Reserved on : 04.02.2020
Delivered on : 30.04.2020

CRIMINAL APPEAL No. 1273 of 1982

1. Harish Chandra
2. Ramshanker -------Appellants

Vs

State of Uttar Pradesh -------Respondent

For Appellant : Sri Anup Kumar Upadhyay, Advocate for appellant no.2, Sri Ramjanam Singh, Advocate for appellant no.1.
For Respondent/State : Sri Amit Kumar Singh, AGA

Hon'ble Raj Beer Singh, J.

1. This appeal has been preferred against the judgment and order dated 11.05.1982 passed by the Special Sessions Judge (Dacoity Affected Area), Farrukhabad in Special Session Trial No. 09 of 1982, under Sections 399, 402 IPC and 25/27 Arms Act (State vs. Harish Chandra and three others) whereby accused appellant Harish Chandra and Ramshanker along with accused Bachchan were convicted under Sections 399, 402 IPC and Section 25/27 Arms Act and they were sentenced as under:

Accused-appellant Harish Chandra	Section 399 IPC	four years rigorous imprisonment.
	Section 402 IPC:	three years rigorous imprisonment.
	Section 25 Arms Act	two years rigorous

		imprisonment.
	Section 27 Arms Act:	three years rigorous imprisonment.
Accused-appellant Ramshanker	Section 399 IPC	four years rigorous imprisonment.
	Section 402 IPC	three years rigorous imprisonment.
	Section 25 Arms Act:	two years rigorous imprisonment.
	Section 27 Arms Act:	three years rigorous imprisonment.

All the sentences were directed to run concurrently.

2. Appeal of co-accused Bachchan (Criminal Appeal No. 1272 of 1982) has already been abated.

3. At the outset, it may be mentioned that this appeal was admitted in the month of May 1982 and record of trial Court was summoned by this Court vide order dated 10.05.2016 but only the impugned judgment has been sent and it was informed by report dated 09.09.2016 of trial Court that except judgment, no other record is available and efforts are being made to reconstruct the record. As per letter dated 14.09.2016, again it was informed that some time may be granted for reconstruction of record. District Judge, Farrukhabad vide letter dated 07.07.2016 has informed that except impugned judgment, other documents of record, were weeded out and that efforts are being made for reconstruction of record.

District Judge Farrukhabad vide letter dated 10.11.2016 has informed that there is no possibility of reconstruction of record of trial Court. District Judge, Farrukhabad vide letter dated 07.04.2017 has informed that despite serious efforts reconstruction of record could not take place and that reconstruction of record is not possible. In view of various letters sent along with reports of Court concerned and District Judge, Farrukhabad, it appears that efforts were made for reconstruction of record but it could not be possible. As this appeal was pending since 1982 and thus, it was felt that appeal be decided finally.

4. In **Shyam Deo Pandey Vs. State of Bihar, 1971 (1) SCC 855** the Apex Court said that fulfillment of requirement for availability of record is necessary to enable the court to adjudicate upon the correctness or otherwise of the order or judgment appealed against nor only with reference to the judgment but also with reference to the records which will be the basis on which the judgment is founded. Relevant part of the judgment is extracted as under :

> "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 judgment appealed against not only with reference to the judgment but also with reference to the records which will be the basis on which the judgment 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 by the Appellate Court."

5. In **Sita Ram and Others Vs. State 1981 Cri.L.J. 65** the Court said that in absence of the original record it is not possible to arrive at a decision that the impugned judgment is supported by the evidence on record and the order of conviction passed and the sentence imposed on the appellants is legally justified and proper. 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 appellant 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. The relevant part of the judgment reads as under :

> "4. Section 385, Cr. P.C. provides that if the appellate court does not dismiss the appeal summarily, it shall cause notice of the time and place at which such appeal will be heard to be given (i) to the appellant or his pleader; (ii) to such officer as the State Government may appoint in this behalf; (iii) if the appeal is from a judgment of conviction in a case instituted upon complaint, to the complainant; (iv) if the appeal is under Section 377 or Section 378, to the accused, and shall also furnish such officer, complainant and accused with a copy of the grounds of appeal. Sub-section (2) provides that 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. Section 386 prescribes the powers of the appellate court. That power has to be exercised after perusing the record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears. In Queen-Empress v. Khimat Singh 1889 All WN 55 this Court observed "the appellant is entitled in law to have a hearing in this Court of his appeal, but the loss of the record has deprived him of the only means of making good the pleas of the appeal...." A Division

Bench of the Calcutta High Court in Abbash Ali v. Emperor (1913) 19 Ind Cas 182 : 14 Cri LJ 182 observed that the appellate court must peruse the record before deciding the appeal. A decision upon a perusal only of the judgment appealed against is not legal.

5. Since it is incumbent on the appellate court to send for the record and peruse it and hear the counsel for the parties before it can exercise its power under Section 386, the present appeal cannot possibly be heard and decided on merit.

6. The appellants have a right to show to this Court that the decision arrived at by the court below was not supported by the evidence on record. They can legitimately contend that material evidence and circumstances have either been ignored or incorrectly appraised. This right cannot be denied to the appellants. In the absence of the original record it is not possible for us to arrive at a decision that the impugned judgment is supported by the evidence on record and the order of conviction passed and the sentence imposed on the appellants is legally justified and proper.

7. In such a situation two courses are open to the Court; (1) to order retrial after setting aside the impugned judgment; or (2) to acquit the appellants. A situation like the present one arose before Courts earlier also. In re Sevugaperumal AIR 1943 Mad 391 (2) : 44 Cri LJ 611 the accused were convicted under Sections 457, 395 and 397 Penal Code, and sentenced to various terms of imprisonment. Following the decision of this Court in Queen-Empress v. Khimat Singh 1889 All WN 55 (supra) the Madras High Court ordered retrial after setting aside the convictions. From the reports of these decisions it is not clear how much time had elapsed between the incident and the date when retrial was directed. In the Madras case the impugned order of the trial court was dated 22-6-1942. The appeal was filed on 6-8-1942 and the original record was destroyed by fire on 17-8-1942. The appeal came up for hearing on 5-11-1942. It may be that the time lapse between the date of the incident and the date of decision by the appellate court was not long. Moreover the Public

Prosecutor conceded in those cases that no other course was possible under the circumstances.

8. In Madhusudhan v. State 1963 (2) Cri LJ 103 (Orissa) the appellant was convicted under Section 302, I.P.C. and sentenced to imprisonment for life by an order of the Sessions Judge dated 17-4-1962. The incident had taken place on 29-3-1962. The appeal came up for hearing on 12-12-1962. The appellate court directed retrial of the case. It may be noted that the order for retrial was passed well within two years of the incident.

9. A similar situation arose before this Court in Zillar v. State 1956 All WR (HC) 613. In this case the appellants were convicted by the Sessions Judge on 21-1-1951 under Sections 304 and 148, I.P.C. in respect of the offence committed on 2-4-1950. The appeal was filed in this Court on 24-1-1951 which came up for hearing in April 1956 when it was brought to the notice of the Court that the entire record of the case had been lost. Attempt was made to reconstruct the record but it proved futile. This Court refused to direct retrial of the case on the reasoning that the case related to an offence which was committed more than six years ago and five years had elapsed since the judgment of the Sessions Judge convicting the appellants was passed. The court took into account the further fact that even the copies of the F.I.R. and the statements of witnesses taken under Section 161 Cr. P.C. were not available as they had been weeded out in the ordinary course.

10. A Division Bench of this Court in Criminal Appeal No. 3235 of 1971 (Jit Narain v. State) decided on 15-3-1978 in similar circumstances allowed the appeal and acquitted the appellants instead of directing their retrial.

11. On a careful consideration of the relevant statutory provisions and the principle 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 appellant 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 lag between the date of the incident and the date on which the appeal comes up for hearing is short, the proper course would be to direct retrial of the case since witnesses normally would be available and it would not cause undue strain on the memory of witnesses. Copies of F.I.R., statements of witnesses under Section 161, Cr. P.C. reports of medical examination etc. would also be normally available if the time gap between the incident and the order of retrial is not unduely 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 F.I.R. and statements of 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 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 hardship to the accused and waste of time, money and energy of the State.

In the present case the incident took place on 23-8-1971. The appellants were convicted by the Sessions Court by an order dated 18-11-1974. The appeal has been pending in this Court for about six years. We are informed that copies of the First Information Report and statements of witnesses recorded under Section 161, Cr. P.C. have been weeded out and are not available. All attempts to reconstruct the record have proved futile. In such a situation it is not permissible for us to affirm the order of conviction of the appellants, since in the absence of the record we cannot possibly feel satisfied that the appellants have been rightly

convicted. Due to lapse of time and non-availability of papers like First Information Report, statements under Section 161, Criminal Procedure Code etc, we do not consider it either just or expedient to order retrial of the case."

6. In **State of U.P. v. Abhai Raj Singh (2004) 4 SCC 6**, the Court observed and held as under :

"6. The powers of the appellate court when dealing with an appeal from a conviction are delineated in sub-clauses (I), (ii) and (iii) of clause (b) of section 386 of the code. The appellate court is empowered by section 386 to reverse the finding and sentence and acquit. Therefore, the acquittal is possible when there is reversal of the finding and sentence and acquit. Therefore, the acquittal is possible when there is reversal of the finding and sentence. The appellate court of competent jurisdiction subordinate to the appellate court or committed for trial . For exercise of the powers in cases of first two categories, obviously a finding on merits after consideration of the materials on record is imperative. Where that is not possible because of circumstances like the case at hand i.e. destruction of the records , the proper course for the appellate court would be to direct retrial after reconstruction of the records the same was impossible. If on the other hand, from the copies available with the prosecuting agency or the defence and/or their respective counsel, reconstruction is possible to be made, the said course indicated in sub-clause (i) and (ii). After perusal of the records and hearing the appellant's pleader and Public Prosecutor under section 377 or 378, the exercise of power as indicated above can be resorted to. As was observed in Bani Singh v. State of U.P. (1996) 4 SCC 720 . The plain language of section 385 makes it clear that if the appellate court does not consider the appeal fit for summary dismissal, it must call for the records and section 386 mandates that after record is received, the appellate court may dispose of the appeal after hearing as indicated.

7. A question would further arise as to what happens when reconstruction is not possible.

Section 386 empowers the appellate court to order that the case be committed for trial and this power is not circumscribed to cases exclusively triable by the Court of Session.(See State of U.P. v. Shankar AIR 1962 SC1154).

8. It has been the consistent view taken by several High court that when records are destroyed by fire or on account of natural or unnatural calamities reconstruction should be ordered. In Queen Empress v. Khimat Singh 1889 AWN 55 the view taken was that the provisions of section 423(1) of the criminal procedure code,1898(in short " the old code") made it obligatory for the court to obtain and examine the record at the time of hearing. When it was not possible to do so, the only available course was a direction for reconstruction. The said view was reiterated more than six decades back in Sevuaperumal,Re AIR1943 Mad 391(2). The view has been reiterated by several high Courts as well,even thereafter.

9. The High court did not keep the relevant aspects and consideration in view and came to the abrupt conclusion that reconstruction was not possible merely because there was no response from the Session Judge. The order for reconstruction was 1-11-1993 and the judgement of the high court is in Criminal Appeal No. 1970 of 1979 dated 25-2-1994. the order was followed in Criminal Appeal No. 1962 of 1979 disposed of on 16-9-1995. it is not clear as to why the high court did not require the session court to furnish the information about reconstruction of records; and/or itself take initiative by issuing positive directions as to the manner, method and nature of attempts,efforts and exercise to be undertaken to effectively achieve the purpose in the best interests of justice and to avoid ultimately any miscarriage of justice resulting from any lapse,inaction or inappropriate or perfunctory action,in this regard; particularly when no action was taken by the high court to pass necessary orders for about a decade when it received information about destruction of record. The course adopted by the high court, if approved, would encourage dubious persons and detractors of justice by allowing undeserved premium to violators of law by acting hand in glove with those

> anti-social elements coming to hold sway,behind the screen, in the ordinary and normal course of justice.
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> 10. We , therefore, set aside the order of the high court and remit the matter back for fresh consideration. It is to be noted at this juncture that one of the respondents i.e. om pal has died during the pendency of the appeal before this court .The High court shall direct reconstruction of the records within a period of six months from the date of receipt of our judgment from all available or possible sources with the assistance of the prosecuting agency as well as the defending parties and their respective counsel. If it is possible to have the records reonstructed to enable the high court itself to hear and dispose of the appeals in the manner envisaged under section 386 of the code,rehear the appeals and dispose of the same, on their own merits and in ordering retrial interest of justice could be better served-adopt that course. If only reconstruction is not possible to facilitate the high court to hear and dispose of the appeals and the further course of retrial and fresh adjudication by the sessions court is also rendered impossible due to loss of vitally important basic records- in that case and situation only, the direction given in the impugned judgement shall operate and the matter shall stand closed. The appeals are accordingly disposed of."

7. In **Pati Ram & Another Vs. State of U.P., 2010 Cri.L.J. 2767**, the Court observed and held as under :

> "12. I have given my thoughtful consideration to the rival submissions made by the parties counsel. It is true that another Bench of this Court in the case of Raj Narain 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 can not be decided on merit in the absence of lower court record. Unless the evidence is available for perusal, in my opinion, the appeal can not 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 judgement, no order on merit can be passed in the appeal.

13. As is evident from the report of IVth Addl. Sessions Judge, Bareilly, no paper of the case is available. In spite of best efforts made by the courts below, the lower court record could not be reconstructed. Since no paper of the case is available, hence there is no possibility of re-trial at this stage after more than thirty years. Therefore, in view of the observations made by the Hon'ble Apex Court in the case of State of U. P. Vs. Abhay Raj Singh (supra) there is no alternative except to acquit the appellants, as hearing of the appeal in accordance with the arrangement made in section 386 cr. p. c. can not be made and retrial also is not possible.

14. Consequently, the appeal is allowed. The impugned judgement and order are set aside and the appellants-accused Pati Ram and Ram Swarup are hereby acquitted of the offence under section 304 read with section 34 ipc for want of trial court record and there being no possibility of retrial."

8. In **Laukush and Another Vs. State of U.P., 2013 (7) RCR(Cri) 493,** the Court observed and held as under :

"2.These two criminal appeals emanate from the same judgment and order dated 30.7.1982 passed in Session Trial No. 496 of 1981-State Vs. Laukush and others, by IXth Additional Session Judge, Kanpur Nagar, whereby the appellants Basdeo, Chhedi Lal, Beni, Shiv Ram, Ramesh, Shyam Lal (appellants in Criminal Appeal No. 1877 of 1982) and two other appellants Laukush and Chhote Lal, who are appellants in Criminal Appeal No. 1878 of 1982, were convicted under Sections 302/149, 147, 307/149, 323/149 I.P.C. and were sentenced to life imprisonment, one year R.I., five years R.I. and six months R.I. respectively. Thus, the appellants have challenged the impugned judgment and order dated 30.7.1982 whereby their conviction and sentence as stated above, was recorded.

3. Both the appeal Nos. 1878 of 1982 and 1877 of 1982 were admitted on 11.8.1982 and at the time

of admission, the appellants were granted bail by this Court and since that date, the appellants continued to be on bail.

4. For disposal of these appeals, the lower court record was requisitioned which could not be available inspite of best possible efforts. As per report of the then District Judge, Kanpur Nagar dated 19.6.2003, the original record was received by the then Assistant Record Keeper Sri Mahesh Katiyar on 30.5.1983 who expired 7-8 years ago. The report to this effect was sent by the District Judge, Kanpur Nagar. The report of the District Judge, Kanpur Nagar dated 19.6.2003 was put up before the Division Bench of this Court on 23.8.2007 when this Court passed the following order:-

"In this view of the matter, the District Judge, Kanpur Nagar shall immediately take steps for trying to get the record of the case reconstructed and utilise the assistance of the counsel for the accused and State and submit compliance report to this Court within four weeks.

List on 24.9.2007."

5. A reminder was issued to the District Judge, Kanpur Nagar by this Court on 24.9.2007 directing the case to be listed on 29.10.2007. The District Judge, Kanpur Nagar vide his report dated 12.2.2008 apprised this Court that efforts for reconstruction of the record were entrusted to Sri R.P. Pandey, Additional District & Sessions Judge, Court No. 9, Kanpur Nagar. Sri Pandey could not complete the work of reconstruction of the record. The report of the District Judge, Kanpur Nagar dated 12.2.2008 was put up before this Court on 10.4.2012. When this Court was not satisfied with the reasons mentioned in the report for not reconstructing the lower court record, the District & Sessions Judge, Kanpur Nangar was directed to take effective steps in reconstruction of the lower court record without fail within two months and the case was directed to be listed on 10.7.2012. It was further directed that in case lower court record is not reconstructed, the District & Sessions Judge, Kanpur Nagar shall appear in person to explain the

reasons as to why the lower court record has not been reconstructed.

6. It is in compliance of the order dated 10.4.2012, passed by this Court, that a report dated 9.7.2012, sent by the Incharge District Judge, Kanpur Nagar to this Court has been placed before us. This report is taken on record which shall form part of this appeal.

7. According to the report dated 9.7.2012, sincere efforts were made at different levels including C.M.O., C.M.S., Superintendent Hallet Hospital, S.H.O. Sachendi, Kanpur and D.I.G., Kanpur Nagar but the reconstruction of the record of the said Sessions Trial could not be possible despite multi pronged approach. According to this report, Smt. Janak Dulari, informant of this case had died long back and it was also informed by the injured persons of this case that their counsel was quite aged and was not practising for last several years and no document was available with them. A letter was also written by enquiry officer/ Additional District & Sessions Judge, Court No. 9, Kanpur Nagar to D.G.C. (Crl.), Kanpur Nagar for furnishing original/ copy of the case diary of the said case. The D.G.C. (Crl.), Kanpur Nagar has also informed that no document is available in the office relating to the said Sessions Trial. The report dated 9.7.2012 of the Incharge District Judge is detailed one mentioning of all efforts made by the Inquiry Officer/ Additional District & Session Judge, Court No. 9, Kanpur Nagar.

8. Affidavits of six accused persons have been filed to the effect that the documents of the aforesaid case are not available with them and their counsel had died long back. According to this report, two accused persons Shiv Ram and Shyam Lal had died. This lengthy and detailed report of the Incharge District Judge, Kanpur Nagar dated 9.7.2012 makes it evident that reconstruction of the said record is not possible.

9. In the absence of original record, since reconstruction is not possible, remanding the appeal back for retrial will not serve any useful purpose at all.

> 10. From the impugned judgment, it transpires that the incident had occurred on 8.6.1979, more than 30 years ago and the appellants were released on bail in the year 1982 by this Court.
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> 11. Since reconstruction of the record is not possible, we apply the decision of the Apex Court in State of U.P. Vs. Abhai Raj Singh (2004) 4 SCC 6, wherein the Hon'ble Apex Court has been pleased to observe as under :-
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> "If only reconstruction is not possible to facilitate the High Court to hear and dispose of the appeals and the further course of retrial and fresh adjudication by the Sessions Court is also rendered impossible due to loss of vitally important basic records- in that case and situation only, the direction given in the impugned judgment shall operate and the matter shall stand closed."
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> 12. In view of the aforesaid, we allow both the appeals and the impugned judgment of conviction and sentence of the appellants are hereby set aside and they are set at liberty and are acquitted of the charges. The appellants are on bail, they need not surrender. Their bail bonds and surety bonds are discharged."

9. In the instant case, it is apparent that record of trial Court has been weeded out. It was also informed by the District Judge Farrukhabad that there is no possibility of reconstruction of record of trial Court and again it was stated by the District Judge that despite serious efforts reconstruction of record could not take place and that reconstruction is not possible. Considering the law on the point that where Lower Court Record is not traceable or weeded out, it is clear that in this case reconstruction is not possible and even retrial is not possible. As per law laid down by the Apex Court in the case of State of U.P. vs. Abhay Raj Singh, 2004 (4) SCC 6 and Division Bench of this Court in above referred cases, this court is left with no option but to decide the appeal as per the settled law.

10. The appeal is accordingly allowed. The impugned judgment and order of the Trial Court dated 11.05.1982 convicting and sentencing

the appellants is hereby set aside and both the appellants Harish Chandra and Ramshankar are acquitted of the charges levelled against them. The accused-appellants are on bail, their bail bonds are cancelled and sureties are discharged.

11. Appeal is allowed in above terms.

12. Copy of this judgment as well as Lower Court Record be sent to the Court concerned forthwith.

Date: 30.04.2020
A. Tripathi

(Raj Beer Singh, J)