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

Date of Pronouncement: 25<sup>th</sup> May, 2011

+ CRL.A. 37/2011

MANOJ TYAGI

..... APPELLANT

Through : Mr. Ranbir Chauhan, Advocate.

versus

GAURAV @ CHOTU & ANR.

..... RESPONDENTS

Through : Mr.Major, Advocate for Respondent No.1 with

Respondent No.1 present in person.

Mr.Ashok, Advocate for Respondent No.2 with

Respondent No.2 present in person.

Mr.Nitin Kumar, Advocate for Respondent No.3 with

Respondent No.3 present in person.

**CORAM:**

**HON'BLE MR. JUSTICE S. RAVINDRA BHAT**

**HON'BLE MR. JUSTICE G.P.MITTAL**

- |                                                                       |     |
|-----------------------------------------------------------------------|-----|
| 1. Whether reporters of local papers may be allowed to see the Order? | Yes |
| 2. To be referred to the Reporter or not?                             | Yes |
| 3. Whether the Order should be reported in the Digest?                | Yes |

**J U D G M E N T**

**S.RAVINDRA BHAT, J. (OPEN COURT)**

1. This is a complainants Appeal against the judgment and order of the learned Additional Sessions Judge dated 28.5.2010 in Sessions Case No.96/2009 through which the Respondents have been convicted for committing offence punishable under Section 307/34 Indian Penal Code (IPC). Pursuant to the notice issued in the appeal (which is confined to the question of sentence) the Respondents/accused have appeared and are represented through counsel.
2. It is urged by the learned counsel for the Appellant that in view of the findings arrived at by the Trial Court, convicting the Respondents of a serious charge under Section 307 IPC, the sentencing choice adopted by it i.e. to release them on probation is contrary to law. It is urged that Section 363 of the Criminal

Procedure Code and Section 4 of the Probation of Offenders Act, 1958 do not permit a Criminal Court to admit any convict who has committed such offences which are punishable for imprisonment for more than ten years, for life to probation. It is also urged additionally that the Trial Court did not have the benefit of proper records since the report of the Probation Officer received by it, did not reveal involvement one of the Respondents i.e. Respondent No.1-Manoj in another Criminal Case No.109/2007 P.S. Swaroop Nagar which is pending before the Court of Paramjit Singh, Additional Sessions Judge, Delhi.

3. Learned counsel for the Respondents urged that the impugned order, so far as it pertains to sentence is unexceptional. It was also urged that so far as Respondent No.2-Manoj is concerned, the Court considered the fact that he had undergone one month's imprisonment during the pendency of the trial. Furthermore learned counsel for Respondent No.1-Gaurav argued that the said Respondent was less than 21 years of age. Learned counsels appearing for Respondent Nos.1 to 3 have urged that in any event the Court felt that since the injury which led to the conviction was caused by the accused/respondent No.1-Gaurav, the sentencing order made by the Trial Court was appropriate and justified.
4. Section 360 (1) of the Code of Criminal Procedure, 1973 reads as under:-

***“Order to release on probation of good conduct or after admonition.-*** (1) *When any person not under twenty-one years of age is convicted of an offence punishable with fine only or with imprisonment for a term of seven years or less, or when any person under twenty-one years of age or any woman is convicted of an offence not punishable with death or imprisonment for life, and no previous conviction is proved against the offender, if it appears to the Court before which he is convicted, regard being had to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a*

*bond, with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct and the meantime to keep the peace and be of good behaviour:*

*Provided that where any first offender is convicted by a Magistrate of the second class not specially empowered by the High Court, and the Magistrate is of opinion that the powers conferred by this section should be exercised, he shall record his opinion to that effect, and submit the proceedings to a Magistrate of the first class forwarding the accused to or taking bail for his appearance before, such Magistrate, who shall dispose of the case in the manner provided by sub-section (2)."*

5. Section 4 (1) of the Probation of Offenders Act, 1958 reads as under:

***"Power of court to release certain offenders on probation of good conduct.-****When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him at once to any punishment direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the court may direct, and in the meantime to keep the peace and be of good behavior.*

6. The fact of the above provisions makes it clear that a Court has a choice in releasing accused found guilty of any offence, on probation. However, the choice is restricted when it involves crimes that are punishable with death or present terms that makes extent to life. The only possible exception is in the case of those who are less than twenty one years.
7. The facts in this case are that the Trial Court found all the Respondents guilty of the offence punishable under Section 307 IPC which is punishable with imprisonment for life. The Court, however, chose to release the Respondents on probation. Additionally, the Complainant/Appellant urges that the Trial Court while considering the Report of Probation Officer was not apprised of

an important circumstance that is another Criminal case was pending against one of the Respondents.

8. Having regard to the entire conspectus of the facts we are of the opinion that the course adopted by the Trial Court cannot be upheld. However, we make it clear that this order shall not be read as precluding the Trial Court from exercising its discretion in the matter of sentence nor are we expressing any opinion on the merits of the findings. We are of the opinion that appropriate course would be to remit the matter back to the Trial Court and to set aside the Order of sentence.
9. Accordingly, the matter is remitted back to the Trial Court for fresh consideration which shall be done after taking into consideration the comprehensive report of conduct of each of the Respondents. If any of the Respondents wishes to place on record any document or evidence additionally, it will be open to them to do so. In the light of the above observations, the impugned order of the Trial Court so far as it pertains to the Respondents sentence is hereby set aside.
10. Parties including Respondents are hereby directed to be present before the Trial Court on 6.6.2011 for further directions. Learned Additional Sessions Judge is requested to complete the proceedings and pass the Order at his earliest convenience. The Appeal is allowed to the above extent.
11. Dasti as well.

**S. RAVINDRA BHAT  
(JUDGE)**

**G. P. MITTAL  
(JUDGE)**

**MAY 25, 2011/sa**