



2025:AHC:154903

HIGH COURT OF JUDICATURE AT ALLAHABAD

CRIMINAL APPEAL No. - 439 of 1983

Nandoo

.....Appellant(s)

Versus

State of U.P.

.....Respondent(s)

Counsel for Appellant(s)	:	Atul Kumar, R.B. Malik, Ravindra Rai
Counsel for Respondent(s)	:	Govt. Advocate

Connected with

CRIMINAL APPEAL No. - 440 of 1983

Charan

.....Appellant(s)

Versus

State of U.P.

.....Respondent(s)

Counsel for Appellant(s)	:	Atul Kumar, Keshar Sahai
Counsel for Respondent(s)	:	Govt. Advocate

Court No. - 71

HON'BLE RAJ BEER SINGH, J.

1. Both the above referred criminal appeals have been arisen from same judgment and order and both the appeals are connected and thus both these appeals are being decided by this common judgment.

2. The Criminal Appeal No. 439 of 1983 has been preferred by appellant Nandoo against judgment and order dated 23.02.1983, passed by learned 3rd Additional Sessions Judge, Muzaffarnagar in S.T. No. 191 of 1980, (State vs. Nandu & Anr.), under Sections 364, 302/34, 201 IPC, P.S. Titavi, District

Muzaffarnagar, whereby the appellant has been convicted under Section 364 IPC and sentenced to five years rigorous imprisonment.

3. The Criminal Appeal No.440 of 1984 has been preferred by appellant Charan against above referred judgment and order, whereby he has also been convicted under Section 364 IPC and sentenced to five years rigorous imprisonment.

4. Heard learned AGA for State. None has appeared on behalf of appellants.

5. At the outset it may be mentioned that as per report dated 01.02.2020, the record of trial Court has been weeded out and in process of reconstruction of the record, except the judgment, no other document could be available. As per report dated 08.10.2020 sent by District Magistrate, Muzaffarnagar the reconstruction of the record or retrial of the case is not possible. As neither the witnesses nor the documents pertaining to the case are available and these appeals are pending since the year 1983, thus, in view of these facts and circumstances, no useful purpose would be served by keeping these appeals pending indefinitely. Rather, it appears appropriate and desirable that thus appeals be decided as per settled law.

6. It is well settled that in absence of original record, it is not possible to arrive at the decision whether the findings recorded by the court below are based on evidence and whether the conviction of appellant is justified or not. 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."

7. In **Sita Ram and Others Vs. State** 1981 Cri.L.J. 65 the Court observed 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.

8. In **Bhunda and Others Vs. State of U.P.**, 2002 Cri.L.J. 3898, the Court observed and held as under :

"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 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 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 witness 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 statement 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.

10. The above case of Division Bench was further relied on by subsequent Division Bench in the case of Ram Nath v. State, 1982 All Cri C 128.

11. In the instant case the report of the Sessions Judge, Jhansi shows that reconstruction of record was not possible despite of all attempts taken in this regard. this Court, therefore, is not in a position to confirm the conviction recorded by the trial Court.

12. So far as the question of ordering retrial is concerned the occurrence in this case took place as late as on 20-5-1975 i.e. as far back as 26 years. In such situation it will not be justifiable to direct retrial.

In this view of the matter, I have no option but to allow the appeal and set aside the conviction and sentence of the appellants."

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

"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.

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 :-

"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."

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."

10. In view of aforesaid pronouncements, it is clear that in the absence of record of trial Court the correctness or otherwise of the findings recorded in the judgment can not be adjudicated upon without reference to the oral and documentary evidence and other relevant material. Thus, in the absence of record of trial Court, it is no possible to arrive at a conclusion that impugned

judgment is supported by evidence on record or that order of conviction and sentence imposed upon the appellants is legally justified and proper. In view of these facts and circumstances the only option available is to set aside the conviction and sentence of the appellant.

11. In the instant matter, as stated above the record of the trial Court has been weeded out. As per report of District Judge, Muzaffarnagar except judgment, no other document was available and reconstruction of the record is not possible. As per another report of District Judge, Muzaffarnagar, retrial of the case is also not possible as the witnesses of the case are not available. As stated above, these appeals are pending since last 42 years. Thus, considering the aforesaid case laws, this Court is left with no option but to decide the appeals as per settled law and therefore appeals have to be allowed.

12. The impugned judgment and order dated 23.02.1983, by which the appellants have been convicted under Section 364 IPC and sentenced to five years rigorous imprisonment, is hereby set aside. The appellants are acquitted of the charges levelled against them. The appellants are on bail and thus, no further order is required.

13. Both the Appeals are **allowed** in above terms.

14. Copy of this judgment be sent to the court concerned forthwith.

September 2, 2025
'SP'/-

(Raj Beer Singh,J.)