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RESERVED/A.F.R.

Case :- CRIMINAL APPEAL No. - 89 of 1987

Appellant :- Chaman Lal
Respondent :- State of U.P.
Counsel for Appellant :- G.K. Pandey,Anurag Shukla (Ac)
Counsel for Respondent :- Govt. Advocate

Hon'ble Ved Prakash Vaish,J.
Hon'ble Mrs. Saroj Yadav,J.

(Delivered by Hon'ble Saroj Yadav,J)

1. This criminal appeal has been preferred by the appellant accused namely Chaman Lal, son of Shri Satya Narain against the judgemnt and order dated 29.1.1987 passed in Sessions Trial No.352 of 1981 (State Vs. M.P.Singh and another) under Section 302 I.P.C. read with Section 34 I.P.C. convicting the appellant to undergo life imprisonment.

2. While admitting the appeal on 5.2.1987, this Court enlarged the appellant on bail. During pendency of the appeal, the appellant/accused absconded and this court issued non bailable warrant against him and he could be arrested after a long time on 10.2.2020. Now appellant/accused is in jail.

3. When the appeal was put up for hearing, the record of the trial court was summoned but the record could not be received and it was reported that the trial court record had already been weeded out and only the impugned judgement is available.

4. The court ordered for reconstruction of the record and attempts were made at various levels for the same but all proved a futile exercise. The District Judge, Lucknow vide its letter no.594/Antim Jaanch No.30113 dated 14.2.2019 reported that the reconstruction of the record of Sessions Trial No.352 of 1981 is not possible. Alongwith above report of the District Judge, the report of the officer-in-charge of the record room (Criminal), District Court, Lucknow has also been attached and according to that report also, the reconstruction of the record is not possible.

5. The attempts were also made at the level of prosecution

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to get the record re-constrcuted but all efforts remained unsuccessful to reconstruct the record. Hence, on the basis of the above quoted material, it is established **that the record has already been weeded out and the reconstruction of that record is not possible.**

6. Heard learned Amicus Curiae Shri Anurag Shukla appearing for the appellant and Shri Chandra Shekhar Pandey, learned A.G.A. for the respondent State.

7. Learned Amicus Curiae submits that since the record is not available, the appeal cannot be decided on merits and even if merit is considered only on the basis of the impugned judgement available on record, there is no cogent evidence to sustain the conviction made because the trial court has convicted the appellant accused on the basis of the extra judicial confession allegedly made and acquitted the another accused on whose instigation, the present appellant accused has been alleged to commit the crime.

8. On the other hand, learned A.G.A. submitted that the appellant has committed the murder of Shri A.U.Siddiqui and has been convicted by the trial court on the basis of the evidence produced by the prosecution. The appellant accused cannot be acquitted only for want of record.

9. Learned Amicus Curiae has relied upon the judgments in the case of ***Pati Ram and another Vs. State of U.P. : 2010 Cri. LJ 2767, ii). Sita Ram and others Vs. State of U.P. : 1981 Cri. LJ 65, and iii). Shyam Deo Pandey Vs. State of Bihar : 1971 (1) SCC 855.***

10. We have considered the submissions made by both the sides and perused the record and the case laws cited above.

11. It is undisputed that the record of the trial court has been weeded out and the reconstruction of that record is not possible as has been reported by the concerned authorities, noted above.

12. It is settled law that for deciding the appeal, perusal of the lower court record is necessary.

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13. In the case of *Shyam Deo Pandey Vs. State (supra)*, the Hon'ble Apex Court has held that perusal of the record is necessary for the appellate court to adjudicate upon the correctness or otherwise of the judgement against whom appeal is preferred.

The relevant paragraph of the judgment runs 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 judgement appealed against not only with reference to the judgement but also with reference to the records which will be the basis on which the judgement 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 the appellate court."

14. Thus, it is clear that for deciding the appeal, it is incumbent upon the appellate court to call for the record and to peruse the record.

15. As noted above, in the present matter, the record has already been weeded out and the reconstruction is not possible.

16. Similar situation arose in the case of *Sita Ram and others Vs. State (supra)* where the Division Bench of this Court held as under :-

"On a careful consideration of the relevant statutory provisions and the principles laid down in the cases cited before us, we are of the opinion that where it is

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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 appeal 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 gap between the date of the incident and date on which the appeal comes up for hearing is short, the proper course would be to direct retrial of the cases since witnesses normally would be available and it would not cause undue strain on the memory of the witnesses. Copies of the F.I.R., statements of the witnesses under Section 161 Cr.P.C., reports of medical examinations 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 the F.I.R. and statements of the 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 the 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 hardships to the accused and waste of time, money and energy of the State."

17. Again, in *Pati Ram and another Vs. State of U.P. (supra)*, in almost similar situation, this court held as under :-

" I have given my thoughtful consideration to the rival

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submissions made by parties' counsel. It is true that another Bench of this Court in case of Raj Narayan 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 cannot be decided on merit in the absence of lower court record. Unless the evidence is available for perusal, in my opinion, the appeal cannot 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 judgment, no order on merit can be passed in an appeal."

18. Thus, it is settled law that for deciding the appeal, perusal of the record of trial court is necessary and if the record is not available and reconstruction is not possible, then following two courses are open to the appellate court :-

(i). To order for re trial after setting aside the conviction; or,

ii). If there is a long gap, then close the matter for want of record as the retrial will also not serve any purpose as the relevant documents are not available.

It is also settled law that appeal cannot be decided in the absence of trial court record.

19. In the present matter, the merit of the case cannot be looked into for want of record. The report of the District Judge, Lucknow and the officer-in-charge of the record room have established that the construction of the record is not possible.

20. In the present matter, the incident took place in the year 1981 and after concluding the trial, the accused was convicted on 29.1.1987. Thereafter this appeal was filed on 4.2.1987 and record was called for but record could not be made available and several efforts were made to get record reconstructed but remained unsuccessful.

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21. Now about 33 years have passed since conviction under challenge. It is a long gap. Since no paper relating to this case is available except the impugned judgement, there remains no possibility of retrial at this stage, after a long gap of about 39 years since the occurrence of the incident.

22. It is clear that in these circumstances, retrial will be a futile exercise. Therefore, there remains no alternative except to close the matter and acquit the appellant, as hearing of the appeal in accordance with the provisions of Section 386 Cr.P.C. is not possible. The order of retrial will also not serve any purpose as in the absence of relevant record, it is impossible for the prosecution to establish the charges against the appellant/accused.

23. Resultantly, the appeal is **allowed.**

24. The impugned judgment and order dated 29.1.1987 passed in Sessions Trial No.352 of 1981 (State Vs. M.P.Singh and another) under Section 302 I.P.C. read with Section 34 I.P.C. convicting the appellant to undergo life imprisonment, is hereby set aside and the appellant Chaman Lal, son of Satya Narain is hereby acquitted of the offence under Section 302 I.P.C. for want of trial court record and there being no possibility of the retrial. The appellant is in jail. He shall be released immediately, if not required in any other case.

25. Let copy of this judgement be sent to the Superintendent of Jail concerned.

26. Office is directed to send copy of this judgment to the trial court concerned.

27. The learned Amicus Curiae shall be paid remuneration as per rules.

The relevant record i.e. impugned judgment be also sent back to trial court concerned.

Order date :22.01.2021
Shukla.

(Saroj Yadav,J) **(Ved Prakash Vaish,J)**

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