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**(1964) 11 BOM CK 0011**

**Bombay High Court**

**Case No:** Criminal Revision Application No. 284 of 1964

Kala Bhika Baria

APPELLANT

Vs

The State

RESPONDENT

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**Date of Decision:** Nov. 16, 1964

**Acts Referred:**

- Criminal Procedure Code, 1898 (CrPC) - Section 439
- Penal Code, 1860 (IPC) - Section 386

**Citation:** AIR 1966 Bom 13 : (1965) 67 BOMLR 223 : (1966) CriLJ 7 : (1965) ILR (Bom) 519

**Hon'ble Judges:** Gokhale, J

**Bench:** Single Bench

**Advocate:** D.P. Shukla, for the Appellant; R.S. Bhosale, Hon. Asst. to Govt. Pleader, for the Respondent

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### **Judgement**

@JUDGMENTTAG-ORDER

(1) This is revision application against the order of the learned presidency Magistrate - 25th Court. Girgaon Bombay convicting the petitioner - accused for having committed an offence under S. 336 I.P.C. and sentencing him to pay a fine of Rs. 10 or in default to suffer S .I. For two days. The prosecution case is that the complainant Gangram Babu worked as a driver of refuse van No. BMS 7622 on the 15th of August 1963. That was the day on which the Municipal workers in Bombay had been on strike the complainant who had apparently not jointed the strike had taken the van near the Maywadi vidalaya in a lane on the backside of Opera. House about 12 p.m. A police party consisting of 3 or 4 policemen accompanied the van for its protection. In the van there were 6 sweepers and one Mukadam for collecting reuse. At the place where the van was stationed the sweepers were collecting refuse and loading it in the van. The police party were in the police van which was standing at a distance of 10 or 12 feet from the van of which the compliant was the driver. After the van was loaded and the complainant was about to enter the van the About

12.15 p.m. the accused came there and abused the complainant and pelted a stone at him. The stone missed the complainant but hit the front right wheel of the van. The police chased the accused and apprehended him at some distance from the place where the van was stationed. The accused was taken to the police station and the first information report was recorded on these allegations. The accused has been prosecuted and convicted and sentenced as stated above for the offence under S. 336 IPC.

(2) The prosecution have examined 3 witnesses including the complainant Gangaram Bapu. The other two witnesses including the complainant are Murlidhar Govind and Jagannath Maruti, both police constables who were members of the party in the police van which was on the spot to protect the van of the complainant. The learned Magistrate has considered the evidence of these three witnesses and has observed that the evidence of the complainant is supported fully by the two police constables who were standing nearby. He has accepted the evidence of the two police constables to the effect that they saw the accused pelting a stone at the complainant. The learned Magistrate then observed as follows "Voluntarily pelting a stone at others is definitely a rash act so as to endanger human life or safety of others and it amounts to an offence under S. 336 I.P.C."

(3) Mr. Shukla who appears for the accused contends that the finding of the learned Magistrate that the accused was the person who pelted a stone at the complainant was on the fact of it being unsupportable by the evidence led by the prosecution. It was his contention that if the circumstances in which the alleged offence is stated to have been committed are taken into consideration it is unbelievable that the accused should be held to have pelted the stone at the complainant. The evidence of the complainant and the two police constables was read over to me by Mr. Shukla and I am unable to accept the contention that the finding of the learned Magistrate that which missed its target but instead hit the right front wheel of the van is erroneous. It is not possible to rely on minor variations in the evidence of these witnesses for holding that the accused was not the person who pelted the stone. I am satisfied that the evidence mainly alleges that the accused threw the stone aiming it at the complainant but it did not hit the complainant but instead hit the right front wheel of the van. This is a revision application and I do not see any reason for interfering with the findings made by the learned Magistrate in this regard.

(4) It was contended on behalf of the accused that he was on sick leave from the 7th of October 1961 on the date of the incident and that he had gone to the doctor for treatment. This plea of the accused has also been considered by the learned Magistrate. No evidence is given as to who the doctor was and as to whether the accused really went to the doctor on that day. In the face of the consistent evidence of the prosecution witnesses, I would confirm the finding of the learned Magistrate that the accused pelted the stone at the complainant, but the stone hit the right

front wheel of the van.

(5) Mr. Shukla then submitted that if the finding of the learned Magistrate that the accused pelted the stone at the complainants were to be accepted, the accused cannot be convicted for the offence under S. 336 I.P.C. He pointed out that the accused wanted to pelt the stone at the complainant Murlidhar by the prosecution has stated that the accused threw the stone deliberately and that he actually saw the accused while has also stated to the same effect. Moreover, all the three witnesses are consistent in filthy language. On the basis of this evidence M. Shukla contends that the act of the accused in pelting a stone at the complainant was not a rash or negligence act but was a deliberate act. Section 336 I.P.C. to the extent to which it is relevant provides as follows:-

"Whoever does any act so rashly or negligently as to endanger human life or the personal safety of others shall be punished with .

Mr Shukla says that the offence consists of danger caused to human life or the personal safety of others by an act which can be called rash or negligent. When a person deliberately attempts to assault or assaults another person and when such an act is proceeding by consideration it cannot be called rash or negligent. There is considerable substance in this contention of Mr. Shukla. He invited my attention to judgment of the Patna High court in *Mahendra v. State* 38 Pat 1006. The learned single judge observed.

"A Rash act is primarily a hasty act , and is thus opposed to a deliberate act. Of course, a rash act is also a voluntary act. An act done voluntarily may be a rash act if it is done without due deliberation and caution". The learned judge relied on two cases of the Allahabad High court. In [Gaya Prasad Vs. Emperor](#), it was observed as follows:

"A rash act is primarily as overhasty act and it opposed to a deliberate act. Even if it is partly deliberate it is done without due thought and caution. Here there is no question of want of the caution. The applicant desired a certain result to follow from the throwing of bricks and he deliberately threw the bricks at the temple for that purpose according to the finding of the two subordinate courts there was neither rashness nor negligence in the act"

(6) The same view has been taken in [Babu Ram Vs. Emperor](#) . In *Maung Ba Kyi v. Emperor* AIR 1937 Rang 273, spargo J. Observed that if the act complained of was a deliberate act it cannot be called a rash or negligent act. The position has been very succinctly state by Straight J. In *Empress of India v. Idu Beg*. ILR 3 All 776. The learned judge has observation as follows:-

"I may remark that criminal rashness is a dangerous or wanton act with the knowledge that it is so and that it may cause injury but without intention to cause injury or knowledge that it will be probably caused. The criminality lies in

running the risk to doing such an act with recklessness or indifference is to the consequences criminal negligence to the gross and culpable neglect or failure to exercise that reasonable or proper care and precaution to guard against the injury either to the public generally or to an individual in particular which having regard to all circumstances out of the which the charge has arisen it was the imperative duty of the accused person to have adopted"

(7) These observations of Straight J. Were quoted with approval by a Division Bench in [H.W. Smith Vs. Emperor](#), . I respectfully agree with the view taken in these cases. Where a person commits a wanton or dangerous act with the knowledge that it is to so and he commits it without knowing that it may probably cause injury or intention of causing it. It will be rash act. In such a case the person committing the act does not know that the result of his recklessness or negligence may probably causes injury to somebody. And he never intends that such an injury would be caused. When a person is negligent as to the consequence of his act and there is a failure on his part to take reasonable and proper care and precaution to guard against injury to somebody else, it is an unintentional act done with consideration and cannot, therefore be rash and negligent act. In the present case the entire prosecution case is directed towards proving that the accused intentionally threw a stone at the complainant. The evidence that the act of the accused was an intentional act, namely of pelting a stone at the complainant with a view to assaulting him. This cannot be said to be an act done rashly or negligently. It is undertaken with a positive intention of causing injury to the complainants. The fact that the act may endanger human life or the safety of others may be a common factor both in the case of intentional as well as rash and negligent act but the latter is not the decisive factor even the finding of the learned Magistrate leaves no room for doubt that the accused had intentionally pelted the stone at the complainant. The fact that the stone missed its target, makes no difference. It may be that on the facts established to the charge could have been for attempt to cause hurt, but I fail to see how the charge could be of a rash and negligent act, as the present charge is under S. 336 I.P.C. In this view of the matter, while confirming the finding of the learned Magistrate that the accused pelted the stone at the complainant but the stone missed the complainant but instead, hit the right front wheel of the van. I cannot confirm the conviction and the sentence imposed on the accused for the offence under S. 336 I.P.C.

I would therefore set aside the order of conviction and sentence imposed on the petitioner - accused for the offence under S. 336 I.P.C. and acquit him if paid shall be refunded.

(8) Conviction and sentence set aside.