



HIGH COURT OF JUDICATURE AT ALLAHABAD

CRIMINAL APPEAL No. - 2298 of 1986

Som Pal Singh And Others

.....Appellant(s)

Versus

State

.....Respondent(s)

Counsel for Appellant(s)	:	Ramendra Nath Tiwari, Viresh Mishra
Counsel for Respondent(s)	:	A.G.A.

Court No. - 78

HON'BLE NAND PRABHA SHUKLA, J.

1. Heard Sri Ramendra Nath Tiwari, learned counsel for the appellants, learned A.G.A. for the State and perused the record.

2. The present Criminal Appeal u/s 374 Cr.P.C. has been filed against the judgment and order dated 26.08.1986 passed by IX Additional Sessions Judge, Moradabad in Sessions Trial No. 62 of 1985 convicting and sentencing the appellants under Section 304 IPC to undergo R.I. for seven years and under Section 323 IPC to undergo R.I. for six months.

3. As per office report dated 03.02.2026, District Judge, Moradabad vide letter dated 02.02.2026, stated that the reconstruction of the file in Sessions Trial No. 62 of 1985 is not possible as the records were weeded out and after discussing the issue of reconstructing of records before learned counsel for both the parties, it is impossible to reconstruct the complete record.

4. In view of the fact, neither reconstruction of the complete relevant record specially statement of witness is possible nor the retrial for deciding the appeal. Hence, in view of the judgment of the Apex Court as well as of this Court in **Tej Pal Singh & Others Vs. State of U.P. (Criminal Appeal No. 2402 of 1981, decided on 02.12.2015)**, there is no option but to allow this appeal.

5. Sections 384, 385 and 386 Cr.P.C. are reproduced here-in-below.

"384. Summary dismissal of appeal.

(1) If upon examining the petition of appeal and copy of the judgment received under section 382 or section 383, the Appellate Court considers that there is no sufficient ground for interfering, it may dismiss the appeal summarily: Provided that-

(a) no appeal presented under section 382 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same;

(b) no appeal presented under section 383 shall be dismissed except after giving the appellant a reasonable opportunity of being heard in support of the same, unless the Appellate Court considers that the appeal is frivolous or that the production of the accused in custody before the Court would involve such inconvenience as would be disproportionate in the circumstances of the case;

(c) no appeal presented under section 383 shall be dismissed summarily until the period allowed for preferring such appeal has expired.

(2) Before dismissing an appeal under this section, the Court may call for the record of the case.

(3) Where the Appellate Court dismissing an appeal under this section is a Court of Session or of the Chief Judicial Magistrate, it shall record its reasons for doing so.

(4) Where an appeal presented under section 383 has been dismissed summarily under this section and the Appellate Court finds that another petition of appeal duly presented under section 382 on behalf of the same appellant has not been considered by it, that Court may, notwithstanding anything contained in section 393, if satisfied that it is necessary in the interests of justice so to do, hear and dispose of such appeal in accordance with law.

385. Procedure for hearing appeals not dismissed summarily.- (1) 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.

(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) Where the only ground for appeal from a conviction is the alleged severity of the sentence, the appellant shall not, except with the leave of the Court, urge or be heard

in support of any other ground.

386. Powers of the Appellate Court. After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may-

(a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be re- tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction-

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re- tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or

(ii) alter the finding, maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same;

(c) in an appeal for enhancement of sentence-

(i) reverse the finding and sentence and acquit or discharge the accused or order him to be re- tried by a Court competent to try the offence, or

(ii) alter the finding maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, so as to enhance or reduce the same;

(d) in an appeal from any other order, alter or reverse such order;

(e) make any amendment or any consequential or incidental order that may be just or proper;

Provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement:

Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal."

6. A cumulative reading of the above referred three Sections (384, 385, 386) make it abundantly clear that the appeal is to be decided on merit after

perusal of lower court record and hearing the appellants or his counsel and the prosecution if the appeal is not dismissed summarily under Section 384 Cr.P.C.

7. In an authoritative pronouncement reported in **AIR 1996 Supreme Court 2439 (1) Bani Singh and Others Vs. State of U.P.**, Hon'ble Apex Court has elaborated meaning of Sections 385 and 386 of Criminal Procedure Code 1973 in Para No. 8 of the judgment which is being reproduced hereinbelow:

"Section 385 (2) clearly states that if the Appellate Court does not dismiss the appeal summarily, it 'shall', after issuing notice as required by sub-section (1), send for the record of the case and hear the parties. The proviso, however, posits that if the appeal is restricted to the extent or legality of the sentence, the Court need not call for the record. On a plain reading of the said provision, it seems clear to us that once the Appellate Court, on an examination of the grounds of appeal and the impugned judgment, decides to admit the appeal for hearing, it must send for the record and then decide the appeal finally, unless the appeal is restricted to the extent and legality of the sentence. Obviously, the requirement to send for the record is provided for to enable the Appellate Court to peruse the record before finally deciding the appeal. It is not an idle formality but casts an obligation on the court to decide the appeal only after it has perused the record. This is not to say that it cannot be waived even where the parties consent to its waiver. This becomes clear from the opening words of Section 386 which say that 'after perusing such record' the Court may dispose of the appeal. However, this Section imposes a further requirement of hearing the appellant or his pleader, if he appears, and the public prosecutor, if he appears. This is an extension of the requirement of Section 385(1) which requires the Court to cause notice to issue as to the time and place of hearing of the appeal. Once such a notice is issued the accused or his pleader, if he appears, must be heard."

8. I have considered the identical issue as to whether in absence of trial court record appeal can be decided or retrial is possible after a long gap of time in **Mauji Lal Vs. State 2022 (119) ACC 522 (DB)** wherein entire case law including judgement of Hon'ble Apex Court in **State of U.P. Vs. Abhay Raj Singh 2004 (50) ACC 691 (SC)** has also been relied on.

9. In view of the judgment of the Apex Court in the Case of **State of U.P. Vs. Abhay Raj Singh (Supra)**, it is not possible either to get the record of the present case reconstructed or retrial as the record has been weeded out in accordance with law. Hence, in view of above stated position of law when record of the trial court is not traceable and reconstruction or re-trial is also not possible, the appeal has to be allowed.

10. Again in the same case, Hon'ble Apex Court has expressed about various alternative steps to be taken in the matter of loss of records in Para 10 of the judgment which is extracted as hereinbelow:

"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 re-construction 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 reconstructed 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 its own merits and in accordance with law. If it finds that re-construction is not practicable but by order retrial interest of justice could be better served - adopt that course and direct retrial - and from that stage law shall take its normal course. If only reconstruction is not possible to facilitate High Court to hear and dispose of the appeals and the further course of retrial and fresh adjudication by 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. The appeals are accordingly disposed of."

11. In a similar case where Trial Court record was not available and reconstruction of record did not succeed, a division Bench of this Court has in the case of **Sita Ram and others Vs. State, 1981 CrL.J 65**, made observation in Para 11 which is quoted herebelow:

"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."

12. In the above referred case of **Sita Ram (supra)** the division Bench acquitted the accused in view of the fact that the lower court record could not be reconstructed. This aspect of **Sita Ram case (supra)** was again considered by another division Bench of this Court in the case of **Ram Nath Vs. State 1982 (19) ACC 128** (decided on 3.11.1981) wherein also following observations were made:-

"After making the aforementioned observations and in view of the fact that the court was not in a position to have the record of the case re-constructed, the Bench directed acquittal of the accused in that case. The principle laid down in Sita Ram's case fully applies to the facts of the present case. As all attempts to have the record re-constructed have failed, this Court is not in a position to affirm the conviction recorded by the trial court. So far as the question of ordering a re-trial is concerned, we find that in the instant case the incident in connection with which the accused were prosecuted, took place as far back as 13th of September, 1970, that is, more than eleven years earlier. In such circumstances it will not be desirable to direct a re-trial. In this view of the matter we have no option but to allow Criminal Appeal No.857 of 1976 and to set aside the conviction and sentence of Ram Nath and to acquit him of the offence with which he has been charged."

13. In similar circumstances another Division Bench of this Court in the case of **Brahmanand Shukla Vs. State of U.P., 2010 (69) ACC 749** made following observations in Para 10:-

"In the present case, as we have mentioned in the earlier part of the judgment only a copy of the Trial Court's judgment is available and no other documents like FIR, post-mortem report, copies of the documents which had been filed by the prosecution and were exhibited during trial, the statement of the witnesses recorded under section 161, Cr.P.C. are available despite various attempts to reconstruct the record. The incident is of the year 1979 i.e., the incident took place about 30 years back. In these circumstances, no fruitful purpose would be served by ordering retrial as the same cannot be conducted at all in absence of these documents.

In the light of the above discussions and circumstances mentioned above, we have no

other alternative but to allow the appeal, set aside the conviction and sentence of the appellant and to acquit him."

14. In similar circumstances another Division Bench of this Court in the case of *Sita Ram and Others Vs. State*, 1981 Cr.L.J. 65 made following observations in Para 12 and 13:-

"12. 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.

13. In the circumstances the appeal is allowed. The order of the court below convicting and sentencing the appellants is set aside and they are acquitted. They are on bail. They need not surrender. Their bail bonds are discharged."

15. In similar circumstances another Division Bench of this Court in the case of **Kesari and Others Vs. State of U.P. [1988 JIC 355]** made following observations in Para 3 and 4:-

"3. Under these circumstances, the lower court's record could not be obtained and without the same, the appeal cannot be heard on merits. It appears that the reconstruction of the record is also not possible, in-as-much as original documents have all burnt out.

4. Under these circumstances, both the appeals stand allowed and the conviction of the appellants and sentences awarded to them are hereby set aside. They are on bail. They need not surrender. Their bail bonds and sureties shall stand discharged."

16. In view of the aforesaid discussions, considering the judgments of Hon'ble the Apex Court and of this Court, since in spite of best efforts, neither reconstruction of record is possible nor re-trial is possible, hence, the criminal appeal cannot be decided on merit in absence of relevant prosecution papers including the statement of witnesses and as such, there is no option but to set aside the impugned judgment of conviction.

17. In view of above, judgment and order of conviction dated 26.08.1986 passed by IX Additional Sessions Judge, Moradabad, is hereby set aside.

18. Accordingly, the present Criminal Appeal stands **allowed**.

April 7, 2026
Shivani Sri.

(Nand Prabha Shukla,J.)