



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 760 OF 2024

Mahanor S/o. Sudmal Kale,
Age : 23 Years, Occu : Agri.,
R/o. Salbatpur, Tq. Newasa,
District Ahmednagar

...APPELLANT

VERSUS

The State of Maharashtra,
Through Police Inspector,
Police Station, Shrirampur (City).
Shrirampur

...RESPONDENT

WITH
CRIMINAL APPLICATION NO. 4292 OF 2019
IN
CRIMINAL APPEAL NO. 760 OF 2024

Mrs. Renuka V. Ghule-Palve, Advocate for the Appellant.
Ms. M. N. Ghanekar, APP for Respondent – State.

CORAM : RAJNISH R. VYAS, J.
DATE : FEBRUARY 18, 2026

JUDGMENT :

1. The accused has approached this Court challenging the judgment dated 25th September 2017 passed in Sessions Case No.12 of 2010 by the Additional Sessions Judge, Shrirampur, by which he was convicted for the commission of offence punishable under Section 399 of the Indian Penal Code, 1860 (hereinafter referred to as “IPC” for the

sake of brevity) and directed to suffer rigorous imprisonment for term of eight years and pay fine of ₹ 8,000/-. A default sentence of two years was also imposed upon him.

2. In short, it is the case of the prosecution that police officers attached to the respondent police station received certain information based on which a raid was decided to be conducted. Accordingly, the necessary arrangements were made. The spot of the incident was raided by the police authorities, where it was found that a few persons were sitting in a thorny bush at night, talking in sign language. When the police officers tried to apprehend the persons, a few ran away, but two of the accused were caught. The present appellant is one of the accused.

3. It is the case of the prosecution that chilli powder and a shock-up of a vehicle were recovered from the accused persons. It is against this background that the first information report was lodged and the investigation carried out. During the course of the investigation, the necessary seizures were made, and the spot panchnama was also prepared. After completion of the investigation, a charge sheet bearing No.30 of 2010 was filed against the three accused. Mr Vijay Balu Bhosale was shown as accused No.1, the

present appellant as accused No.2, and one Ramesh Bhosale was shown as accused No.3.

4. The record reveals that the charge was framed against the present appellant on 22nd June 2017, to which he did not plead guilty. The other two accused were not be tried for want of their presence.

5. The prosecution, to bring home the charge, examined total of six witnesses. The accused was then questioned under Section 313 of the Code of Criminal Procedure 1973 (hereinafter referred to as “Cr.PC.” for the sake of brevity), in which he took a defence of false implication. The accused neither entered the witness box nor examined any other witnesses.

6. Considering the evidence available on record, the Trial Court awarded the conviction and sentenced the accused – appellant as stated above.

7. The learned counsel for the appellant contended that the evidence available on record shows that the prosecution did not prove the ingredients of the offences registered and that, in fact, it was a case of false implication.

8. According to her, even if the evidence tendered by the prosecution is taken as it is, it would reveal that there is nothing against the present appellant. She submits that different witnesses have advanced different stories, which weaken the prosecution's case. She thus prays for acquittal.

9. Per contra, Ms Ghanekar, learned APP, contended that the prosecution has led cogent and reliable evidence and that, in fact, recovery at the instance of the appellant establishes his guilt. She submitted that the evidence tendered by the police officers is cogent and reliable and was thus rightly considered by the Trial Court.

10. I have heard the respective counsel and also gone through the record of the case. Since the accused was charged under Section 399 of the Indian penal code (IPC), it is necessary to see what the said provision speaks about.

11. Section 399 of the IPC speaks about preparation to commit dacoity. It states that whoever prepares to commit dacoity shall be punished with rigorous imprisonment for a term which may extend to 10 years. A fine is also prescribed.

12. Dacoity is defined under the provisions of Section 391 of IPC, which states that when five or more persons conjointly commit or attempt to commit a robbery -----, it is said to have committed dacoity.

13. The discussion regarding the applicability of Section 391 of IPC would not be complete unless and until the definition of robbery is perused, which can be found in Section 390 of IPC.

14. Section 390 of IPC defines robbery in two contingencies: when the theft is robbery and when extortion is robbery.

15. The theft is robbery if, in order to committing of the theft, or in committing the theft, or carrying away or attempting to carry away property obtained by the theft, the offender, for that end voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint.

16. Though in the present case the question is regarding preparation to commit dacoity, the definition of theft will also have to be appreciated, which is defined under Section 378 of the IPC. In simple language, theft means an act intending to take dishonestly any movable property out of the possession of any person without that

person's consent. Section 378 of the IPC defines theft at length.

17. At this juncture, it is necessary to mention here that there are four stages in the commission of a crime: (1) an intention, (2) preparation, (3) attempt and (4) completion.

18. Thus, it will have to be seen whether the case of prosecution falls short of an attempt and is one step ahead of intention, and consequently or proves preparation.

DIFFERENCE BETWEEN ATTEMPT AND PREPARATION

19. In Abhaynand Mishra Vs. State of Bihar¹ 1961 SCC OnLine SC 67 and in case of In re : T. Munirathnam Reddi it was observed at p. 122:

“The distinction between preparation and attempt may be clear in some cases, but, in most of the cases, the dividing line is very thin. Nonetheless, it is a real distinction. The crucial test is whether the last act, if uninterrupted and successful, would constitute a crime. If the accused intended that the natural consequence of his act should result in death but was frustrated only by extraneous circumstances, he would be guilty of an attempt to commit the offence

¹ 1961 SCC OnLine SC 67

of murder. The illustrations in the section (Section 511) bring out such an idea clearly. In both the illustrations, the accused did all he could do but was frustrated from committing the offence of theft because the article was removed from the jewel box in one case and the pocket was empty in the other case.” The observations “the crucial test is whether the last act, if uninterrupted and successful, would constitute a crime” were made in connection with an attempt to commit murder by shooting at the victim and are to be understood in that context. There, the nature of the offence was such that no more than one act was necessary for the commission of the offence.

24. *We may summarise our views about the construction of Section 511 IPC, thus : A person commits the offence of attempt to commit a particular offence when (i) he intends to commit that particular offence; and (ii) he, having made preparations and with the intention to commit the offence, does an act towards its commission; such an act need not be the penultimate act towards the commission of that offence but must be an act during the course of committing that offence.*
25. *In the present case, the appellant intended to deceive the University and obtain the necessary permission and the admission card and, not only sent an*

application for permission to sit at the university examination, but also followed it up, on getting the necessary permission, by remitting the necessary fees and sending the copies of his photograph, on the receipt of which the University did issue the admission card. There is therefore hardly any scope for saying that what the appellant had actually done did not amount to his attempting to commit the offence and had not gone beyond the stage of preparation. The preparation was complete when he had prepared the application for the purpose of submission to the University. The moment he despatched it, he entered the realm of attempting to commit the offence of “cheating”. He did succeed in deceiving the University and inducing it to issue the admission card. He just failed to get it and sit for the examination because something beyond his control took place inasmuch as the University was informed about his being neither a graduate nor a teacher.”

20. In *State of M.P. v. Mahendra, alias Golu*², distinction between “preparation” and “attempt” to commit rape, is aptly decided and it was observed as under :

“12. *It is a settled proposition of criminal jurisprudence that in every crime, there is first, mens rea (intention to commit), secondly, preparation to commit it, and*

2 (2022) 12 SCC 442

thirdly, attempt to commit it. If the third stage, that is, “attempt” is successful, then the crime is complete. If the attempt fails, the crime is not complete, but law still punishes the person for attempting the said act. “Attempt” is punishable because even an unsuccessful commission of offence is preceded by mens rea, moral guilt, and its depraving impact on the societal values is no less than the actual commission.

13. *There is a visible distinction between “preparation” and “attempt” to commit an offence and it all depends on the statutory edict coupled with the nature of evidence produced in a case. The stage of “preparation” consists of deliberation, devising or arranging the means or measures, which would be necessary for the commission of the offence. Whereas, an “attempt” to commit the offence, starts immediately after the completion of preparation. “Attempt” is the execution of mens rea after preparation. “Attempt” starts where “preparation” comes to an end, though it falls short of actual commission of the crime.*
18. *Even prior thereto, this Court in **[Madan Lal v. State of J&K [(1997) 7 SCC 677]** opined that the degree of the act of an accused is notably decisive to differentiate between “preparation” and “attempt” to commit rape. It was held thus : (SCC p. 689, para*

12)

“12. The difference between preparation and an attempt to commit an offence consists chiefly in the greater degree of determination and what is necessary to prove for an offence of an attempt to commit rape has been committed is that the accused has gone beyond the stage of preparation. If an accused strips a girl naked and then making her lie flat on the ground undresses himself and then forcibly rubs his erected penis on the private parts of the girl but fails to penetrate the same into the vagina and on such rubbing ejaculates himself then it is difficult for us to hold that it was a case of merely assault under Section 354 IPC and not an attempt to commit rape under Section 376 read with Section 511 IPC. In the facts and circumstances of the present case the offence of an attempt to commit rape by the accused has been clearly established and the High Court rightly convicted him under Section 376 read with. Section 511 IPC.”

19. The difference between “attempt” and “preparation” in a rape case was again elicited by this Court in

Koppula Venkat Rao v. State of A.P. [Koppula Venkat Rao v. State of A.P., (2004) 3 SCC 602] , laying down that : (SCC p. 606, paras 10-11)

- “10. *An attempt to commit an offence is an act, or a series of acts, which leads inevitably to the commission of the offence, unless something, which the doer of the act neither foresaw nor intended, happens to prevent this. An attempt may be described to be an act done in part-execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and, possessing, except for failure to consummate, all the elements of the substantive crime. In other words, an attempt consists in it the intent to commit a crime, falling short of, its actual commission or consummation/ completion. It may consequently be defined as that which if not prevented would have resulted in the full consummation of the act attempted. The illustrations given in Section 511 clearly show the legislative intention to make a difference between the cases of a mere preparation and an attempt.*
11. *In order to find an accused guilty of an attempt with intent to commit rape, court has to be satisfied that the accused, when he laid hold of*

the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part. Indecent assaults are often magnified into attempts at rape. In order to come to a conclusion that the conduct of the accused was indicative of a determination to gratify his passion at all events, and in spite of all resistance, materials must exist. Surrounding circumstances many times throw beacon light on that aspect.”

Thus what emerges from the aforesaid observation is that though preparation, which is stage in commission of offence may not cause direct injury to any person, but the law acts in proactive manner to control the commission of offence.”

21. In this regard, it is necessary to consider the testimony of PW-2 Kachru Chothve, who was a Police Head Constable and driver attached to Police Station Shrirampur. He deposed that on 20th December 2009, at about 10:30 to 11:00 p.m., he was called by PI-Pandole, who informed him that they had to go somewhere; accordingly, PW-2, along with Panchas and other persons, proceeded from the police station and came near Ashok Petrol Pump. PW-2 deposed that the vehicle was parked there, and they walked up to the

FCI Godown. They noticed 5 to 6 people sitting in a thorny bush, signalling to each other. PW-2 and others chased the said persons, and only two persons were apprehended. PW-2 further deposed that he fell due to a scuffle and sustained injury to his left hand. Thereafter, PI – Pandole and PSI – Ballayya, along with other staff, prepared the panchnama, and chilli powder, a motorcycle shock-up, and one iron rod were found. Those two people were then brought to the police station. This witness identified the articles produced in the Court, namely chilli powder, a motorcycle shock absorber(shock up), and an iron rod. He then identified the accused, who was present in the Court.

22. In cross-examination, PW-2 has admitted that the Shrirampur - Newasa road is a highway and that there are hotels and shops on both sides of that road between the petrol pump and the railway bridge. There was darkness at that time, but PW-2 volunteered that there were stars in the sky. He admitted he was assigned to drive the jeep, but denied the suggestion that he could not leave it due to the wireless. He stated that he was unable to state the weight of chilli powder with its wrapper, and also admitted that chilli powder can be purchased from a grocery shop and that any person can bring a stick,

an iron rod, or a shock-up.

23. PW-2, in cross-examination, further admitted that he was unable to state which of those persons was possessing which particular item. He also admitted that, due to the darkness, he could not see the faces of those persons.

24. So far as the testimony of this witness is concerned, it is necessary to mention here that he was a driver who had sustained injuries on his body in a scuffle. Though he identified the accused in the dark, the fact remains that, in cross-examination, he admitted he could not see the faces of those persons. It is worth mentioning that the incident in question occurred on 20th December 2009, whereas the examination and evidence of this PW-2 were recorded on 26th July 2017; thus, his identification of the accused after a lapse of more than eight years seems to be highly doubtful.

25. As PW-2 has stated that he has sustained injury, let us see the testimony of PW-4, Dr Anil Momle, who stated that on 21st December 2009, he examined PW-2 and found two injuries: (1) abrasion left elbow measuring 3x3 cm, and (2) contusion with abrasion left on the knee joint measuring 2x4 cm. He stated that the

injury occurred within 24 hours. During cross-examination, he admitted that no signature or thumbprint of the patient was obtained on the certificate.

26. The evidence of the aforesaid witness shows that he examined the patient, PW-2, on 21st December 2009 and, after examination, issued an injury certificate. As rightly pointed out by the learned counsel for the appellant, the said medical certificate does not bear any thumb impression or signature of the PW-2. Further, at the bottom of the medical certificate (Exhibit 62), the outward number of the MLC and the date of the MLC are not mentioned, and the column for forwarding the copy to PSI is also not filled. Thus, this raises a doubt regarding the examination of PW-2 at the hands of PW-4.

27. This takes me to the testimony of PW-3 Shankar Bahirath, who was attached to Shrirampur City Police Station as a Head Constable. According to him, on 12th December 2009, at about 10:30 to 11:00 p.m., PI – Pandole called the police staff and informed them that they were required to carry out a raid. Accordingly, all those persons went to the spot in a government vehicle. He stated that PI Pandole told PSI Ballayya to proceed to the incident site on a

motorcycle with two police personnel. When they reached the spot, some persons were found near the FCI Godown, sitting in a circle. When the police officials arrived, those persons started running, and two were caught.

28. He deposed that a scuffle took place between those persons and PW-2, due to which PW-2 fell and sustained injury. During the personal search of those two persons, accused Bhosale was found in possession of chilli powder, and the present appellant was found in possession of a steel rod. He stated that wooden logs were found lying at the spot; accordingly, the panchnama was prepared there, and those persons were taken to the police station. The report was lodged below Exhibit 60. The PW-3 identified the muddemal shown to him in the Court, as well as the accused–appellant.

29. In cross-examination, he admitted that the steel rod he referred to was a rod of the shock-up of a truck. He further admitted that in the report he had incorrectly stated that the steel rod was of a truck, when in fact it was of a motorcycle.

30. PW-3, in his cross-examination, has stated that when the incident had taken place, it was dark and he did not personally catch

anybody. He also stated that the incident occurred within the railway's jurisdiction and that there were localities on both sides of the railway line; the Newasa road was also situated beside the railway line. He deposed that there was traffic on the Newasa road at that time, and that they did not call any drivers of those vehicles for a panchnama, nor did they record their names. He further admitted that no third person had filed a complaint with the police regarding the presence of those persons at the spot. He denied other suggestions.

31. The testimony of this witness would reveal that, though he was occupying the post of Assistant Sub Inspector, he admitted that the rod which he stated in the police report was not the shock-up rod of a truck. He stated that it was incorrectly stated that the steel rod was from a truck. This testimony, if taken into consideration in the background of the entire prosecution case, would reveal that the possibility cannot be ruled out that the police authorities set the criminal law in motion against the accused persons without having cogent and reliable evidence.

32. PW-5 is one Prasad Salve, who was a Police Constable attached to Shrirampur City Police station, and who deposed about the information given by PI- Pandole for effecting a raid behind the FCI

godown beside the railway line, and thereafter they reaching the spot. He stated that their staff member proceeded from behind the FCI godown with PI – Pandole towards the railway line. PI – Pandole received a call from PSI – Ballayya, whose team had gone to the incident site by private vehicle. PSI – Ballayya then gave a signal to PI – Pandole that some persons were holding discussions beside the bushes, and when the police staff encircled those persons, they found that all those persons were sitting in a circle, with one person in the middle portion giving signals to them. The raid was conducted, and two persons were caught, while the others ran away from the scene, taking advantage of the darkness.

33. PW-5 has deposed that, on enquiry, those two persons disclosed their names, and also revealed the name of another accused. PSI – Ballayya then conducted a personal search of those persons, in which chilli powder was found in the possession of one of the accused. In contrast, a motorcycle shock-up pipe was found in the possession of another accused. A panchnama was prepared, and the accused were taken into custody. He also deposed about the injury received by PW-2 during the course of the raid. He identified the present appellant in the Court.

34. PW-5 was then subjected to cross-examination, in which he admitted that the panchas were called by PHC – Bahirath and that no information was received that those persons were sitting at the spot for the purpose of committing theft. The attention of this witness was drawn to the portion marked A in his statement, which stated that PSI Balaiyya had asked him to reach the spot with his staff from the northern direction.

35. This witness admitted that the raiding party was holding sticks and pistols and also had vehicles, and that all the accused persons were encircled by the raiding teams from all sides. He admitted that the incident occurred between 11:00 p.m. and 12:00 a.m., when it was dark, but he volunteered that there were stars in the sky. He admitted that, due to the darkness, he could not tell what was in the accused persons' hands. He further showed his inability to state the time required to reach the spot. He stated that he had known the accused for a long time. The other suggestions were denied.

36. At this juncture, it is necessary to mention here that the conduct of this particular witness fails to provide any confidence. The reason is that, though the raiding party was holding sticks and pistols,

had a vehicle, and had encircled those persons from all sides, only two were caught. The raiding party consisted of eight to ten persons, whereas this witness did not mention the number of persons sitting on the spot.

37. PW-6 is one Bharat Ballayya, who was attached to Shrirampur City Police Station as a PSI and stated that the investigation of the crime was handed over to him. On 20th December 2009, PI – Pandole informed PW-6, i.e., Ballayya, and the staff that a raid was to be effected near the FCI Godown based on information received by him. Police Constable Bahirath then called two panchas, and PW-6, along with the staff, proceeded to the incident site in government and private vehicles at 10:30 p.m. Some dacoits were found sitting on the northern side of the said godown in the light of stars, and they effected the raid.

38. He deposed that they nabbed two of the dacoits, while four dacoits managed to flee by taking advantage of the darkness. On personal search, chilli powder wrapped in paper and a motorcycle shock-up rod pipe were found in the custody of the two accused apprehended. The weapons were then seized by preparing the panchnama below Exhibit 56, which commenced from 23:00 hours

and was completed on 23:45 hours. The said panchnama shows that, in the search for the two persons apprehended, chilli powder, one steel motorcycle shock-up pipe, three iron rods and one iron bar were seized. Though the panchnama shows that chilli powder was found in a pocket of Vijay Bhosale's pants, there is nothing on record to confirm whether it was chilli powder. PW-6 identified the present appellant in the Court.

39. In cross-examination, he stated that he was not in a position to state the exact number of persons who went to effect the raid. He admitted that he conducted the raid, prepared the panchnama, and investigated the crime. He further deposed that he, along with his staff, went by a four-wheeler, while others went by a private car. When question was put whether he could state as to which particular person from the staff caught which of the two persons, he replied that all of them caught those two persons. He further stated that he did not recall whether they conducted a personal search of those persons. He admitted he could not understand the question and later denied that the panchas' personal search was conducted. He admitted that there was no panchnama for the personal search of his staff and himself. He further admitted that no statement of

independent witnesses was recorded other than that of the police staff and that the spot of the incident was situated near the railway bridge.

40. This witness, in cross-examination, admitted that it was not mentioned in the report that a truck shock-up was found in the custody of the accused and stated that the portion marked A in the report was correct. He further stated that he recorded the statement of Prasad Salve, and that the portion marked A of the said statement was correct.

41. At this juncture, it is necessary to mention here that, though PW-6 admitted that he had conducted the raid, prepared the panchnama, and investigated the crime, he surprisingly also deposed that he was not in a position to state the exact number of persons who went to effect the raid. The aforesaid fact also casts a light of suspicion on the testimony of this witness.

42. The witness discussed earlier stated that, at the time of the raid, there was a discussion between the accused persons who were sitting in thorny bushes, but what the discussion was about is not mentioned in the panchnama. The brief description could have clearly shown the accused's intention, which could have provided foundation

to test whether it was a case of preparation to commit dacoity. The prosecution has not brought anything on record to show that the accused were intending to commit theft, robbery, and consequently, dacoity.

43. The entire story advanced by the prosecution appears to be doubtful. Merely because two persons were having a shock-up rod and the alleged chilli powder would not, in the peculiar facts and circumstances of the case, constitute the commission of an offence under Section 399 of IPC. The overall testimony of the prosecution witnesses clearly shows that the prosecution has not established the ring of truth, in its case. In that view of the matter, there is nothing on record to show that the prosecution has proved the case beyond a reasonable doubt.

44. So far as the findings of the Trial Court are concerned, suffice it to say that the evidence was not appreciated in the proper perspective. That being so, the present appeal is liable to be allowed and is accordingly allowed.

45. Hence, I pass the following order.

ORDER

- A) The judgment passed by Additional Sessions Judge, Shrirampur, on 25th September 2017, in Sessions Case No.12 of 2010, so far as convicting the appellant for the commission of an offence punishable under Section 399 of the Indian Penal Code, is set aside.
- B) The appellant, accused Mahanor Sudmal Kale, is acquitted for the commission of an offence punishable under Section 399 of IPC. He be set at liberty, if custody is not required in any other case.
- C) Fine amount, if deposited, be returned to him.

46. The learned appointed counsel for appellant has argued the case at length and has invited my attention to various pieces of evidence; her fees are quantified at ₹ 10,000/-.

47. Pending applications, if any, also stand disposed of.

(RAJNISH R. VYAS, J.)