²³ [5th February 1991].

The inclusion of foresight (after analysing the circumstances) and inference from the surrounding circumstances, offers an intermixed approach to infer intention in a particular case; the former being the objective and latter being absolutely subjective. It can be argued as well that the inference of foresight is also subjective because a uniform methodology cannot be laid down, it also varies from case to case. But it is argued to be objective because of the nature of the test applied for inferring intention; i.e; the test of a reasonable person. The reasonable person is not a person situated in abstract, rather; (s)he is a person of ordinary prudence situated in the same circumstances as that of the accused. Hence, the inference of foresight is considered an objective test.

If the foresight is concluded to be present in a given case (at the end of the accused) but the circumstances do not indicate the accused to have intended. Intention is a word of darker mens rea, the circumstances of the case must suggest this from all the corners that there was intention of the accused to cause death of the victim. Inferring intention by tick marking all the ingredients of section 300(3) IPC, 1860²⁴ would amount to oversimplification to arrive at a conclusion. It is necessary to be investigated that whether the accused intended the causation of the injury that is present on the body of the deceased. This is the subjective inquiry which is sought to be done. For this, a holistic analysis of the circumstances has to be done.

Pre-meditation is not an essential or a necessary element to infer intention in a given case. If the accused has made a decent preparation to result into the offence, it becomes easier to infer intention. But if there is no evidence of pre-meditation, no scheme of preparation, then; can we still conclude that intention is present? It becomes difficult to conclude so. The act itself has to be closely looked at, the manner of conduct of the accused, the nature of weapon used (if any), how that weapon came into the hands of the accused, number of injuries inflicted on the body of the accused, the acts of the accused after the commission of the offence; are few of the many to be pondered upon to give the confirmation of presence of intention.

According to *Kenny in Outline of Criminal Law*²⁵

“... Intention: To intend is to have in mind a fixed purpose to reach a desire objective. [...] the state of mind of a man who not only foresees but also desires the possible consequences of his conduct. [...] there cannot be intention unless there is also foresight, since a man must decide to his own satisfaction, and accordingly must foresee, that to which his express purpose is directed...”

Therefore, the approach that is evident from the case is the amalgamation of desire and foresight, if reflected from the conduct of the accused and other surrounding circumstances, amounts to presence of intention.

INTENTION AND CULPABILITY

There is a link between the two, an *evaluative link*.²⁶ Why evaluative link, because through the confirmation of a link between the act and the accused, the cause of the consequences of such acts is attributed to the accused. This attribution is because of the presence of fault element in

²⁴ With respect to the above discussed case of *Jai Prakash v. State (NCT of Delhi)*; [1991, SC]

²⁵ 17th Edition at page 31

²⁶ A.P. Simister, Chapter- *A disintegrated theory of culpability* from Granville Williams's *The Sanctity of life and Criminal Law*. (Cambridge University Press Publication, Published in 2013)

the accused at the time of commission of the act. Not only the act, rather the agent and the agency behind it is also disapproved. Hence, culpability is closely associated with the fault element.

No person can be held culpable for an act if there is an absence of requisite confluence of mens rea and actus reus. Without fault element there is absence of *culpa* (guilt). As Granville Williams observed, “ *the act constituting a crime may in some circumstances be objectively innocent, and take its criminal colouring entirely from the intent with which it is done.*”²⁷ In result based offences, for instance; murder; it is needed to be shown that the agency is blameworthy to constitute an offence. It is the absence of intention which deviates the culpability of an accused from murder to culpable homicide not amounting to murder.²⁸

Lord Goddard in *R v. Steane*²⁹ states that a particular intent must be laid and charged, that particular intent must be proved. The only question is what is the extent and nature of the intent that section 300 (thirdly) requires and how is it to be proved?³⁰ The intent of the accused is to be proved up to the satisfaction of the jury and if there remains a doubt in such satisfaction, the accused is entitled to acquittal.³¹ This clearly signifies that lack of intention implies lack of culpability and lack of culpability implies lack of criminal responsibility.

The nature of injury cannot be subjected to the secondary status of consideration to infer intention in order to ascertain culpability. As it was stated in the case of *Virsa Singh v. State of Punjab*,³²

“... *Where death is caused by a single blow, it is always much more difficult to be absolutely certain what degree of bodily injury the offender intended...*”

The nature and manner of causation of injury affirms or denies the presence of intention in the accused. Certainly, repeatedly causing of fatal injuries within a set time frame amounts to intentional causing of such injuries. Locking a hut from outside, and setting it ablaze; assaulting the persons coming to rescue the victim by throwing dust into their eyes, signifies intention and leaves no ground for doubt regarding the nature of mens rea; present.³³

What circumstances can signify intention and when can it be proper to infer intention? A man, who in anger throws the child to the hard surface and as a result, the child died.³⁴ It was virtually certain that the child shall die if thrown on the surface and the accused can be said to have knowledge of the same as well. But, can the intention be inferred? Can we unhesitatingly say that the accused *intended* to cause death of the child? Can we say that the state of mind of the accused was in a condition to form and possess of *intention* to cause death? The accused did appreciate the consequence can be presumed but does the appreciation of his acts is sufficient to infer intention? Here, the discussion is not about foresight with respect to his acts. The point to ponder upon is whether the appreciation of the acts of the accused sufficient to infer such acts intentional? The case discusses about *virtual certainty* and *little short of overwhelming*

²⁷ *Ibid.*

²⁸ In English law jurisdiction, from murder to manslaughter.

²⁹ (1947) 1 All ER 813, 816.

³⁰ Referred in *Virsa Singh v. State of Punjab* (1958 SC 465).

³¹ *Ibid.*

³² [1958 SC 465]

³³ *Rawalpenta Venkalu v. State of Hyderabad* (1956 SC 171).

³⁴ Facts of *R v. Woolin* [1992] AC 82.

foresight.³⁵ The case discusses this principle that along with other circumstantial evidences if the inference is that the consequence was virtually certain to occur then, the intention can possibly be inferred³⁶. The argument that the accused appreciated or appears to have appreciated the *substantial risk* of the acts and the consequences of the acts; therefore, it can be concluded that intention was the only fault element present; is not appropriate. The court rightfully asserts that the term risk is suitable (comparatively) to the recklessness but certainly not for murder. It cannot be said that it is safe to infer intention if the accused appreciated the substantial risk in the act, such appreciation can be one of the consideration to assess the presence of intention, but not the only consideration. The gives rest to this conundrum by stating;

“... if he thought or may have thought, that in throwing the child he was exposing him to only the slight risk of being injure, then you would probably readily conclude that he did not intend to cause serious injury, because it was out of his contemplation that he would be about the consequence at all when he threw the child. [...] if he did not appreciate the serious harm to the child, it cannot be said that he intended to cause death of the child...”

Such an act may be a reckless act but not murderous act. The degree of *likelihood* required for the provision of murder should be of the highest degree.³⁷ The assessment of the presence of such degree shall be done through the sight of a reasonable person situated in the circumstances of the accused.³⁸

IS INTENTION TO BE INFERRED ONLY WITH RESPECT TO A SPECIFIC VICTIM?

The requirement of murder is intention to cause death of an individual, but is it restricted only to such particular individual? Is the concept of intention attached only to the act or is it also linked to the victim, whom the accused intended to cause death of? The argument is whether the fault element is associated with the conduct element of the offence or is it extended to the subject of concurrence of the two?³⁹ The criminal law jurisprudence appears to be divided. The logic is that the requisite mens rea is of the accused for the offence, towards an individual, it is immaterial who was the individual; once it is proved that the intention was present and the act was voluntary, the death is attributed to the accused. But, at the same time the victim⁴⁰ cannot be anyone. If the accused had no reasonable thought to cause death to the victim, rather; it was intended to be caused to some other person; can we say that the victim was an unforeseeable intervention in the line of execution of accused's intention? Will the attribution of intention to the accused in such a case of substitution of victims, proper? The concept of transfer of malice

³⁵ *Ibid.*

³⁶ The ordinary foresight may mean knowledge but certainly not intention, as already discussed above.

³⁷ *Director of Public Prosecutor v. Smith* [1961] A.C. 290.

³⁸ The applicability of objective test of ordinary person in the subjective settings. The following tests are to be done,

- (1) *How probable was the consequence of death?*
- (2) *Was the act a voluntary act of the accused?*
- (3) *Did he foresee the act and the consequence ?*
- (4) *Did he appreciate the risk involved in his voluntary act?*

³⁹ The concurrence of mens rea and actus reus.

⁴⁰ who was not within the foresight of the accused.

deals with what? The transfer of whose malice and to whom? It is certain that the malice is of the accused but if we are talking about it being transferred, it suggests that it was directed to one (earlier) but owing to some circumstances, it got deviated to another. This clearly means that the concept of intention is associated with the subject (the person against whom the intention is formed) also. The person who was thought to be the victim got replaced by the one against whom there was no intention, how can we say that the element of concurrence is present? If concurrence element is absent (in cases of transfer of malice) how can we say that the offence is committed? The actual sufferer can be at the most be considered an intervention, foreseeable or not; is absolutely subjective. In the presence of the intervention, it cannot be said that the offence which was intended was committed. The accused should be entitled to diminished liability. The case of *Emperor v. Mushunooru Suryanarayanmurthy*⁴¹ is a classic example that discusses the above confusion, in which the majority opinion favours the infliction of same liability of murder on the accused for causing death to the intervening victim, who actually became the sufferer. The minority opinion was not indifferent to the importance of the direction of the intention (of the accused) towards a particular person.

*R v. Michael*⁴² is an essential reading of English jurisdiction along with the above case of Indian jurisdiction. The accused intended to cause death of his illegitimate child and instead caused the death of her own daughter. The actual victim was not within the line of his foresight when he formed an intention to cause death of the intended victim. The issue was that the causal chain between the intention and the causation of death was broken or not when there was an unforeseen intervention of the deceased. The court considered the chain to be unbroken because the victim was an innocent third party who intervened. This reasoning does not satiate the urge to find the original state of causal link, whether sustained or ruptured. What reasoning can it be behind the sustenance of the causal link? The innocence of third party intervention? And if that so, is it a reasonable conclusion?

The subject matter of transfer of malice is controversial and unsettled. The logical conclusions appear to be incompatible with the conventional approach of analysis.

CONCLUSION

Intention being the most essential element in the offence of murder and culpable homicide requires and deserves a settled base. The foundation of intention is needed to be unearthed and brought to the surface to understand its original state by removing the dust settled on its layered identity. It is disappointing that neither the courts in their respective jurisdictions in India nor in the United Kingdom have attempted to define *intention* in a manner that it becomes comparatively uncomplicated and capable of being located to understand and interpret the primary fault element of culpable homicide *simpliciter*, culpable homicide; not amounting to murder and murder. The meaning of various shades of the fault element awaits for their respective identity only through inference(s) taken from a given set of circumstances of a particular case. Even the approach of the courts in both the countries is not uniform or *predictable* in themselves. The definition and the method of interpretation of such an indispensable fault element has become *dependent* upon the juries and the judges, which was never the intention of Lord Macaulay, who drafted the Indian Penal Code, 1860; like a cosmos

⁴¹ [1912] 22 MLJR 333 (Mad.)

⁴² [1840] 173 ER 867

and meticulously framed it to not depend upon the whims of the courts to interpret the way they want to. The substantive legislation is incomplete without including the definitions of the basics of the criminal law, which is *mens rea* and further distinctions between its various shades. It is invincibly arguable that it is difficult to define *mens rea* and particularly the shade of intention but an attempt should be made to settle the chaos which follows owing to the failure of the purpose of the criminal law and its implementation because of this deficiency and the consequent uncertainty in the law and its interpretation. Absence of definitions or meanings assigned to the primary fault elements and inclusion of all possible definitions of offences with such fault elements is like a human body devoid of the soul; that is a corpse. We may appreciate such a Code for its durability for it stood the test of the time but, at the same time, we cannot ignore the possibilities of the possible miscarriages of justice which may have taken place because of the inherent deficiency of the Code. Only because a judgement is the reflection of competency as well as the authority, this does not guarantee the soundness of the decision till eternity. Complexities of the law are required to be resolved but uncertainties within the law can make the complexities worse and absence of formal recognition to the meaning(s) of fault elements of primal importance; harbingers inherent uncertainty within the law and the longer the uncertainty, the messier the chaos is; as a consequence. The association of *intention* with *knowledge*, the two primary fault elements; is crucial and is needed to be compared by analysing their state of degrees. This is indelible that inferring them as one would enhance the pre-existing uncertainty in law in this respect. This piece of work is an attempt to navigate an ocean like concept through a small boat of personal contemplation with the oars of English and Indian criminal law cases of culpable homicide and murder.