

UR No.213

**THE K.K. LUTHRA MEMORIAL MOOT COURT COMPETITION
2013**

**IN THE
HON'BLE COURT OF APPEALS, POLKRAINE**

**CASE CONCERNING
"MANUFACTURE SALE & POSSESSION OF BANNED NARCOTIC DRUG"
&
"CONTEMPT OF COURT & MEDIA TRIAL"**

Criminal Appeal No. ____/2013

[Under S.385 1AA of The Polkranian Criminal Procedure, 2006]

IN THE MATTERS OF:

**DR IBRAHIMOVIC
(APPELLANT)**

v.

**POLKRANIAN TIMES & OTHS.
(RESPONDENT)**

Memorandum on Behalf of Appellant

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STATEMENT OF FACTS

Polkraine is a landlocked country established in 2005 with its capital city as 'Torresnik'. It has adopted common law system, as a judicial model within its constitutional democracy.

[PARTIES]

Dr Ibrahimovic- is a Nobel Prize winner chemist. He has received several patents for developing new organic compounds to combat ailments affecting the sinuses, nasal passages and respiratory system.

- The Polkranian Times- is the leading English daily, it is 90% state owned and controlled. The news paper has a reputation of being the 'mouthpiece' of the ruling party and of ridiculing those who oppose the ruling party, by making wild allegations in the paper.
- TorresnikToday- is a news channel owned by Polkranian Times Inc.

[RELEVANT FACTS]

1. Dr. Ibrahimovic had thrown a lavish party at his villa on the outskirts of Torresnik on 19th January, which was attended by the top notch socialites of the city. An undercover journalist from Torresnik Today had slipped into the party armed with a hidden camera concealed in the button of his blazer and engaged Dr. Ibrahimovic in a forty five minutes conversation, at a secluded spot near swimming pool, which was noticed by other guests.
2. On 21st January at 10:30 am police raided the accused's laboratory, accompanied with a video journalist from Torresnik Today and a chemical expert attached to police department.
3. At The time of raid, the accused seemed to be working with 'Red Phosphorous' and nearby in a vat contained ingredients for production of 'Pseudoephedrine', which was said to have initiated half an hour ago.
4. He was arrested after the raid and on the basis of information by CEO of Polkranian Times, video clip evidences and on the grounds of possession of ingredients for producing crystal meth. On same day in evening Torresnik Today showed video clips of the party in an 'explosive' news segment "Ibrahimovic: The Meth Man."
5. The channel showed grainy footage pieced together, containing clippings like a model inhaling cocaine in a driveway, lights, loud music, Dr Ibrahimovic socialising with the guests and a 28 minutes conversation of the Journalist with him.

[CONVERSATION LEADING TO CONTROVERSY]

JOURNALIST- "So....that Inquiry. Did you really smoke grass in office?"

IBRAHIMOVIC-“Ha Ha...No Someone just saw it lying in my drawer. Obviously, I cleaned everything before the stuff hit the fan.”

JOURNALIST-“I am more of a meth man myself.”

IBRAHIMOVIC-“Yeah? I haven’t tried it.”

JOURNALIST-“NO WAY! I don’t believe you.”

IBRAHIMOVIC-“I am not lying.”

Journalist- “But are you telling me that you’ve never come in contact with the stuff? You’ve never been tempted?”

IBRAHIMOVIC- “No I have never been tempted...[audio is unclear for 30 seconds] know where can get some?”

JOURNALIST- “Could you get me some? I’m willing to pay good money. I mean a LOT! Because my friends do it as well.”

IBRAHIMOVIC- “Let me see and get back to you.”

6. The news channel claimed that the video was sent to the police through ‘proper channels’. Dr. Ibrahimovic identified his voice in the recording but said footage has been cobbled together and distorted to give an incomplete picture. The trial began on 10th February. The journalist during cross examination said they were following the accused for quite some time and had many more evidence against him. But he was unable to answer the reason for its withholding and speculated about the same.
7. The counsel for accused argued that firstly the video tape evidence is insufficient, Secondly, his actions do not constitute ‘attempt’ as he was in ‘preparation’ stage & thirdly he has been ‘entrapped’ by journalist who acted as ‘agent provocateur’ and the entire episode amounts to abuse of process.
8. Torresenik Today continued its attack on the accused, via ‘two hour specials’ and ‘citizen’s verdict’ and declared him ‘guilty’. Polkranian Times also published defamatory statements about the judge trying the case which read-“Will the judge continue to question the prosecutor or will he do what his conscience tells him to do?”, which led to the judge detaching himself from the case. Accused filed an application for initiating contempt of court against Polkranian Times Inc.. The new judge reheard the entire case and convicted Dr. Ibrahimovic and sentenced him to 9 yr’s imprisonment & fine of 40,000 dollars. Dr Ibrahimovic then moved two separate appeals challenging the conviction and the dismissal of the contempt application, which have been clubbed together. The matter is now up for hearing.

STATEMENT OF JURISDICTION

The appellant has preferred an appeal to Court of Appeals under Section 385(1AA) of the Polkranian Criminal Procedure, 2006.

STATEMENT OF ISSUES

- I. WHETHER THE CONVICTION IS UNREASONABLE AND LIABLE TO BE SET ASIDE?**

- II. WHETHER CONTEMPT PROCEEDINGS SHOULD BE INITIATED AGAINST POLKRANIAN
TIMES INC.?**

PLEADINGS

CONTENTION I - THE CONVICTION IS UNREASONABLE AS 'MENS REA' & 'ACTUS REUS' IS ABSENT.

It is humbly submitted that the conviction of accused is '*unreasonable*'¹ as-

[I.1] THERE IS ABSENCE OF REQUISITE MENS REA.

It is submitted that *mens rea* literally means 'guilty mind'.² All offences require proof of blame worthy mind³ and in the present case, there is absence of *mens rea* because -

[I.1.A] *The accused is a man of good character and repute.*

It is submitted that character becomes conclusive & material consideration in determination of guilt⁴ & in judging his innocence.⁵ As per *Wigmore*,⁶ *the evidentiary value of character includes examining and indicating the extent of likelihood of commission of crime.* The evidence of good character, if satisfactorily proved must be considered in determining the guilt beyond reasonable doubt.⁷ The present case states that the accused is a luminary; a wealthy & Nobel prize winner scientist who holds several patents and enjoys good reputation.⁸

[I.1.B] *The accused has clean records.*

It is further submitted that the accused has an illustrious career, although an internal inquiry took place against him for possessing marijuana but was held inconclusive.⁹ Therefore, in absence of any conclusive proof, it is his common law right to be presumed innocent unless proven guilty.¹⁰ Hence, in the present case, it is evident that the accused has clean records.

[I.1.C] *The accused has denied involvement in methamphetamine production in video tape.*

It is submitted that in the most relied evidence, i.e. the video tape, the accused has not only denied any links to the sale and production of methamphetamine¹¹ (hereinafter referred as meth)

¹ Section 385(1AA), Polkramian Criminal Procedure Code, 2006.

² THE DIGEST 17 (1st ed., Vol 14 (2), London Butterworths & Co. Ltd. 1993).

³ DAVID ORMEROD, SMITH & HOGAN CRIMINAL LAW 45 (12th ed. Oxford Press 2008).

⁴ JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 1456 (Vol. IA, Wolters Kluwer (India) Pvt. Ltd. 2008).

⁵ Habeeb Mohammad v. State of Hyderabad, AIR 1954 SC 51.

⁶ WIGMORE, *Supra* note 4.

⁷ Emperor v. Khurshid Hussain, AIR 1947 Lah 410.

⁸ Moot Proposition of K.K Luthra Moot Court Competition 2013, ¶ 4. (Hereinafter referred as moot problem).

⁹ *Id.*

¹⁰ Coffin v. U.S., 156 U.S. 432 (1894).

¹¹ Refer Moot Problem, ¶ 9.

but also has specifically mentioned that he has never been tempted for its use.¹² The most relevant portion of the video is unclear & leads to many probable interpretations. One such way is as follows: *Dr. Ibrahimovic – “No, I’ve never been tempted...[Meth is a very harmful drug; you should stay away from it. There is a medicine which is very effective in abstaining from it. I] know where you can get some.”* Hence, it cannot be established that accused is involved into meth.

Thus, none of the facts or circumstances are able to establish the requisite mens rea of accused.

[I.2] THERE IS NO “ACTUS REUS” ON THE PART OF THE ACCUSED.

The physical element of a crime or behaviour connected to the crime is called the *actus reus*.¹³ A person must participate in all the acts necessary to constitute a particular crime in order to be guilty thereof.¹⁴ In the present case, the accused’s conduct in the party & at his laboratory is not enough to constitute the *actus reus* for the attempt of sale and manufacture of meth as-

[I.2.A] *Requisite ingredients for the manufacture of methamphetamine are absent.*

It is most humbly submitted that production of meth involves reaction of iodine with hydrochloric acid to obtain hydriodic acid, which reduces pseudoephedrine to meth in presence of red phosphorus¹⁵. Since the chief ingredients for manufacture of meth i.e. Iodine & Hydrochloric acid were not found, hence, manufacture was impossible.

[I.2.B] *The chemicals recovered are non-controlled substances used commonly in respiratory and nasal medicines.*

It is humbly submitted that the chemicals found in accused’s possession are commonly used in respiratory and nasal medicines. Red Phosphorous is an ordinary lab reagent used for their preparation¹⁶ and Pseudoephedrine, is used to relieve nasal congestion, allergies, hay fever and sinus. It is used in many general medicines like Paracetamol, Aspirin, Ibuprofen,¹⁷ and is not prohibited under the Polkranian Narcotic Drugs Act, 2006.

¹² *Id.*

¹³ DAVID ORMEROD, SMITH AND HOGAN CRIMINAL LAW 42 (12th ed., Oxford 2002).

¹⁴ *Scott v. Com.*, Ky. 353, 197 S.W. 2d 774 (1946).

¹⁵ *Drug Enforcement Administration, Statistical Reports, 1989*, bjs.ojp.usdoj.gov/content/pub/pdf/dcf.pdf (Sept 20, 2012).

¹⁶ Charles Salocks & Karlyn Black Kaley, *Technical Support Document: Toxicology Clandestine Drug Labs/ Methamphetamine/Red Phosphorus*, oehha.ca.gov/.../TSD%20Red%20Phosphorus%20Meth%20Labs%20 (Sept 20, 2012).

¹⁷ <http://heterodoxy.cc/meowdocs/pseudo/pseudosynth.pdf> (Sept 20, 2012).

[I.2.C] The actions of the accused do not constitute an attempt to manufacture meth.

It is further submitted that under Polkranian Penal Code,¹⁸ to establish attempt of illicit preparation of drugs, intent to manufacture the drugs and the performance of overt or substantial acts towards manufacture¹⁹ has to be proved, which has failed to consummate.²⁰ According to *Halsbury's Law of England*, the requirement of overt act cannot be satisfied by preparation alone,²¹ and in the present case, no overt act has been done by the accused to constitute attempt. It should not be remotely connected,²² because it would not to be considered as attempt.²³ If at all we assume that the accused was attempting to manufacture 'meth', but from the facts it can be concluded that he had, at the most reached the stage of 'preparation' and not 'attempt'. Therefore, it is pleaded before this honourable court that, as attempt is not established, the arrest made when the accused was in the stage of preparation was unjust.

[I.3] THERE IS NO COINCIDENCE BETWEEN ACTUS REUS AND MENS REA.

It is mandatory that the *mens rea* must coincide in point of time with the act and causes the *actus reus*.²⁴ It has been held in an Indian²⁵ and a Rhodesian case²⁶ that if there were two acts and the first act, though accompanied by the *mens rea* did not lead to the commission of the crime, whereas the second act, not accompanied by the *mens rea* caused the injury, the accused must be acquitted. In the instant matter, neither there is coincidence between the two, nor there is the commission of *actus reus*.

CONTENTION II – CONVICTION SHOULD BE SET ASIDE ON THE GROUNDS OF INCONCLUSIVENESS & INADMISSIBILITY OF EVIDENCE & ABUSE OF PROCESS.

It is submitted that the conviction of the accused should be set aside because there is grave disregard to the evidence and right to fair trial of the accused as-

[II.1] THE EVIDENCE OF VIDEO TAPE IS NOT ADMISSIBLE.

It is humbly submitted that in order to be admissible, the recording should be relevant,²⁷ authentic²⁸ & untampered²⁹ and in the absence of evidence of any such conversation, the tape

¹⁸ Section 321, 322, The Polkranian Penal Code, 2006.

¹⁹ State v. Stensaker, 2007 ND 6.

²⁰ CORPUS JURIS SECUNDUM ¶ 267 (Thomson West 2006).

²¹ State v Brenn, 138 N.M 451.

²² Section 322, The Polkranian Penal Code, 2006.

²³ THE DIGEST 556 (1st ed., Vol 15 (1), London Butterworths & Co. Ltd. 1993).

²⁴ R v. Jakeman, 1983 Crim LR 1983.

²⁵ R v. Khandu, (1890) ILR 15 Bom 195.

²⁶ R v. Shorty, [1950] SR 280.

²⁷ The State v. Ravi alias Munna, (1999) DLT 730.

recorded conversation is indeed no proper evidence and cannot be relied upon.”³⁰ In the present case, the video tape evidence is not admissible because-

[II.1.A.] *The video tape is not relevant piece of evidence with regard to the fact in issue.*

It is humbly submitted that the evidence offered must be relevant to the fact in issue.³¹ The video clip evidence in present case offers no relevant piece of evidence as-

[II.1.A.1] *The model inhaling cocaine has no connection with production & sale of meth.*

Wigmore³² says, anything which is neither directly or indirectly relevant & has no connection with the principal transaction is ought to be put aside. The impugned video contains clippings like model inhaling cocaine on the bonnet of her car in an unidentified driveway,³³ has no connection with the charges on the accused.³⁴ Hence it is irrelevant and vexatious.

[II.1.A.2] *The conversation regarding marijuana has no relation with the present matter.*

It is respectfully submitted that too remote fact furnishing fanciful analogy³⁵ or conjectural inference³⁶ should be rejected. The video clip shows the conversation where journalist is consistently making inquiries regarding marijuana, and his past inconclusive inquiry. If at all the accused possessed marijuana but it has no connection with the present case. Further, charges do not pertain to production & sale of marijuana, therefore, whole conversation is irrelevant.

[II.1.B] *Recording was not authentic.*

It is respectfully submitted that the recording which is offered as evidence, only when properly authenticated³⁷ is admissible evidence.³⁸ As formulated in *Steve M. Solomon, Jr., Inc. v. Edgar*³⁹ and affirmed in several cases,⁴⁰ a recording is authentic if is proved to the satisfaction of the court that the device was capable of taking testimony, the operator of the device was competent to operate the device, correctness of the recording is established, tampering have not been made, safe preservation of the record must be shown & testimony elicited was voluntarily

²⁸ United States v. Caceres, 440 U.S. 741, (1979).

²⁹ R.K. Anand v. Registrar, (2009) 8 SCC 106.

³⁰ Rupchand v. Mahabir Prasad, AIR 1956 Punj. 173.

³¹ R. v. Gadsby, [2005] EWCA Crim 3206.

³² JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 193 (Vol. VII, Wolters Kluwer (India) Pvt. Ltd. 2008).

³³ Refer Moot Problem, ¶ 9.

³⁴ Refer Moot Problem, ¶ 12.

³⁵ WIGMORE, *Supra* note 32.

³⁶ Jetharam v. State of Rajasthan, AIR 1979 SC 22.

³⁷ United States v. White, 401 U.S. 745, 746–50 (1971).

³⁸ United States v. McKeever, 169 F. Supp. 426, (S.D.N.Y. 1958).

³⁹ 88 S.E.2d 167 (Ga. Ct. App. 1955); State v. Cannon, 92 N.C. App. 246.

⁴⁰ United States v. Branch, 970 F.2d 1368, 1371–72 (4th Cir. 1992); Commonwealth v. Brinkley, 362 S.W.2d 494; United States v. Starks, 515 F.2d 112, 121 (3d Cir. 1975).

made, without duress.⁴¹ In the instant matter the video recording is not authentic because-
[II.1.B.1] The video recording lacked audibility & intelligibility.

It is most humbly submitted that audibility & intelligibility of the recording relates to whether the listener is able to hear and understand what is on the recording.⁴² The voice of the speaker should be clearly audible and not lost or distorted by other sounds or disturbances.⁴³ The offering party has the initial burden of establishing a recording's audibility and intelligibility. In *People v. Feld*,⁴⁴ it was enunciated that “the court must be given to hold in their hands a transcript as they listened to the playback of the records.” Even Common law dictates that, a transcript “mirrors the tape”⁴⁵ and contains only what can actually be heard on the recording.⁴⁶ Since the video is grainy & unclear with no reference to any transcripts provided. It should not be considered as intelligible and audible.

[II.1.B.2] Safe custody is not established on the part of prosecution.

It is further contended that it was categorically held in the case of *Ram Singh v. Col. Ram Singh*⁴⁷ that the recording must be carefully sealed and kept in a safe or official custody. A chain of custody which establishes the “reasonable probability that no tampering has occurred” is to be shown.⁴⁸ In case of *R v. Stevenson*,⁴⁹ it was held that when safe custody & preservation is not proved then for a judge there is no alternative but to reject the evidence.⁵⁰ The facts state that tapes were sent to police through “proper channel”. But they nowhere state that the tapes were kept far from the reaches of the other officials of Polkranian Times Inc. and were in absolute isolation. Since, the CEO of Polkranian Times Inc. is a party to the present case, the tapes may have reached to the hands to wrong hands. Thus, there is a fair chance of evidence being tampered and hence safe custody and preservation is not established.

[II.1.C] The video clip is tampered.

The Court must be satisfied beyond reasonable doubt that the recording has not been tampered

⁴¹ *Alonzo v. State*, 219 So. 2d 858, 878; *Lamar v. State*, 282 N.E.2d 795, 797, 800; *United States v. Biggins*, 551 F.2d 64, 66 (5th Cir. 1977); *Adams v. State*, 407 P.2d 169, 173.

⁴² *State of North Carolina v. Michael Odell Sibley*, 140 NC App 584 (99-1206) 11/21/2000.

⁴³ *State Tr. P.S. Lodhi Colony New Delhi v. Sanjeev Nanda*, 2012 (7) SCALE 120.

⁴⁴ 641 N.E.2d 924 (1994).

⁴⁵ Clifford S. Fishman, *Recordings, Transcripts, and Translations as Evidence*, 81 WASHINGTON LAW REVIEW 473, (2006).

⁴⁶ *United States v. Font-Ramirez*, 944 F.2d 42, 48 (1st Cir. 1991); *People v. Rao*, 386 N.Y.S.2d 441.

⁴⁷ AIR 1986 SC 3.

⁴⁸ *People v Mcgee*, 399 N.E 2d 123, (N.Y App. Div. 1979).

⁴⁹ 1971 (1) All ER 678.

⁵⁰ *R v. Stevenson*, 1971 (1) All ER 678.

with.⁵¹ It should look for independent corroboration and intrinsic evidence before it relies on the tape.⁵² In present case the video tape provided is tampered since-

[II.1.C.1] The clipping has not undergone any forensic testing.

It is submitted that the examination of recorded evidence is necessary for establishing its authenticity.⁵³ The tape has not been subjected to any tampering detection test like physical inspection, critical listening, waveform analysis & spectrograph analysis,⁵⁴ hence the possibility of tampering cannot be ruled out.

[II.1.C.2] Integrity of the video tape has not been established.

It is further submitted that the Supreme Court of India in *Ram Singh v. Col. Ram Singh*⁵⁵ held that every possibility of tampering⁵⁶ with or erasure⁵⁷ of a part of a tape-recorded statement must be ruled out otherwise it may render the said statement out of context and, therefore, inadmissible.⁵⁸ The acceptance of recorded evidence in the court of law depends solely on the establishment of its integrity.⁵⁹ Discontinuity and abnormality are signs of tampering,⁶⁰ which are clearly present in the video tape as *the 45 minutes conversation between the accused and the journalist was reduced to 28 minutes*. Thus, the integrity of video has not been established.

[II.1.C.4] The most relevant part of video is unclear.

In the present matter, the most germane 30 seconds of the video on which the prosecution has vehemently relied is ambiguous and unclear.⁶¹ Thus, convicting anyone for a serious offence like this on the basis of such vague evidence is not only unjust but illegal as well.

[II.1.C.5] The unnatural sequence of video clip suggests tampering.

It is further contended that the impugned video recording contains several unnatural sequenced footages cobbled together to give an incomplete picture.⁶² The unnatural sequence of events on the videotape permits the judge to conclude that the tape was distorted.⁶³ In the instant matter, the video contains several small clips joined together having no reasonable connection.

⁵¹ Yusufalli Esmail Nagree v. State of Maharashtra, AIR 1968 SC 147.

⁵² http://article.wn.com/view/.../Verdict_in_Tehelka_sting_case_on_April_27 (Sept 19, 2012).

⁵³ *Detection Technique of Video Tape Alteration on the Basis of Sound Track Analysis*, THE INDIAN POLICE JOURNAL, July- September, (2004).

⁵⁴ *Authenticity Analysis*, <http://stutchmanforensic.com/Services/20Authenticity%20Analysis.htm> (Sept 18, 2012).

⁵⁵ AIR 1986 SC 3.

⁵⁶ R.M. Malkani v. State of Rajasthan, (1973) 1 SCC 471.

⁵⁷ Ziyauddin Burhanuddin Bukhari v. B.R. Mehra, AIR 1975 SC 1788.

⁵⁸ Ram Singh v. Col. Ram Singh, AIR 1986 SC 3.

⁵⁹ STEPHEN MASON, ELECTRONIC EVIDENCE 129 (2nd ed., LexisNexis Butterworths 2010).

⁶⁰ *Authenticity Analysis*, *Supra* note 54.

⁶¹ Refer Moot Problem, ¶ 9.

⁶² *Id.*

⁶³ Clifford, *Supra* note 45

[II.1.D] *The equipment used for video recording is not authentic.*

[II.1.D.1] *No expert opinion is sought regarding authenticity of equipment.*

It is contended that the problem with the digital evidence is the ease by which evidence can be altered⁶⁴, resulting in errors, inaccuracies, misuse, tampering or bias within visualizations leading to huge miscarriage of justice.⁶⁵ Where the data is stored in separate storage devices such as tapes,⁶⁶ then only digital evidence specialist may be able to detect intentionally hidden data which cannot be seen without the use of an appropriate disk diagnostic tool.⁶⁷ In the present case, the video clip has not undergone any such expert diagnosis. Hence, reliance made on such undiagnosed untested evidence will cause grave injustice to the accused.

[II.1.D.2] *Authenticity of device is not established.*

It is further submitted that Lord Griffith in *Cracknel v. Willis*⁶⁸ held that the trial by machine is entirely a nascent concept and should be applied with a degree of caution.⁶⁹ Machine presumed to have worked correctly is somewhat rash assumption.⁷⁰ Relying party is required to discharge the legal burden in relation to the reliability and authenticity of machines.⁷¹ The other party can challenge the accuracy of the statements by proposing the exhibited faults, errors or other forms of failure that might have affected the integrity of evidence and its reliability.⁷² In the present case, the proper working of video camera and software used in its making has not been tested. Hence conviction of the accused by relying on an untested electronic device is highly unjust.

[II.1.F] *The prosecution is unable to prove the guilt of the accused beyond reasonable doubt.*

It is submitted that as per the Polkranian Law, the burden of proof lies on the prosecution to establish the guilt of the accused beyond reasonable doubt. *Halsbury's Laws of England maintains that prosecution should prove to full criminal standards any fact essential to admissibility of evidence.*⁷³ The abovementioned arguments do prove that there lies a reasonable doubt in all the charges framed against the accused. Thus, the conviction should be set aside.

⁶⁴ STEPHEN MASON, ELECTRONIC EVIDENCE 59 (2nd ed., LexisNexis Butterworths 2010).

⁶⁵ Thomas L. Bohan, 'Computer-Aided Reconstruction: Its Role In Court', *Ancient Reconstruction: Technology And Animations* SOCIETY OF AUTOMOTIVE ENGINEERS, 179-186 (1991).

⁶⁶ MASON, *Supra* note 64 at p. 90.

⁶⁷ *Id.*

⁶⁸ [1988] 1AC 450.

⁶⁹ *Cracknel v. Willis*, [1988] 1AC 450.

⁷⁰ MASON, *Supra* note 66.

⁷¹ *Mckeown v DPP*, [1995] Crim LR 69.

⁷² Henriette Picot & Marlene Kast, *Digital Evidence and Electronic Signature* 5 LAW REVIEW, 108-109 (2008).

⁷³ HALSBURY'S LAWS OF ENGLAND 1374 (5th ed., Vol. 11.3, LexisNexis Butterworths 2010).

[II.2] STATEMENT OF WITNESS IS NOT ADMISSIBLE

It is humbly submitted that the testimony which is based on speculations & conjectures of witness is inadmissible.⁷⁴ Further, *Halsbury's Laws of England* maintains that a testimony which is mere guess, opinion or belief of one which produces speculative inference is irrelevant and should be excluded.⁷⁵ In the present case, the statement of witness during the cross examination failed to establish anything substantial in the unclear 30 seconds of video and also the speculation about withholding the evidence makes it inadmissible.

[II. 3] STING OPERATION DONE BY TORRESENIK TODAY IS NOT LEGALLY VALID.

[II.3.A] *Torresenik Today did not have a bona fide intention to carry out sting operation.*

It is respectfully submitted that the Apex Court of India recently deprecated the validity of sting operations if it is carried out in private interest⁷⁶ or for an ulterior purpose of either raising the TRP of the channel or source of minting money.⁷⁷ In the matter at hand, the sting operation was carried solely for purpose of defaming the accused which is very clearly evident from the facts of the case, and therefore, invalid. They also had an inner motive to get higher TRP by falsely accusing an individual⁷⁸ which could be manifested from the statement of the journalist given during his cross-examination. The facts state that he had no explanation for why they did not report the matter to the police earlier. The unexplained failure of a party to produce relevant evidence, in his or her possession or control, gives rise to an adverse inference⁷⁹ that the intention of such party is malicious.⁸⁰

In the present matter, the journalist was an employee of Torresnik Today which is owned by Polkranian Times Inc. which has a reputation of being the mouthpiece of the ruling 'Polkranian Peoples' Party' and it often contains critical pieces targeting those who opposed the ruling party. It also frequently contained articles and cartoons ridiculing the accused.⁸¹ Thus, the journalist had a private interest in undertaking such action.

⁷⁴ AMERICAN JURISPRUDENCE 322 (2nd ed., Vol. 29, Thomson Reuters 2011).

⁷⁵ HALSBURY'S, *Supra* note 73.

⁷⁶ John W. Thornton, Expanding Video Tape Techniques in Pretrial and Trial Advocacy, 9 FORUM 105 1973-1974.

⁷⁷ R.D. Bohet, Ex-Dy. Supdt. Gr.-I, Central Jail v. Lt. Governor of Delhi, Govt. of NCT of Delhi, CAT (Principal Bench), Decided On: 24.11.2006 (Unreported).

⁷⁸ Saurabh Gaur, *Essay on Sting Operations Exposing Corruption or Just Increasing TRP's*, <http://www.preservearticles.com/201108019700/634-words-essay-on-sting-operations-exposing-corruption-or-just-increasing-trps.html> (Sept 20, 2012).

⁷⁹ CORPUS JURIS SECUNDUM 333 (Vol. 31A, Thomson West 2006).

⁸⁰ Clay v. United Parcel Service, Inc., 501 F.3d 695 (6th Cir. 2007); Everest Capital Ltd. v. Everest Funds Management, L.L.C., 393 F.3d 755 (8th Cir. 2005); Singh v. Gonzales, 491 F.3d 1019 (9th Cir. 2007). Carson v, Burlington Northern, Inc., 52 FRD 492 (D. Neb. 1971).

⁸¹ Refer Moot Problem, ¶ 3.

[II.3.B] *Torresenik Today has no authority to do sting operation.*

Further it is submitted that prior permission has not been obtained for carrying out the sting operation and it is falsely claimed by the news channel that the police had been informed about the sting operation because the police had clearly stated in the facts⁸² that the CEO of Polkranian Times Inc. had informed them about the involvement of the accused into drugs the day previous to the day when the accused was arrested on the basis of such information.⁸³ Hence, Torresenik Today was not authorized by the police for doing sting operation.

[II.3.C] *Journalist acted as Agent provocateur to entrap the accused.*

If at all, permission was sought then also, it is most courteously contended that the sting operation amounts to entrapment as the following three conditions are fulfilled: *Firstly, the idea for committing the crime came from the agent and not from the person accused. Secondly, agent then persuaded or talked the person into committing the crime and thirdly, the person was not ready and willing to commit the crime before interaction with the agent.*⁸⁴

In the present case, Journalist acted as Agent provocateur as he tried to make the commission of the alleged offence easier and more attractive by deliberately involving in discussion, secondly, he somehow encouraged the infraction so that the accused can be convicted and penalized and forced the accused to act illegally/immorally, or be tempted into doing something wrong, and thirdly, where the accused did not intend to do so and blatantly refuted his interest and involvement in the manufacture and sale of methamphetamine.

[II.3.D] *Evidence from such entrapment is not admissible.*

It is humbly put forwarded that in *R v. Sang*,⁸⁵ it was observed that exclusion of evidence may only be ordered if the accused has been lured into incriminating himself by deception.⁸⁶ An agent provocateur is certainly an interested witness in the sense that he is interested to see that the trap laid by him succeeded⁸⁷ and it would not be safe to rely upon such evidence without corroboration.⁸⁸

The evidence obtained by means of entrapment is barred if it is unconstitutionally secured⁸⁹ and in the immediate matter, the evidence was obtained by infringing the right to privacy of the

⁸² Refer Moot Problem, ¶ 8.

⁸³ *Id.*

⁸⁴ Bruce Hay, *Sting Operations, Undercover Agents and Entrapment*, [http:// www.law.harvard.edu/programs/olin_center/](http://www.law.harvard.edu/programs/olin_center/) (Sept 20, 2012).

⁸⁵ (1979) 2 All E.R. 1222.

⁸⁶ *R. v. Christou*, (1992) 4 All E.R. 559.

⁸⁷ DeFeo Michael, *Entrapment as a defence to Criminal Liability*, 1 UNIV. SAN FRANCISCO L. REV. 243.

⁸⁸ *Bhanuprasad Hariprasad Dave and Anr. v. State of Gujarat*, (1965) GLR 958.

⁸⁹ *Fresneda v. State*, 483 P.2d 1011 (1971); *State v. Fuller*, 15 Kan. App. 2d 34, 802 P.2d 599 (1990).

accused which is constitutionally guaranteed by the Bill of Rights.⁹⁰ Thus, the evidence received through such sting operations is not admissible.

[II.4] STING OPERATION, IN THE PRESENT CASE AMOUNTS TO ‘ABUSE OF PROCESS’.

It is submitted that entrapment and the use of evidence obtained by entrapment may deprive a defendant of the right to a fair trial⁹¹ and amounts to abuse of process.⁹² In *R v. Shannon*,⁹³ the court accepted that evidence may properly be excluded when the behavior of the police or prosecuting authority has been such as to justify a stay on grounds of abuse of process. In *Madan Lal v. State of Punjab*,⁹⁴ where the magistrate framed charges against the petitioner for the production and sale of drugs, without following proper procedure was held to be an abuse of process. In New Zealand, the court has an inherent jurisdiction to exclude evidence so as to prevent an abuse of process by the avoidance of unfairness.⁹⁵

It is further submitted that the accused was arrested on the morning of 21st January, however, his trial began on 10th February; which is in clear violation of his fundamental rights enshrined in the Bill of Rights of the Constitution of Polkaine.⁹⁶ Not only the accused was brought before the court way beyond the *permissible time of 48 hours*, but no explanation was provided for the same. Also there was no mention of any arrest warrant for the accused when the police raided the premises of his laboratory⁹⁷ and thus the abovementioned facts indicate that there was clear abuse of the investigative and judicial process and therefore the conviction should be set aside.

Hence, it is concluded that the verdict of trial of court is based upon irrelevant, unauthentic & tampered evidence which is obtained out of an invalid sting operation where the accused has been entrapped deliberately amounting to abuse of process. Thus, there is an evident disregard to evidence, hence, it satisfies ground for setting aside conviction u/s. 385(1AA)(a).

CONTENTION III: INTERFERENCE OF MEDIA AMOUNTS TO DENIAL OF FAIR TRIAL AND GROUND FOR CONTEMPT OF COURT.

⁹⁰ Section 14, Bill of Rights.

⁹¹ Teixeira de Castro v. Portugal, (1998) 28 EHRR 101.

⁹² Chris Taylor, *Entrapment: Abuse of Process*, J. CRIM. L. 2005, 69(5), 380-384.

⁹³ [2001] 1 WLR 51.

⁹⁴ 1982 C.L.J. (Cr.) 33.

⁹⁵ Police v. Lavalle, [1979] 1 NZLR 45.

⁹⁶ Section 35(1) (d), Bill of Rights.

⁹⁷ Refer Moot Problem, ¶ 8

It is humbly submitted before this honourable court that Article 11 and 10 of the Bill of Rights guarantee the Right to life and its dignity be protected. Although Article 16⁹⁸ does provide the Freedom of expression to the citizens and the media, but the term has its limitations and that has been concurred by many common law countries.⁹⁹

In recent times, there have been numerous instances worldwide in which ‘media trial’ of the accused has been conducted and verdict passed even before the court passes its judgment.¹⁰⁰ Trial¹⁰¹ means the process of justice, the formal judicial examination of evidence and determination of legal claims in an adversary proceeding.

In *Zahira Habibullah Sheikh v. State of Gujarat*,¹⁰² popularly known as the ‘Best Bakery Case’, the Supreme Court of India explained that a “*fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor, atmosphere of judicial calm uninfluenced newspaper dictation or popular clamor*”.

The problem is more visible when the matters involve big name and celebrities. In such cases media reporting can swing popular sentiments either way.¹⁰³ It is, thus, necessary to make a balance between the right of free media on one hand and the right to fair trial on the other.

Since Dr. Ibrahimovic is a well known figure who is pleading his innocence in a very serious offence, his case should not be jeopardized by the malicious media reports which are not only interfering in the administration of justice but are valid grounds of initiation of contempt proceedings.

[III.1] THE MEDIA IS PREJUDICING THE TRIAL AND INVESTIGATION PROCESS.

When all the media reports are flooding the television and the newsstands, it is a fallacy to say or to assume that the presiding judge is a person who cannot be affected by outside information. In Lord Hemphrey’s views:

*“He (judge) is a human being and it is not likely that any judge would give a decision which he would not have given but for information which had been improperly conveyed to him, it is embarrassing to the judge that he should be told matters which he would much rather not hear and which make it much more difficult for him to do what is his duty.”*¹⁰⁴

⁹⁸ Section 16, Bill of Rights.

⁹⁹ D.D BASU, LAW OF THE PRESS 20 (5th ed., LexisNexis Butterworths 2010); *R. v. Dean of St. Asaph*, (1784) 3 TR 428.

¹⁰⁰ *Sahara v. SEBI*, I.A. Nos. 14 and 17 in C.A. No. 733 of 2012.

¹⁰¹ BRYAN A. GARNER, BLACK’S LAW DICTIONARY 1644(8th ed. 2004).

¹⁰² *Zahira Habibullah Sheikh v. State of Gujarat*, (2004) 4 SCC 158; *Cooper v. People*, (1889) 6 Lawyers Report Annotated 430(B).

¹⁰³ *Binayak*, *Freedom of Expression with particular reference to freedom of the Media*, 2 SCC (JOUR) 1(1982).

¹⁰⁴ *R v. Davies*, (1945) 435 (K.B.). See also *Attorney General v. BBC* (1980) 3 All E R 161.

In *Saibal Kumar v. B.K. Sen*,¹⁰⁵ the Indian Supreme Court tried to discourage the tendency of media trial and remarked, “No doubt, it would be mischievous for a newspaper to systematically conduct an independent investigation into a crime for which a man has been arrested and to publish the results of the investigation. The basis for this view is that such action on the part of a newspaper tends to interfere with the course of justice, whether the investigation tends to prejudice the accused or the prosecution.”

In *M.P. Lohia v. State of West Bengal*,¹⁰⁶ the same Court has strongly deprecated the media for interfering with the administration of justice by publishing one-sided articles touching on merits of the *sub judice* matter.

Therefore, in the instant matter, the scurrilous attacks by the Polkranian Times and the Torresnik Today, on the accused are prejudicing the trial and interfering in the administration of justice.

[III.2] THE COMMON LAW “RIGHT OF PRESUMPTION OF INNOCENCE” HAS BEEN VIOLATED BY THE MEDIA.

Presumption of innocence, which derives its source from the common law,¹⁰⁷ is the basis of criminal jurisprudence and it is an essential component of any judicial system that the accused should receive a fair trial.¹⁰⁸

Prejudicing fair trial through publication is a test of contempt of court which is adopted from common law of England.¹⁰⁹ Fair trials and public confidence in the courts, as the proper forum for settlement of disputes as part of the administration of justice, under the common law, were given greater weight than the goals served by unrestrained freedom of the press.¹¹⁰ According to Article 6(2) of the European Convention of Human Rights, presumption of innocence needs to be protected. The *German Courts* have accordingly underlined the need to balance the presumption of innocence with freedom of expression based on employment of the above normative parameter of *presumption of innocence*. *France and Australia* have taken a similar stance.¹¹¹

Thus, based on this common law approach, the trial shouldn't be in an atmosphere where the media has presumed the accused guilty and is adjudicating the case itself rather than mere reporting it.

[III.3] THE RIGHT OF FAIR TRIAL HAS BEEN VIOLATED BY MEDIA.

¹⁰⁵ 1961 SCR (3) 460.

¹⁰⁶ AIR 2005 SC 790.

¹⁰⁷ Sahara, *Supra* note 100.

¹⁰⁸ Article 34 & 35, Bill Of Rights; Anukul Chandra Pradhan v. Union of India, (1996)6 SCC 354.

¹⁰⁹ St. James Evening Post, *Infra* note 123.

¹¹⁰ Sahara, *Supra* note 100.

¹¹¹ *Id.*

[III.3.A] There is a violation of Human Rights by media.

The Universal Declaration of Human Rights¹¹² provides for “full equality to a fair and public hearing by an independent and impartial tribunal.” The European Convention on Human Rights¹¹³ and the International Covenant for protection of Civil and Political Rights¹¹⁴ provide for the same. With its constant attacks on the accused with two hour ‘special’ programmes and so called ‘explosive’ stories;¹¹⁵ the media is taking away his right of trial in an unprejudiced manner.

[III.3.B] There is a violation of Fundamental Rights of the accused.

It is further submitted that the Constitution of Polkraine guarantees that the State must *respect, promote, protect and fulfil* the Bill of Rights.¹¹⁶ Polkranian Times Inc. being 90% state owned¹¹⁷ and controlled thus, falls within the definition of ‘State’¹¹⁸ and has the same abovementioned responsibilities which have been vehemently omitted by them.

Not only have they denied the accused a ‘fair trial’¹¹⁹ by publications and TV shows against him during the pendency of the trial but also created a partial clamour against him. Polkranian Times Inc. has been after the accused from long before the trial started and have been ridiculing him in their newspaper¹²⁰ due to his associations with the opposition party and its leaders; denying him his fundamental rights of political freedom¹²¹ and association.¹²² Thus, the malice could easily be inferred from their conducts which is now at a stage of grave denial of fundamental rights of the accused who is not only an informed citizen of the country but also a medical luminary.

[III.4] INTERFERENCE OF MEDIA IN ADMINISTRATION OF JUSTICE IS A GROUND TO INITIATE CONTEMPT OF COURT PROCEEDINGS.

Prejudicing fair trial as an instance of contempt of court was first recognized by Lord Hardwicke L.C. in *St. James Evening Post*¹²³ case and has been subsequently followed by the English courts¹²⁴ and also by the Privy Council.¹²⁵

¹¹² Article 10, UDHR.

¹¹³ Article 6, ECHR.

¹¹⁴ Article 15, ICCPR.

¹¹⁵ Refer Moot Problem, ¶ 9.

¹¹⁶ Section 7(2), Bill of Rights.

¹¹⁷ Refer moot problem ¶ 5.

¹¹⁸ Article 8, International Law Commission; MALCOLM SHAW, INTERNATIONAL LAW 704 (5th ed., Cambridge University Press 2005).

¹¹⁹ Section 34, Bill of Rights.

¹²⁰ Refer Moot Problem ¶ 9.

¹²¹ Section 19(1)b, Bill of Rights.

¹²² Section 18, Bill of Rights.

¹²³ (1742) 2 Atk. 469.

¹²⁴ Attorney General v. Sports Newspapers Ltd. & Ors., [1992] All.E.R. 503; Miller v. Knox, 132 E.R. 915; Reg. v. Grey, (1900) 2 Q.B. 36.

If a citizen, in the garb of exercising the right of free expression tries to scandalize the court or undermines the dignity of the Court, then the Court would be entitled to exercise the power under contempt provision.¹²⁶

Public interest demands that there should be no interference with the judicial process and the judicial decision should not be coerced by publications.¹²⁷ In fact, it was held by the Indian Supreme Court¹²⁸ that public interest, public welfare and good intention need not be looked into for ascertaining whether a publication interferes with the due and proper course of administration of justice. In *R.K. Anand's case*¹²⁹, the Supreme Court of India observed that the media is not free to publish any kind of report concerning a *sub-judice* matter. More or less on similar lines, the same Court commented in *Manu Sharma's case*¹³⁰ that trial by media should be avoided particularly at a stage when the suspect is entitled to the constitutional protections. Invasion of his rights is bound to be held impermissible.¹³¹

It was further held by the Supreme Court in the case of *A.K. Gopalan v. Noordeen*¹³² that a publication made after 'arrest' of a person could be contempt if it was prejudicial to the suspect or accused.¹³³ No editor has the right to assume the role of an investigator to try to prejudice the court against any person.¹³⁴ Parties have a constitutional right to have a fair trial.¹³⁵ It is held by the Indian Supreme Court in *P.C. Sen (In re:)*¹³⁶, that: "*Tending to influence the result of a pending trial is a grave contempt. The question is not whether the publication does interfere but whether it tends to interfere with due course of justice. It is not the intention of the press but how it tends to interfere with the administration of justice.*"

Former Chief Justice of India, *Hidayatullah, J.* had said¹³⁷:

"While fair and temperate criticism of this court of any other court even if strong, may not be actionable, attributing improper motives or tending to bring judges or courts into hatred and contempt or obstructing directly or indirectly within the functioning of courts is serious contempt of which notice must and will be taken"

¹²⁵ *Andre Paul Terence Ambard v. Attorney General Trinidad & Tobago*, AIR 1936, PC 141; *Debi Prasad v. Emperor*, AIR 1943 PC 202; *Hindustan Times v. State of U.P.*, (2003) 1 SCC 591.

¹²⁶ *Arundhati Roy, In re*, AIR 2002 SC 1375.

¹²⁷ *Reliance Petro Chemicals Ltd. v. Proprietors of Indian Express Newspaper Bombay Ltd.*, AIR 1989 SC 190.

¹²⁸ *Sunnulal Badha Vallabha v. Yeshwant Singh*, 1952 Cri.L.J 632.

¹²⁹ *R.K. Anand*, *Supra* note 29.

¹³⁰ *Manu Sharma v. State (NCT Of Delhi)*, SC Criminal Appeal No. 157 of 2007.

¹³¹ *Id.*

¹³² 1969 (2) SCC 734.

¹³³ *R v. Evening Standards Co.*, (1954) 1 All Eng.Rep.1026.

¹³⁴ *D.M. v. MA Hamid Ali Gardish*, AIR 1940 Oudh 137.

¹³⁵ *Zahira*, *Supra* note 101.

¹³⁶ AIR 1970 SC 1821.

¹³⁷ *E. M. Sankaran Namboodiripad v. T. Narayanan Nambiar*, 1971 SCR (1) 697.

Thus, in the instant matter, the Polkranian Times Inc., its CEO and the Managing Editors have prejudiced a *subjudice* matter and in all possibility have interfered in the administration of justice and denied a fair trial to the accused. Their editorial was a perfect example of scandalous attack on the judiciary and the reason why the trial judge left the case on the grounds of being ‘*compromised*’ should clearly be attributed to it. Therefore, it is humbly pleaded before the court to take into account all the fulfilled grounds of the contempt of court by the Polkranian Times Inc. and initiate contempt proceedings against them.

PRAYER FOR RELIEF

Wherefore, in the lights of facts stated, issues raised, arguments advanced and authorities cited, it is most humbly prayed and implored before the Hon’ble Court of Appeals, that it may be graciously pleased to adjudge and declare:

- a) Dr Ibrahimovic is not liable for attempt of manufacture & sale of methamphetamine, is therefore entitled to be acquitted.
- b) Contempt proceeding should not be initiated against Polkranian Times Inc., its CEO and Managing Editors of Polkranian Times & Torresnik Today.

And pass any other order that it may deem fit in the favour of accused in ends of equity, justice & good conscience.

All of which is most humbly and respectfully submitted.

Place: Torresenik, Polkkraine

s/d

Date: 29th/September/2012

COUNSEL FOR APPELLANT