

## **Ramachandra Narasimha Kulkarni vs State Of Mysore on 1 April, 1964**

**Equivalent citations: 1964 AIR 1701, 1964 SCR (7) 606, AIR 1964 SUPREME COURT 1701, 1964 ALL. L. J. 822, 1965 MADLJ(CRI) 596, 1965 2 SCJ 337, 1964 7 SCR 606, 1964 2 SCWR 9, 1964 SCD 1024**

**Author: K.C. Das Gupta**

**Bench: K.C. Das Gupta, Raghubar Dayal**

PETITIONER:

RAMACHANDRA NARASIMHA KULKARNI

Vs.

RESPONDENT:

STATE OF MYSORE

DATE OF JUDGMENT:

01/04/1964

BENCH:

GUPTA, K.C. DAS

BENCH:

GUPTA, K.C. DAS

SUBBARAO, K.

DAYAL, RAGHUBAR

CITATION:

1964 AIR 1701

1964 SCR (7) 606

ACT:

Post Offices Act--Wilfully detaining postal articles--The meaning of the expression "wilful"-Mere negligence Or inadvertance not enough-Detention must be for a purpose Post offices Act, 1898 (VI of 1898) s. 53.

HEADNOTE:

The appellant was a registration clerk in a post office. He was prosecuted on the allegation that he committed theft of a half of a ten rupee note contained in a registered letter along with a petition for exchanging it, for altering the petition and for detaining the registered letter for a day with the purpose of committing the theft and making the alteration. He was charged under Ss. 52, 53 and 54

respectively of the Post Offices Act, 1898. The Sessions Judges who tried the case found him not guilty of the offence under s. 52 but guilty under Ss. 53 and 55. On appeal to the High Court he was found not to be guilty of the offence under s. 55; the conviction under s. 53 was maintained. Thereupon he appealed to this Court.

It was contended by the appellant before this Court that assuming that he detained the envelope he cannot be said to have detained it "wilfully", unless it is shown that he had some purpose in doing it and since the purpose alleged by the prosecution has not been proved the appellant cannot be said to have committed the offence under s. 53.

Held: per K. Subba Rao and K. C. Das Gupta, JJ. A review of the case law brings out clearly the guiding principle that the meaning to be attached to the words "wilful" or "wilfully" has to be ascertained on a close examination of the scheme and nature of the legislation in which the words appear and the context in which they are used.

Re Young and Harston, 31 Ch. D. 174 Wheeler v. New Merton Board Mills, [1933] (2) K.B. 669 United States of America v. Harry Murdock, 78 Law, Ed. 689, Hudson v. Official Liquidator, A.I.R. 1929 All. 826, In re T. M. K. Govindarajulu Chetty, 1951 2 S.T.C. 27 and In re Jayarama Chettiar, I.L.R. 1949, Mad. 121 referred to.

(ii) A comparison of the various sections of the Act shows that the legislature took a more serious view of the offence of wilful detention of postal articles than any of the offences in Ch. X and has, therefore, prescribed a comparatively heavy punishment. Hence it is reasonable to think that in s. 53 when the word "wilfully" was used the legislature also intended that the detention would be punishable only if made for some purpose.

(iii) The prosecution alleged in the present case that the purpose was theft of the note but the existence of that purpose has not been established and detention was not deliberate and hence the appellant cannot be said to have detained the article wilfully.

Per Raghubar Dayal, J. (dissenting)-

The legislature where it intended to make the purpose behind an act an ingredient expressly stated so, as for example in s. 52. If the word "wilful" or "wilfully" is used in the Act as

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a synonym for an act done deliberately and for some purpose, the expression wilful could have been used in the place of "for any purpose whatsoever". This the legislature did not do though it used that in s. 53.

(ii) The mere act of detaining a postal article by any person other than a postal officer is made punishable with only fine under s. 67 and a higher punishment is provided under s. 53 because the culprit is an officer of the post office who has opportunities to detain the, postal articles

and who acts contrary to his duties.

(iii) The expression "wilfully" in s. 53 means "intentionally and deliberately" and not "accidentally" or "negligently".

(iv) From the facts of the case it is proved that the appellant deliberately detained the registered letter. His intention and deliberation were directed towards the detaining of the registered letter and to the non-forwarding of it in due course with the mail that day. Every intentional and relevant act must be with some purpose or object. He, therefore obtained the letter wilfully and is guilty of the offence under s. 53.

Taylor v. Vergette (861) 30 L.J. Ex. 400, Reg. v. Senior (1899) 1 Q.B 283, Tamboli v. Great India Peninsular Railway Company, L.R. 55 I.A. 67, Wheeler v. New Merton Board Mills Ltd. [1933] 2 K.B. 669, Hudson v. Official Liquidator, A.I.R., 1929 All. 826 and T. N. K. Govindarajulu Chetty, 1951 S.T.C. Vol. 2, 26, referred to.

#### JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 202 of 1962. Appeal by special leave from the Judgment and Order dated August 1, 1962, of the Mysore High Court in Criminal Appeal No. 213 of 1961.

W. S. Barlingay and A. G. Ratnaparkhi, for the appellant. R. Gopalakrishnan and B. R. G. K. Achar, for the res- pondent.

April 1, 1964. The Judgment of SUBBA RAO and DAS GUPTA JJ. was delivered by DAs GUPTA J. RAGHUBAR DAYAL J delivered a dissenting opinion.

DAS GUPTA, J.-The appellant, who was a registration clerk in the Haveri Post Office in the Mysore State, was tried by the Sessions Judge, Dharwar, on charges under s. 52, s. 53 and s. 55 of the Indian Post Office Act. The prosecution case is that on the 18th October 1955 a registered letter containin half portion of a ten-rupee note and petition on behalf of one Muppayyagonda asking for the said note to be exchanged for a fresh note was received at the Haveri Post Office at 4.30 p.m. from the Branch Post Office at Kabbur. The appellant who was a, registration clerk at Haveri at the time, however, detained the registered envelope instead of despatching it that very day as he should have done. He despatched it the next day. It was the prosecution case that the appellant removed the half portion of the ten-rupee currency note from inside the envelope and to cover up his misconduct made alterations in the petition contained in the envelope and in the list of registered articles. All this was discovered, it is said, when the Reserve Bank of India, to which this envelope was addressed made enquiries in the matter on finding that no note had been enclosed with the petition. The appellant admitted that the envelope was received at the Haveri Post Office on October 18, 1955 and also, that he did not despatch it on that date. His case was that it was received at about 5.30 p.m. on the 18th and so it was too late for despatch on that date but that he despatched it duly on the 19th,

On a consideration of the evidence the Sessions Judge held that the charge under s. 52 of the Indian Post Office Act for the theft of currency note and for secreting the registered articles had not been established and acquitted him of that charge. He, however, found it proved that the appellant had fraudulently altered the lists of registered articles and thereby committed an offence under s. 55 of the Indian Post Office Act. He also held that the appellant had wilfully detained the envelope and thus committed an offence under s. 53 of the Indian Post Office Act. He accordingly convicted the appellant of the charges under Ss. 53 and 55 of the Indian Post Office Act and sentenced him to undergo two months' imprisonment on each charge. The sentences were directed to run concurrently.

On appeal, the High Court of Mysore set aside the appellant's conviction under s. 55 of the Indian Post Office Act but maintained his conviction under s. 53, being of opinion that while the wilful detention of the envelope by the appellant had been proved, the alleged alterations by him in the list of registered articles had not been established. Against the High Court's decision the present appeal has been preferred by the appellant, Ramchandra Narasimha Kulkarni.

In support of the appeal it is contended by Dr. Barlingey that as the allegations of theft of the note or of alterations in the list of registered articles by the appellant have not been established, the appellant must be held not to have committed any offence under s. 53 of the Indian Post Office Act. It is argued that assuming that the envelope was detained by the appellant as alleged, he cannot be said to have detained it "wilfully" unless it is shown that he had some purpose in doing it. But, the purpose alleged by the prosecution was that he wanted to commit theft of the currency note, and to cover this up, to make alterations in the list of registered articles, these purposes have not been established. So, argues the learned Counsel, the detention of the envelope should be held to have been made without any purpose but only through inadvertence or mere carelessness. That would not constitute, according to the learned Counsel, a wilful detention.

The words "wilful" and "wilfully" are frequently used in many statutes and have come up for judicial consideration in the courts of this country as also elsewhere. The meaning given to these words have differed in different contexts. Sometimes, any intentional act has been held to be a wilful act. (Re Young and Harston)(1). Often, it has been said that the word wilful suggests bad conduct or action though it does not necessarily connote blame. (Wheeler v. New Merton Board Mills)(2) Not infrequently the word has been used to mean that the act had been done with a bad purpose or without justifiable excuse or stubbornly, obstinately or perversely. (United States of America v. Harry Murdock)(3). Some decisions stress the requirement of deliberation or reckless disregard of the fact whether the act was or was not in breach of duty in deciding whether it has been wilful. (Hudson v. Official Liquidator)(4); and In re T.N.K. Govindarajulu Chetty)(5). In the last mentioned case, viz., In re T.N.K. Govindarajulu Chetty's case, the Madras High Court held that a submission of a false return cannot be a wilful submission unless the dealer has deliberately made the return with the knowledge that he was excluding a taxable item, though in almost similar circumstances another Bench of the same High Court took a different view and held that even though when an assessee, under the impression that a particular item is not taxable and, therefore, need be excluded in the return, omits to make a mention, of it in the return which he furnished with the full knowledge of his having committed the same, he has "wilfully" omitted it. (In re Jayarama Chettiar) (6).

A review of these various decisions brings out clearly the guiding principle that the meaning to be attached to the words "wilful" or "wilfully" has to be ascertained on a close examination of the scheme and nature of the legislation in which the words appear and the context in which they are used.

Turning now, for this purpose, to the Indian Post Office Act, we notice that s.53 which makes punishable the wilful detention or delay of a postal article by an officer of the post office in one of the several sections which create offences under this Act. There are 21 such sections, being sections 49 (1)31 Ch. D. 174.

(2) 1933(2) K.B. 669.

(3)78 Law E. 389.

(4) A.I.R. 1929 All. 826.

(5)1951 2 S.T.C. 27.

(6) I.L.R. 1949 Madras, 121.

L/P(D)ISCI-20 to 56 and 58 to 70, all in Chapter X of the Act. Some of these offences, viz., those under Ss. 49, 58, 59, 63, 64, 65, 66 and 67 are punishable only with fine. The offences under Ss. 50, 51, 52, 53, 54, 55, 56, 60, 61, 62, 68 and 69 are made punishable also with imprisonment. Of these again, the offences under s. 53, are punishable with imprisonment which, may extend to seven years; offences under Ss. 53, 54, 55, 56, 60, and 68 are punishable with imprisonment which may extend to two years; offences under Ss. 61 and 62 are punishable with imprisonment which may extend to one year while offences under Ss. 51 and 69 are punishable with imprisonment which may extend to six months only. An offence under s. 50 is punishable with imprisonment extending to one month or with fine extending to Rs. 50/-. This comparison clearly shows that the legislature took a more serious view of the offence of wilful detention of a postal articles (s. 52) than of many other offences in this Chapter. Delay in the conveyance or delivery of a mail bag or other postal articles in the course of transmission by a person employed to carry the same is made punishable with only a fine of Rs. 501- (s. 49). Withdrawal from duties of office without permission or without having given a month's previous, notice in writing by a person employed to carry or deliver a mail bag or postal article is also made punishable only with imprisonment extending to one month or with fine extending to Rs. 501-. Making of a false entry in the register with intention to induce the belief that an article has been delivered is made punishable with imprisonment extending to only six months or with fine extending to Rs. 100/-. But Wilful, detention of a postal article is made punishable with imprisonment extending to two years. Is it reasonable to thin that the legislature would prescribe this heavy punishment for detention of a postal article which was not deliberate and on purpose, while prescribing lighter punishment as mentioned above for the offences under Ss. 49, 50 and 51. We do not think so. The very fact that this comparatively heavy punishment of two years' imprisonment has been prescribed for wilful detention while lighter punishment has been prescribed under Ss. 49, 50 and 51, justifies, in our opinion, the conclusion that the word "wilful"

was used by the legislature to mean only such detention which was deliberate and for some purpose. It is interesting to notice in this connection that in the, preceding section 52 the legislature after making punishable the offence of theft of a postal article or of dishonest misappropriation of the same, also made punishable the secretion, destruction or throwing away any postal article if done "for any purpose whatsoever". It is, in our opinion, reasonable to think that in s. 53 when the word "wilfully" was used, the legislature also intended that the detention would be punishable only if made for some purpose.

Coming now to the facts of the present case, we find that the prosecution alleged a definite purpose, viz., the purpose of theft of the contents of the envelope-as the purpose with which the postal article was detained. The existence of that purpose has not, however, been established. Nothing was suggested before us as to, what other purpose the appellant could 'have had in detaining the article. There is, therefore, no escape from the conclusion that the detention was not deliberate and on purpose, but as a result of either inadvertence or carelessness or negligence. So, the appellant cannot be said to have

-detained or delayed the article 'wilfully'. Accordingly, we allow the appeal, set aside the order of conviction and sentence passed by the High Court and order that the appellant be acquitted of the charge against him. RAGHUBAR DAYAL, J.-The main question to determine, in this case, is what the expression 'wilfully detains or delays' in s. 53 of the Indian Post Office Act, 1898 (Act VI of 1898), hereinafter called the Act, means.

I do not agree that it means such detention which was deliberate and for some purpose. I am of opinion that the detention or delay would be 'wilful' if it was intentional and deliberate on the part of the officer of the post office, as opposed to detention or delay -on account of negligence or inadvertence. The word 'wilful' or 'wilfully' used in other enactments have been construed by Court in this manner. I may refer 'to some of these cases. In Taylor v. Vergette(1) 'wilful delay' has been construed ,to mean 'intentional delay'.

'Wilfully' means that the act is done deliberately and intentionally, not by accident or inadvertence, but so that the mind of the person who does the act goes with it". In Tamboli v. Great Indian Peninsular Railway Company(3) the Privy Council had to construe the expression 'wilful neglect' in determining the responsibility of the railway administration or its servants and approved of what was said by Lord Russell in Reg. v.

Senior(2).

(1) (1861) 30 L.J. Ex. 400. (2) [1889] 1 Q.B. 283,

290. (3) L.R. 55 I.A. 67=I.L.R. 52 Bom. 169.

L.P(D)LSCI--20(a) In Wheeler v. New Merton Board Mills, Ltd.(1) it was said: -

"'Wilful act' is plain English, and I can entertain no doubt that the installing of this machine without guard or fence for use in the factory was a wilful act by some one. It was an act, and it was intentional. It is true that though 'wilful' and 'intentional' are synonymous..... wilful' is more commonly used in modern speech of bad conduct or actions than of good, though it does not necessarily connote blame; but that is far from supporting the strange contention that wilful act in s. 29, sub-s. 1, must be confined to something done with intent to injure".

In Hudson v. Official Liquidator(2) 'wilful default' was construed and it was said at p. 930:

"The adjective 'wilful' in 'wilful acts or defaults' has evidently been used as a description and not as a definition. The idea intended to be conveyed is that the default is occasioned by the exercise of volition or as the result of the non-exercise of will due to supine indifference, although the defaulter knew or was in a position to know that loss or harm was likely to result. The word does not necessarily suggest the idea of moral turpitude. We have also to eliminate the elements of accident or inadvertence -or honest error of judgement. The default must be the result of deliberation or intent or be the consequence of a reckless omission. 'Wilful default', therefore, is indicative of some misconduct in the transaction of business or in the discharge of duty by omitting to do something either deliberately or by a reckless disregard of the fact whether the act or omission was or was not a breach of duty".

This view was accepted by the Madras High Court in T.N.K. Govindarajulu Chetty, In re(3).

The words 'wilful' and 'wilfully' have been used in the various provisions of the Act do not lead to any different interpretation of these words.

Section 6 of the Act provides, inter alia, that no officer of the Post Office shall incur any liability by reason of any loss, mis-delivery, delay or damage, unless he has caused the same fraudulently or by his wilful act or default.

(1)[1933] 2 K.B. 669. (2) A.I.R. 1929 All. 826- (3) 1951 2. S.T.C. 27.

Section 48(c) provides that no suit or other legal proceeding shall be instituted against the Government or any officer of the post office in respect of the payment of any money order being refused or delayed by, or on account of, any accidental neglect, omission or mistake by, or on the part of an Officer of the post office, or for any other cause whatsoever, other than the fraud or wilful act or default such officer; and brings out effectively the contradistinction between wilful act or default of an officer and an act done on account of accidental neglect, omission or mistake.

Section 49 to 70 provide for offences. Sections 49, 50 and 51 deal with offences which are committed by persons who are employed to carry or deliver any mail bag or any postal article, in course of transmission by post. They are thus offences by carriers of postal articles. They can be committed both by the officers of the postal department and by others as well. Such of the acts contemplated by

those sections which can also fall under the other sections exclusively applicable to officers of the post office, will naturally be dealt with under those sections. The persons who will be dealt with under Ss. 49 to 51 or other sections providing for lighter punishments will be those who are not officers of the postal department but are concerned in any manner with the transmission of the post.

Clause (c) of s. 49 makes punishable the loitering or making delay in the conveyance or delivery of any mail bag or postal article, and thus emphasizes the necessity of prompt transport of postal articles.

Sections 52 to 66 provide for offences by officers of a post office.

Section 52 provides punishment for committing theft or dishonestly misappropriating in respect of or, for any purpose whatsoever, secreting, destroying or throwing away any postal article in the course of transmission by post or anything contained therein. The offence is punishable with imprisonment upto seven years and also with fine. This is the most serious offence.

It is to be noted for our purpose that the secreting, destroying or throwing away of the postal article for any purpose whatsoever is an offence. An act done with a purpose must be a deliberate act and a deliberate act must also be one done with some purpose. The legislature, where it intended to make the purpose behind an act an ingredient of the offence, expressly stated so. If the word 'wilful' or 'wilfully' is used in the Act as a synonym for an act done deliberately and for some purpose, the expression 'wilfully' could have been used in the place of 'for any purpose whatsoever'. This, however, the legislature did not do, though it used that word in the very next section, viz., s. 53 which reads:

15 "Whoever, being an officer of the Post Office, contrary to his duty, opens, or causes or suffers to be opened, any postal article in course of transmission by post, or wilfully detains or delays or causes or suffers to be detained or delayed, any such postal article, shall be punishable with imprisonment for a term which may extend to two years, or with fine or with both:

Provided that nothing in this section shall extend to the opening, detaining or delaying of any postal article under the authority of this Act or in obedience to the order in writing of the Central Government or the direction of a competent Court".

Sections 54, 55 and 56 make certain acts done fraudulently, knowingly or with intent, punishable with imprisonment upto two years or fine. Section 55 makes the fraudulent altering or secreting or destroying of a document which an officer of the post office is entrusted with keeping, punishable with imprisonment upto two years and with fine. This act is considered less heinous than that of secreting, destroying or throwing away of any postal article in the course of transmission by post, for any purpose whatsoever. Section 66(1) makes the master of a ship who, in certain circumstances, knowingly has in his baggage or in his possession or custody, any postal article within the exclusive privilege conferred on the Central Government by



s. 4, punishable with fine which may extend to Rs. 50/- for every such postal article. Here a certain act committed knowingly is made an offence. Sub-s. (2) of s. 66 makes the detention of any postal article, after a demand for it has been made by an -officer of the post office, punishable. Here, the mere detention after a demand is made penal irrespective of the intention or purpose behind such detention.

Section 67 makes the detention of mails or any postal article in the course of transmission by post by anyone except under the various circumstances mentioned in the section, in offence. Here again, mere detention is made an offence irrespective of the circumstances in which it is made, excepting for reasons mentioned in the section itself.

Section 68 reads:

"Whoever, fraudulently retains, or wilfully secretes or makes away with, or keeps or detains, or when required by an officer of the post office, neglects or refuses to deliver up, any postal article in course of transmission by post which ought to have been delivered to any other person, or a mail bag containing a postal, article, shall be punishable with imprisonment for a term which may extend to two years, and shall also be punishable with fine".

It is to be noticed that 'wilfully' secreting any postal article in the course of transmission by post is an offence under this section. A comparison with the provisions of s. 52 of the Act indicates that the legislature must have used the expressions 'wilfully' and 'for any purpose whatsoever' in different senses.

maliciously with intent to injure any person, offences. 'Wilfully' here is used as something distinct from 'maliciously' and is, further used in addition to the expression 'with intent to injure any person', that is to say, the particular purpose or intent is -in ingredient of the offence in addition to 'wilfully'.

Sections 6 and 48(c) provide that an officer of a post office would be liable for the loss, misdelivery, delay or of damage to any postal article in the course of transmission or for the delay in the payment of a money order, only when this happens as a result of his wilful act or default. The person suffering from such misdelivery etc., has no claim against the officer of the post office if that thing has been the result of something which could not be said to be the wilful act or default of a postal officer. It is no concern of the addressee or recipient of an article in transit by post that the wilful act or default of the postal officer was with a certain purpose or not and whether that officer succeeded in that purpose or not. :Vie should be successful in his claim if the postal officer has deliberately not acted in the manner he is required to act tinder the Act or the rules framed thereunder or if he has deliberately acted in violation of the duties entrusted to him. In either case, the act of the officer concerned would be wilful inasmuch as he would act intentionally in violation of his duty or in a manner in which he is not to act and not accidentally or inadvertently.

The provision of s.53 of the Act require that the office wilfully detains' the postal article and that the act of detention be contrary to his duty prescribed by or under the Act. Section 21(2)(c) empowers the Central Government to make rules providing for the detention and disposal of articles in course of transmission by post in certain circumstances. Sections 22(1), 23, 26, 27B and 37(2) provide for the circumstances in which postal articles can be detained or delayed. It is not necessary to detail those circumstances. The clause 'contrary to his duty' governs both the act of opening of the Postal article and to the act of detaining it. The first necessary ingredient of the offence under s. 53 is that the postal officer should act contrary to his duty. Such an act, however, can take place by accident or negligence also, without the officer's knowing it or even giving any thought to it and therefore without his exercising his will in that matter. The legislature, therefore, felt that accidental or negligent acts be not made offences and that detention of the postal article, even if it be contrary to duty, be protected and that only such detention of the articles be made punishable which be committed wilfully, i.e., when the officer applied his mind towards the act and has committed it deliberately with the intention of committing it.

The mere act of detaining mails or postal articles by any person other than a postal officer is made punishable only with fine under s. 67 of the Act. This indicates that the punishment under s. 53 is severe because the culprit is an officer of the post office who has opportunities to detain the postal article and who acts contrary to his duty. The proviso to s. 53 refers to cases which would have come within the main provisions, and provides that the main provisions do not extend to the opening, detaining or delay- ing of any postal article under the authority of the Act or in obedience to the order in writing of the Central Government or the direction of a competent Court. Such acts would be undoubtedly deliberate and without any criminal purpose.

The use of the expression 'for any purpose whatsoever' in s. 52 is no guide to construe the word 'wilfully' in s. 53. It appears to have been used in s. 52 in contradistinction to the mens rea necessary for the commission of the offence of theft or of dishonest misappropriation. Its use makes it clear that the act of secreting, destroying or throwing away of the postal article will be punishable if with a purpose, whatever that may have been.

I, therefore, construe 'wilfully' in s. 53 to mean 'intentionally and deliberately' and not accidentally or negligently and hold that the appellant has been rightly convicted of the offence under that section.

I am further of opinion that even if the expression 'wilfully detains' in s. 53 of the Act means a detention deliberate and for some purpose, the appellant is not entitled to an acquittal on the findings the Courts have arrived at. The appellant, in ordinary course of business, would have forwarded the registered letter by the mail on October 18, 1955 when it had been received at the usual hour and the appellant's contention that it was received after the despatch of the mail has not been accepted. It follows that the appellant deliberately detained the registered letter. The intention and deliberation was directed towards the detaining of the registered letter and to the non-forwarding of it in due course With the mail that day. Every intentional and deliberate act must be with some purpose or object. It may be that in some cases the object be achieved by the mere doing of the act intended, that is to say, the object was just the doing of that act. In other cases, an

act may be done with some further object also. The appellant's purpose behind his intentional act of detaining the registered letter must have been to remove what he might have suspected the letter to contain. If he did not have any such object, he could not have any reason to depart from his duty and detain the letter instead of sending it by the next mail in the ordinary course of his duties. His act, therefore, in detaining the letter, amounted to his detaining it wilfully.

that he himself opened the letter, tampered with its contents, and removed the half currency note, facts which have been proved to have been committed by someone, does not mean that his detaining the letter was not on purpose. A person may do an act with a certain purpose and yet may not succeed in his purpose. Even if he succeeds it may not be possible for any other person to establish that he did that act for that purpose and did succeed in achieving that purpose.

I would, therefore, dismiss the appeal.

ORDER BY COURT In accordance with the majority opinion, the appeal is, allowed, the order of conviction and sentence set aside and the appellant ordered to be acquitted of the charge against him.

Appeal allowed.