

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

**CRIMINAL APPEAL NO.1298 OF 2019
WITH ALS/2/2020**

**THE STATE OF MAHARASHTRA
VERSUS
SAMPAT S/O. POPAT SHRIRAM AND OTHERS**

.....
APP for Appellant : Mrs. V. S. Chaudhari
.....

**CORAM : SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.**

DATED : 1st FEBRUARY 2023

PER COURT :

1. Learned APP for the appellant-applicant State has preferred Criminal Appeal No. 1298 of 2019 for enhancement and Application for Leave to Appeal by State challenges the acquittal of respondents.

2. The respondents have faced prosecution in Sessions Case No. 34 of 2019 before the Additional Sessions Judge, Shrigonda. Prosecution has examined in all 11 witnesses to bring home guilt of the accused persons by the judgment and order dated 14.10.2019. All the respondents – original accused Nos.1 to 7 have been held guilty for committing offence under section 326 read with 149 of Indian Penal Code. However, instead of sentencing them at once, benefit of section 4 of the Probation of Offenders Act, 1958 (for short, “PO. Act”) was given to them.

3. Learned APP submits that the learned Additional Sessions Judge, Shrigonda in his cryptic judgment, though has come to the conclusion that the accused persons have committed offence under section 326 read with section 149 of Indian Penal Code, totally erred in applying section 4 of the P.O. Act. He failed to consider that said benefit under section 4 of the P. O. Act cannot be given to a person found guilty of having committed an offence punishable with imprisonment for life.

4. Section 326 of IPC prescribes punishment up to imprisonment for life. Further, the report of the Probation Officer appears to be not called as there is absolutely no discussion about the same in the judgment. Further, when the learned Additional Sessions Judge has applied section 149 of IPC, he ought not to have acquitted the accused persons under section 143, 147 and 148 of IPC, and therefore, appeal deserves to be admitted and leave deserves to be granted to challenge the entire decision.

5. We agree with the submissions on behalf of the State at this *prima facie* stage. When the learned Additional Sessions Judge had come to the conclusion that accused have committed offence under section 326 of IPC then it ought to have seen as to whether section 4 of P. O. Act can be made applicable. The wordings of section 4 of P. O. Act appears to be barred, when

the offence to which the punishment prescribed is death or imprisonment for life for granting the benefit under the Act. Though, section 7 of the P.O. Act prescribes that the report of the Probation Officer to be confidential, it is expected that reference of the same should be in the judgment and those circumstances which prompted the concerned Judge to extend the benefit under the same section should be reflected in the judgment. When a discretion has been given, it has to be exercised judiciously that means all the necessary legal provisions should be gone into.

6. When the learned Additional Sessions Judge has held the respondents guilty of committing offence under section 149 of IPC by observing that all the accused had come with common object to take revenge of earlier days quarrel, it ought to have been considered that section 149 of IPC would be applicable to the unlawful assembly which is described under section 141 of IPC and made punishable under section 143 of IPC. In other words, unless the ingredients of section 141 are held to be proved there cannot be a conviction under section 149 of IPC. Therefore, the acquittal of respondents needs to be reconsidered and for that purpose re-appreciation of the evidence in the appeal is required.

7. We are, therefore, of the opinion that, the Criminal Appeal No. 1298 of 2019 deserves to be admitted and leave to appeal deserves to be granted to the prosecution. Hence the following order :-

ORDER

- (i) The criminal appeal stands **admitted**.
- (ii) Leave to file appeal is granted.
- (iii) Compliance under section 390 of the Code of Criminal Procedure be got done and the terms and the conditions for bail to be decided by the learned trial Judge.
- (iv) Issue notice to respondents, to be made returnable on 14.03.2023
- (v) Call Record and Proceedings with paper-book.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)

Tandale/-