

(1997) 09 BOM CK 0013
In the Bombay High Court
Case No : Criminal Appeal No. 73 of 1994

Manik Bandu Gawali

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 02-09-1997

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154
Evidence Act, 1872 — Section 3, 45, 59, 61
Penal Code, 1860 (IPC) — Section 300, 307, 323, 324, 326

Citation : (1998) 5 BomCR 777 : (1998) CriLJ 2246 : (1998) 2 DMC 315 :
(1998) 2 MhLj 628

Hon'ble Judges : L. Manoharan, J;G.D. Patil, J

Bench : Division Bench

Advocate : M.R. Daga, for the Appellant; Majmudar, A.G.P., for the Respondent

Judgement

L. Manoharan, J.—The accused in Sessions Case No. 112 of 1993 of the Court of Additional Sessions Judge, Buldana is the appellant. He along with the second accused was charged for the offence punishable u/s 307 read with section 34 of the Indian Penal Code. The learned Judge acquitted the second accused and convicted the first accused-appellant u/s 307, Indian Penal Code and sentenced him to undergo rigorous imprisonment for seven years and to pay fine of Rs.500/- in default, to undergo R.I. for a further period of three months underline second part of section 307, I.P.C. The finding, conviction and sentence are under challenge in this appeal.

2. P.W. 1 Saraswati was married to the first accused and in that relationship she begot a son who, on the date of occurrence, was about 3 years old and was residing with her. Accused was residing with P.W.1 and her family, but 3-4 months before the occurrence he started living away from her along with accused No. 2. On the date of occurrence i.e. on 16-8-1993, according to the prosecution, the first accused along with the second accused came to the house of P.W.1 in the evening and demanded P.W. 1 to hand over his son. PW.1 declined and said that she would hand over him in the next morning. On that both the accused left,

but accused No.1 returned after a short time. According to the prosecution, at that moment there was nobody except P.W. 1 in the house, for her parents had gone to wash bullocks and her sister had gone for washing clothes. Then the first accused poured kerosene from a bottle on P.W. 1 and set on fire and ran away. According to the prosecution, at that time second accused was seen in the nearby bush. P.W. 1 raised alarm. Hearing the alarm her sister rushed to her and threw water on her. Thereafter she was taken to the hospital where P.W. 2 Dr. Ramteke admitted her, and at the hospital her statement was recorded by the Executive Magistrate. Constable Mohan filed complaint before P.W.3 Chavan, Police Sub-Inspector along with the said statement. On the basis of the same, P.W. 3 registered a crime against the accused persons for the offence punishable under sections 326 and 307 r/w section 34,I.P.C. After completing the investigation P.W. 3 laid charge before the Court. Court framed charge against the accused persons for the offence punishable u/s 307 read with section 34,I.P.C. On the accused pleading not guilty to the charge, prosecution examined RWs. 1 to 3. The learned Sessions Judge after adverting to the evidence of these witnesses, sentenced the first accused as indicated above.

3. Mr. Daga, learned Counsel for the appellant, challenged the very finding by the learned Judge maintaining that the prosecution has failed to examine any of the neighbours or even the sister of P.W. 1 who, according to the prosecution, threw water on her. The learned Counsel maintained that there is no acceptable evidence to show that the accused brought kerosene and poured it on P.W. 1. It was maintained by the learned Counsel that with due regard to the hostile relationship between P.W. 1 and the first accused, uncorroborated testimony of P.W. 1 could not have been made the basis for conviction. The learned Counsel also maintained that the possibility of her attempting to commit suicide also cannot be excluded.

4. On the other hand Mr. Mujumdar, learned Additional Public Prosecutor maintained that in the context of the fact that P.W. 1 sustained injuries which as per evidence of P.W. 2. Dr. Ramteke could be sustained by fire, normally a wife could not have made false allegations against her husband. He maintained, the evidence of P.W. 1 is sufficiently corroborated by the evidence of P.W. 2 and the attending circumstances.

5. It is necessary in this context to note that there was hardly any time lapse in registering the crime; and her statement was recorded in the hospital itself. Though the statement does not amount to a dying declaration, the same is a statement on the basis of which complaint was filed before P.W. 3. In chief-examination P.W. 1 swears as to how the occurrence took place. The fact that the accused was having bottle containing kerosene with him was brought out in the cross-examination of P.W. 1. In fact, the trial Court points out that this particular aspect was brought out in the cross-examination. The cross-examination is such that, the same could not in any way shake the veracity of what she said in the chief-examination. Added to that the medical evidence corroborates her.

Therefore, the argument of the learned Counsel Shri Daga that prosecution failed to prove the occurrence cannot be accepted.

6. The main thrust of the argument of Shri Daga, was, with due regard to the nature of injuries sustained by P.W. 1 the offence is not one punishable u/s 307, I.P.C. The learned Counsel relied on the evidence of P.W. 2 to demonstrate that P.W. 1 sustained only 16 per cent burns and pointed out that, though in the cross-examination P.W. 2 volunteered to say that if treatment was not given, the injuries could be sufficient to cause death, the same cannot be sustained in view of the nature of injury sustained by her. This aspect is stressed by the learned Counsel, as according to him, when injury is sustained in the alleged attempt to commit murder, the nature of the injury has to be focussed to see whether the intention was to cause death; and if the injury is such that same cannot cause death in the ordinary course of nature, then according to the learned Counsel, the same cannot constitute attempt to murder as understood u/s 307, I.P.C., instead it could only be an offence punishable either u/s 324 or 326, I.P.C. depending on the nature of injury sustained. The learned Counsel, in support of the said argument, referred us to the decision in *Sanjay Kumar v. State of M.P.*, 1994 S.C.C. 586 where, all that is held is that, for conviction u/s 307 it must be shown that the accused acted with such intention or knowledge and under such circumstances that if he by that act caused death, he would be guilty of murder. The learned Counsel then relied on the decision in *Virsa Singh Vs. The State of Punjab*, which was referred to and followed in a decision in *Jai Prakash Vs. State (Delhi Administration)*, . *Virsa Singh's* case arose u/s 302, I.P.C. The Supreme Court held that once the intention to cause the bodily injury actually sustained is proved, the rest of the enquiry is purely objective and the only question then would be whether the said injury is sufficient in the ordinary course of nature to cause death. This is emphasised in the decision in *Jaiprakash's* case (cited *supra*). From the principle laid down in these two decisions the learned Counsel sought to maintain that unless injuries are capable of causing death in the ordinary course of nature, the offence of attempt to commit murder cannot be maintained u/s 307, I.P.C.

7. In appreciating this argument, it is necessary to advert to section 307, I.P.C. which is as under:

"307. Attempt to murder.--- Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore mentioned.

Attempts by life convicts.--- When any person offending under this section is under sentence of imprisonment for life, he may, if hurt is caused, be punished with death."

Illustrations.

(a) A shoots at Z with intention to kill him, under such circumstances that, if death ensued, A would be guilty of murder. A is liable to punishment under this section.

(b) A, with the intention of causing the death of a child of tender years, exposes it in a desert place. A has committed the offence defined by this section, though the death of the child does not ensue.

(c) A, intending to murder Z, buys a gun and loads it. A has not yet committed the offence, A fires the gun at Z. He has committed the offence defined in this section, and if by such firing he wounds Z, he is liable to the punishment provided by the latter part of the first paragraph of that section.

(d) A, intending to murder Z by poison, purchases poison and mixes the same with food which remains in A's keeping; A had not yet committed the offence defined in this section. A places the food on Z's table or delivers it to Z's servants to place it on Z's table. A has committed the offence defined in this section.

The section requires that the act must have been with intention or knowledge, and under such circumstances that, if the said act caused death, he would be guilty of murder. Intention or knowledge of the said nature is necessary ingredient to bring out offence u/s 307, I.P.C. The first part says that if the act is proved to have been done with intention or knowledge as afore indicated, he shall be punished with imprisonment of either description for a term which may extend to ten years, and the second part states that when hurt is caused in that attempt, the offender shall be liable for imprisonment for life or such punishment mentioned in the first part of the section. The third part says that when a person undergoing sentence of imprisonment for life commits attempt to murder and hurt is caused, he may be punished with death.

Having understood the scope of the section as indicated above, it is necessary to look at the illustrations. Mere preparation is not enough to constitute an offence. Unless that preparation passes to the stage of attempt, it cannot be made punishable. Illustration (c) is of importance which envisages an offender intending to cause murder buys a gun and loads it. The illustration says that he has not committed the offence, but if he fires the gun, he commits the offence; and if, by such firing he wounds the victim, he is liable for punishment provided under the latter part of the first paragraph of the section. So, once hurt is caused in an attempt to murder, the accused will be liable to be punished under the second part of section 307, I.P.C. Illustration (d) demonstrates that mere preparation by itself would not amount to attempt. It postulates a case where a person, with intention to cause murder, purchases poison and mixes it with the food and keeps it with himself. The illustration says that, the same would not constitute attempt to murder. But when he places the food on the table of the victim or delivers it to the servant to place it on the table, the illustration says,

the same is attempt to murder. Therefore, it is clear, to constitute an offence u/s 307 no injury as such is necessary; but when in the attempt injury is caused, illustration (c) clearly demonstrates that the offender will be liable to punishment under the second part of section 307, I.P.C.

8. Now it is necessary to advert to the decision referred to by the learned Counsel Mr. Daga. Those decisions cannot have application because section 300 postulates completed act; not attempt. Section 300 will come into play only when pursuant to the act death occurs. Section 300 Thirdly applies when death is caused with an intention to cause bodily injury and the injury so caused is sufficient in the ordinary course of nature to cause death. There, even when the intention was only to cause such bodily injury which injury in the ordinary course of nature is enough to cause death and death ensues, it is murder. Thus section 300 Thirdly concerns a case where the intention as such was not to cause death but was to cause injury of the description mentioned therein. That is, as per section 300 Thirdly, even when the intention was not to cause death, it is enough that the intention was to cause an injury which in the ordinary course of nature is sufficient to cause death and death ensues. Therefore, u/s 300 Thirdly, if the accused causes intentionally a particular injury and the victim dies, irrespective of the question whether the accused intended to cause death, it will be murder, provided the injury so inflicted was sufficient in the ordinary course of nature to cause death. It is the said part of section 300 that fell for consideration in the aforesaid two decisions cited by the learned Counsel Shri Daga. With due regard to the wording of section 307, particularly when section 307 takes into its fold not only the case where injury is sustained, but even a case where no injury is sustained also, to say that the intention has to be discerned only by looking at the injury is not correct. In terms of section 307 in an attempt to cause death if injury is sustained, the offence becomes an aggravated one.

9. The scope of section 307 fell for consideration in the decision of State of Maharashtra Vs. Balram Bama Patil and Others, where Their Lordships adverted to the question as to the relevance of nature of injury in deciding the intention, held :

"To justify a conviction u/s 307 it is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even in some cases, be ascertained without any reference at all to actual wounds It is not necessary that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. What the Court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in this section. An attempt in order to be criminal need not be the penultimate act. It is sufficient in law, if there is present an intent coupled with some overt act in execution thereof."

In such circumstances we are unable to agree with the learned Counsel Shri Daga when the learned Counsel maintained that unless injury is shown to be such that the same is capable of causing death in the ordinary course of nature, offence u/s 307 would not be made out.

10. The only question now to be considered is whether the facts and circumstances as proved in this case would persuade the conclusion that the first accused had intention to cause death. In the context the test would be, if the attempt materialised into complete act, whether death could have ensued. Here the evidence to which we have already adverted shows that the first accused came to the house of P.W. 1, then he poured kerosene from a bottle which he had with him and lighted her with a match stick. Then the sequence is, as soon as thus P.W. 1 was lighted by the appellant, she raised alarm, the appellant ran away. The alarm attracted her sister who was away for washing clothes. She rushed back and since she saw her sister in flames, she threw water on her. The flames came to be extinguished because of throwing of water by the sister of P.W. 1. When a person doused in kerosene is set at flame and if the flame is not extinguished by external force, the person is certain to meet with death. As we have noticed, section 307 does not contemplate even causing of any injury provided it is successfully proved that the attempt was in pursuance of the intention to cause death. Intention being a condition of mind, generally is a matter for inference from attending circumstances including the method in which the alleged act was sought to be executed. The means and method by which the act was sought to be executed, at times, will have crucial bearing especially in a case of attempt to commit an offence. That intention is demonstrated sufficiently by the overt act attributed to the accused. That the act could not be materialised cannot come to the rescue of the accused, because it is not a case of sheer preparation. That attempt was carried to certain extent causing hurt. Pouring an inflammable substance like kerosene on the victim and lighting the victim are acts which open the doors of the mind of the assailant. The effect of the act proved against accused is like throwing a lighted match stick on gun powder. It should not be forgotten that a person is presumed to have intended the natural and ordinary consequence of his act. Second limb of section 307 stood satisfied and, therefore, we are in agreement with the learned Sessions Judge when he held that the prosecution is successful in proving the offence punishable u/s 307, I.P.C. against the first accused.

11. Lastly Shri Daga maintained that the punishment of seven years rigorous imprisonment at any rate is disproportionate. The learned Sessions Judge has stated the reasons for awarding the sentence. The learned Counsel Shri Daga submitted that the accused has already undergone four years' imprisonment and sought support from the decision in State of Maharashtra Vs. Balram Bama Patil and Others, to maintain that the sentence already undergone will be sufficient. We have given our anxious thought and consideration to the said submission. We cannot escape noticing the amendments made to the Indian Penal Code in the context of attacks on females --- particularly sections 304B and 498A. These are

incorporated because of the awareness of certain tendency and the resolve to curb it. With due regard to the nature of the offence, the way in which the same was executed, we are not inclined to accept the said submission of the learned Counsel for the appellant. Therefore, we are in agreement with the learned Sessions Judge as to the sentence awarded to the accused. Thus there is nothing to interfere in the judgment under appeal. The appeal is liable to be dismissed which we accordingly dismiss.

12. Appeal dismissed.