

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CRL. REV. PETITION NO.709/2005 & CRL.M.A.9575/2005

Reserved on : 18.01.2008

%
24.01.2008

Date of decision :

SHRI MADAN GOPAL @ MADAN BHAIYA ... PETITIONER
Through : Mr.R.N.Mittal, Sr.Advocate with
Ms.Manisha Bhandari, Advocates

- V E R S U S -

STATE GOVT.OF NCT OF DELHI... ..RESPONDENT
Through : Mr. R.N.Vats, APP for the State

CORAM :

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

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| 1. Whether the Reporters of local papers
may be allowed to see the judgment? | No |
| 2. To be referred to Reporter or not? | No |
| 3. Whether the judgment should be
reported in the Digest? | No |

SANJAY KISHAN KAUL, J.

1. The petitioner is aggrieved by the framing of charges against him by the order dated 13.7.2005 in FIR 270/1999 in respect of offences alleged against him under Section 307 of the Indian Penal Code, 1908 (in short 'IPC').
2. The case of the prosecution is that they received secret information on 23.7.1999 that some dreaded criminals of

Uttar Pradesh would gather at Ashoka Hotel at Chanakya Puri to kidnap a trader for some ransom. The police team, thus, visited the venue at the hotel on 23.7.1999 at 11.30 A.M. Two vehicles - one Maruti Zen and one Opel Astra, arrived at about 11.45 A.M. and the petitioner got out at 12.00 noon from the vehicle. At about 12.15 P.M. the Opel Astra followed by the Maruti Zen started to move again when they were asked to stop. The petitioner was sitting on the right side on the back seat of the Opel Astra car and he pointed out a mouser from inside the car at the police party when the window glass of the vehicle was down. The other person accompanied in the car also did the same and one Ram Pratap sitting in the car incited the driver to drive the car over the policemen. Simultaneously, firing took place from the Maruti Zen car and there was return fire. The petitioner and others were over-powered. In the firing, Saria Pahalwan was shot dead.

3. Trial court record has been summoned and perused.
4. An FIR was filed under Sections 186/353/307/34 IPC and under Section 25/27 read with Section 59 of the Arms Act. The learned Additional Sessions Judge framed charges against the petitioner under Sections 307/186/353/34 IPC only as the petitioner was stated to have a license for the mouser.
5. The petitioner aggrieved by the framing of the charges, filed

Criminal Revision Petition No.444/2001 and the prosecution pleaded that the medical evidence was yet to be recorded to see whether there is any injury. The revision petition was disposed of by the order dated 4.11.2003 with the direction that the evidence of the doctor has to be recorded and thereafter the petitioner would be at liberty to file another petition. It is stated that thereafter the evidence of the doctor was recorded.

6. A categorical assertion has been made in para-3 of the petition that other than Criminal Revision Petition No.444/2004 (which should actually read as 444/2001), no other petition was filed before this Court or any other Court. On the recording of doctor's evidence, the petitioner filed another Criminal Revision Petition No.901/2003 for revision of charges under Section 307 IPC, which was disposed of by an order dated 7.5.2004 with the direction that it was open to the petitioner to move the trial court for amendment of charges. The petitioner thereafter filed an application for amendment of the charges, which request has been declined by the impugned order dated 13.7.2005.
7. A perusal of the impugned order shows that the learned ASJ has considered the application of the petitioner under Section 216 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the said 'Code') on merit. The learned trial court took note of the plea of the petitioner

that there was no allegation against the petitioner of any overt act as the accused had not fired the pistol and no injury has been received by any member of the raiding party. There was no MLC of any member of the raiding party. The petitioner had a licensed revolver and that is why the charges were not framed under the Arms Act. It is further alleged that there was contradiction in the statement of the prosecution witnesses recorded under Section 161 of the Cr.P.C.

8. The aforesaid pleas were sought to be opposed by the learned APP for the State before the trial court and it was submitted that the accused had pointed a pistol at the members of the raiding party and, thus, even if the accused has not fired and no injuries received by any member of the raiding party, charges under Section 307 IPC had been properly framed. The intention to point the pistol was to kill even though no injuries have actually been caused.
9. The trial court has relied upon the observations in Sagayam Vs. State of Karnataka, 2000(3) C.C.Cases (SC)23 where it was held that it is not essential that bodily injury capable of causing death should have actually been inflicted to justify conviction under Section 307 IPC since an attempt in order to be criminal need not be the penultimate act foreboding death. It is sufficient in law if there is present an intent coupled with some overt act in execution thereof, such act

being proximate to the crime intended and if the attempt has gone so far that it would have been complete but for the extraneous intervention which frustrated its consummation. The trial court noted that the said judgment as well as another judgment relied upon by the petitioner, being Durgo Bai & Anr. Vs. State of Punjab, 2004 III AD (Cr.) SC 385 which dealt with the cases where after recording of evidence there was acquittal and not at the stage of framing of charge. Not only that, the observation in Sagayam Vs. State of Karnataka (supra) substantiates the plea that if there is an intent coupled with some overt act in execution, the same would suffice.

10. The trial court also examined the general principles for framing of charges that only sifting of evidence is necessary and as long as there is strong suspicion which leaves the court to think that there is ground for presuming that the accused has committed an offence, it is not open to the court to see that there is no sufficient ground for proceeding against the accused.
11. The factum of the accused pointing the pistol towards the members of the raiding party was an intention to kill and such intention could develop at the spur of the moment. It was held that there was sufficient material to frame charges.
12. Learned senior counsel for the petitioner strongly contended

that the statement of Shri Palbinder Singh of the Anti-Robbery Cell under Section 161 of the Cr.P.C. showed that when the mouser was recovered, there was one bullet stuck but the mouser was locked. It was, thus, pleaded that in view of the provisions of Section 227 of the Cr.P.C. dealing with the discharge of an accused, the present case was one where there was no sufficient ground for presuming any intent on the part of the petitioner so as to give rise to framing of charges under Section 307 IPC. Learned senior counsel emphasized that there were 9 police personnel who visited the site and two of them were in uniform. None of the persons including the persons in civilian dress went inside the hotel to find out what transpired in the meeting or in what manner. The common intent or the facts necessary for conspiracy have be gathered. It was only a case where a legal weapon was shown and the petitioner ran. The reason for this was stated to be that the police party had already shot dead a person in the encounter and there was an apprehension that the petitioner would meet the same fate.

13. Learned APP for the State, on the other hand, drew the attention of this Court to the charge-sheet to contend that a secret information was received about some hardcore criminals assembling together and it was known that these persons could indulge in firing and, thus, the police party

had to move carefully. The apprehension of the police party was correct as the mouser was pointed at the police by the petitioner to obstruct in the functioning of the police party with an intent to kill the personnel in order for the petitioner to escape.

14. Learned counsel for the parties referred to the judgment of the Supreme Court in Niranjan Singh Karam Singh Punjabi, Advocate & Ors. Vs. Jitendra Bhimraj Bijjaya and others, (1990) 4 SCC 76 to advance their case. The case, however, dealt with the special statute being the Terrorists and Disruptive Activities (Prevention) Act, 1987. The aspect of framing of charges was also dealt with. It was held that the Court had to sift and weigh the evidence on record and other documents only for the limited purpose of ascertaining whether prima facie case is made out against the accused. Thus, if such material is available, charges should be framed under Section 228 of the Cr.P.C. and, if there is absence of such material, then the accused should be discharged under Section 227 of the Cr.P.C.
15. Learned senior counsel for the petitioner emphasized by reference to the judgment in Dilawar Babu Kurane Vs. State of Maharashtra, 2002 CRL.L.J.980 that the Court while exercising powers under Section 227 of the Cr.P.C. does not act as a mere post-office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the

total effect of the evidence and the documents produced before the Court, and should not make a roving inquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial. On no prima facie case being made out, the High Court was held to have acted correctly in discharging the accused.

16. It is towards the culmination of the hearing that the learned APP pointed out that the averments made by the petitioner in respect of no other petition being filed are incorrect as the petitioner had, in fact, filed Criminal Misc.(Main) No.91/2001, which was dismissed by a speaking order on 16.3.2001. The said judgment is reported as Madan Gopal & Madan Bhaiya Vs. State, 2001 (1) JCC (Delhi) 316. Learned senior counsel for the petitioner did seek to canvass that the petitioner at that stage had approached for quashing of the FIR while the present stage was for quashing of charge-sheet though he did concede that this fact ought to have been mentioned in the petition. Learned senior counsel pleaded that neither the instructing counsel nor he was aware of this fact as he was not the counsel earlier for the petitioner.
17. On hearing learned counsel for the parties, I am of the considered view that there is no ground made out for amending the charge-sheet. The case against the petitioner is that he had used a mouser (albeit a licensed one) by

pointing it at the police party. He was sitting in a car where other person accompanying him had even asked the driver to run over the police party. The fact that the petitioner may not have actually fired or caused injury itself would not be sufficient to absolve the petitioner at this stage. It is always open to the petitioner during the course of evidence to establish the lack of *mens rea* in a case under Section 307 of the IPC.

18. It is not in dispute that the gun was loaded though it was stated by one of the police personnel that the same was locked when it was recovered. There was a time gap between the pointing of the mouser, the petitioner being over-powered and the mouser being recovered. Whether the mouser was locked prior to it or during the intervening period or whether the bullet was not fired, being in the chamber and in what circumstances, is a matter of evidence.
19. In Madan Gopal & Madan Bhaiya Vs. State (supra), some of the observations made are material though the case related to the quashing of the FIR. It has been observed that on seeing a mouser aimed, the police officer must have got terribly shaken obstructing him in the discharge of his official duties. The mouser was loaded. In my considered view, it cannot be said at this stage that the only object of the petitioner was to somehow run away from the scene by

pointing the mouser.

20. The trial court has discharged the function of sifting through the material on record to come to the conclusion that there was sufficient material to frame the charges.
21. In view of the aforesaid, the correctness, legality and propriety of the order framing the charges or refusing the plea of the petitioner to modify the charges cannot be doubted.
22. Dismissed.
23. Trial court record be sent back.

CRL.M.A.9575/2005

Application does not survive for consideration and is disposed of.

JANUARY 24, 2008
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SANJAY KISHAN KAUL, J.