

(1971) 04 BOM CK 0016
In the Bombay High Court
Case No : Criminal Appeal No. 1291 of 1969

Ramchandra Bhairu Shingate

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 14-04-1971

Acts Referred:

Penal Code, 1860 (IPC) — Section 307, 326

Citation : (1971) 73 BOMLR 811 : (1972) MhLj 226

Hon'ble Judges : Vimadalal, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Vimadalal, J.—This is an appeal by an accused who has been convicted by the learned Sessions Judge, Satara, of an offence u/s 326 of the Indian Penal Code and sentenced to two years' rigorous imprisonment and a fine of Rs. 500.

2. The facts of the prosecution case are that, at the material time viz. on December 17, 1968, one Balvant Shingate who was an agriculturist by profession was working as the Talathi of a village named Sartale about 6 or 7 miles away from another village named Marde in Satara District. The said Balvant was a close friend of one Sitarai Shiugate, the brother of the accused, and the accused as well as his brother Sitaram had their lands in the village of Marde. It appears that Balvant had a brother named Waman with whom he had certain property disputes, and the said Waman was a friend of the accused. This is the background of the relations between the parties. On the morning of December 17, 1968 Sitaram had gone to Balvant's house as Balvant needed Sitaram's cart for the removal of groundnut creepers from one part of his field to another part of the same field, and Balvant and Sitaram, therefore, started to go to Sitaram's house. On the way, they were joined by one Shankar Patil who was formerly a revenue Patil. The three of them went together to Sitaram's house and had tea there, and Shankar and Balvant then left the house of Sitaram, Shankar being-ahead by 10 or 12 paces. Whilst they were walking in that order and were only

about 50 paces from Sitaram's house, according to the prosecution, the accused Ramchandra came from the north side where his own field was situated, on to the road by which Balvant was proceeding. The prosecution case is that when he came in front of Balvant he took out a knife from the pocket of his pyjama trouser and gave a blow with that knife on the left side of Balvant's stomach, that Balvant then shouted, whereupon the accused gave another blow on the right side of Balvant's stomach, that oil hearing the shouts Sitaram rushed to the spot from his house and caught hold of his brother the accused and lifted him up and threw him on the ground, in which process Sitaram himself sustained a slight injury. The prosecution story is that the accused then tried to strike Sitaram on his back but the blow missed him and the blade of the knife came in contact with the ground and got bent. Sitaram then snatched the knife from the hand of the accused and gave it to his servant Maruti who had also come up by then, but the knife was ultimately taken possession of by the injured man Balvant who kept it in a cloth bag which he had with himself. Balvant was then put in a bullock cart and was given medical attention and fortunately recovered to tell the story in the trial Court. On these facts, the accused was charged with the offence of having attempted to commit the murder of the said Balvant u/s 307 of the Indian Penal Code, and having caused injuries to the said Balvant in that process. The Sessions Judge accepted the prosecution evidence and held that it was the accused who had inflicted the injuries in question on Balvant, but convicted him not of the offence u/s 307 of the Indian Penal Code with which he had been charged, but of the offence u/s 326 of the Penal Code and sentenced him as already stated above. It is from that order of conviction and sentence that the accused has preferred this appeal.

3. [His Lordship after considering the evidence and holding that the prosecution had proved the guilt of the accused beyond reasonable doubt, proceeded.]

4. The only other question that survives is whether the trial Court was right in convicting the accused of the offence u/s 326 of the Indian Penal Code, when the actual charge framed against him was one u/s 307 of the Indian Penal Code. The offence u/s 326 of the Indian Penal Code cannot be said to be a minor offence in relation to the offence u/s 307 of the Indian Penal Code, having regard to the fact that the punishment provided by Section 326 of the Penal Code is not less than that provided by Section 307, and having regard also to the fact that the ingredients of the two offences are different in some respects. The conviction of the accused u/s 326 of the Penal Code by the trial Court cannot, therefore, be justified under the provisions of Section 238 of the Code of Criminal Procedure nor, in my opinion, can that conviction be buttressed by Section 535(1) of that Code which provides that a finding or sentence is not invalidated merely because no charge was framed, unless a failure of justice has been occasioned thereby. Section 535(1) cannot be invoked in cases in which, the ingredients of the offence charged and of the offence of which the accused has been found guilty are in any manner different, for the simple reason that failure of justice is bound to result in such cases, in my opinion, Section 535(1) applies only to

cases in. which either there is no charge at all and the offence is not of a serious nature, or in which the offence charged is of such a nature that there is no difference between the ingredients of that offence and the ingredients of the offence of which the accused has actually been convicted, or the offence charged comprises all the ingredients of the offence of which the accused has been found guilty and some more. I also do not accept the contention that the absence of a charge u/s 326 of the Indian Penal Code in the present case is a mere irregularity which can be cured under the provisions of Section 537(6) of the Code of Criminal Procedure for, as a matter of plain language, Clause (b) of Section 537 does not deal with cases in which there is a complete omission to frame a charge in respect of the particular offence of which the accused has been found guilty. I have, therefore, come to the conclusion that the conviction of the accused u/s 326 of the Indian Penal Code by the trial Court cannot be sustained and must be aside.

5. That does not, however, mean that the accused must be acquitted in the present case. An appellate Court has ample powers u/s 423(7)(b)(2) of the Code of Criminal Procedure to alter the finding whilst maintaining the sentence, so long as it does not convict the accused of an offence of an entirely different character, I, therefore, see no difficulty in the way of my convicting the accused in the present case of the offence u/s 307 of the Indian Penal Code and maintaining the sentence already passed upon him by the trial Court, if I come to the conclusion that the evidence on record proves nil the ingredients of that offence.

6. It was sought to be contended by Mr. Bhonsale on behalf of the accused that, having regard to the evidence of Dr. Desai, I cannot hold that the prosecution has proved the accused to be guilty of the offence of attempting- to murder the said Balvant u/s 307 of the Indian Penal Code. He has relied upon the fact that Dr. Desai has in terms stated that, though in the first instance he thought the injuries on Balvant were serious, his opinion is that they were "not necessarily sufficient to endanger human life" and that though injuries Nos. 2 and 3 were in the vicinity of certain vital organs, injury 1 was not located on any vital part of the human anatomy. It is true that Dr. Desai has given that evidence in the trial Court but, in my opinion, the argument of Mr. Bhonsale on this point is fallacious, in so far as it overlooks the fact that there may be an attempt to commit murder even without inflicting any injury at all on the intended victim of the offence. The most outstanding example of such a case is the case of *Emperor v. Vasudeo Goyte* (1982) 34 Bom. L.R. 371 in which the accused fired two shots at Sir Ernest Hotson, the then Acting- Governor of Bombay, from a revolver at point blank range, but the shots failed to take effect, either due to a defect in the ammunition, or to the intervention of a leather wallet and folded currency notes in the pocket of the Governor. On those facts, a Division Bench of this Court held the accused guilty of the offence of attempting to murder Sir Ernest Hotson, though no injury whatsoever was caused to him by the act of the accused. What the prosecution has to prove in order to bring home an offence u/s 307 of the

Indian Penal Code is, (1) that the death of the victim was attempted; (2) that the death was attempted to be caused by or in consequence of the act of the accused; and (3) that such act was done either with the intention of causing death, or with the intention of causing such bodily injury as was sufficient in the ordinary course of nature to cause death. It is not necessary for me to refer to other ingredients which are not applicable to the facts of the present case. In my opinion, the evidence on record before me in this appeal leaves no room for doubt that the death of Balvant was attempted to be caused by the act of the accused of stabbing him with a huge knife in the abdomen. There can also be no doubt that that act of the accused, viz. the stabbing, was done with the intention of causing- death, or, in any event, with the intention of causing such bodily injury as was sufficient in the ordinary course of nature to cause death, but failed to achieve its object because of certain supervening circumstances to which I will presently refer. Mr. Tipnis has pointed out the facts from which both these intentions can be easily inferred. Those facts are: (1) the nature of the weapon used, viz. a Rampuri knife as big as 12 1/2" in length of which the blade alone was 5 1/2" long and 1 1/2" broad in the middle; (2) the manner in which the accused whipped out the knife from the pocket of his pyjama trouser and struck the two blows in quick succession on the unsuspecting Balvant; (3) the part of the body selected, viz. lower part of the abdomen which is a vital part of the human anatomy; and (4) the nature of the injury inflicted which, but for the fact that it happened to go slanting, would have inflicted irretrievable damage on the victim of the offence. The reasons why the accused did not succeed in accomplishing his intention to cause the death of Balvant, or to cause him bodily injury sufficient to cause death, was the prompt intervention of the accused's own brother Sitaram who came and bodily lifted the accused and threw him on the ground, and the fortuitous circumstance that when the accused tried to wield a knife on Sitaram in order to get him out of the way, it missed Sitaram by causing him only a slight injury and the blade of the knife happened to come in contact with the ground and got bent. But for these two supervening circumstances, I have no doubt that the accused would have been able to accomplish his object of killing Balvant or, at any rate, of causing him such injuries as would be sufficient in the ordinary course of nature to cause death. I have, therefore, come to the conclusion that the evidence on record from which all these conclusions follow establishes beyond any reasonable doubt all the ingredients of the offence u/s 307 of the Penal Code of attempting to commit the murder of Balvant, with which the accused was charged in the trial Court. I, therefore, convict him of that offence and maintain the sentence passed upon him by the trial Court.

7. I cannot part with this case without observing that the sentence which the trial Court has passed upon the accused in this case is inadequate, having regard to the seriousness of the offence. No notice of enhancement of sentence has, however, been directed to be issued on the accused at the time of the admission of this appeal and I do not think it necessary to direct such a notice to be issued

at this stage as it would entail an adjournment of the hearing of this appeal. The accused must surrender to bail within a week.