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these general propositions do not affect the special conditions of the present case, which have already been sufficiently indicated.

In these circumstances, the decree of the lower appellate Court cannot be sustained. The appeal is allowed, the decree of the lower appellate Court set aside, and the decree of the first Court restored with costs throughout.

Appeal allowed.

B. G. R.

APPELLATE CRIMINAL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice Broomfield.

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January 6.

EMPEROR *v.* VASUDEO BALWANT GOGTE (ORIGINAL ACCUSED).*

Indian Penal Code (Act XLV of 1860), section 307—Attempt to murder—Essentials of the offence—Duty of prosecution regarding witnesses favouring defence.

The accused fired two shots from a revolver which was a powerful weapon at another at point blank range. The shots hit the person attacked but did not cause his death owing to some defect in the ammunition or to some obstacle obstructing the passage of the bullet :

Held, that accused was rightly convicted of an offence punishable under section 307 of the Indian Penal Code.

Queen-Empress v. *Niddha,*[1] approved.

Reg. v. *Cassidy,*[2] doubted and distinguished.

To attract the operation of section 307 of the Indian Penal Code the accused must do an act with such a guilty intention and knowledge and in such circumstances that but for some intervening fact the act would have amounted to murder in the normal course of events.

The words "under such circumstances" in section 307 have not such a wide meaning as was given to them in *Reg.* v. *Cassidy,*[2] but they refer to facts which introduce a defence to a charge of murder, such as for instance, the accused was acting in self defence or in the course of military duty.

There is no rule that in murder cases including cases of attempt to murder every eye-witness must be examined by the prosecution. The duty of the prosecution

*Criminal Appeal No. 714 of 1931.

[1] (1891) 14 All. 38.

[2] (1867) 4 Bom. H. C. (Cr. C.) 17.

is not to endeavour to obtain a conviction at any cost but to see that the facts are fairly presented before the Court. *Prima facie* it is for the prosecution to call such witnesses as they think will establish their case. If the Public Prosecutor knows of a witness who favours the accused, it is his duty either to call the witness himself or to see that the defence is supplied with the name so as to give the accused an opportunity of calling him.

CRIMINAL APPEAL No. 714 of 1931 from conviction and sentence passed by N. J. Wadia, Sessions Judge of Poona.

The accused, a student studying in the junior B.A. Class in the Fergusson College at Poona, fired two shots at His Excellency Sir Ernest Hotson, the Acting Governor of Bombay, from a powerful revolver. The shots were fired at point blank range but they failed to take effect owing to some defect in the ammunition or to the intervention of a leather wallet and folded currency notes in the pocket of the Governor. On these facts the accused was tried by the Sessions Judge of Poona with a Jury and convicted of an offence punishable under section 307 of the Indian Penal Code. The accused was also convicted under section 19 (*e*) and (*f*) of the Indian Arms Act. For the first offence he was sentenced to undergo rigorous imprisonment for eight years, while he was sentenced to undergo rigorous imprisonment for two years on each of the charges under section 19 (*e*) and (*f*) of the Indian Arms Act ; all these sentences were to run concurrently.

The accused appealed to the High Court.

S. G. Patwardhan, K. N. Dharap and *B. G. Padhye,* for the accused.

P. B. Shingne, Government Pleader, for the Crown.

BEAUMONT C. J. This is an appeal by the accused against his conviction by the verdict of a jury for an offence under section 307 of the Indian Penal Code for which he was sentenced to eight years' rigorous imprisonment, and against his conviction also under section 19 (*e*) and (*f*) of the Indian Arms Act by the Sessions Judge of Poona sitting with assessors. The sentences passed under the Indian

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Arms Act were shorter than the sentence under section 307 of the Indian Penal Code, and as the sentences were to run concurrently, it is not necessary to consider the propriety of the conviction under the Indian Arms Act if the conviction under section 307 of the Indian Penal Code stands. This being an appeal from the verdict of a jury, the appellant's case must be limited to points of law, and Mr. Patwardhan on behalf of the accused has adopted a course which follows, I think, a wise rule of advocacy and one which I wish were adopted more frequently in these Courts, of confining his argument to what are really the important points.

The facts, so far as it is necessary to state them for the purposes of dealing with the points of law, are extremely few and simple. His Excellency Sir Ernest Hotson, the Acting Governor of Bombay, was on the date of the offence paying a visit to the Fergusson College, Poona, and in the course of the visit, he in company with the Principal of the College and certain of the Professors and his Aide-de-Camp went to the College Library. Whilst there, and whilst the party was engaged in inspecting some portraits in the Library, two revolver shots were fired at His Excellency. The evidence of the prosecution, which was accepted by the jury, is that the accused fired two shots from a revolver which was immediately taken from him and was found to be a powerful weapon—·380 calibre. Although two shots were fired at His Excellency at point blank range, and the two bullets were afterwards found in the lining of his coat, no injury was in fact occasioned to His Excellency, and the first and principal point taken by Mr. Patwardhan is that, that being so, no offence was committed under section 307 of the Indian Penal Code. That section reads in this way :—

"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 " as there provided.

Mr. Patwardhan says that the meaning of that section is that the act done must be such that it is capable of causing

death, and that, from the fact that neither of these two shots, fired at point blank range and which in fact hit His Excellency, caused death, we must infer that, owing to some defect in the ammunition or for some unexplained reason, the act was not in fact capable of causing death. In support of his contention Mr. Patwardhan refers us to a decision of this Court in *Reg.* v. *Cassidy*.[a] In that case the facts were that the prisoner presented a gun which he believed to be capped, but which in fact was not capped, at a Drum-Major with the intention of murdering him, but before he could pull the trigger the gun was knocked out of his control; so that in fact in that case the trigger was not pulled, and as the gun was not capped it was not capable of doing any harm. It was held that no offence had been committed under section 307, Indian Penal Code. The case is clearly distinguishable on the facts from the present case, but the learned Judges gave certain reasons for their decision which I find it rather difficult to follow. The learned Chief Justice in giving judgment says that to bring the case within section 307 the act must be capable of causing death in the natural and ordinary course of things, and if the act complained of is not of that description, a prisoner cannot be convicted of attempt to murder under this section; and then he holds that the gun not having been in fact capped the act of the prisoner was not one which could have caused death. He went on, however, to hold that the case could be brought within section 511 of the Indian Penal Code, and the accused was convicted under that section. If the reasoning of the learned Judges in that case be right as to the construction of section 307, and if the act committed by the accused must be an act capable of causing death in the ordinary course, it seems to me that logically the section could never have any effect at all. If an act is done which in fact does not cause death, it is impossible to say that that precise act might have caused death. There must be some change in the act to produce a

[a] (1867) 4 Bom. H. C. (Cr. C.) 17.

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different result, and the extent to which the act done must be supposed to be varied to produce the hypothetical death referred to in section 307 is merely a question of degree. If a man points at his enemy a gun which he believes to be loaded but which in fact is not loaded intending to commit murder (which is *Cassidy's* case[1]), it is no doubt certain that no death will result from the act. But equally certain is it that no death will result if the accused fires a revolver at his enemy in such circumstances that in fact, whether through defect of aim, or the activity of the target, the bullet and the intended victim will not meet. If, however, section 307 does not cover the case of a man who fires a gun at his enemy with intent to kill him but misses his aim, it is difficult to see how the section can ever have any operation. The case of *Reg.* v. *Cassidy*[1] was considered by Mr. Justice Straight in *Queen-Empress* v. *Niddha*[2] and he differs from the reasoning of the Bombay High Court. He sums up his conclusion in these words. He says (p. 43) :—

"It seems to me that if a person who has an evil intent does an act which is the last possible act that he could do towards the accomplishment of a particular crime that he has in his mind, he is not entitled to pray in his aid an obstacle intervening not known to himself. If he did all that he could do and completed the only remaining proximate act in his power, I do not think he can escape criminal responsibility, and this because, his own set volition and purpose having been given effect to to their full extent, a fact unknown to him and at variance with his own belief intervened to prevent the consequences of that act which he expected to ensue, ensuing."

I myself prefer the reasoning of Mr. Justice Straight in that case to the reasoning of this Court in *Reg.* v. *Cassidy*,[1] although, as I have pointed out, it is not necessary for us to differ from the latter decision, which is indeed binding upon us, because the facts in that case were quite different from the facts with which we have to deal. I think that what section 307 really means is that the accused must do an act with such a guilty intention and knowledge and in such circumstances that but for some intervening fact the act

[1] (1867) 4 Bom. H. C. (Cr. C.) 17. [2] (1891) 14 All. 38.

would have amounted to murder in the normal course of events. I think that the words "under such circumstances" have not such a wide meaning as was given to them in *Reg.* v. *Cassidy*.[1] Those words, in my opinion, refer to facts which would introduce a defence to a charge of murder, such as, for instance, that the accused was acting in self-defence or in the course of military duty. But if you have an act done with a sufficiently guilty intention and knowledge and in circumstances which do not from their nature afford a defence to a charge of murder, and if the act is of such a nature as would have caused death in the usual course of events but for something beyond the accused's control which prevented that result, then it seems to me that the case falls within section 307.

Now here, the facts being that the accused fired two shots from a powerful revolver at point blank range at His Excellency, it seems to me that the case clearly falls within section 307. I do not think it really matters whether the failure of the bullets to take effect was due to some defect in the ammunition, or whether it was due to the intervention of a pocket book and currency notes which are proved to have been in His Excellency's pocket at the time of the incident and through part of which one of the bullets is shown to have gone. On that view of the case it is not necessary to decide the second point as to whether, if section 307 had not applied, the accused could have been convicted under section 511 of the Indian Penal Code. There is a difference of opinion as to the law on that point between this Court in *Reg.* v. *Cassidy*[1] and Mr. Justice Straight in the case to which I have referred. This Court held that the case of an attempt to murder might be brought under section 511, and Mr. Justice Straight thought that all cases of attempt to murder must come under section 307. I do not myself think that there is very much substance in the point. If in fact every case of

[1] (1867) 4 Bom. H. C. (Cr. C.) 17.

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attempt to murder can be brought within section 307, then *cadit quæstio*, the question of applying section 511 does not arise. If, on the other hand, section 307 is not exhaustive, I do not see any reason why section 511 should not cover the cases which are excluded from section 307. There would, however, be the difficulty in this case that the verdict of the jury was only upon section 307.

The next point taken on behalf of the accused was that His Excellency was not called as a witness, nor were any of the students who were present at the time of the offence. The evidence is that about 200 to 250 students were in the room at the time. Mr. Patwardhan suggests that there is a rule that, at any rate in capital cases,—and he was bound of course to extend his contention to embrace cases of attempt to murder,—every eye-witness ought to be called by the prosecution, and for that he relied on the case of *Ram Ranjan Roy* v. *Emperor*.[1] I do not think that there is any such rule. No doubt, as pointed out by the Calcutta High Court, the duty of the prosecution is not to endeavour to obtain a conviction at any cost, but to see that the facts are fairly presented before the Court. But *prima facie* it is for the prosecution to call such witnesses as they think will establish their case. No doubt if the Public Prosecutor knows of a witness who favours the accused, it is his duty either to call the witness himself or to see that the defence is supplied with the name of the witness and given an opportunity of calling him. In the present case undoubtedly the evidence called by the prosecution was sufficient to establish the charge. Mr. Patwardhan suggests that his client was prejudiced by the fact that His Excellency did not go into the witness box. I cannot myself see in what respect His Excellency could have given any evidence which could possibly have helped the accused. I pressed Mr. Patwardhan to tell me in what respect he suggested

[1] (1914) 42 Cal. 422.

that the evidence of His Excellency could have helped the accused, but he was unable to say more than that the accused's pleader might perhaps have got something out of the witness in cross-examination which would have helped the accused, but he was unable to suggest any specific point in which the evidence of His Excellency would have been useful. There is evidence before the Court that His Excellency was not hurt by the bullets, so that it was not necessary to call him for that purpose. It was suggested that His Excellency's evidence might have been of value on the defence set up by the accused, viz., that it was not he but somebody else who fired the shots. But as the evidence is that His Excellency at once flung himself upon the accused it is perfectly obvious that he at any rate thought that the accused was the guilty party. It seems to me that there is no substance whatever in the suggestion that the case has been in any way prejudiced by the failure of the prosecution to call any more witnesses. It was of course open to the accused himself, if he was so minded, to call any witness he chose, and no obstacle to his so doing was put in his way. I have not much sympathy with accused persons who desire to call evidence and also to preserve to themselves or to their advocates the right of having the last word before the Court, which right only arises where no evidence is called, and who in order to enjoy the best of both worlds invite the prosecution to call the evidence which should be called by the defence. If a witness gives evidence in favour of the accused I see no reason why the prosecution should not have the right to cross-examine him.

The only other point taken on the appeal was a point under section 342 of the Criminal Procedure Code. The accused before the Committing Magistrate made a statement in these words. He was asked, "You have heard the evidence recorded against you. What have you to say about it?", and he said "I have nothing to state here in this Court." Well, if he had stopped at that, he would have been on safe

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ground, but then he went on "I have fired two shots at His Excellency the Governor of Bombay. I want to say nothing. I did not think that the last sentence regarding my firing at His Excellency would be taken down in my statement." It is suggested, for some reason which I do not appreciate, that the reference to the firing of two shots ought to have been eliminated because the accused did not think that it would be taken down. But the Magistrate was bound to take down what the accused said; he was quite right in taking down also the statement which the accused made afterwards that he did not think that the words would be recorded. The Magistrate was quite right in recording the whole statement and in my opinion there is no substance whatever in that objection. That being so, I think that the appeal must be dismissed and the conviction and sentence confirmed.

BROOMFIELD J. Mr. Patwardhan's principal argument on behalf of the appellant is that the conviction under section 307 is wrong because the language of that section requires that the act done by the accused must have been one capable of causing death in the natural and ordinary course of events. For the purposes of this argument Mr. Patwardhan has assumed that the act done by the accused in the present case was not one capable of causing death in the natural and ordinary course of events. I am not satisfied that that assumption can fairly be made. The accused fired two bullets. The second bullet (by which I mean the bullet which was found five days after the offence, because as far as I am aware the evidence does not show which of the two shots was fired first) appears only to have struck the shoulder of His Excellency's coat and to have entered the buckram lining and then fallen down inside the lining. The other bullet, however, which was fired in the direction of the heart appears to have passed through, first, the coat and then a leather pocket book containing eight currency notes which

were folded. The bullet, therefore, had to pass through the coat, the leather sides of the wallet and sixteen thicknesses of paper. It also appears that there was a metal stud upon the wallet which the bullet may also have struck. It is obvious that these obstacles must have obstructed the passage of the bullet to some extent, and personally I am not prepared to say on the evidence in the case that if those obstructions had not been there the firing of this bullet might not have caused death. However, for the purposes of this argument, let us assume that the act done by the accused was not capable of causing death in the ordinary course of events. In support of his argument Mr. Patwardhan relies on the judgment of this Court in *Reg.* v. *Cassidy*,[1] where the facts were that the accused Cassidy intending to kill the Drum Major of his corps presented an uncapped rifle at him believing it to be capped, but he was prevented from pulling the trigger. The accused in that case was found guilty under sections 299 and 300 of the Indian Penal Code read with section 511. There was an alternative charge under those sections and the Court in giving judgment expressed the opinion that the case did not come within the scope of section 307 of the Code. That decision was dissented from by Mr. Justice Straight of the High Court of Allahabad in *Queen-Empress* v. *Niddha*.[2] There the facts were that the accused intending to kill a man who was advancing against him pointed a gun at him and pulled the trigger; the gun was loaded and was known to the accused to be loaded but it did not go off. It was doubtful on the evidence whether the cap exploded and failed to detonate the charge or whether the cap had fallen off before the trigger was pulled. The Court held there that the offence was an offence under section 307, the conviction which had been recorded under section 511 was altered to one under section 307 and Mr. Justice Straight disagreed with the reasoning upon which the judgment in *Cassidy's* case[1] was

[1] (1867) 4 Bom. H. C. (Cr. C.) 17. [2] (1891) 14 All. 38.

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based. One point is perfectly clear and that is that either under section 307 or under section 300 read with section 511 an offence such as the one committed by the accused in this case would have been held to be an attempt to murder both by the High Court of Bombay and by the High Court of Allahabad. The question whether the offence falls technically under section 307 or under section 511 would be no more than a question of academic interest but for the fact that the accused in the present case was tried by a jury, and I do not think that fact need cause any serious difficulty, because the Judge in his charge to the Jury had of course to state the law and he stated the law to be that on the facts alleged the offence would be one under section 307. He cited the case of *Queen-Empress* v. *Niddha*[1] and put that to the jury as a correct statement of the law. That being so, it would have been impossible for the jury to convict the accused under any other section of the Code. Speaking for myself, I am of opinion that if we held that the offence ought to be regarded as an offence under section 511, it would be open to us in appeal to alter the finding on this point on the ground that in his statement of the law the learned Judge had misdirected the jury. I agree with the learned Chief Justice, however, in holding that a case like the present does properly come within the scope of section 307, and that that is the proper section to apply and not section 511 of the Code. It may be that at some future time it may be necessary for a full bench of this Court to consider the decision in *Cassidy's* case.[2] In the present case it is not necessary because that case can clearly be distinguished on the facts. It can be distinguished, firstly, for the reason which I gave at the commencement, viz., that it is not satisfactorily established in this case that the act of the accused was not one capable of causing death in the ordinary course, and, secondly, on the ground that in *Cassidy's* case[2] the trigger of the gun was not pulled and the attempt was not completed in the same sense

[1] (1891) 14 All. 38.

[2] (1867) 4 Bom. H. C. (Cr. C.) 17.

as in the present case. The facts, therefore, were by no means on all fours with those with which we have to deal.

Both in *Cassidy's* case[1] and in the case of *Queen-Empress* v. *Niddha*[2] the intention of the accused to kill was admitted or at any rate clearly proved, and for the purpose of his main argument Mr. Patwardhan admitted that the accused in the present case also had the intention to kill. He was not, however, prepared to admit that proposition in its entirety, and though he has not devoted much of his argument to that point he did maintain that the accused did not intend to kill. The only evidence, however, that he had not that intention consists of the fact that no injury was caused to His Excellency. Certain circumstances to which I have already referred, viz., that one bullet was apparently stopped by the lining of the coat and the other by the leather wallet containing the currency notes, may appear to show that the ammunition used was defective or that the normal charge of powder had been reduced. There is no evidence that this was so, but, assuming that it was so, the fact would not be at all relevant for the purpose of showing the intention of the accused unless it was known to the accused. According to the rule laid down in section 106 of the Indian Evidence Act when any fact is especially within the knowledge of any person the burden of proving that fact is upon him; and the first illustration to the section is this:—

"When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him."

Now, no defence of this kind was set up by the accused. He has never alleged that he had loaded his weapon with a reduced charge in order that he might not cause injury, he has never alleged that he had any reason whatever to suppose that the ammunition was defective so that in fact it would not be likely to cause injury; nor was any such argument or suggestion put forward at any time on the accused's behalf

[1] (1867) 4 Bom. H. C. (Cr. C.) 17. [2] (1891) 14 All. 38.

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by his legal advisers. We have also to consider the fact that he was in possession of two revolvers, both fully loaded, and it appears that a considerable quantity of spare ammunition was found in his room. If the suggestion were that he did not intend to kill or to cause any serious injury why did he fire loaded cartridges at all, why not use blank ammunition? Further, we have on the record of the case a letter written by the accused while he was in prison, Exhibit 24-A. It appears to have been written on or about August 11, which is the date on which the accused made his statement to the Committing Magistrate admitting that he had fired two shots at His Excellency. In this letter the accused referring to what he had done said :—

"It was impossible for me to avoid it. It is quite necessary to offer life sacrifice for the love of the country."

Later on he said :—

"By the grace of God I will have a chance to pass my youth in a life of laborious penance, and avoid to fall a prey to worldly charms, and become a stamped patriot which gives one great pleasure."

It seems to me that this letter is not only entirely inconsistent with the defence which the accused subsequently put up at the trial, viz., that he did not fire the revolver at all, but is also inconsistent with any theory that he had no intention to kill but was firing a weapon with a reduced charge of ammunition merely in order to cause alarm. I think it is impossible to suppose that in writing this letter to his relation the accused was falsely pretending to be a "patriot." It is also in evidence (the fact is deposed to by the Deputy Superintendent of Police Mr. Kothawala) that the accused refused to give information with regard to the place where he obtained the weapons and ammunition. The evidence of this witness appears to show that the accused had given information suggesting that he had obtained the revolvers from Hyderabad. He was taken to Hyderabad in order that he might point out the shop, but he declined because as he said he had taken a vow not to do

so. All this, in my opinion, is inconsistent with the defence now put forward that the accused had no intention to cause death.

It was argued by Mr. Patwardhan that it was the duty of the Judge to point out to the jury the legal difficulties arising in connection with sections 307 and 511, that is to say, that he ought to have explained to the jury the legal points arising on the hypothesis that the weapon used by the accused was one not capable of causing death in the ordinary course. But, as I have explained, no defence of this kind was actually set up, and the defence which was actually set up was inconsistent with any such plea. Under those circumstances I am not prepared to say that it was the duty of the Judge to go out of his way to explain a hypothesis for which there was no foundation either in the evidence or the arguments before the Court. The jury, it is hardly necessary to say, was only concerned with the facts. The question whether the facts in evidence constituted an offence under section 307 or one under section 511 would not be for the jury at all, but for the Judge.

As regards the point taken under section 342 of the Criminal Procedure Code I have nothing to add to what the learned Chief Justice has said.

As to the argument that the prosecution ought to have called His Excellency as a witness, I also agree that, under the circumstances of this case, since the other evidence made the facts as clear as they possibly could be made, it was not necessary to do so. I do not find anything in the judgment in *Ram Ranjan Roy* v. *Emperor*,[1] which would require one to hold that it was the duty of the prosecution to call His Excellency as a witness.

I agree that the conviction under section 307 is correct and that the appeal must be dismissed.

Appeal dismissed.

B. G. R.

[1] (1914) 42 Cal. 422.