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IN THE COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR
CRIMINAL APPLICATION (APPA) NO. 53/2016
IN
CRIMINAL APPEAL NO. 462/2015

(Pundlik s/o Gunwant Mamankar and others vs. The State of Maharashtra vs. Shrikrishna
s/o Ramrao Mamankar and two others)

Office Notes, Office Memoranda of
 Coram, appearances, Court's orders
 of directions and Registrar's orders

Court's or Judge's order

Mr. Anil Mardikar Sr.Adv. with Mr. S.G. Joshi, Advocate for applicants
 Mr. T.A. Mirza, APP for respondent-State

CORAM : **B.R.GAVAI &**
Mrs.SWAPNA JOSHI, JJ.
DATED : **16th April, 2016**

Heard.

The applicants who were original accused
 nos. 14,15 and 16 have approached this Court for
 suspension of sentence.

The applicants along with the other accused
 having convicted for an offence punishable under
 sections 302 read with Section 149, 307 r/ws.
 149 and 326 r/ws.149 of the Indian Penal Code.

The prosecution case is that the day of the
 incident was immersion of Ganpati idols. It is the
 prosecution case that while the group of the
 accused was taking procession, there was an
 altercation between PW Ganesh and some of the
 accused persons. As a result of the said incident,

the accused persons assaulted the deceased and other victims, in which deceased-Pandurang died; whereas PW 1-Ganesh, PW 3 -Damodar and PW 4 Govind have sustained serious injuries.

Shri A.M. Mardikar, learned senior counsel with Mr. Sumit Joshi, submits that since the prosecution has failed to explain the injuries on the accused persons and since the real genesis of the incident is suppressed by the prosecution, the conviction u/s 149 IPC would not be tenable. Learned senior counsel, therefore, submits that in that event, even for the sake of arguments, it is accepted that a case of Section 302 and 307 IPC would be tenable, the Court will have to find out the role played by each of the accused and only if there is a role attributed to an accused of assaulting the deceased, such accused could be convicted for an offence punishable u/s 302 IPC. On the contrary, the learned counsel submits that in the event there are no witnesses deposing about the assault on the deceased by the accused, then such of the accused cannot be convicted for an offence punishable u/s 302 IPC.

Per contra, Mr.T.A. Mirza, learned APP submits that since the entire group of accused persons has assaulted the deceased the case would squarely fall u/s 149 IPC. Learned APP submits that in any event PW 3-Damodar clearly implicates

the present applicants. Learned APP therefore submits that the applicants are not entitled for suspension of sentence. As held by the Apex Court a detailed elaboration of the evidence at this stage would not be permissible. Undisputedly, from the evidence of PW 1-Ganesh, it is clear that the present applicants have also sustained injuries. However the prosecution has failed to explain the injuries on the applicants. Since the injuries on the person of the prosecution have not been explained, it *prima facie* appears that the real genesis of the incident has not been brought on record by the prosecution. In that view of the matter, at least, *prima facie*, the question was to whether the conviction u/s 149 would be tenable or not.

If that be so, the Court will require to separate the grain from the chaff to find out the culpability of the present applicants for the offence punishable u/s 302 IPC.

Perusal of the evidence of PW 1-Ganesh and PW 4-Govind shows that these witnesses speak about the assault only on their person by the present applicants. They do not speak about the assault by this accused on the deceased person. No doubt, though PW 4-Govind deposes in examination-in-chief about the assault by the present accused on the deceased, his statement

is recorded after a period of 30 days. In his cross-examination, he clearly admits that immediately on the next day, his statement was recorded by the Special Executive Magistrate in that statement he did not implicate the present applicants.

In that view of the matter, at the most, the conviction of the present applicants could be for an offence punishable u/s 307 or 326 IPC.

It is submitted that the applicants were in jail throughout the trial, except initial period of six months. Nothing has been brought on record by the prosecution to establish that the present applicants have misused their liberty.

In that view of the matter, we are inclined to allow the Application. The order of sentence is suspended. The applicants, namely (1) Shrikrishna Ramrao Mamankar; (2) Gopal s/o Ramrao Mamankar and (3) Mukund Pralhad Mamankar are directed to be released on bail, on their furnishing surety in the sum of Rs. 15,000/- (fifteen thousand) each, with one or more sureties in the like amount.

Application is allowed accordingly.

JUDGE

JUDGE

safare