



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of Decision: 21.03.2024

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CRL.A. 204/2001

ANIL DUTT

..... Appellant

Through: Mr. Mridul Arora, Advocate

versus

STATE

..... Respondent

Through: Mr. Laksh Khanna, APP for State
with Insp. Gulshan Nagpal and SI
Prem Parkash, P.S. Sunlight Colony.

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT (ORAL)

1. The present appeal has been instituted against the judgment of conviction and order on sentence passed by the learned Trial Court in the case arising out of FIR No.459/1988 registered under Sections 365/368/506/120B IPC and Sections 25/27/54/59 Arms Act at P.S. Srinivas Puri.
2. During the consideration of the appeal, a peculiar situation has come up whereby neither copy of the appeal nor the impugned judgment alongwith statement of witnesses are available.
3. A perusal of the proceeding sheets indicate that though the appeal had been filed in the year 2001, the first order available in the captioned appeal is that of 18.01.2019, which reads as under:-

“File put up with office note for reconstruction of the case file of this appeal.

Issue court notice to the Ld. counsel for appellant as well as Ld.



standing counsel (Crl.) to file the copy of document/available with them in respect of present appeal.

List this matter on 19.02.2019.”

4. It appears that notice issued to counsel for the appellant was received back with the reply that he no longer represents the appellant in the present case. On 22.02.2019, the Court noted the abysmal situation w.r.t reconstruction of case records and directed the Joint Registrar (Judicial) to make expeditious efforts to reconstruct the missing records. In the proceedings held before the Joint Registrar (Judicial) on 05.04.2019, it was noted that a fresh notice had been directed to be issued to learned counsel for the appellant, which was received back with the report that he had expired. In pursuance to the notice issued to SHO, P.S. Sunlight Colony, it was stated that the police file had been found and the relevant records available in it were directed to be filed. A report was also sought from the State as to the availability of the appeal filed and relevant records, however, the same were also not found to be available with the learned APP. The appellant was directed to produce the appeal paper book and relevant records, who placed on record an affidavit stating that all the records were available with his earlier counsel *Mr. Zafar Siddiqui*, who has expired and that no records are available with him. In this backdrop, a report was received from the Joint Registrar (Judicial) that efforts to reconstruct the file of the appeal were made, however, record was found nowhere except for the few documents available in the police file. Faced with this situation, this Court directed the State to check the records in VRK Office where shadow files are maintained. The order passed was also directed to be communicated to the Commissioner of Police, for him to look into the fact situation.



5. A detailed report dated 16.03.2021 regarding reconstruction of the Trial Court Record has also been received from the learned M.M.-08 (South East, Saket Court), wherein in the concluding paragraph, it has been stated that:-

“Also, since the matter is very old, record of order sheets/evidence/ other court proceedings is not available in the court computers. Thus, despite best efforts, only copy of chargesheet, case diary and police file could be procured in this matter and re-construction of trial court record could not be completed.”

6. The above report was also accompanied by statement of *SI Brahm Prakash*, P.S. Sunlight Colony and *Insp. Brahma Dutt*, P.S. Lajpat Nagar, who stated that except for the copy of FIR and charge-sheet alongwith statement of two witnesses recorded under Section 161 Cr.P.C., no other records are available.

7. Learned APP for the State has informed that efforts were made to trace records in VRK Office, Sub Divisional, Lajpat Nagar, however, only some part of the case diary could be traced and no judicial paper could be found. A Status Report in this regard has been placed on record.

8. Further, learned APP for the State has stated that an inspection of the paperbook and LCR was carried out and in this regard, he has handed over a brief note on the availability of documents on record, which is taken on record. The relevant extract of the brief note is extracted hereunder:-

<u>DOCUMENTS AVAILABLE ON RECORD</u>
I. RELEVANT DOCUMENTS IN PLEADINGS:
Cross Examination of PW-4/Avinash Gupta [@ e.pg. 43 to 48] - Also @ e.pg. 262 to 265 of LCR II



Cross Examination of one Vijay Shankar [@ e.pg. 57 to 59]

- Also @ e.pg. 274 to 275 of LCR II

Misc. Documents from inner case diary [@ e.pg. 62 to 352]

- Also @ 182 to of LCR II

II. RELEVANT DOCUMENTS IN LCR-I

Orders by the Trial Court with regard to reconstruction of documents

25.02.2021- “Reconstruction cannot be done” [@ e.pg. 38]

16.03.2021- “Only copy of the Chargesheet and case diary could be procured” [@ e.pg. 42]

Letters sent by the Trial Court to the Joint Registrar, Delhi High Court [@ e.pg. 46 to 48]

III. RELEVANT DOCUMENTS IN LCR-II

Detailed Report regarding reconstruction in Trial Court [@ e.pg. 5 & 6]

Statement of IO Bharam Prakash who produced police file [@ e.pg. 48]

9. From the above discussion, it is clear that only incomplete police file and no judicial record is available barring cross examination of two witnesses. A similar situation had arisen before the Supreme Court in State of U.P. v. Abhay Raj Singh & Anr.¹, wherein the Supreme Court observed:-

“1. In these appeals the question of seminal importance which arises is whether in exercise of power under Section 386 of the Code of Criminal Procedure, 1973 (in short “the Code”), the appellate court would be justified in directing acquittal, where the records of the trial court are not placed before it on some ground or the other. The Allahabad High Court by the

¹ (2004) 4 SCC 6



impugned judgement directed acquittal of the accused person (present respondents) who were appellants before it.

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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 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."

10. Recently, in Jitendra Kumar Rode v. Union of India², the Supreme Court had occasion to deal with such a situation where entire record was lost and untraceable and despite best efforts the same could not be re-constructed. The Court while taking note of its earlier decision including Abhay Raj (Supra) as well as Dhanajay Rai @ Guddu Rai v. State of Bihar³

² 2023 SCC OnLine SC 485

³ 2022 SCC OnLine SC 880



and Section 385 Cr.P.C., has concluded as under :-

“11. Being aggrieved by the order of conviction being upheld, the Appellant has preferred the present appeal. It is apparent on the fact of the record that the record could never be reconstructed in its entirety, especially the relevant ones by the concerned District Court. The Court, nonetheless, found sufficiency in the partly reconstructed record, which included only a few documents, such as FIR and upheld the conviction on merits.

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37. Protection of the rights under Article 21 entails protection of liberty from any restriction thereupon in the absence of fair legal procedure. Fair legal procedure includes the opportunity for the person filing an appeal to question the conclusions drawn by the trial court. The same can only be done when the record is available with the Court of Appeal. That is the mandate of Section 385 of the CrPC. Therefore, in the considered view of this Court, it is not within prudence to lay down a straightjacket formula, we hold that noncompliance with the mandate of the section, in certain cases contingent upon specific facts and circumstances of the case, would result in a violation of Article 21 of the Constitution of India, which we find it to be so in the instant case.

38. The language of Section 385 shows that the Court sitting in appeal governed thereby is required to call for the records of the case from the concerned Court below. The same is an obligation, power coupled with a duty, and only after the perusal of such records would an appeal be decided.

39. In the view of the aforesaid, the appeal is allowed. The impugned judgment and the conviction dated 07.12.1999 passed by Special Judge (Prevention of Corruption Act, 1988), Lucknow, in Case No.7/1996 is set aside, subject thereof, is set aside.

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11. The Supreme Court in Jitendra Kumar Rode (Supra) took note of the decisions in Sita Ram v. State of Uttar Pradesh⁴, Khalil Ahmad v. State of U.P.⁵, Vir Pal & Anr. v. State⁶, Hira Lal & Ors. v. State of U.P.⁷ and Bhunda & Ors. v. State of U.P.⁸ and issued following directions:-

“44. Therefore, this Court finds it fit to issue the following directions:

1. The Registrar General of the High Courts shall ensure that in all cases of criminal trial, as well as civil suits, the digitization of records must be duly undertaken with promptitude at all District Courts, preferably within the time prescribed for filing an appeal within the laws of procedure.

2. The concerned District Judge, once the system of digitization along with the system of authentication of the digitized records is in place in their judgeship, to ensure that the records so digitized are verified as expeditiously as possible.

3. A continually updated record of Register of Records digitized shall be maintained with periodic reports being sent to the concerned High Courts for suitable directions...”

12. A Coordinate Bench of this Court in Ramesh Kaushik v. State of Delhi⁹ had come across with a similar situation, wherein except for some portion of police records, no judicial records was available. Consequently, the appeal was allowed and judgment of conviction was set aside.

13. In the present case, the offence is stated to have taken place somewhere in the year 1988, whereas the appeal was statedly filed in the year 2001. About 20 long years have gone by since the appeal came to be

⁴ 1980 SCC OnLine All 531

⁵ 1986 SCC OnLine All 211

⁶ 1999 SCC OnLine All 1348

⁷ 1999 SCC OnLine All 1392

⁸ 2001 SCC OnLine All 864

⁹ 2022 SCC OnLine Del 4185



filed and despite best efforts on the part of the trial court, prosecution/State as well as the Registry of this Court, the relevant records of the trial/appeal could not be found or reconstructed. Evidently, even copy of the impugned judgement and order on sentence as well as copy of the appeal are not available on record. Only aforementioned documents are available on record however, none of these documents are of assistance in the consideration of the present appeal inasmuch as none of the said document can provide a glimpse into the judicial appreciation and application of mind made to the facts and evidence of the case, which finally led to the conviction of the appellant.

The Supreme Court in Jitendra Kumar Rode (Supra) duly noted and approved the decision of the Allahabad High Court in Sita Ram (Supra) wherein it was observed that in cases where the entire record has been lost or destroyed and the reconstruction of the records is also not possible, the Appellate Court shall order retrial provided the time lag between the incident and the date of hearing of appeal is short. However, if the time lag is long, then the Appellate Court should not order retrial. Consequently, the Supreme Court in the facts of the case before it, while acquitting the appellant before it, observed that since 28 years had passed since the commission of the offence and further considering that the trial court record could not be reconstructed despite efforts of the courts below, re-trial would not serve the interest of justice and would not serve any fruitful purpose. It was also stated that the time elapsed between the commission of the offence and hearing of the appeal must be duly taken into consideration while deciding the appeal.

14. Taking cue from the observations of the Supreme Court in Jitendra



Kumar Rode (Supra) and applying the same to the facts of the present case, this Court is of the considered opinion that since around 36 long years have passed since the commission of the offence and the records of the present appeal could not be reconstructed despite repeated efforts, an order for retrial would prove to be against the interest of justice. However, at the same time, since this Court cannot look into the factum of application of mind and appreciation of evidence done by the trial court while convicting the appellant, it cannot possibly uphold the conviction in absence of the relevant record.

15. In view of the discussion undertaken above, the present appeal is allowed and the judgement of conviction and order on sentence passed by the learned Trial Court in the case arising out of FIR No.459/1988 registered under Sections 365/368/506/120B IPC and Sections 25/27/54/59 Arms Act at P.S. Srinivas Puri is set aside. Consequently, the appellant is acquitted. The bail bond and surety bond are discharged.

16. Copy of this order be communicated to the concerned Trial Court for information

MANOJ KUMAR OHRI
(JUDGE)

MARCH 21, 2024

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