Babulal Bhagwan Khandare & Anr vs State Of Maharashtra on 2 December, 2004

Equivalent citations: AIR 2005 SUPREME COURT 1460, 2004 AIR SCW 7376, 2005 CRI LJ (NOC) 42, 2005 (1) SRJ 577, 2004 (10) SCALE 188, 2004 (8) ACE 659, 2005 (10) SCC 404, 2005 SCC(CRI) 1553, 2004 (7) SLT 357, (2005) 26 ALLINDCAS 413 (SC), (2005) 1 JCR 459 (ALL), (2004) 24 ALLINDCAS 194 (ALL), (2004) 50 ALLCRIC 526, (2004) 115 DLT 670, (2005) 1 CRIMES 58, (2005) 79 DRJ 159, (2005) 1 CHANDCRIC 1, (2005) 1 EFR 78, (2005) 2 EASTCRIC 118, (2005) 30 OCR 150, (2005) 1 RECCRIR 137, (2005) 1 SCJ 213, (2004) 4 CURCRIR 351, (2005) 1 UC 364, (2005) 1 KCCR 473, (2005) 51 ALLCRIC 470, (2005) 1 ALLCRILR 636, (2004) 8 SUPREME 686, (2005) 1 ALLCRIR 163, (2004) 10 SCALE 188, 2005 (1) ANDHLT(CRI) 178 SC, (2005) 1 ANDHLT(CRI) 178

Author: Arijit Pasayat

Bench: Arijit Pasayat, S.H. Kapadia

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           CASE NO.:
Appeal (crl.)  1403 of 2004

PETITIONER:
Babulal Bhagwan Khandare & Anr

RESPONDENT:
State of Maharashtra

DATE OF JUDGMENT: 02/12/2004

BENCH:
ARIJIT PASAYAT & S.H. KAPADIA

JUDGMENT:
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J U D G M E N T (Arising out of SLP (Crl.) No. 880/2004 ARIJIT PASAYAT, J.

Leave granted.

Appellants question correctness of the judgment rendered by a Division Bench of the Bombay High Court, Nagpur Bench upholding their conviction for offences punishable under Sections 302 and 307 read with Section 34 of the Indian Penal Code, 1860 (in short the 'IPC'). For the former offence each was sentenced to undergo imprisonment for life and to pay a fine of Rs.500/- with default

stipulation and seven years' rigorous imprisonment and a fine of Rs.500/- with default stipulation for the latter offence. One Sau Kamal wife of appellant Babulal Khandare was acquitted of all the offences with which she was charged. The appellants were, however, acquitted of the offence of alleged attempt to commit murder of Dinkar Shivaji Wankhede. Prosecution version as unfolded during trial is essentially as follows:

> Deceased Shivaji Natthu Wankhade was the husband of Complainant Vatchalabai (PW-1). Deceased Madhukar Daulat Wankhede and Ramesh Ganpat Wankhede were the nephews of Shivaji and Vatchalabai. Injured Sudhakar (PW-5) is the brother-in-law of Vatchalabai and deceased Shivaji. The houses of the accused persons are situated near the house of complainant Vatchalabai. The accused persons are cobblers and they use Suri (a kind of knife) and Rapi for cutting the skin of cattle required for preparing foot wear.
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> The incident took place on 8.8.1997 which was the day of Nagpanchami festival. On that day at about 04.00 p.m. accused Babulal, accused Nandulal, deceased Madhukar, Dadarao and Arun were playing cards in front of the house of Madhukar. Some verbal exchange took place between accused Babulal and deceased Madhukar. On noticing the same, deceased Shivaji went to intervene and convinced all of them not to quarrel. Thereafter accused Babulal and accused Nandulal as also deceased Madhukar returned to their houses.
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> Later on the same day, around 7.00 p.m. again a verbal exchange took place between accused Babulal, accused Nandulal and deceased Madhukar. At that time also, deceased Shivaji tried to convince all of them not to quarrel as it was a day of festival. Accused Babulal uttered a song containing some filthy words. Deceased Shivaji and Madhukar started returning home. When they were returning home, accused Babulal asked his wife i.e. accused No.3 Sau Kamal to bring Rapi from the house. Accused No.3 rushed into her house, brought Rapi and handed it over to accused Babulal, who tried to conceal the same by holding his hand back. On seeing this, Dinkar (PW-3) gave a word of caution to Shivaji, who turned back. Accused Babulal gave two blows of Rapi on the abdomen of Shivaji. Due to these blows, internal organs of Shivaji came out and he fell on the ground. Dinkar attempted to hold accused Babulal and in that attempt, he sustained injuries to the fingers of his right-hand. As per Vatchalabai (PW-1), accused Babulal gave two blows of Rapi to Madhukar, one on his left leg and the other on his chest. As per Dinkar, accused Babulal gave two blows of Suri to Madhukar, one on his abdomen and the other on his leg. Madhukar fell down in front of his house. The accused Babulal and Nandulal assaulted Sudhakar. Accused Babulal gave a blow of Rapi on the abdomen of Sudhakar and accused Nandulal gave a blow of knife on the chest of Sudhakar. Sudhakar also fell down on the ground. Deceased Ramesh who was present on the spot, said that the accused persons had unnecessarily assaulted innocent persons. Thereupon accused Nandulal assaulted Ramesh with Suri on his abdomen. The internal organs of Ramesh came out from the abdomen. Ramesh attempted to move from the spot, but ultimately he collapsed in

front of the house of Shivaji.

On the same day, Janefal Police received a message on wireless that there was an incident of quarrel in village Deulgaon Sakharsha and an entry in respect of the said message came to be taken in the station diary by Head Constable Aniruddha Nakhate. PSI Thakara who was in charge of the Police Station, proceeded for spot. On reaching the village, he noticed that the injured persons were already shifted to Primary Health Centre, Janefal. PSI Thakare recorded the report given by complainant Vatchalabai (PW-1).

Shivaji died before he was reached the hospital. Ramesh also died prior to receiving treatment in the hospital. Madhukar was shifted to General Hospital, Buldana where he received some medical treatment. He succumbed to injuries in the midnight of 11th August, 1997 (night intervening 11th and 12th August). Medical treatment was also received by injured Sudhakar and Dinkar in Primary Health Centre, Janefal and then in General Hospital, Buldana.

The inquest Panchanamas were prepared by the police in respect of the dead bodies of Shivaji, Madhukar and Ramesh. The clothes on the dead bodies were taken in custody by police. Post-mortem was conducted on the dead bodies.

On 11.8.1997 when accused nos. 1 and 2 were in the custody of police, they gave information regarding the weapons of offence and expressed their readiness to produce the same from their respective houses. The memoranda of the statements given by accused Nos. 1 and 2 were prepared. Accused No. 1 Babulal produced Rapi and Suri from the roof of his house. He also produced his blood stained clothes from his house. Accused No. 2 Nandulal produced a knife from the roof of his house. His clothes were already seized at the time of his arrest. All the articles were forwarded to Chemical Analyst, Nagpur for examination and the Chemical analyser's report was received. On completion of investigation, the accused Nos. 1 to 3 were charge sheeted.

On the case being committed to the Court of Session, Learned Sessions Judge framed the charge. The prosecution examined in all nine witnesses to further its version. Out of them three witnesses (PWs 1, 3 and 5) were claimed to be the witnesses to the occurrence.

The defence of the accused/appellants are, as revealed from the examination of accused under Section 313 of the Code of Criminal Procedure, 1973 (in short 'the Code') was that deceased Madhukar and deceased Ramesh entered their house in their absence and attempted to tease accused No. 3. Accused No. 3 raised hue and cry. When people gathered, accused No. 3 complained to them about the conduct of Madhukar and Ramesh. On arrival of accused Babulal and accused Nandulal, accused No. 3 narrated the incident to them. Accused nos. 1 and 2 thereupon went to the house of Madhukar to enquire. At that time Buddha people (the community to which the deceased belonged) attacked accused Babulal and Nandulal. Since it was dark, they could not see as to who

assaulted whom. The further contention of the accused persons is that Buddha people attacked their houses and the doors of the houses were broken and houses were demolished.

The defence of the accused persons, as is revealed from the suggestions made to the prosecution witnesses during their cross examination, was that deceased Shivaji and Ramesh were drunk and Ramesh entered the houses of accused persons to rape accused No. 3. When the accused persons made a complaint to Buddha people as regards the conduct of Ramesh, they made an attack on the house of accused persons. They gave a severe beating to accused Babulal and accused Nandulal and there was commotion during which the injuries were caused to the deceased and the injured persons at the hands of Buddha people themselves.

The learned Sessions Judge, Buldana accepted the case of prosecution and held that the charges levelled against accused Nos. 1 and 2 were proved. He, therefore, convicted and sentenced the accused Nos. 1 and 2 who are the appellants herein, as detailed above. Trial Court analysed the evidence of the witnesses in detail, keeping in view the fact that they were related to the deceased. The evidence of eye witnesses PWs. 1, 3 and 5 was felt to need careful and close scrutiny. It discarded the plea of the right of private defence as well as the plea that Exception 4 to Section 300 applies to the facts of the case. The order of conviction and sentence was assailed by the appellants before the High Court.

The High Court held that the evidence of the injured eye witnesses was cogent, credible and truthful. The High Court also examined the evidence in great detail and came to hold that the conclusions of the trial court were in order.

In support of the appeal, learned counsel for the appellants submitted that the courts below have discarded the plea of right of private defence and applicability of Exception 4 to Section 300 IPC without properly analyzing the factual position. The defence plea was probable and should not have been discarded. In any event, Section 34 IPC cannot be pressed into service, and more particularly so far as appellant no. 2 is concerned.

Learned counsel for the respondent-State on the other hand supported the judgments of the courts below and submitted that the factual findings recorded clearly indicate the role played by each of the accused persons. Courts below have rightly discarded the plea that the accused were exercising right of private defence or that Exception 4 to Section 300 is applicable. Section 34 IPC has also been rightly applied.

The Fourth Exception of Section 300, IPC covers acts done in a sudden fight. The said exception deals with a case of prosecution not covered by the first exception, after which its place would have been more appropriate. The exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or

some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A 'sudden fight' implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1.

The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300, IPC is not defined in the IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'.

Where the offender takes undue advantage or has acted in a cruel or unusual manner, the benefit of Exception 4 cannot be given to him. If the weapon used or the manner of attack by the assailant is out of all proportion, that circumstance must be taken into consideration to decide whether undue advantage has been taken. In Kikar Singh v. State of Rajasthan (AIR 1993 SC 2426) it was held that if the accused used deadly weapons against the unarmed man and struck a blow on the head it must be held that using the blows with the knowledge that they were likely to cause death, he had taken undue advantage. In the instant case blows on vital parts of unarmed persons were given with brutality. The abdomens of two deceased persons were ripped open and internal organs come out. In view of the aforesaid factual position, Exception 4 to Section 300 I.P.C. has been rightly held to be inapplicable.

Section 34 has been enacted on the principle of joint liability in the doing of a criminal act. The Section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the Section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of mind of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it pre-arranged or on the spur of moment; but it must necessarily be before

the commission of the crime. The true contents of the Section are that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. As observed in Ashok Kumar v. State of Punjab (AIR 1977 SC

109), the existence of a common intention amongst the participants in a crime is the essential element for application of this Section. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision.

As it originally stood the Section 34 was in the following terms:

> "When a criminal act is done by several persons, each of such persons is liable for that act in the same manner as if the act was done by him alone."

In 1870, it was amended by the insertion of the words "in furtherance of the common intention of all" after the word "persons" and before the word "each", so as to make the object of Section 34 clear. This position was noted in Mahbub Shah v. Emperor (AIR 1945 Privy Council 118).

The Section does not say "the common intention of all", nor does it say "and intention common to all". Under the provisions of Section 34 the essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. As a result of the application of principles enunciated in Section 34, when an accused is convicted under Section 302 read with Section 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. As was observed in Ch. Pulla Reddy and Ors. v. State of Andhra Pradesh (AIR 1993 SC 1899), Section 34 is applicable even if no injury has been caused by the particular accused himself. For applying Section 34 it is not necessary to show some overt act on the part of the accused.

The above position was highlighted recently in Anil Sharma and Others v. State of Jharkhand [2004 (5) SCC 679].

In Abrahim Sheikh & Ors. v. State of West Bengal (AIR 1964 SC 1263) this Court stated that no doubt a person is only responsible ordinarily for what he does and Section 38 IPC ensures that. But Section 34 as well as Section 35 provide that if the criminal act is the result of the common intention, then every person who did the criminal act with such intention would be responsible for the total offence irrespective of the share which he had in its perpetration. The logic, highlighted illuminatingly by the Judicial Committee in the illustrious case of Barendra Kumar Ghosh v. Emperor (AIR 1925 PC1), is that in crimes as in other things "they also serve who only stand and wait".

Section 34 has therefore been rightly applied. Only other question which needs to be considered, is the alleged exercise of right of private defence. Section 96, IPC provides that nothing is an offence which is done in the exercise of the right of private defence. The Section does not define the expression 'right of private defence'. It merely indicates that nothing is an offence which is done in the exercise of such right. Whether in a particular set of circumstances, a person legitimately acted in the exercise of the right of private defence is a question of fact to be determined on the facts and circumstances of each case. No test in the abstract for determining such a question can be laid down. In determining this question of fact, the Court must consider all the surrounding circumstances. It is not necessary for the accused to plead in so many words that he acted in self-defence. If the circumstances show that the right of private defence was legitimately exercised, it is open to the Court to consider such a plea. In a given case the Court can consider it even if the accused has not taken it, if the same is available to be considered from the material on record. Under Section 105 of the Indian Evidence Act, 1872 (in short 'the Evidence Act'), the burden of proof is on the accused, who sets up the plea of self-defence, and, in the absence of proof, it is not possible for the Court to presume the truth of the plea of self-defence. The Court shall presume the absence of such circumstances. It is for the accused to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution. An accused taking the plea of the right of private defence is not necessarily required to call evidence; he can establish his plea by reference to circumstances transpiring from the prosecution evidence itself. The question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden. Where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the Court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record. (See Munshi Ram and Ors. v. Delhi Administration (AIR 1968 SC 702), State of Gujarat v. Bai Fatima (AIR 1975 SC 1478), State of U.P. v. Mohd. Musheer Khan (AIR 1977 SC 2226), and Mohinder Pal Jolly v. State of Punjab (AIR 1979 SC

577). Sections 100 to 101 define the extent of the right of private defence of body. If a person has a right of private defence of body under Section 97, that right extends under Section 100 to causing death if there is reasonable apprehension that death or grievous hurt would be the consequence of the assault. The oft quoted observation of this Court in Salim Zia v. State of U.P. (AIR 1979 SC 391), runs as follows:

> "It is true that the burden on an accused person to establish the plea of self-defence is not as onerous as the one which lies on the prosecution and that, while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross-examination of the prosecution witnesses or by adducing defence evidence."

The accused need not prove the existence of the right of private defence beyond reasonable doubt. It is enough for him to show as in a civil case that the preponderance of probabilities is in favour of his plea.

The number of injuries is not always a safe criterion for determining who the aggressor was. It cannot be stated as a universal rule that whenever the injuries are on the body of the accused persons, a presumption must necessarily be raised that the accused persons had caused injuries in exercise of the right of private defence. The defence has to further establish that the injuries so caused on the accused probabilise the version of the right of private defence. Non- explanation of the injuries sustained by the accused at about the time of occurrence or in the course of altercation is a very important circumstance. But mere non-explanation of the injuries by the prosecution may not affect the prosecution case in all cases. This principle applies to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and credit- worthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries. [See Lakshmi Singh v. State of Bihar (AIR 1976 SC 2263)]. A plea of right of private defence cannot be based on surmises and speculation. While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor. In order to find whether the right of private defence is available to an accused, the entire incident must be examined with care and viewed in its proper setting. Section 97 deals with the subject matter of right of private defence. The plea of right comprises the body or property (i) of the person exercising the right; or (ii) of any other person; and the right may be exercised in the case of any offence against the body, and in the case of offences of theft, robbery, mischief or criminal trespass, and attempts at such offences in relation to property. Section 99 lays down the limits of the right of private defence. Sections 96 and 98 give a right of private defence against certain offences and acts. The right given under Sections 96 to 98 and 100 to 106 is controlled by Section 99. To claim a right of private defence extending to voluntary causing of death, the accused must show that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt would be caused to him. The burden is on the accused to show that he had a right of private defence which extended to causing of death. Sections 100 and 101, IPC define the limit and extent of right of private defence.

Sections 102 and 105, IPC deal with commencement and continuance of the right of private defence of body and property respectively. The right commences, as soon as a reasonable apprehension of danger to the body arises from an attempt, or threat, or commit the offence, although the offence may not have been committed but not until there is that reasonable apprehension. The right lasts so long as the reasonable apprehension of the danger to the body continues. In Jai Dev. v. State of Punjab (AIR 1963 SC 612), it was observed that as soon as the cause for reasonable apprehension disappears and the threat has either been destroyed or has been put to route, there can be no occasion to exercise the right of private defence.

In order to find whether right of private defence is available or not, the injuries received by the accused, the imminence of threat to his safety, the injuries caused by the accused and the circumstances whether the accused had time to have recourse to public authorities are all relevant

factors to be considered. Similar view was expressed by this Court in Biran Singh v. State of Bihar (AIR 1975 SC 87). (See: Wassan Singh v. State of Punjab (1996) 1 SCC 458, Sekar alias Raja Sekharan v. State represented by Inspector of Police, T.N. (2002 (8) SCC 354).

As noted in Butta Singh v. The State of Punjab (AIR 1991 SC 1316), a person who is apprehending death or bodily injury cannot weigh in golden scales in the spur of moment and in the heat of circumstances, the number of injuries required to disarm the assailants who were armed with weapons. In moments of excitement and disturbed mental equilibrium it is often difficult to expect the parties to preserve composure and use exactly only so much force in retaliation commensurate with the danger apprehended to him where assault is imminent by use of force, it would be lawful to repel the force in self-defence and the right of private-defence commences, as soon as the threat becomes so imminent. Such situations have to be pragmatically viewed and not with high-powered spectacles or microscopes to detect slight or even marginal overstepping. Due weightage has to be given to, and hyper technical approach has to be avoided in considering what happens on the spur of the moment on the spot and keeping in view normal human reaction and conduct, where self-preservation is the paramount consideration. But, if the fact situation shows that in the guise of self-preservation, what really has been done is to assault the original aggressor, even after the cause of reasonable apprehension has disappeared, the plea of right of private-defence can legitimately be negatived. The Court dealing with the plea has to weigh the material to conclude whether the plea is acceptable. It is essentially, as noted above, a finding of fact.

The right of self-defence is a very valuable right, serving a social purpose and should not be construed narrowly. (See Vidhya Singh v. State of M.P. (AIR 1971 SC 1857). Situations have to be judged from the subjective point of view of the accused concerned in the surrounding excitement and confusion of the moment, confronted with a situation of peril and not by any microscopic and pedantic scrutiny. In adjudging the question as to whether more force than was necessary was used in the prevailing circumstances on the spot it would be inappropriate, as held by this Court, to adopt tests by detached objectivity which would be so natural in a Court room, or that which would seem absolutely necessary to a perfectly cool bystander. The person facing a reasonable apprehension of threat to himself cannot be expected to modulate his defence step by step with any arithmetical exactitude of only that much which is required in the thinking of a man in ordinary times or under normal circumstances.

In the illuminating words of Russel (Russel on Crime, 11th Edition Volume I at page 49):

> "....a man is justified in resisting by force anyone who manifestly intends and endeavours by violence or surprise to commit a known felony against either his person, habitation or property. In these cases, he is not obliged to retreat, and may not merely resist the attack where he stands but may indeed pursue his adversary until the danger is ended and if in a conflict between them he happens to kill his attacker, such killing is justifiable."

The right of private defence is essentially a defensive right circumscribed by the governing statute i.e. the IPC, available only when the circumstances clearly justify it. It should not be allowed to be

pleaded or availed as a pretext for a vindictive, aggressive or retributive purpose of offence. It is a right of defence, not of retribution, expected to repel unlawful aggression and not as retaliatory measure. While providing for exercise of the right, care has been taken in IPC not to provide and has not devised a mechanism whereby an attack may be a pretence for killing. A right to defend does not include a right to launch an offensive, particularly when the need to defend no longer survived.

In the instant case, there is no material even to suggest that the accused persons apprehended danger of any kind, much less a threat to life. The claim of right of private defence has therefore been rightly discarded.

When the legal position as noted above is applied to the factual scenario the inevitable conclusion is that the courts below have rightly found the accused appellants guilty, and no interference is called for with the concurrent findings of fact, the conviction as recorded and sentence as imposed.

Appeal fails and is dismissed accordingly.