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WHEN COMMON INTENTION FRACTURES: MID-ACT WITHDRAWAL, CRIMINAL ATTRIBUTION, AND LEGISLATIVE REFORM

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Abstract

The doctrine of common intention under Section 3(5) of the Bharatiya Nyaya Sanhita, 2023 (BNS), establishes the principle of collective criminal liability by attributing the criminal act of one participant to all persons sharing a common intention. However, the provision remains silent on the legal consequences of an individual's withdrawal from a common criminal plan after its formation. This research examines the statutory lacuna concerning mid-act withdrawal and its implications for individual culpability under Indian criminal law. It analyses the judicial interpretation of common intention, particularly the requirement of prior concert and participation in furtherance of a shared criminal objective. Although the Supreme Court has acknowledged the possibility of withdrawal, the absence of a clear statutory test creates uncertainty regarding the circumstances in which an accused may be absolved of liability. The study further evaluates the limitations of the doctrine of locus poenitentiae in addressing withdrawal from joint criminal enterprises. A comparative analysis of English criminal jurisprudence and Section 2.06(6)(c) of the American Model Penal Code highlights alternative approaches to recognizing effective withdrawal while preventing impunity. Adopting a doctrinal and comparative legal methodology, the research argues that the absence of an express withdrawal defence creates an imbalance between collective accountability and individual culpability. It proposes the introduction of a statutory proviso to Section 3(5) BNS requiring unequivocal communication of withdrawal, effective preventive action, or timely warning to law enforcement authorities. The study concludes that a carefully defined withdrawal provision would strengthen legal certainty, promote fairness, and align collective criminal liability with the principles of individual responsibility and constitutional protection under Article 21.

Keywords: Bharatiya Nyaya Sanhita, Common Intention, Criminal Liability, Individual Culpability, Withdrawal Doctrine.

1. INTRODUCTION

When multiple individuals collaboratively devise and carry out a criminal offence, each must confront the repercussions of the group's actions. This tenet of the criminal justice system is acknowledged in all legal frameworks, from ancient Rome to modern international criminal courts.[1] The notion of shared intention, as enshrined in Section 3(5) of the BNS, is a provision within Indian criminal law.[2]

Nonetheless, the Indian legal framework exhibits a critical structural deficiency. Once a person has engaged in establishing a collective intention, there exists no legal mechanism via which they can free themselves from responsibility if their mindset subsequently alters. This study seeks to rectify this oversight by posing the research inquiry: given the lack of a statutory escape provision for withdrawal, how ought courts to evaluate exculpation, and does this gap contravene the principles of personal culpability?

Prior to advancing, an initial clarification is necessary. The requirement for collective criminal responsibility is unequivocally acknowledged in this document. When individuals combine their resources, determination, and actions

to pursue a common illicit goal, the legal system would be significantly deficient if it could only hold accountable the person who delivered the last strike. Section 3(5) of the BNS plays an essential role in this context. A superficial interpretation of the clause would imply that any concession granted to the accused could jeopardise the state's ability to pursue them under collective culpability. That apprehension is reasonable yet ultimately misguided. A meticulously constructed withdrawal clause, which necessitates significant, proactive measures instead of a simple reconsideration, allows both parties' interests to coexist without adverse effects. This study argues that the two can and ought to coexist inside a unified legal framework. This document is organized into six sections. Part II discusses the principles of Section 3(5) BNS and its legal interpretation. Part III delineates and examines the gap in withdrawal jurisprudence. Part IV analyses comparative structures. Part V presents a framework for legislative transformation. Part VI brings the paper to a close.

2. COMMON INTENTION UNDER SECTION 3(5) BNS

2.1 The Statutory Text

Section 3(5) of the BNS, reflecting the earlier Section 34 of the IPC, articulates: "When a criminal act is perpetrated by several persons with a common purpose, each individual is liable for that act as though it were committed exclusively by them." This provision delineates a duty principle, a legal assumption that attributes the illicit conduct of one person to those who harbored a common intention.[3]

Three conditions must be satisfied for Section 3(5) to be operative. First, a criminal act must be committed; thereafter, two or more persons must be involved; and ultimately, there must be a pre-existing mutual intention, a collective comprehension. The third criterion is the most contentious and vital for the withdrawal process.

2.2 Prior Concert

The seminal case underlying Section 3(5) of BNS is Barendra Kumar Ghosh v. King-Emperor,[4] in which the Privy Council determined that the term "criminal act" encompasses a sequence of actions that together form the offence. The principle developed is that Section 3(5) functions not through individual physical actions but through a collective criminal intent. Even inactive members could be held accountable, as long as they possess the shared intent that led to the result.[5]

However, the Privy Council in Mahbub Shah v Emperor[6] introduced a critical qualification that common intention requires a pre-arranged plan. This was the starting point of a shift in the court's reasoning while considering the application of Section 3(5). The Supreme Court further strengthened this requirement in Pandurang, Tukia and Bhillia v State of Hyderabad,[7] holding that common intention presupposes prior concert, a pre-arranged plan, because without such a plan vicarious criminal liability cannot be put upon an accused for the acts of another. The plan need not be elaborate, nor require a lengthy interval of time. It can arise suddenly when bystanders join an assault upon invitation, thereby demonstrating their assent.[8]

The Supreme Court in Jasdeep Singh v. State of Punjab[9] has delineated a sophisticated framework, asserting that Section 3(5) establishes a presumption that associates the unlawful actions of one individual with all, in alignment with a shared aim. Employing the analogy of a football team, the court determined that the aggregate outcomes are shared by all members. The court notably remarked that "there could be instances where an individual, although initially engaged in establishing a shared intent to perpetrate a crime, may subsequently retract from it." However, it offered no doctrinal criteria to implement the observation.

Additionally, the Supreme Court in Madhusudan v. State of Madhya Pradesh[10] exonerated the defendants in a homicide case, determining that a conviction under the former Section 34 IPC is untenable without proof of active involvement and collective intent. The court noted that "a mere common intention alone may not invoke Section 34 IPC without an accompanying action," so differentiating the mental aspect from the physical one.[11] In Constable 907

Surendra Singh v. State of Uttrakhand,[12] the Supreme Court annulled the convictions of police constables who were only present in the same vehicle as the officer who discharged the lethal shot, asserting that a prior agreement, rather than mere physical closeness, is the essential criterion for joint liability.[13]

The judiciary has repeatedly determined that two prerequisites are paramount before Section 3(5) BNS can impose liability on a group member. Initially, a mutual understanding and a predetermined strategy, followed by an action executed to advance that collective purpose. The rational conclusion, which the doctrine has yet to embrace, is that since both prerequisites must be fulfilled for responsibility to ensue, then the lack of either condition should, theoretically, provide the accused with an avenue for exoneration. A defendant who, upon establishing a shared intent, authentically retracts and declines to engage in the perpetration of the crime has disrupted the essential connection mandated by the law. The Supreme Court in Jasdeep Singh explicitly acknowledged that an individual who was actively involved in establishing a shared aim may yet retract from it. Nonetheless, that acknowledgement, despite its importance, has lingered unanchored, yielding no philosophy, no criteria, no benchmark.

3. THE WITHDRAWAL LACUNA

3.1 The Asymmetry of Collective Agency

The principle of personal criminal responsibility is founded on the alignment between action and mental condition at the moment of execution.[14] The defendant in these instances governs the complete trajectory of their behaviour. In common intention liability, the legal standing of the accused is influenced not solely by their actions but also by the actions of their accomplices. This engenders a shared agency dilemma, wherein an individual, upon aiding in the establishment of a communal intention, initiates a process of criminal accountability that functions autonomously from their later mental disposition.[15]

The disparity is pronounced. The outcome is that an individual who sincerely regrets and distances themselves from a collective illegal endeavour remains legally connected to the group's conduct, provided that such activities were executed in pursuit of the initial shared objective.[16]

3.2 The Judicial Exit and its Inadequacy

In the lack of legislative direction, Indian Courts have been compelled to devise an improvised structure for withdrawal claims, namely, the doctrine of Locus Poenitentiae.[17] Originating from contract law, the principle in criminal law permits retraction from criminal activities prior to their enforcement.
The principle is firmly entrenched within the framework of attempt. In Malkiat Singh v. State of Punjab,[18] the Supreme Court determined that if the defendant retains “a place for repentance” where they might reconsider, and the actions taken thus far are innocuous, the behaviour is classified as mere preparation. In contrast, in Abhayanand Mishra v. State of Bihar,[19] the Court determined that once the accused has finalised preparations and taken a "substantial step" toward committing the crime, the opportunity for withdrawal is nullified, rendering the accused guilty of an attempt even if they halt partway.[20]

The issue is that these concepts relevant to attempts under Section 62 BNS do not seamlessly correspond to the shared liability structure of Section 3(5). In this case, when any co-participant initiates the illegal act, the defendant seeking to withdraw encounters a judicially established threshold that is both arbitrary and too stringent, rather than one defined by statute. The insights from State of Maharashtra v. Joseph Mingel Koli[21] indicate that a timely and effective withdrawal can mitigate responsibility, however it is an evidentiary risk rather than a legal entitlement.[22]

4. COMPARATIVE FRAMEWORKS

4.1 The English Law of Withdrawal

English criminal jurisprudence has established a very intricate structure for disengagement from collective enterprise. The pivotal case is R v. Becerra and Cooper,[23] in which the Court of Appeal examined the standards for effectively disengaging from a criminal operation, highlighting the importance of clear communication of withdrawal to fellow offenders. The Court deemed Becerra's exclamation of "let's go" and subsequent escape inadequate, noting that a response of "substantially greater magnitude and efficacy" was necessary, such as physically intervening to prevent the co-participant from assaulting the victim. Nonetheless, the English framework acknowledges that withdrawal criteria are not uniform; they vary according to the severity of the offence. In R v. Grundy,[24] the court determined that if an offence has not yet occurred, the defendant must merely convey clearly to their accomplices that they do not plan to continue. In a similar vein, R v Rook[25] established that withdrawal needs more than mere non-participation, especially where the defendant had previously been involved. The Court determined that the defendant wishing to retract must "exert every effort to thwart the offence.

The most intricate synthesis is present in R v. Mitchell & King,[26] which established a bifurcated standard indicating that if the offence has neither commenced nor is imminent, clear communication suffices; however, if the offence has commenced or is imminent, physical intervention or reporting is necessary. Significantly, in instances where the aggression is impulsive and unpremeditated, simply vacating the location may suffice.

This contextual framework, categorised by urgency, premeditation, and phases of wrongdoing, embodies a principled compromise between BNS's reticence and complete immunity. The absence of such gradation in Indian jurisprudence serves as the most severe criticism of the current legal framework.

4.2 The Model Penal Code

The American Law Institute's Model Penal Code contains the most extensive legal foundation for disengagement from complicity. Section 2.06(6)(c) offers a defence if the defendant withdraws their involvement before the crime occurs and either: (i) completely nullifies its efficacy in the execution of the crime; or (ii) promptly alerts law enforcement or otherwise exerts “proper and substantial effort” to avert the crime.[27]

Analysts like Cassidy and Massing have observed that the MPC's paradigm for renunciation faces criticism, especially in conspiratorial scenarios where physical intervention is unattainable.[28] Nonetheless, the definition of defence within the MPC framework is significantly more advanced than BNS's lack of commentary.

5. TOWARDS LEGISLATIVE REFORM

This paper proposes the following statutory addition as a new sub-clause to Section 3(5) BNS, modelled on MPC Section 2.06(6)(c) and informed by the English standards.

“Provided that a person who has participated in forming a common intention shall not be liable under this sub-section for an act committed in furtherance thereof if, before the commission of such act, that person: (a) unequivocally communicated to all other participants their intention to withdraw from the common plan; and (b) either took reasonable and effective steps to prevent the commission of the act, or gave timely warning to law enforcement authorities. The burden of proving withdrawal under this proviso shall lie on the accused.”

This formulation, while preserving the core function of S 3(5) BNS also ensures creating meaningful right of exculpation for those who genuinely repudiate the common intention before the offence is committed. The proposed structure replicates the MPC approach while incorporating the English sensitivity.

6. CONCLUSION

The legal framework concerning section 3(5) BNS exhibits a significant structural discrepancy, acknowledging the theoretical possibility of withdrawal while lacking any means to enforce that acknowledgement legally. Indian Courts have persistently advocated for a dual standard criterion for the implementation of Section 3(5), although they have refrained from acknowledging the evident implication that the dissolution of either should eliminate liability; the Constitution necessitates more adherence under Article 21. The BNS, in emulating the IPC, has also mirrored its omissions. This has led to the misallocation of a legislative chance. A formalized withdrawal clause, progressive, significant, and meticulously defined, does not equate to a concession of impunity. It is what contemporary fundamental criminal law mandates.

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