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

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Judgment delivered on: 03.01.2024

+ **CRL.A. 741/2003**

RAMESH & ANR.

..... Appellants

Through: Mr. Ashok Kumar Garg and Ms. Kavita Agrawal, Advocates.

versus

STATE OF NCT OF DELHI

..... Respondent

Through: Mr. Aashneet Singh, APP for State with SI Ravi Saini, NR-II Crime Branch

AND

+ **CRL.A. 719/2003**

MAHESH & ANR.

..... Appellants

Through: Mr. Ashok Kr. Garg, Ms. Kavita Agrawal & Mr. Sanjay Rana, Advocates.

versus

STATE OF NCT OF DELHI

..... Respondent

Through: Mr. Hemant Mehla, APP for the State with SI Sukhvinder Singh, P.S. Crime Branch, NR-II.

CORAM:

HON'BLE MR. JUSTICE VIKAS MAHAJAN

JUDGMENT

VIKAS MAHAJAN, J.

CRL.A. 741/2003

1. The present appeal has been preferred by the appellants against the impugned judgment dated 20.10.2003 passed by the learned Additional



District & Sessions Judge, Delhi, whereby the appellants along with three other co-accused, were held guilty and convicted under Section 304 part-II IPC read with Section 34 IPC. However, all accused including the present appellants were acquitted of the charges under Section 201 IPC.

2. The challenge in the appeal is also to an order on sentence dated 23.10.2003 passed by the learned Additional District & Sessions Judge, Delhi whereby the appellants were sentenced to undergo rigorous imprisonment of five years along with a fine of Rs.10,000/-.

3. It is the case of the appellants that a fine of Rs.10,000/- imposed on the appellants has already been paid by them.

4. The appeal preferred by the appellants was admitted on 10.11.2003 and a direction was given to requisition the Trial Court Record (TCR) and nominal roll. Since, the TCR was not received, the direction to call for the TCR was reiterated *vide* order dated 03.12.2003.

5. On 15.01.2004, the sentence of the appellants was suspended and they were released on bail. Thereafter, the matter remained on the 'Regular Board'. However, the appeal was listed on an office note on 12.05.2009 when this Court noted that as per office report TCR is not traceable. Accordingly, the Registry was directed to trace out the same and submit a report within four weeks from 12.05.2009.

6. Thereafter, the matter was adjourned from time to time and an endeavour was also made to reconstruct the TCR. However, the complete TCR could not be reconstructed.

7. On 02.02.2011, the Court directed to list the matter in the category of 'Regular Matters' as per its year of filing.

8. The appellants recently filed an application being



Crl.M.A.No.17208/2023 seeking early hearing in the present matter. It was pointed out in the application that this Court *vide* order dated 28.11.2022 passed in connected appeal i.e. Crl.A.736/2003 titled as “Ramesh Kaushik vs. State of Delhi”, arising out of the same impugned judgment and order, has already acquitted the co-convict, namely, Ramesh Kaushik after recording a finding that TCR could not be reconstructed as the same has been lost.

9. The early hearing was thus, allowed and the matter was heard finally on 31.10.2023.

10. The learned counsel for the appellant invited the attention of the Court to the judgment in *Ramesh Kaushik (supra)*, whereby an appeal preferred by the co-convict against the same impugned judgment of conviction and order on sentence, was allowed observing that complete TCR could not be reconstructed and in order to affirm the conviction of the appellant therein, a perusal of the TCR is an essential element for hearing of the appeal and every appellant has a right to satisfy the appellate court that the material evidence available on record did not justify his conviction and this valuable right cannot be denied to the appellant.

11. The Court noted that a perusal of the impugned judgment shows that the witnesses had turned hostile and the impugned judgment is based upon preponderance of probabilities. Further, the Court also noted that retrial is not in the interest of justice as material documents such as inquiry report of the ACP, final inquiry report of the SDM, seizure memos, post mortem report, FSL/viscera report, inquest report, MLC and depositions of the witnesses are not available.

12. This Court also placed reliance on the decision of the Hon’ble Supreme Court in *State of UP vs. Abhay Raj Singh &Anr.: (2004) 4 SCC 6*, while



allowing the appeal of co-accused Ramesh Kaushik. The relevant extract of the judgment dated 28.11.2023 reads thus:

“15. In the present case, the impugned judgment is dated 20.10.2003 and the order of sentence is dated 23.10.2003. The appeal was filed immediately thereafter and was admitted. Despite the repeated efforts of this Court, the Trial Court record has not been re-constructed. The material documents including the depositions of the witnesses are not available despite the best efforts.

16. As already indicated, the order dated 12.11.2009 categorically states that the Trial Court record has been lost.

17. I am of the view that in the present case, every possible effort has been made to re-construct the Trial Court Record. Despite all the efforts by this Court, the Registry, the learned counsel for the parties, the Trial Court record has not been re-constructed as the same is lost.

18. I am in agreement with the submission of Mr. Sud, learned senior counsel that in the present case, the witnesses had already turned hostile and the impugned judgment is based upon preponderance of probabilities. In addition, re-trial is also not in the interest of justice as the material documents such as Inquiry Report of the ACP, Final Inquiry Report of the SDM, Seizure Memos, Post-Mortem Report, FSL/Viscera Report, Inquest Report, MLC and depositions of the witnesses are not available.

19. I am of the view that in order to affirm the conviction of the appellant, the perusal of the Trial Court Record is the essential element of hearing of the appeal. Every appellant has a right to satisfy the Appellate Court that the material evidence available on record did not justify his conviction and this is a valuable right which cannot be denied to an appellant.

20. As per settled principles of criminal jurisprudence, every accused carries with him the presumption of innocence even at the appellate stage.

21. For the aforesaid reasons and as per the guidelines laid



down in the judgment titled “**State of UP v. Abhay Raj Singh and Anr.**” (*supra*), the appeal is allowed and the order of judgment dated 20.10.2003 and order of sentence dated 23.10.2003 are hereby set aside.

22. *The appeal is disposed of in the aforesaid terms.*”

13. Reference may also be had to the recent decision of the Hon’ble Supreme Court in **Jitendra Kumar Rode vs. Union of India**¹, wherein the Hon’ble Supreme Court while considering somewhat similar situation, where entire record of the TCR had been lost and was not traceable and the documents sent as “reconstructed documents” did not constitute the relevant Trial Court Record, allowed the appeal and set aside the impugned judgment of the High Court, whereby the High Court had upheld the conviction despite having noted on an earlier occasion that the reconstruction of records was not in accordance with rules. The relevant part of the decision reads thus:

“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 non-compliance 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,

¹2023 SCC OnLine SC 485



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.”

14. The position in the present appeal is also same as the trial court record which was not traceable in the case of **Ramesh Kaushik** (*supra*) is common to the present appeal.

15. In view of the above, the appeal is allowed and the judgment of conviction dated 20.10.2003 alongwith the order on sentence dated 23.10.2003 passed by the learned Additional Sessions Judge, Delhi in S.C. No.203/2003 arising out of an FIR No.367/2001, PS Malviya Nagar, are set aside.

16. The appeal is disposed of in the above terms.

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17. This appeal also arises out of the same impugned judgment dated 20.10.2003 passed by the learned Additional District & Sessions Judge, Delhi, whereby the appellant along with four other co-accused, was held guilty and convicted under Section 304 part-II IPC read with Section 34 IPC and *vide* order dated 23.10.2003 he was sentenced to undergo rigorous imprisonment of five years along with a fine of Rs.10,000/-.

18. In this appeal also the position is same as the TCR/material documents, including the depositions of the witnesses, which are not traceable, are common to the present appeal.

19. The appeal is thus, allowed and the judgment of conviction dated 20.10.2003 alongwith the order on sentence dated 23.10.2003 passed by the



learned Additional Sessions Judge, Delhi in S.C. No.203/2003 arising out of an FIR No.367/2001, PS Malviya Nagar, are set aside.

20. The appeal is disposed of in the above terms.

VIKAS MAHAJAN, J.

**JANUARY 03, 2024
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