IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL REVISION APPLICATION NO.272 OF 2016

1. Kondiba s/o. Bali Gawali,
Age 77 years, Occ. Agril.,

2. Satish s/o. Kondiba Gawali,
Age 37 years, Occ. Agril.,

3. Laxman s/o. Kondiba Gawali,
Age 37 years, Occ. Agril.,

4. Ashok s/o. Kondiba Gawali,
Age 36 years, Occ. Agril.,

5. Smt. Draupada w/o. Kondiba Gawali,
Age 71 years, Occ. Agril.,

All R/o. Shedgaon, Tq. Shrigonda,
District Ahmednagar .. Applicants

Versus

The State of Maharashtra
Through Police Inspector,
Shrigonda Police Station,
Tq.Shrigonda, District Ahmednagar .. Respondent

Mr. Shrikant T. Veer, Advocate for Applicants;
Mr. A. A. A. Khan, A.P.P. for Respondent

CORAM : S. G. MEHARE, J.
Reserved on : 11.10.2024
Pronounced on : 24.10.2024

JUDGMENT :-

1. Heard the learned counsel for the applicants and the learned A.P.P. for the respondent.

2. The applicants have impugned the judgment and order of the learned Judicial Magistrate First Class, Shrigonda (Court No.2) passed in Regular Criminal Case No.237 of 1998, dated 13.05.2015, convicting the accused for the offences punishable under Sections 504, 506, 143, 147, 148, 324, 326, read with Section 149 of the Indian Penal Code (for short, “I.P.C.”) and the judgment and order of the learned Additional Sessions Judge, Ahmednagar, in Criminal Appeal No.146 of 2015, dated 06.12.2016, dismissing the appeal and confirming the judgment and order of the learned Judicial Magistrate First Class, Shrigonda.

3. Accused No.1 to 5 were sentenced to suffer imprisonment for the offence punishable under Sections 143, 147, 148, 324, and 326 read with Section 149 of the I.P.C.

4. The prosecution case in brief was, that the informant was the resident of village Shedgaon, Taluka Shrigonda. He has two brothers. One of them was accused No.1 and another was Vitthal. Their father expired in 1973. He was cultivating ancestral joint family property Block No.44, after the demise of the father it was recorded in the name of accused No.1. The informant with his brothers orally partitioned their lands and they were cultivating separately. In spite of the partition, accused No.1 entered his name in the cultivation column of Block No.44. then the first informant and his brother entered their names in the revenue record.

Therefore, the accused No.1 challenged that order before the Collector. The Collector directed them to file a civil suit. Their suit was pending before the Civil Court.

5. On 13.08.1998, when the informant's brother Vitthal and his wife were harvesting the groundnuts, the accused No.1 saw them from some distance. Therefore, he called the first informant. When the first informant and his other brother were talking, all the accused came there armed with iron bar, axe and sticks. Accused No.1 was holding a stick. Accused No.3 and 4 were holding axes and accused No.2 was holding a iron bar. Accused No.1 gave a stick blow on his thigh. Accused No.3 started inflicting axe blows on his brother. They beat the first informant and his brother one by one. Their wives came there to rescue them. However, the accused also beat them. The informant has suffered a head injury and on the thigh. His brother had a head injury. The hands of his sister-in-law were fractured. On the basis of the report, all accused were tried for the above offences. On appreciating the evidence, both Courts convicted them as mentioned above.

6. The learned counsel for the applicants has vehemently argued that the stick recovered from accused No.1 was not bloodstained. The recovery of the axe from the accused No.2 and 3 was not proved. Only the Investigating Officer led the evidence. No role was attributed to accused No.5. One of the witnesses

admitted in her evidence that the alleged weapons were not used. Therefore, there was no identification of alleged weapons. However, both Courts erroneously believed in the recovery of weapons. The witnesses were not able to state the number of blows and overact of each accused. The brother of the first informant did not state the exact date of the incident. Even then, the Court believed them. Both Courts erred in holding that the discrepancies mentioned above were minor; therefore, witnesses cannot be disbelieved, if it is otherwise not trustworthy. He also argued that both Courts did not consider the non-examination of one of the injured. Hiding such a material witness raises serious doubt and the other evidence was damaged. He further argued that the recovery panchas were hostile. Accused No.3 and 4 went to the Police Station with weapons was not a ground to believe the prosecution case. The prosecution has to establish its case independently. Both Courts did not believe that the injuries may be self inflicted. The overt act of each accused was not proved, even then both Courts have erroneously held them guilty for the substantive offence under Section 149 of the I.P.C. Particularly, it was proved that accused No.5 did not overt act. Therefore, she could not be held for the offence with a common object. Both Courts did not appreciate the evidence properly. Therefore, erroneously held the accused guilty.

7. To bolster his arguments, he relied on the following cases:-

(i) *Pala Singh and ors. vs. State of Punjab, 1993 SCC OnLine P&H 1107;*
(ii) *Babu Hamidkhan Mestry vs. State of Maharashtra, 1995(1) BomCR 339;*
(iii) *Ramesh Kumar Gupta vs. State of Madhya Pradesh, 1995 AIR 2121;*
(iv) *Vinod Kumar vs. State of Uttar Pradesh, Laws(All)-1984-9-67, Crimes-1985-1-65*.

8. In alternative, he has argued that considering the length of litigation and the growing age of the accused, the sentence may be reduced. To bolster his arguments, he relied on the case of *Ramdas vs. State of Madhya Pradesh, 2009 AIR SCW 604*, on the point of appreciation of evidence. He also relied on the case of *Allarkha Habib Memon Etc. vs. State of Gujarat, 2024 SCC Online SC 1910*.

9. Per contra, the learned A.P.P. for the State argued that barely where the panch witnesses on recovery panchanama is hostile is no substantial defect in the trial because the injured have proves the facts of assault with deadly weapons. In the absence of support from the panchas the Investigating Officer may prove the recovery panchnama being its author. The accused had no case of a single blow. Non-examination of one of the injured is also not bad and make the prosecution case disbelivable when the other cogent and reliable evidence is available to prove the incident and acts of the accused. The absence of the overt tact of one of the

accused does not exonerate him if it is proved that was the member of unlawful assembly knowing well the object of the other co-accused. He would submit that the evidence of the eyewitnesses was not impeached to such an extent making the prosecution case disbelievable. The applicants/accused had assaulted the injured with deadly weapons together with a common object. The rule of appreciating the evidence was not violated. Both judgments are free from errors and infirmity. He prayed to dismiss the revision.

10. Considering the vehement arguments of the applicant, the following points fall for consideration:-

(i) Whether accused No.5 could not be held guilty for the offence punishable under Section 149 of the Indian Penal Code?

(ii) Can an Investigating Officer prove panchanamas if the panch witness is hostile and the second panch witness is not examined?

(iii) Whether non-examination of one of the injured is fatal to the prosecution?

(iv) Can the sentence reduced in this case?

(v) Are the accused entitled to the benefit of the Probation?

11. Section 149 of the I.P.C. provides that every member of unlawful assembly is guilty of offence committed in prosecution of

common object. Section 149 of the I.P.C. has been divided into two parts. The first part of the section is the offence to be committed in prosecution of the common object, and the second is, the offence which the party 'knew' was likely to be committed in prosecution of the common object. The common object of unlawful assembly has to be inferred from the facts and circumstances disclosed.

12. The term 'knew' in Section 149 of the I.P.C. implies something. It is about 'constructive criminal liability', which means, every member of that unlawful assembly at the time of committing the offence, is a member of the guilty of the offence. The section creates a vicarious liability for unlawful acts committed pursuant to unlawful assembly by any member of the assembly.

13. Section 142 of the I.P.C. again speaks of the awareness of the facts which render any unlawful assembly or continues in it, is said to be a member of an unlawful assembly. He is joining the assembly intentionally and continues in the assembly, if he proved to be a such person though not actually done something, could be held guilty for the offence punishable under Section 149 of the I.P.C.

14. To punish the accused under Section 149 of the I.P.C., the object should be common to the persons who compose the

assembly, that is to say, they should all be aware of it and concur on it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the unlawful assembly and the other members may just join and adopt it. Once it is formed, it need not continue to be the same.

15. The Hon'ble Supreme Court in ***Babu Hamidkhan Mestry*** (supra), relying on the judgment of *Masalti v. State of U.P.*, held that it would be extremely hazardous to convict on the testimony of a single eyewitness. In such cases, the rule of prudence requires that Courts should insist on a plurality of eyewitnesses.

16. Further, the Court has appreciated the facts of the case and the ratio of the Hon'ble Supreme Court in ***Baladin and others v. State of Uttar Pradesh, AIR 1956 SC 181,*** were also considered. The Hon'ble Supreme Court in paragraph No.19 has observed thus;

> "It is well settled that mere presence in an assembly does not make such a person a member of an unlawful assembly unless it is shown that he had done something or omitted to do something which would make him member of an unlawful assembly or unless the case falls under Section 142, I.P.C."

17. Each case has its facts. In the case at hand, the prosecution has a specific case that the incident happened in a field. When the

brother of the first informant with his wife were harvesting the groundnuts, accused No.1 saw them and returned home. Thereafter, all accused came there armed with an axe, the rod, the iron bar and sticks. The description of the weapons the accused used was satisfactorily given. Then they quarrelled with the injured and the first informant caused them injuries. At the time of the incident, accused No.5 was present with co-accused. They came together from their house armed with deadly weapons. The remaining accused assaulted the injured with deadly weapons. Accused No.5 had joined their company from their house. So, it can be inferred that she knew or was aware that unlawful assembly was formed to commit such an offence and she deliberately joined that assembly. Therefore, barely she did not actually cause any injury to any of the injured, would not exonerate her from punishment for the offence under Section 149 of the I.P.C. Considering the facts of the case and the law as regards 'knowledge' and awareness and deliberate joining the unlawful assembly and continuing to be in the assembly, the ratio laid down in the case of ***Babu Hamidkhan Mestry*** (supra), would not assist the applicants.

18. It was argued that the panch on recovery panchnama of weapons is hostile, the second panch witness was not examined. Therefore, the prosecution failed to prove the recovery and it materially affected the testimony of other witnesses. The Hon'ble

Supreme Court, in the case of ***Mritunjoy Biswas vs. Pranab, (2013) 12 SCC 796*** has held that the conviction can be based in the case, there is no recovery or seizure where clinching and direct evidence is acceptable.

19. The Investigating Officer, can prove the seizure panchnama, if witnesses do not support the prosecution. His evidence could not be thrown, he being a police officer. Barely failing to identify the weapons by one of the injured would also not make the prosecution case doubtful. In the case at hand, the injured have specifically led the evidence attributing the role to every assailant. The trial Court as well as the first Appellate Court appreciating the evidence believed that the direct evidence of the injured was acceptable. Hence, the prosecution has proved the charges beyond the reasonable doubt against the accused. In the circumstances, barely failing to examine the second panch on recovery panchnama would not make the prosecution case doubtful.

20. Same way, barely the witness on the spot panchnama not supported the prosecution and gave an admission in cross-examination that he did not visit the spot of the incident can also not be grounds for doubting the prosecution case because the evidence of the injured is clinching and admissible.

21. The ground of not appreciating the evidence properly

appears not supported by the provision of law. On reading the findings of both courts, there appears no error in appreciating the evidence. Therefore, the case of ***Allarkha Habib Memon Etc.*** *(supra)* also does not assist the accused.

22. In the alternative, the learned counsel for the applicants has prayed to reduce the sentence or extend the benefit of the Probation of Offenders Act, 1958 (for short, “Act of 1958”).

23. The applicants have been convicted and sentenced to suffer imprisonment for one year for the offence punishable under Section 326 read with Section 149 of the I.P.C. and for remaining offences, they were sentenced to suffer rigorous imprisonment for three months and six months respectively. Three injured had suffered contused lacerated wounds on the parietal region of the scalp, arm and the contusions on the thigh, knee, hands, chest etc., and both hands of one injured were fractured. Three injured had 19 injuries caused by the sharp and deadly weapons. Considering these facts the question of reducing sentence is to be considered.

24. India’s sentencing policy is to promote a just society, protect the rights of the victim and convict and deter crime. The policy is based on the proportionality of the sentences/punishment to the crime committed. The Court should consider the offender’s circumstances including his/their previous conduct. The Court

should also consider the nature of society and public conscience while exercising the powers of sentencing the accused. The Court should exercise discretion to determine the appropriate sentence based on the facts and circumstances of the case.

25. Considering the injuries caused to the injured, the use of deadly weapons, the aggression of the accused, arming with deadly weapons, the nature of the crime, the growing crimes in society for trivial reasons, previous litigations, the safety of society, and public conscience, the Court is of the view that the maximum sentence of a year for the offence punishable with life imprisonment and up to ten years was proportionate. Therefore, there was no scope to reduce the sentence.

26. The second alternative prayer of the applicants was for granting the benefit of the Act of 1958.

27. Section 4 of the Act of 1958 provides for the power of the Court to release certain offenders on probation of good conduct. The benefit under Section 4 of the Act of 1958 can be granted to the accused for the offence which is not punishable with death or imprisonment for life. The applicants have been convicted for the offence punishable under Section 326 read with Section 149 of the I.P.C. which provides punishment with imprisonment for life. Therefore, no benefit as such could be extended.

28. The High Court of Punjab and Haryana, in ***Pala Singh*** (supra), had modified the judgment of the trial Court convicting the accused from the offence under Section 326 to Section 325 of the I.P.C. Hence, the probation was extended. This Court did not hold as such. Therefore, that case would not assist the applicants.

29. The Court, on examining the reasoning and conclusion of both Courts, holds that there are no errors of law on the face of the record and there are no grounds to interfere with the impugned judgments and orders. Hence, the order:-

ORDER

(i) Criminal Revision Application stands dismissed.

(ii) The applicants/accused to surrender before the learned Judicial Magistrate First Class, Shrigonda, for undergoing the sentences imposed upon them, on 13.11.2024.

(iii) The fine amount be forfeited to the Government if not forfeited.

(iv) R & P be returned to the concerned trial Court.

(S. G. MEHARE)
JUDGE

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