

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

CRIMINAL APPEAL NO.211 OF 2017

1. Popat s/o. Vyankat Pawar,
Age : 53 years, Occ. Agri.,
2. Sitabai Popat Pawar,
Age : 46 years, Occ. Household,
3. Ashabai Arjun Pawar,
Age : 26 years, Occ. Household,
4. Sakhubai Pintu Pawar,
Age : 24 years, Occ. Household,
5. Nanibai Balaji Pawar,
Age : 41 years,
6. Akkabai Govind Pawar,
Age : 40 years, Occ. Household

All r/o. Yermala, Tq. Kallam,
Dist. Osmanabad

..Appellants

Vs.

The State of Maharashtra

..Respondent

Mr. S.J.Salunke, Advocate for appellants

Mrs.A.V.Gondhalekar, APP for respondent

**CORAM : R.G. AVACHAT, J.
RESERVED ON : MARCH 02, 2020
PRONOUNCED ON : MARCH 04, 2020**

JUDGMENT :-

This appeal is directed against the judgment and order dated 28.04.2017 passed by learned Additional Sessions Judge, Osmanabad, in Sessions Case No.1 of 2016, whereby the appellants herein have been convicted for the offences punishable under Sections 147, 148, 307, 353, 332, 225 and 506 read with Section 149 of Indian Penal Code and sentenced to imprisonments. The details of conviction and sentences are given in the tabular form as under :-

Conviction	Imprisonment and fine	Punishment in default
Section 148 of IPC	R.I. for one year and fine Rs.200/-	R.I. for One month
Section 307 read with Section 149 of I.P.C.	R.I. for ten years and fine of Rs.500/-	R.I. for Three months
Section 332 read with Section 149 of I.P.C.	R.I. for one year and fine of Rs.200/-	R.I. for One month
Section 225 read with Section 149 of I.P.C.	R.I. for one year and fine of Rs.200/-	One month
Section 506 read with Section 149 of I.P.C.	R.I. for one year and fine of Rs.200/-	One month

2. The facts, giving rise to the present appeal, are as follows:-

Popat Pawar (Accused no.1) was an accused wanted in a criminal case, vide C.R. No.76 of 2011 registered with Yermala Police Station for various offences punishable under Maharashtra Control of Organised Crime Act and Indian Penal Code ("I.P.C.", for short).

3. Rajendra Motale (PW 4) was an Officiating Police Station Officer (P.S.O.), Yermala Police Station. On 31.01.2012, he received a tip-off that Popat (Accused no.1) had come to his residence. PW 4 - Rajendra accompanied by his sub-ordinate police staff went to the house of Popat (A1). It was 1.30 p.m. Having seen the police party, Popat (A1) hid behind an Indica car, stationary nearby his house. PW 4 - Rajendra and his staff overpowered Popat (A1) and informed him to have been arrested in the said crime. Sitabai (Accused no.2), wife of Popat (A1),

made hue and cry. Ashabai (Accused no.3) and other female members of Popat's family gathered. They resisted the police party from taking Popat (A1) to police station. During the melee, Popat (A1) asked his wife Sitabai (A2) to fetch kerosene. He loudly said *"he would set at least one of the police personnel on fire"*. Sitabai (A2) brought a can containing kerosene, an empty vessel and a match-box and splashed kerosene on the person of PW 4 – Rajendra. She then ignited a match-stick with a view to set him afire. Other police personnel could successfully prevent her from setting PW 4 – Rajendra ablaze. Other women members (A3 to A6) of Popat's family and absconding accused, pelted stones at the members of the police party. Three-four police personnel were injured. Additional police force from kalamb Police Station was summoned. Thereupon, female offenders fled away. The police party brought Popat (A1) to the police station. PW 4 – Rajendra lodged the FIR (Exh.55).

4. Based on the FIR, crime came to be registered for the offences punishable under Sections 147, 148, 307, 353, 332, 336, 225, 504 and 506 read with Section 149 of I.P.C. PW 14 – Bhagat, S.D.P.O., Kallam, did investigation of the crime. He recorded statements of the persons acquainted with the facts and circumstances of the case. Injured police personnel were medically examined. Their medico-legal certificates were obtained. The scene of offence panchnama (Exh.89) was drawn. Articles like kerosene can, a vessel and a match-box came to be seized. Kerosene stained uniform of PW 4 – Rajendra also taken charge of. From the scene of offence, a half burnt match stick and kerosene stained earth was obtained. All the seized articles were sent to the office of chemical analyser for analysis and report. C.A. report was received. Appellant nos.2 to 6 also came to be arrested. Other accused are found to be absconding. On completion of the investigation, the

appellants came to be proceeded against by filing the charge sheet. On committal of the charge-sheet, the case came to be assigned to learned Additional Sessions Judge for trial in accordance with law. He framed the Charge (Exh.48). The appellants pleaded not guilty. Their defence was of false implication.

5. The appellants were charged on nine counts. To sustain the charge(s), the prosecution examined ten witnesses. The documents in the nature of panchnamas, C.A. report, etc. came to be tendered in evidence. On appreciation of the evidence in the case, the trial Court was pleased to convict and sentence the appellant, as stated above.

6. Heard Mr.Salunke, learned Counsel for the appellants and Mrs.Gondhalekar, learned APP for the respondent.

7. Mr.Salunke, learned Counsel for the appellant, would submit that it is a glaring case of false implication. The trial Court did not appreciate

the evidence in the case in the light of the provisions of Sections 307 and 149 of I.P.C. No independent witness has been examined. He, therefore, urged for setting aside the impugned judgment and order.

8. Learned APP would, on the other hand, submit that the evidence of the witnesses cannot be disbelieved merely because they belonged to constabulary. Oral testimonies of the injured police personnel have been corroborated by their medico-legal certificates, C.A. report and scene of offence panchnama. By virtue of Section 149 of I.P.C., all the members of unlawful assembly have rightly been convicted. According to her, no interference with the impugned judgment is called for.

9. I have considered submissions made by learned Counsel for the appellants and learned APP as well.

10. Section 141 of I.P.C. reads thus :-

141.Unlawful assembly.— An assembly of five or more persons is designated an “unlawful assembly”, if the common object of the persons composing that assembly is –

(First) – To overawe by criminal force, or show of criminal force, [the Central or any State Government or Parliament or the Legislature of any State], or any public servant in the exercise of the lawful power of such public servant; or

(Second) – To resist the execution of any law, or of any legal process; or

(Third) – To commit any mischief or criminal trespass, or other offence; or

(Fourth) – By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

(Fifth) – By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

Explanation.— An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly.

11. By virtue of Section 149 of I.P.C., every member of an unlawful assembly is guilty of the offence committed in prosecution of the common object. If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence. Section 149 of the I.P.C. makes every member of an unlawful assembly at the time of committing of the offence guilty of the offence. The section creates a vicarious liability for the unlawful acts committed pursuant to the common object by any other member of the assembly. The basis of such constructive liability is mere membership of such assembly with

the requisite common object or knowledge. Therefore, once the Court holds that certain accused persons formed an unlawful assembly and an offence is committed by any member of that assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every member of that unlawful assembly is to be held guilty of that offence. After such a finding it would not be open to the Court to see as to who actually did the offensive act or require the prosecution to prove which of the members did the offensive acts (**Lalji Vs. State of U.P., AIR 1989 SC 754**). It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall

within the purview of section 141 (**Bikau Pandey Vs. State of Bihar, AIR 2004 SC 997**).

12. It cannot be gainsaid that it is the quality of evidence and not quantity thereof, matters. The evidence of police personnel cannot be outrightly rejected merely because they belong to the department/investigating agency. It has, however, to be kept in mind that the evidence of such witnesses should be subject to close scrutiny.

13. PW 4 to PW 10 were the members of the police party visited the house of Popat (A1) for arresting him. Close scrutiny of their evidence would indicate that in almost all material particulars, their evidence is consistent with each other. That itself suggests their manifest interest in the case. They are all birds of a feather.

14. PW 4 – Rajendra was the head of the police party. It is in his evidence that pursuant to a tip off that Popat (A1) had come his residence, he along

with his police personnel went to his house. On having seen the police team, Popat (A1) hid behind a stationary car. He could, however, be overpowered. His wife Sitabai (A2) made ruckus. Other female members of his house also gathered there. All of them resisted PW 4 – Rajendra and his team from taking Popat (A1) to the police station. Popat (A1) asked his wife Sitabai (A2) to fetch kerosene, as he wanted to kill one of the police personnel by setting on fire. Sitabai (A2) obliged. She came with a can containing kerosene, a vessel and a match-box. It is further in his evidence that Sitabai (A2) splashed kerosene on the person of PW 4 – Rajendra and lit a match stick. P.S.I. Gawande and lady constables – Jadhav and Raut could overpower Sitabai (A2) and thus, prevented the mishap. It is further in his evidence that the women accused (A3 to A6) and other absconding accused pelted stones, whereby PW 5 – PSI Gawande and PW 10 – Dhakane, Police Constable, suffered injuries.

15. With a view to avoid repetition of the evidence, I do not propose to reproduce the oral evidence of PW 5 to PW 10. Suffice it to say that their evidence is consistent with the evidence of PW 4 – Rajendra in material particulars. Inconsistency *interse* their evidence would be highlighted herein below.

16. It is true that the evidence of PW 4 to PW 10 may be said to have been corroborated by their medico legal certificates (Exh.82 to Exh.86). The Charge is stated to have been duly proved on the basis of testimony of the Medical Officers, who had examined PW 4 to PW 10.

17. PW 4 – Rajendra lodged the FIR (Exh.55). Almost all the contents of the FIR have been reiterated by him in his oral evidence. The report lodged with the concerned police station in respect of a cognizable offence first in point of time with a view to set the criminal law in motion, is called

FIR. Since it is lodged first in point of time, it is assumed that all the facts are fresh in the mind of the person lodging the FIR and thus, are reflected therein. Close reading of the FIR, undoubtedly, indicates that it was the case of PW 4 – Rajendra that Sitabai (A2) brought a kerosene can, a vessel and and a match-box. After having splashed kerosene on the person of PW 4 – Rajendra, lady constables – Raut, Jadhav and PSI Dhakane snatched away the match-box and thus, prevented her from igniting a match stick. As such, the case made out in the FIR is that no match-stick was ignited. Whereas, in his oral evidence, PW 4 – Rajendra has improved his version in the FIR, by stating that Sitabai (A2) ignited the match stick.

18. PW 5 – Dinkar testified that while Sitabai (A2) was about to ignite the match stick, he and lady constables caught hold of her hands and successfully prevented her from lighting a match stick. PW – 7 Sahebrao and PW 9 – Kanchan testified that Sitabai

(A2) lit a match stick and threw it on the person of PW 4 - Rajendra. PW 8 - Venkatesh and PW 10 - Suryakant deposed that Sitabai (A2) lit the match stick and tried to set ablaze Rajendra.

19. The aforesaid evidence, undoubtedly, indicates that when, in the FIR itself, it was not the case of the informant that Sitabai (A2) ignited a match stick, in the oral testimony before the Court, the aforesaid witnesses alleged her to have lit a match stick. Even two of the witnesses testified that she threw a lighted match stick towards PW 4 - Rajendra. This evidence, undoubtedly, indicates that their evidence is not consistent *interse*. The witnesses have improved their versions over the allegations made in the FIR.

20. Section 307 of I.P.C. speaks of attempt to murder. It states that 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.

21. We have to take the version as is appearing in the FIR, which states that Sitabai (A2) threw kerosene on the person of PW 4 - Rajendra. The match-box was removed from her hands. As such, she did not even attempt to ignite a match stick. Even if we assume the evidence of aforesaid prosecution witnesses to be true to the extent of Sitabai (A2) splashing kerosene on the person of PW 4 - Rajendra, said act would, in no way, have caused his death. As such, the prosecution evidence could not make out a case/offence punishable under Section 307 of I.P.C.

22. Even if it is assumed that Sitabai (A2) splashed kerosene on the person of PW 4 - Rajendra, by the said act itself, no death could have been caused and therefore, ingredients of Section 307 of I.P.C. do not get attracted.

23. It is true that the principle '*falsus in uno, falsus in omnibus*' has no application in India. The facts in hand, however, indicate that the police

team was comprised of seventeen members. All of them were armed with fire arms. The alleged incident is said to have lasted for about two hours. It is just unconscionable to imagine that none of the police officials in the team acted in self defence. The case of the prosecution that Sitabai (A2) brought a can containing kerosene, an empty vessel and a match-box and then poured kerosene from the can in the vessel for being thrown/sprinkled on the person of PW 4 – Rajendra, is just unimaginable.

24. The alleged incident took place in a broad day light. The scene of offence was a thickly populated area. No independent witness has been examined. Even if we accept the case of the prosecution as it is, only Popat (A1) and Sitabai (A2) could be attributed with the offence punishable under Section 307 read with Section 107 of I.P.C. The alleged utterances by Popat (A1), asking his wife (A2) to fetch kerosene to set on fire one of the police personnel in the team, could be said to be an

utterance made at the spur of a moment. The alleged gathering of Popat (A1) and his family members could, in no way, be attributed to be formation of an unlawful assembly since inception with an object to eliminate, at least one of the police personnel in the team. The alleged action of Sitabai (A2) in fetching the kerosene would be an independent act done in response to the desire of Popat (A1). It is, therefore, surprising, as to why the trial Court has convicted rest of the accused persons for the offence punishable under Section 307 read with Section 149 of I.P.C. True, every member of the unlawful assembly, even not taking part in the overt-act committed to achieve the object of unlawful assembly, would be guilty of the main offence.

25. Out of nine accused, only one is a male. It is not known as to how PW 4 – Rajendra (informant) could name all the females in the FIR. Admittedly, only appellant no.1 was overpowered on the spot and taken to the police station. All the female accused/

appellant nos.2 to 6 and the absconding accused, allegedly, away from the scene. A2 to A6 came to be arrested at least four months after the alleged incident. On their arrest, no test identification parade has been held. There are general allegations in the FIR and/or oral evidence recorded before the Court that other accused persons pelted stones at the police party. Two-three stones hit the police personnel causing injuries thereby. Their injury certificates have been duly proved by the evidence of the Medical Officers, who have examined them. PW 4 – Rajendra did not state in his evidence before the Court, that he was hurt as one of the stones hit his shoulder. General and omnibus allegations have been made against rest of the female appellants. They have not been specifically identified before the Court. A general statement has been made that the accused are present before the Court.

26. It is not that no incident did take place. It is, however, reiterated that the witnesses

examined in the case (police personnel) are birds of a feather. They were seventeen in number, armed with firearms. None of them did anything in exercise of right of self defence. When the FIR itself, indicates that Sitabai (A2) did not ignite a match stick, the police personnel attributed her with said overt-act. This indicates their determination to implicate the appellants in serious offence like attempt to commit murder, which is punishable with imprisonment with ten years and fine as well. When the match stick was not lighted, a half burnt match stick was shown to have been recovered from the scene of offence. The same indicates the Investigating Officer too, was involved to see that the appellants are prosecuted for a serious offence.

27. The entire evidence in the case suggests falsity of the prosecution case. It is just difficult to disengage the truth from falsehood. The evidence of the police personnel did not inspire confidence. On the basis of such kind of evidence, the trial

Court ought not to have held the prosecution to have proved almost all the offences the appellants were charged with. I am not at one with the findings recorded by the trial Court. Interference therewith is, therefore, called for.

28. In the result, the appeal succeeds. Hence, the following order :-

(i) The Criminal Appeal is allowed.

(ii) The judgment and order of conviction and sentence dated 28.04.2017 passed by learned Additional Sessions Judge, Osmanabad, in Sessions Case No.1 of 2016 is set aside.

(iii) The appellants are acquitted of the offences punishable under Sections 147, 148, 307, 353, 332, 225 and 506 read with Section 149 of Indian Penal Code.

(iv) Appellant nos.1 and 2 be set at liberty forthwith, if not required in any other case.

(v) Bail bonds of appellant nos.3 to 6 shall stand cancelled.

(vi) Fine amount, if paid, be refunded to the appellants.

[R.G. AVACHAT, J.]

kbp