A.F.R.

High Court of Judicature at Allahabad (Lucknow)

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Neutral Citation No. - 2024:AHC-LKO:34405-DB

Reserved on :- 20.03.2024
Delivered on :- 03.05.2024

Court No. - 3

Case :- GOVERNMENT APPEAL No. - 511 of 1987

Appellant :- State of U.P.

Respondent :- Hirdai Narain And Others

Counsel for Appellant :- Govt. Advocate

Counsel for Respondent :- Pawan Kumar Tiwari,Pranjal Krishna

Hon'ble Mrs. Sangeeta Chandra,J.

Hon'ble Ajai Kumar Srivastava-I,J.

(Per :- Ajai Kumar Srivastava-I, J)

1. We have heard Ms. Meera Tripathi, learned A.G.A. for the State-appellant and have also perused the records available before us.

2. By means of the present government appeal, the State seeks to assail the judgment and order dated 11.03.1987, passed by the learned IXth Additional Session Judge, Lucknow in Sessions Trial Nos.472 of 1984, arising out of Crime No.135 of 1984, under Section 307 I.P.C., Police Station, Alambagh,

District Lucknow, whereby the learned trial Court has acquitted the accused-respondents, Phool Chand and Hirdaya Narain of the charges under Sections 307 read with 34 I.P.C.

3. From a perusal of record, it transpires that the instant government appeal was filed against two respondents, namely, Hirdaya Narain and Phool Chand. However, the respondent, Phool Chand has died during the pendency of this appeal. The instant appeal in respect of respondent, Phool Chand has already been abated vide order dated 22.08.2022. Therefore, the appeal survives only with regard to the respondent, Hirdaya Narain.

4. The prosecution case, in short conspectus, is that the informant, Sri Chinaji Lal Badhani, was going home from his office on 10.04.84 when he found 10 persons, who were ex-employees of Scooter India Limited, staging a Dharna at the gate of the factory after being dismissed. All the ex-employees, including the accused Phool Chand and Hirdai Narain, nourished grudge towards the informant. Upon seeing the informant alone, the accused persons, Phool Chand and Hirdai Narain, assaulted the informant with a Danda. The informant sustained injuries on his left hand, right leg and forehead.

5. On the basis of aforesaid written report, Ext. Ka-1, a first information report as Crime No.98 of 1980, under Sections 147, 148, 149 & 302 I.P.C. came to be registered against all the accused-

respondents at Police Station, Jethwara, District Pratapgarh.

6. From a perusal of the impugned judgment and order dated 11.03.1987, it appears that various opportunities were afforded to the prosecution to adduce evidence in support of its case. However, as the prosecution failed to adduce any evidence in support of its case, consequently, the learned trial Court closed the opportunity of adducing evidence and proceeded to pass the impugned judgment and order dated 11.03.1987, whereby, the respondents have been acquitted of all the charges leveled against them as there was no evidence against them.

7. On the face of it, we do not find any perversity with the findings of the learned trial Court. After affording a reasonable opportunity to the prosecution to adduce evidence in support of its case, the trial court proceeded to decide Sessions Trial No.472 of 1984. In the absence of any evidence to support the prosecution's case, the respondents were ultimately acquitted vide judgment and order dated 11.03.1987.

8. We notice that while admitting the instant government appeal, the trial court record was summoned. In this regard, the then District and Sessions Judge, Lucknow submitted a report dated 18.07.2022. The report reveals that the entire papers in the form of Natthi-B of the record of Sessions Trial Nos. 472 of 1984 have been weeded out and only the

original judgment was available on the record, which was sent to this Court by the then Sessions Judge, Lucknow.

9. Section 385 Cr.P.C. requires that before the appeal is heard and decided it is necessary to send for the records of the case. Being relevant Section 385 Cr.P.C. is quoted hereinbelow:-

> *385. Procedure for hearing appeals not dismissed summarily.—*
>
> *(1) .....*
>
> ***(2) The Appellate Court shall then send for the record of the case, if such record is not already available in that Court, and hear the parties:***
>
> *Provided that if the appeal is only as to the extent or the legality of the sentence, the Court may dispose of the appeal without sending for the record.*
>
> *(3) .....*
>
> ***(Emphasis supplied by us)***

10. Hon'ble the Supreme Court in the case of **Shyam Deo Pandey Vs. State (1971) 1 SCC 855**, has held that perusal of the record is necessary for the appellate court to adjudicate upon the correctness or otherwise of the judgment against which the appeal is preferred. The relevant paragraph of the judgment is quoted hereinbelow:-

> ***"18.Coming to section 425, which has already been quoted above, it deals with powers of the appellate court in disposing of the appeal on***

> ***merits. It is obligatory for the appellate court to send for the record of the case, if it is not already before the court. This requirement is necessary to be complied with to enable the court to adjudicate upon the correctness or otherwise of the order or judgement appealed against not only with reference to the judgement but also with reference to the records which will be the basis on which the judgement is founded. The correctness or otherwise of the findings recorded in the judgment on the basis of the attack made against the same, cannot be adjudicated upon without reference to the evidence, oral and documentary and other materials relevant for the purpose. The reference to "such record" in "after perusing such record" is to the record of the case sent for the appellate court."***
>
> ***(Emphasis supplied by us)***

11. Thus, it is clear that for deciding a criminal appeal, it is incumbent upon the appellate court to call for the record of trial Court and to peruse the same at the time of disposal of such appeal. As such the appeal cannot be decided in the absence of trial court record.

12. According to the report of the then District and Sessions Judge, Lucknow dated 18.07.2022, as noted above, in the present matter, the trial Court record has already been weeded out and its reconstruction is not possible.

13. In a similar situation a division bench of this Court in the case of **Sita Ram and others Vs. State 1981 Cri. LJ 65** has held as under :-

> *"On a careful consideration of the relevant statutory provisions and the principles laid down in the cases cited before us,* ***we are of the opinion that where it is not possible to reconstruct the record which has been lost or destroyed it is not legally permissible for the appellate court to affirm the conviction of the appeal since perusal of the record of the case is one of the essential elements of the hearing of the appeal.*** *The appellant has a right to try to satisfy the appellate court that the material on record did not justify his conviction and that right cannot be denied to him. We are further of the opinion that if the time gap between the date of the incident and date on which the appeal comes up for hearing is short, the proper course would be to direct retrial of the cases since witnesses normally would be available and it would not cause undue strain on the memory of the witnesses. Copies of the F.I.R.,*

statements of the witnesses under Section 161 Cr.P.C., reports of medical examinations etc. would also be normally available if the time gap between the incident and the order of retrial is not unduly long. Where, however the matter comes up for consideration after a long gap of years, it would neither be just nor proper to direct retrial of the case, more so when even copies of the F.I.R. and statements of the witnesses under Section 161 Cr.P.C. and other relevant papers have been weeded out or are otherwise not available. In such a situation even if witnesses are available, apart from the fact that heavy strain would be put on the memory of the ***witnesses, it would not be possible to test their statements made at the trial with reference to the earlier version of the incident and the statements of witnesses recorded during investigation. Not only that the accused will be prejudiced but even the prosecution would be greatly handicapped in establishing its case and the trial would be reduced to a mere formality entailing agony and hardships to the accused and waste of time, money and energy of the State."***

(Emphasis supplied by us)

14. In the case of **Pati Ram and another Vs. State of U.P. : 2010 Cri. LJ 2767**, in almost similar situation, this court held as under :-

> *" I have given my thoughtful consideration to the rival submissions made by parties' counsel. It is true that another Bench of this Court in case of Raj Narayan Pandey (supra) has decided the appeal on merit in the absence of lower court record on the basis of the impugned judgement only, but in my considered opinion, the appeal cannot be decided on merit in the absence of lower court record. Unless the evidence is available for perusal, in my opinion, the appeal cannot be considered and decided on merit merely on the basis of the lower court judgement, as evidence is essentially required to consider the merit of the impugned judgement and merely on the basis of the said judgment, no order on merit can be passed in an appeal."*

15. Thus, it is settled law that for deciding the appeal, perusal of the record of trial court is necessary and if the record is not available and reconstruction of record is also not possible, then following two courses are open to the appellate court :-

> *(i). To order for re trial after setting aside the conviction; or,*
>
> *ii). If there is a long gap, then close the matter for want of record as the retrial will also not serve any purpose as the relevant documents are not available.*

17. Adverting to the case in hand, we are constrained to observe that the circumstances, which led the trial Court to close the opportunity of

prosecution to adduce the evidence leading to the acquittal of the respondents herein cannot be adjudicating by this Court for want of record of trial Court. Even reconstruction of record of Session Trial No.472 of 1984 is not possible, which is reflected from the report of then District Judge, Lucknow and the officer-in-charge of record room, District Court Lucknow.

18. This incident took place in the year 1984 and the respondents were acquitted thereafter on 11.03.1987. Thereafter this appeal was filed in the year 1987 and record was called for but record could not be made available to this Court. Efforts were made to get the record reconstructed, however, the same remained unsuccessful. About 36 years have passed since acquittal under challenge. It is a long gap. Since no paper relating to this case is available except the impugned judgement, therefore possibility of retrial at this stage, after a long gap of about 36 years since the occurrence of the incident appears to be bleak.

19. We have also noticed that as the record of the Sessions Trial No. 472 of 1984 was not made available to this Court despite the same having been requisitioned by this Court for the reason that the entire papers of Natthi-B have been weeded out. The report of the District and Sessions Judge, Lucknow as well as report of officer-in-charge record room, District Court, Lucknow make it clear that

reconstruction of records of Sessions Trial No.472 of 1984 is also not possible. Therefore, having regard to the judgment rendered by the Hon'ble Supreme Court in **Shyam Deo Pandey (Supra)** and also having regard to the judgments passed by this Court in **Sita Ram (Supra)** & **Pati Ram (Supra)** we are constrained to uphold the impugned judgment and order dated 11.03.1987 acquitting the respondents.

20. Hon'ble Supreme Court in the case of **Chandrappa and others v. State of Karnataka, (2007) 4 SCC 415** has held that an appellate court must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court. It also held that if two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.

21. We are, thus, of the considered view that instant appeal deserves to be dismissed and the same is, accordingly, **dismissed**.

22. In compliance with the provision contained in Section 437-A Cr.P.C. the surviving respondent,

Hirdaya Narain is directed to furnish personal bond and two sureties to the satisfaction of the court concerned within a period of six weeks from today.

23. Only original judgment and order dated 11.03.1987 was sent to this Court by the trial Court, which may be sent along with a copy of this judgment to the learned trial Court for information and necessary compliance.

(Ajai Kumar Srivastava-I, J) **(Sangeeta Chandra, J)**

Order Date :- 03.05.2024

A.Dewal