(2018) 03 BOM CK 0139

Bombay High Court (Nagpur Bench)

Case No: CRIMINAL APPEAL NO.281 OF 2017

VINAYAK S/O. YUVRAJ PURAM AND ANOTHER		APPELLANT
	Vs	
THE STATE OF MAHARASHTRA THR. POLICE STATION OFFICER POLICE STATION TIRORA, DIST. GONDIA		RESPONDENT

Date of Decision: March 22, 2018

Acts Referred:
Indian Penal Code, 1860 â€" Section 34, 307, 324#Indian Evidence Act, 1872 â€" Sec 27

Citation: (2018) 03 BOM CK 0139

Hon'ble Judges: ROHIT B. DEO, J

Bench: Single Bench

Advocate: R.M. Daga, N.H. Joshi

Final Decision: Disposed Of

Judgement

ROHIT B. DEO, J.

1.The appellants are challenging the judgment and order dated 08-05-2017 rendered by the learned Additional Sessions Judge, Gondia in Sessions Trial

36/2013, by and under which the appellants- accused are convicted for offence punishable under Section 307 of the Indian Penal Code (""IPC"" for

short) and are sentenced to suffer rigorous imprisonment for ten years and to payment of fine of Rs.3,000/-.

2. The prosecution case :

P.W.2 Bhaktraj Walke is a resident of village Khairi, Tahsil- Tirora, District - Gondia. At 8-00 p.m. on 10-8-2012 he had gone to the pan shop of one

Lala Walke to purchase kharra (a mixture of tobacco, betel leaf and other ingredients). The accused were riding a motorcycle which hit P.W.2 who

fell down and sustained injury to left leg. P.W.2 confronted the accused, accused 2 Nitin Idpate caught hold of P.W.2 and accused 1 Vinayak Puram

inflicted a knife blow on the left side of the abdomen. The accused fled from the spot. P.W.2 was taken to Navezari Hospital by Birajlal Walke

(P.W.1) who also accompanied Birajlal and Shastri in taking the injured to Navezari Hospital, lodged report (Exhibit 31) at Tiroda Police Station on 11-

8-2012, on the basis of which report and printed first information report (Exhibit 32) offence under Section 307 read with Section 34 of the IPC was

registered against the accused vide Crime 156/2012.

P.W.11 API Arun Baraiya conducted the investigation and submitted the charge-sheet in the Court of Judicial Magistrate First Class, Tiroda, who

committed the proceedings to the Sessions Court. The learned Sessions Judge framed charge (Exhibit 16) under Section 307 read with Section 34 of

the IPC. The accused abjured guilt and claimed to be tried. The defence is of false implication.

3. Shri R.M. Daga, learned Counsel for the accused, in all fairness, is not disputing that the finding recorded by the learned Sessions Judge that the

accused Vinayak inflicted a single blow with a cutter on the abdomen of the injured (P.W.2) is well supported by the evidence on record. He would,

however, submit, that even if the evidence is accepted at face value, the accused could not have been convicted under Section 307 of the IPC and the

offence made out would be under Section 324 of the IPC.

4. Indubitably, the incident occurred in a sudden flare up due to an altercation. The prelude to the assault was that the two wheeler which accused

Nitin was driving hit the injured who fell down and sustained injury to a leg. The injured protested and accused 2 Nitin then held him and accused 1

Vinayak inflicted a single blow on the left Ã, side of the abdomen of P.W.2. P.W.2 refers to the weapon used in the assault as a knife. The weapon

which was used in the assault and seized was referred to the General Hospital, Bhandara and the opinion of the Medical Officer who examined the

weapon is Exhibit 91. P.W.10 who carried the weapon in sealed envelope to General Hospital, Bhandara described the weapon as ""blade"". P.W.11

Investigating Officer who seized the weapon pursuant to memorandum statement under Section 27 of the Indian Evidence Act also describes the

weapon as a blade. P.W.12 Dr. Yogesh Nakade who examined the weapon describing this weapon as a ""sharp cutter"" with a blade 5 cm. in length

and 1 cm in breadth with one edged sharp and the other blunt. The word ""Natraj"" is written on the plastic handle of the cutter. The diagram drawn by

P.W.12 which diagram is a part of Exhibit 91 reveals that the weapon is a pencil cutter with a blade shorter in length than the handle. The fact that a

single blow is inflicted by the pencil cutter would be a strong circumstance to negate that the accused had the requisite intention or knowledge as

would attract Section 307 of the IPC. P.W.12 has proved the injury report Exhibit 90. The depth of the injury is not mentioned. The statement in the

examination-in-chief that the incised wound exposed the underlying fat and muscle is not sufficient to hold that the injury was grievous or life

endangering. The injury certificate Exhibit 90 is silent on the nature of the injury. Injury certificate does not state that the injury is either grievous or life

endangering. The evidence of P.W.1 that he was admitted in the hospital for eight days or thereabout again does not take the case of the prosecution

any further in explaining the nature and extent of the injury. Concededly, there is absolutely no evidence on record, except the injury certificate Exhibit

90 to throw light on the nature or extent of the injury sustained or the medical treatment received.

5. It is not in dispute that the incident occurred in the heat of passion and a single blow with a pencil cutter was inflicted. The injury is not grievous or

life endangering. The assault was not premeditated. It is difficult to record a finding with any degree of certainty, that the accused intended to cause

such injury as he knew to be likely to cause death or which was sufficient in the ordinary course of nature to cause death. It would be apposite to

refer to the following observations of the Hon'ble Apex Court in Sarju Prasad v. State of Bihar reported in AIR 1965 SC 843 :

3. It is common ground that the act for which the appellant has been convicted under Section 307 consisted of causing an injury in the vital region of

Shankar Prasad's person but that no vital organ of Shankar Prasad was actually cut as a result of this injury. Learned counsel for the appellant,

therefore, contends that the injury was a simple one and that as it was not such as was in the ordinary course of nature likely to result in death the

offence falls not under Section 307 but under Section 324, I. P.C. According to learned counsel, before a person can be found guilty of the offence of

an attempt to commit murder the prosecution must establish that the actual act which the assailant is shown to have committed was such as would in

the ordinary course of nature have resulted in death and that here as the injury was a simple one, no vital organ of Shankar Prasad having been

damaged, it does not fall within the purview of Section 307, I. P. C. It was no doubt held in Reg v. F. Cassidy, 4 Bom HC (Cr.) 17 which was

followed in Martu v. Emperor, 15 Bom LR 991 that for a person, to be convicted under Section 307, I. P. C. the act done must be an act done under

such circumstances that death might be caused if the act took effect, that is to say, the act must be capable of causing death in the natural and

ordinary course of things. But these decisions were not followed by the same High Court in Wasudeo Balwant Gogte v. Emperor, ILR 56 Bom 434 :

(AIR 1932 Bom 279). There is a large body of decisions of other High Courts to the same effect as the decision in Gogte's case, ILR 56 Bom 434 :

(AIR 1932 Bom

279). There, Beaumont C. J. referring to Cassidy's case, 4 Bom HC (Cr.) 17 has observed:

If the reasoning of the learned Judges in that case be right as to the construction of Section 307 and if the act committed by the accused must be an

act capable of causing death in the ordinary course, it seems to me that logically the section could never have any effect at all. If an act is done which

in fact does not cause death, it is impossible to say that that precise act might have caused death. There must be some change in the act to produce a

different result, and the extent to which the act done must be supposed to be varied to produce the hypothetical death referred to in Section 307 is

merely a question of degree. If a man points at his enemy a gun which he believes to be loaded but which in fact is not loaded intending to commit

murder (which is Cassidy's case), it is no doubt certain that no death will result from the act. But equally certain is it that no death will result if the

accused fires a revolver at his enemy in such circumstances that in fact, whether through defect of aim, or the activity of the target, the bullet and the

intended victim will not meet. If, however, Section 307 does not cover the case of a man who fires a gun at his enemy with intent to kill him but misses

his aim, it is difficult to see how the section can ever have any operation.

4. After pointing out that this decision was not followed by the Allahabad High Court in Queen Empress v. Niddha, ILR 14 All 38 the learned Chief

Justice continued:

The words 'under such circumstances' refer to acts which would introduce a defence to a charge of murder, such as, for instance, that the accused

was acting in self-defence or in the course of military duty. But if you have an act done with a sufficiently guilty intention and knowledge and in

circumstances which do not from their nature afford a defence to a charge of murder, and if the act is of such a nature as would have caused death in

the usual course of events but for something beyond the accused's control which prevented that result, then it seems to me that the case falls within

Section 307.

5. Thus according to the learned Chief Justice the act to fall within Section 307 must be such that but for the intervention of some circumstance it

would, if completed, have resulted in, death. There is no evidence in this case that a fatal injury or an injury to a vital organ was prevented by any

intervening circumstance.

6. All these decisions were considered by this Court in Om Prakash v. State of Punjab,1962-2 SCR 254 : (AIR 1961 SC 1782) and though Cassidy's

case, 4 Bom HC (Cr.) 17 was not expressly dissented from the actual view taken by this Court is more in consonance with the view taken by

Beaumont C. J. in Gogte's case, ILR 56 Bom 434 : (AIR 1932 Bom 279) and the view taken by the Allahabad High Court in Niddha's Case, ILR 14

All 38 than that taken in Cassidy's case, 4 Bom HC (Cr.) 17. In Gogte's case, ILR 56 Bom 434: (AIR 1932 Bom 219) no injury was in fact

occasioned to the victim Sir Earnest Hotson, the then acting Governor, due to a certain obstruction. Even so, the assailant Gogte was held by the court

to be jointly (sic) under Section 307 because his act of firing a shot was committed with a guilty intention and knowledge and in such circumstances

that but for the intervening fact it would have amounted to murder in the normal course of events. This view was approved by this Court. Therefore,

the mere fact that the injury actually inflicted by the appellant did not cut any vital organ of Shankar Prasad is not by itself sufficient to take the act out

of the purview of Section 307.

7. Having said all this we must point out that the burden is still upon the prosecution to establish that the intention of the appellant in causing the

particular injury to Shankar Prasad was of any of the three kinds referred to in Section 300, Indian Penal Code. For, unless the prosecution discharges

the burden the offence under Section 307, I. P. C. cannot possibly be brought home to the appellant. The state of the appellant's mind has to be

deduced from the surrounding circumstances and as Mr. Kohli rightly says the existence of a motive to cause the death of Shankar Prasad would

have been a relevant circumstance. Here, the prosecution has led no evidence from which it could be inferred that the appellant had a motive to kill

the victim of his attack. On the other hand he points out that as the appellant had no enmity with Shankar Prasad that neither of them even knew each

other and that as the appellant inflicted the injury on Shankar Prasad only to make him release the wrist of Sushil while Sushil was in the act of

stabbing Madan Mohan he cannot be said to have had the motive to kill Shankar Prasad and, therefore, no intention to cause murder or to cause any

injury which may result in death could be inferred. Now, it is the prosecution case that about a week before the incident Sushil, for certain reasons,

had given a threat to Madan Mohan to the effect that he would be taught a lesson and according to the prosecution Sushil and the appellant Sarju

were lying in wait for Madan, Mohan in the chowk on the day in question with chhuras with the intention of murdering him. The prosecution wants us

to infer that these two persons also had the intention of murdering any one who went to the rescue of Madan Mohan. It seems to us that from the

facts established it cannot be said that the appellant had the intention of causing the death of Shankar Prasad or of any one who went to Madan

Mohan's rescue. If such were his intention then another significant fact would have possibly, though not necessarily, deterred him and that is that

Madan Mohan and Shankar Prasad were not the only persons there at that time but were accompanied by some other persons. Moreover the incident

occurred in broad day light in a chowk which must be a well-frequented area. It is not easy to assume that in such circumstances the appellant could

have intended to commit a crime for which the law has provided capital punishment.

8. The only other question then is whether the appellant intended to cause such injury as he knew to be likely to cause death or intended to inflict an

injury which was sufficient in the ordinary course of nature to cause death or that he knew that his act was so imminently dangerous that it must in all

probability cause death or cause an injury as is likely to cause death.

9. It is true that the witnesses say that the appellant used a chhura. It is also true, that the injury was inflicted on a vital part of the body but the fact

remains that no vital organ of the body was injured thereby. Again, we do not know how big the chhura was and, therefore, it cannot be said that it

was sufficiently long to penetrate the abdomen deep enough to cause an injury to a vital organ which would in the ordinary course of nature be fatal.

The chhura could not be recovered but the prosecution should at least have elicited from the witnesses particulars about its size. We are, therefore,

unable to say with anything near certainty that the appellant had such intention or knowledge. Incidentally we may point out that Shankar Prasad does

not say that after he released the wrist of Sushil the appellant inflicted or even tried to inflict any further injury on him.

10. In this state of the evidence we must hold that the prosecution has not established that the offence committed by the appellant falls squarely under

Section 307, I. P. C. In our opinion, it amounts only to an offence under Section 324, I. P. C.

6. The conviction of the accused under Section 307 of the IPC is not sustainable and is set aside. The accused are convicted for offence punishable

under Section 324 of the IPC.

7. Accused Vinayak Puram has already undergone eighteen months of detention as an under trial prisoner and then as a convict and accused 2 Nitin

Idpate, who is convicted with the aid of Section 34 of the IPC, has undergone thirteen months of detention. I deem it appropriate to sentence accused

Vinayak Puram and Nitin Idpate to detention already undergone.

8. The accused are acquitted of offence punishable under Section 307 of the IPC read with Section 34 of the IPC. Instead they are convicted for

offence punishable under Section 324 read with Section 34 of the IPC and are sentenced to suffer detention already undergone.

9. Accused Vinayak Puram is in jail. He be released from custody forthwith unless required in any other case.

10. The bail bond of accused Nitin Idpate shall stand cancelled. Fine paid by the accused, if any, shall be refunded to them.

11. The appeal is partly allowed and is disposed of.