

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 21 OF 2007

Walmik S/o. Baburao Karad,
Age : 32 years, Occup. Nil,
R/o : Vidyanagar, Paralivaijnath,
Ta. Parli, Dist. Beed.

...APPELLANT

VERSUS

The State of Maharashtra

...RESPONDENT

....
Mr. R.N. Dhorde, Senior Advocate instructed by
Mr. V. R. Dhorde, Advocate for applicant
Mr. M. M. Nelekar, APP for respondent

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CORAM : K.K. SONAWANE, J.

RESERVED ON : 11th FEBRUARY, 2019.
PRONOUNCED ON : 28th FEBRUARY, 2019.

JUDGMENT :-

1. Being dis-satisfied with the conviction for the offence punishable under Sections 307 and 353 of the Indian Penal Code (IPC) and resultant sentence of rigorous imprisonment for two years and to pay a fine of Rs.7,000/- in default to suffer simple imprisonment for a period of six months and rigorous imprisonment for one year and to pay fine of Rs.2,000/- in default to suffer simple imprisonment for a period of three months on both counts respectively, imposed by the learned Ad-hoc Additional Sessions Judge, Ambejogai, District Beed, in Sessions Case No. 93 of 2005, the appellant preferred the present appeal under Section 374(2) of the Code of Criminal Procedure, 1973, (Cr.P.C.), to redress his grievances.

2. The scenario of the prosecution case culled out in brief is that, the function of inaugurations of branch office of political party known as "Bhartiya Yuva Morcha" was scheduled to be held on 21-01-2002 at village Aswalamba, Taluka Parali, District Beed. Therefore, the Police Personnel PHC Shri. Gajkoas, PC Bandu Kadam, PC Awachar (Bhavsar), PC Sarukh and others were deployed for *Bandobast* duty in the village. All the police personnel on Bandobast duty had been to the village Aswalamba in Government vehicle Police Jeep bearing MH-06-M-9816. The PC Sy. Amjad Sy. Meer was the driver of the Police Jeep. The inaugural function commenced at about 10.00 p.m. in the night hours. The leader of BJP political party Shri. Dhananjay Mundhe inaugurated the Branch Office of Yuva Morcha. The Sarpanch Shri. Jiwraj Dhakne was the President of function. When the leader Shri. Dhananjay Mundhe was addressing to the gathering, that time, the person Shri. Shivaji Mundhe from audience uttered the obscene and lewd comments towards leader Shri. Dhananjay Mundhe. The disgusting and offensive words passed by the person Shri. Shivaji Mundhe created chaos and confusion in the gathering. The restive audience became violent and started attacking the miscreant namely Shri. Shivaji Mundhe. The Police Personnel on *Bandobast* duty rushed to maintain law and problem. The Police Personnel took the miscreant Shivaji Mundhe in their custody and requested the member of the assembly not to attack him. But, the mob was not in a condition to listen. They started pelting stones and insisted for custody of the miscreant Shivaji Mundhe. The police personnel anyhow succeeded to extricate him from the clutches of the mob. In the attempt, police

personnel also received the injuries following scuffle and stone pelting by the mob. However, police personnel made the injured Shivaji Mundhe to sit in the jeep, and the driver PC Sayyed attempted to switch on the vehicle jeep for proceeding towards Ambejogai Police Station. But, the mob cordoned off the vehicle to prevent the police personnel to carry the miscreants Shivaji Mundhe away from the spot. The mob flung the stones. The vehicle jeep caused damage in the incident. Meanwhile, the appellant-accused Shri. Walmik Karad caught hold the shirt collar of PC Sy. Amjad - driver of the Police Jeep vehicle. He took out the weapon revolver and put it on the head near the ear of PC Sy. Amjad. But, suddenly some one else pulled back the appellant Walmik Karad, and thereafter, the Police vehicle proceeded further towards Ambejogai with injured Shri. Shivaji Mundhe and other police staff. The police personnel PHC Shri. Sambhaji Gajkos filed the report of the incident to the Police of Ambejogai Police Station.

3. Pursuant to FIR of PHC Gajkos, the concerned PSO of Ambejogai Police Station registered the Crime No. 16 of 2002 under Sections 147, 148, 323, 324, 307, 353, 332 read with section 149 of the IPC as well as Sections 3 and 4 of the Prevention of Damage to Public Property Act, 1984, and Section 5 read with Section 27 of the Arms Act, 1959. Accordingly, police set the penal law in motion. The investigation was entrusted to P.I. Shri Chavan. He visited to the spot of incident and drawn the *panchnama* of scene of occurrence. He collected the clothes of injured under *panchnama*. He recorded statements of witnesses acquainted with the facts of the case. He inspected the vehicle-Police Jeep in presence of panchas and drawn

panchnama. He apprehended the accused for the sake of investigation. IO collected the Medical Certificate of the injured, etc., and after due investigation, he preferred the charge-sheet against in all 17 accused, including appellant in this case. The learned Magistrate committed the proceedings to the Court of Sessions for trial of the accused within ambit of law.

4. The learned Additional Sessions Judge, after compliance of procedural formalities, framed the Charge (Exhibit-8) against in all 17 accused including the present appellant. They all denied the charges and claimed for trial. In order to bring home guilt of the accused, prosecution examined in all seven witnesses in this case and also produced the documents of *panchnama* of spot, seizure of clothes of injured, Medical Certificate of injured etc to prove the charges against accused. The learned Sessions Judge recorded the statements of accused persons under section 313(1)(b) of the Cr.P.C. to afford them an opportunity to explain the incriminating circumstances brought on record. The accused denied the circumstances against them and claimed their false implication in this case due to political rivalry.

5. The learned Additional Sessions Judge considered the entire evidence adduced on record and arrived at the conclusion that prosecution failed to prove the offences beyond all reasonable doubt levelled against all other accused Nos. 2 to 17. Therefore, they all were acquitted for the charges pitted against them. The learned Sessions Judge also pleased to exonerate the present appellant for the charges under Section 143, 147, 148, 323, 324 and 332 read with Section 149 of the IPC as well as offences under Section 3 (1) of the

Prevention of Damage to Public Property Act, 1984, and Section 5 read with Section 27 of the Arms Act, 1959. However, the learned Additional Sessions Judge held the present appellant guilty for the offence punishable under Sections 307 and 353 of the IPC and imposed the resultant sentence of imprisonment and fine as indicated above. Being aggrieved by the findings of conviction and resultant sentence, the appellant invoking remedy under Section 374(2) of the Cr.P.C. preferred the present appeal for redressal.

6. The points of controversy in this appeal are centered on the question of sustainability of charges under Sections 307 and 353 levelled against the appellant.

7. In order to prove these charges, prosecution examined PW-1 Bandu Sadashiv Kadam (Exhibit-32), PW-2 Sambhaji Gajakosh – first informant (Exhibit-34), PW-3 Arun Sitaram Bhausar (Exhibit-38). These prosecution witnesses are the police personnel, deployed for *Bandobast* duty in the village “Aswalamba” on the day of incident. They deposed that, in the inaugural function of branch office of “Bhartiya Yuwa Morcha”, the PW-4 Shivaji Mundhe passed lewd and derogative comments towards leader Shri. Dhananjay Mundhe. The audience became furious and started assaulting to PW-4 Shivaji. The police personnel on Bandobast duty rushed to extricate the miscreant Shivaji. They made the PW-4 Shivaji, to sit in police jeep. But, the mob was insisting for custody of PW-4 Shivaji Mundhe. They started pelting stones. The driver of the police jeep, PC Sy. Amjad was about to start the vehicle, the appellant-accused put the weapon revolver on the head, near ear of the driver PC Sy. Amjad. But, some one else

pulled the appellant back. Thereafter, police personnel proceeded towards Ambejogai Police Station in police jeep accompanied with PW-4 Shivaji Mundhe.

8. The PW-5 P.C. Sy. Amjad Sy. Meer deposed that on the day of incident, he was on *Bandobast* duty at village 'Aswalamba'. At the relevant time, he was discharging the duty as driver on the police vehicle jeep. He stated about the ruckus occurred in the inaugural function of Branch Office of "Bhartiya Yuva Morcha" in the village following disgusting and offensive comments by PW-4 Shivaji Mundhe. The audience started assaulting the miscreant Shivaji Mundhe. The police on *Bandobast* duty succeeded to extricate him from the clutches of the mob and made him to sit in the police jeep. The mob was insisting the custody of PW-4 Shivaji. Meanwhile, the appellant came there and put the weapon revolver on his head near ear. The appellant threatened him not to remove the vehicle from the spot. The PW-5 Sy. Amjad – driver of police jeep further testified that, when the appellant was about to fire, someone else pulled his hand and took him away from the vehicle. Thereafter, PW-5 driver Sy. Amjad started the vehicle and proceeded towards Ambejogai Police Station with PW-4 Shivaji Mundhe.

9. Prosecution also made abortive attempt to adduce evidence of star witness PW-4 Shivaji Mundhe. But, initially he made volte-face and refused to favour the prosecution case. The learned prosecutor declared him hostile and prefer to cross-examine him to elicit the truth. However, during the course of cross-examination by the learned prosecutor, he conceded that the appellant- Walmik Karad

pointed out pistol on his chest and given the threats that he should not remain in Parali town for a month. He further added that when the driver of police jeep was about to start the vehicle, the appellant Walmik Karad put revolver on the head near ear of driver of police vehicle. But, later on he did not remember what had happened thereafter.

10. Now, the question would arise for consideration as to whether the charge under Section 307 of the IPC pitted against the appellant is sustainable on the basis of aforesaid evidence of police personnel and PW-4 Shivaji Mundhe. The provision of Section 307 of the IPC is reproduced as below -

"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 here in before mentioned.

Attempts by life convicts- [When any person offending under this section is under sentence of ¹⁰⁴[imprisonment for life], he may, if hurt is caused, be punished with death.]

11. It is evident from the aforesaid provision that there must be an act which is itself sufficient of causing death. The expression, *"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"*, unequivocally denotes that the act must be done with the intent or knowledge requisite for commission of offence of

murder. Moreover, mere intention to commit a specified crime does not *ipso facto* amount to an attempt, but there must be some overt-act towards commission of crime. The act under Section 307 of the IPC must be one which, by itself, capable of causing death in the natural and ordinary course of things.

12. Mr. Dhorde, learned Senior Counsel for appellant vehemently submits that in the present case, there are no allegation about fire from the revolver by the appellant. The appellant in a sudden fight pointed the revolver at the driver of the Police jeep, but some one else pulled him back, therefore, there was no opportunity for the appellant to fire from the revolver. In such background, it cannot be said that appellant did an act towards commission of offence of murder. Moreover, the prosecution did not bring on record whether the weapon revolver was loaded at the relevant point of time, when it was flashed to the Police Personnels and P.W. 4-Shivaji Munde. There was no recovery of weapon revolver in this crime. According to learned Senior Counsel, there is no cogent and dependable evidence on record to draw the adverse inference against appellant for his act of attempting to commit murder as envisaged under section 307 of the IPC. He relied upon the exposition of law delineated by the Hon'ble Apex Court in the cases of ***Om Prakash Vs. State of Punja*** reported in ***1961 Supreme Court, 1782*** and ***Awadesh Mahto and others Vs. State of Bihar*** reported in ***1979 Cri.L.J. 1275***, wherein it has been held that act towards commission of murder need not be penultimate act and in cases of attempt to commit murder by fire arm, the act amount to attempt must be only and the last act to be done by the culprit.

13. At this juncture, I find much more substance in the arguments advanced on behalf of learned Senior Counsel Mr. Dhorde for the appellant. It is not in dispute that there was an incident of sudden fight occurred at the spot following lewd and offensive comments passed by miscreant PW-4 Shivaji Mundhe, in the gathering. The audience started thrashing him but the Police Personnels deployed on bandobast duty intervene in the fight and rescued the miscreant PW-4 Shivaji Mundhe from the clutches of the violent mob. The police personnel was about to take away the miscreant PW-4 Shivaji Mundhe in the Police jeep to Ambejogai Police Station, but, the appellant flashed the revolver at the driver of Police jeep, however, before he had time to do anything further, someone else from the mob pulled him back. Therefore, there was no execution of act to commit murder of Police Personnels, etc. The mere act of putting revolver on head near ear of the driver of police jeep or pointing revolver at the PW-4 Shivaji Mundhe would not itself sufficient to cause their death as contemplated under Section 307 of the IPC. But, if there was any fire from the revolver by the appellant and someone else from the mob prevented the shot taking effect, in such situation, the inference can be drawn that the offence under Section 307 of the IPC is made out against appellant. It is to be noted that the provisions of Section 307 of the IPC would apply to the situation, when there has not been merely a commencement of an execution of the purpose, but, something remain short of complete execution; the consummation being hindered by the circumstances, independent of the will of the author.

14. The Honourable Apex Court in the case of **Om Prakash Versus State of Punjab** (*supra*) observed in paragraph 16 as under-

"It may, however, be mentioned that in cases of attempt to commit murder by fire arm, the act amounting to an attempt to commit murder is bound to be the only and the last act to be done by the culprit. Till he fires, he does not do any act towards the commission of the offence and once he fires, and something happens to prevent the shot taking effect, the offence under s. 307 is made out. Expressions, in such cases, indicate that one commits an attempt to murder only when one has committed the last act necessary to commit murder. Such expressions, however, are not to be taken as precise exposition of the law, though the statements in the context of the cases are correct."

15. The illustration 'C' of Section 307 of the IPC also itself makes it clear that in a case of attempt to cause death by fire arm, the arm must be fired and till it's fire no offence of attempt to commit murder under Section 307 of the IPC is held to be taken place. Illustration 'c' reads as below -

(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 this section.

16. In the matter-in-hand, as referred *supra*, there are no allegations that appellant fired the revolver. It is simply a case in which the appellant aimed the revolver at the driver of Police jeep and miscreants PW-4 Shivaji Mundhe, but before he do something more, unknown person from the mob pulled him back. In such circumstances, there is no impediment to arrive at the conclusion that the bare act of pointing revolver on the Police Personnel or PW-4 Shivaji, would not itself the act of "an attempt to commit murder" as contemplated under

Section 307 of the IPC. It is to be reiterated that till appellant used the weapon for firing, he cannot be blamed for the offence of attempt to commit murder. But, if he opened the fire and intervention of someone else prevented the shot from taking effect, the offence under Section 307 of the IPC would be held committed against the appellant. In such peculiar circumstances, in the present case, conviction of appellant under Section 307 of the IPC is not sustainable and deserves to be quashed and set aside.

17. It is also significant to note that there was no seizure or recovery of weapon - revolver during the course of investigation, which was used by the appellant while commission of crime. There were no endeavour on the part of prosecution to bring on record the circumstances as to whether the alleged weapon – revolver was loaded or it was in empty condition at the time of alleged incident. The appellant-accused is also absolved from the offence under section 5 read with section 27 of Arms Act. These circumstances found detrimental to weak edifice of the prosecution case.

18. Moreover, the attending circumstances on record reflect that the appellant had no strain relations or animosity with the police personnels, nor they had come in contact with each other prior to the incident. The restive mob vented wrath against the miscreant PW-4 Shivaji Mundhe. There was no reason for the appellant to assault police constable for committing his murder. It is unsafe to fasten guilt on the appellant for the charge under Section 307 of the IPC. The evidence of PW-4 Shivaji Mundhe indicates that appellant put the

weapon revolver on his chest and given threats that he should not remain in Parali town for a month. This version of P.W. 4 Shivaji unequivocally suggests that there was no intention of the appellant to eliminate Shivaji Mundhe, otherwise, he had an opportunity to shoot him on the spot. In such background also, it can be held that the appellant had no ill-intention to commit murder of police personnel or PW-4 Shivaji Mundhe. In addition to these facts as referred above, bare act of pointing the weapon towards prosecution witnesses would not itself sufficient to bring home guilt of appellant under Section 307 of the IPC.

19. In regard to conviction of appellant for the offence punishable under Section 353 of the IPC is concerned, it is to be noted that, appellant has been absolved by the learned trial Court for the offence punishable under Sections 143, 147, 148, 323, 324, 332 read with section 149 of the IPC as well as Sections 3 and 4 of the Prevention of Damage to Public Property Act, 1984, and Section 5 read with Section 27 of the Arms Act, 1959. Learned trial Court also ventured to exonerate the co-accused No. 2 to 17 for the offences pitted against them including Section 353 of the IPC. There were allegations that accused including appellant formed the unlawful assembly and in prosecution of the common object of such assembly, pelted the stones, assaulted the Police personnels and caused damages to the Police vehicle, etc. But, the learned trial Court found reluctant to draw adverse inference against all of them even for the charges under Section 353 of the IPC. As discussed above, the act of appellant flashing the revolver to the Police Personnels would not itself

sufficient to constitute offence under Section 307 of the IPC against him. Therefore, there is no propriety to fasten the guilt under Section 353 of IPC against the sole appellant, when he has been absolved from the offence of unlawful assembly, rioting etc. In the result, the conviction of the appellant under Section 307 and 353 of IPC is required to be upset and set aside. The findings of conviction of appellant for offence under Section 307 and 353 appear perverse, erroneous and not amenable within provisions of law. Therefore, appeal of the appellant deserved to be allowed in the interest of justice.

20. In above premise, the appeal stands allowed. The impugned Judgment and order of conviction and resultant sentence passed by the learned *Ad-hoc* Additional Sessions Judge, Ambejogai dated 11-01-2007, in Sessions Case No. 93 of 2005, is set aside and quashed. The appellant-accused is hereby acquitted for the offence punishable under Sections 307 and 353 of the IPC. The fine amount, if any, deposited by the appellant be refunded to him, after expiry of appeal period. Bail bond of the appellant stands cancelled.

21. In sequel, appeal stands disposed of in above terms. No order as to costs.

[K. K. SONAWANE]
JUDGE