
(2016) 06 AHC CK 0074
In the Allahabad High Court
Case No : Criminal Appeal No. 1082 of 1982

Bhagirath	Vs	APPELLANT
State of U.P.		RESPONDENT

Date of Decision : 27-06-2016

Acts Referred:

Penal Code, 1860 (IPC) — Section 332, 333, 379

Citation : (2016) 96 ACrC 50 : (2016) 166 AIC 863

Hon'ble Judges : Karuna Nand Bajpayee, J.

Bench : Single Bench

Advocate : G.P. Dixit, A.R. Gupta, S.S. Tiwari, Satyam Singh and Shiv Nath Singh, Advocates, for the Appellant; A.G.A, for the Respondent

Final Decision : Allowed

Judgement

Karuna Nand Bajpayee, J.—This criminal appeal has been filed on behalf of four appellants namely Bhagirath the appellant no. 1, Hari Nath the appellant no. 2, Sri Krishna the appellant no. 3 and Channa the appellant no. 4 against the judgment and order of conviction dated 29.4.1982 passed by VIIIth District and Sessions Judge, Etawah in S.T. No. 123 of 1981 whereby the appellants have been convicted under Sections 333, 332 and 379 of I.P.C. to undergo sentence of 5 years, 2 years and 01 year rigorous imprisonment respectively. All the sentences were to run concurrently.

2. The appeal with regard to the appellants no. 3 and 4, Srikrishna and Channa has already been abated because of their death and it survives only with regard to the appellants no. 1 and 2 namely, Bhagirath and Harinath respectively.

3. The perusal of the record reveals that the incident relates to the year 1977 and the appeal was filed after conviction in the year 1982. The perusal of the order-sheet further reveals that after filing of the appeal, the same was admitted and notices were issued. The bail was also granted to the appellants, Bhagirath, Srikrishna, Harinath and Channa on 3.5.1982. It appears that long thereafter

when the appeal was taken up, the office report was placed before the Court, which revealed that on 26.11.2002 a letter was sent to the District and Sessions Judge, Etawah to send the lower court's record, on which a letter from the District and Sessions Judge, Etawah was received by the office with the information that the record of the case has already been weeded out. It further transpires from the order-sheet that on 8.7.2003, Hon''ble Onkareshwar Bhatt, J. (since retired) before whom the appeal was placed, was pleased to direct reconstruction of the record. In compliance of this order, as the office report dated 30.1.2004 reveals, the attempts to resurrect the file were made and in this regard, Sri V.K. Tyagi, Additional District and Sessions Judge, Etawah was appointed as the Officer Incharge to reconstruct the file. But according to the report of the Additional District and Sessions Judge, the only papers which could be made available, were the injury report of the first informant Ramsnehi dated 20.2.1977 and his Xray report dated 23.2.1977 in the form of certified copies from the office of Chief Medical Superintendent, Etawah. Apart from this, no other document of any kind could be made available from either side of the parties to the case. The report of the District and Sessions Judge, Etawah dated 27.11.2003 forms part of the record and has also been perused by this Court, which indicates the same fact. No record with regard to the statement of the witnesses examined in the court could be retraced despite full-fledged efforts. It further transpires that in the light of the report from the District and Sessions Judge, Etawah, when this appeal was taken up in the year 2004, Hon''ble K.N. Ojha, J. (since retired) decided to proceed with the matter as such and in order to make the presence of the accused-appellants available before this Court, issued coercive process on 23.3.2004. Thereafter, it further transpires from the perusal of the order-sheet that for several years up till the year 2012, efforts and coercive measures to ensure the presence of the accused-appellants continued and eventually, the counsels for the surviving accused-appellants appeared before the Court along with the appellants on 29.10.2012. The order-sheet dated 30.10.2012 also reveals that Sri Shiv Nath Singh, learned counsel for the appellants appeared before the Court and informed that the appellants, who were duly identified by him, have already obtained their bail in compliance of Court's order and they were also present in the Court. It further transpires that as for certain reasons, the appeal could not be taken up soon thereafter, and three further years elapsed, notices were again sent to the appellants informing them about the readiness of the appeal for hearing and according to the office report, notices were duly served upon the surviving appellants no. 1 and 2 namely, Bhagirah and Hari Nath respectively.

4. Today, when this appeal has been taken up which was listed for final hearing, none has appeared on behalf of the surviving appellants even in the revised call.

5. Heard learned A.G.A. for the State and perused the record.

6. Ordinarily, this Court in the absence of counsel could have appointed an "Amicus Curiae" in this matter to argue on behalf of the appellants. But such

recourse would have been necessary only if there was, at all, any possibility of the appeal being dismissed. As has already been noted that the entire record of the case has been lost and the only available papers on record which could be retraced back are just the certified copies of the injury report and the Xray report of the first informant and of course the judgment of the case. Apart from these papers, there is absolutely nothing available on record. In such a situation, in the light of the settled principles of law laid down by this Court and also by the Hon"ble Apex Court, there does not appear to be any possibility to maintain the conviction of the appellants and, therefore, there is hardly any need to appoint any "Amicus Curiae" and further consume the Court's time in that process. The appeal has to be decided on the basis of the available record which is far too scanty. Court is only required to peruse the same and come at its own conclusion which in the peculiar circumstances of the case appears to be inevitable and foregone both. Because of the same reason, this Court taking the assistance of the learned A.G.A. deems it fit to proceed in the matter, peruse the record and discuss the law in this regard in order to arrive at a lawful conclusion in the case.

7. The facts of the case as they emerge from the perusal of the impugned judgment are like this:

The appellants are said have been cutting the forest trees on 20.2.1977 and when the forest guard, Ramsnehi raised objection to the same, he was assaulted upon as a result of which he received certain injuries. The charge sheet was submitted after due investigation into the case and during the process of trial, charges under Sections 379, 332 and 333 of I.P.C. were framed against the accused-appellants which they denied. During the course of trial P.W.1 Ramdas, P.W.2 Ramsnehi, both of whom were forest guards, were produced in the court and they also deposed in the court about the aforesaid occurrence having been committed by the appellants. Some other bystanders are said to have intercepted and saved the guards and on interception of some more persons who gathered on spot, the accused-appellants fled away. The F.I.R. of the case was lodged which was exhibited as Ext.Ka1. The forest guard Ramsnehi was medically examined by Dr. S.D. Mishra, P.W.3, who has deposed in the trial court about the injuries found on the person of Ramsnehi, which were in the nature of six lacerated wounds, two abrasions, swellings and three contusions. The injured P.W.1 Ramsnehi was also Xrayed by Dr. Chandra Prakash, who found fracture on finger and metacarpal bone of Ramsnehi. P.W.1 Ramdas and P.W.2 Ramsnehi, the witnesses of fact, were examined and apart from them, Dr. S.D. Mishra (P.W.3), Head Constable Sarju Prasad (P.W.4), who has prepared chik report, Dr. Chandra Prakash (P.W.5), who prepared Xray report, were also examined in the trial court. After weighing the evidence and appreciating the same, the trial court found the four accused 4 Bhagirah, Harinath, Srikrishna and Channa guilty of having committed the said offences and as a result thereof, they were convicted for the alleged offences accordingly as has already been described hereinbefore.

8. It appears to be appropriate to touch upon the relevant case laws applicable in

a situation like this as has been involved in the present matter. The malady which this Court is confronting in this appeal has been faced by this court even on former occasions and the Court had looked up for some light in the authoritative pronouncements made by the Hon"ble Supreme Court in this regard. This Court may usefully refer to the case of State of U.P. v. Abhai Raj Singh, AIR 2004 SC 3235 again wherein it had been held as under:

".....8. It has been the consistent view taken by several High Courts that when records are destroyed by fire or on account of natural or unnatural calamities, reconstruction should be ordered. In Queen Empress v. Khimat Singh (1889 A.W.N. 55) the view taken was that the provisions of Section 423(1) of the Criminal Procedure Code, 1898 (in short "the old Code") made it obligatory for the Court to obtain and examine the record at the time of hearing. When it was not possible to do so, the only available course was a direction for reconstruction. The said view was reiterated more than six decades back IN RE Sevugaperumal and Ors. (AIR 1943 Madras 391) . The view has been reiterated by several High Courts as well, even thereafter.

"10.The High Court shall direct reconstruction 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 reconstruction is not practicable but by order of 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."

9. In the case of Sita Ram v. State, 1981 Cr.L.J. 65 also the original record was not available to the appellate court as the same was destroyed as a result of an accidental fire that broke out in the court below. In those circumstances, the Division Bench of this court had proceeded to observe as under:

"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 element 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 FIR, statement of the witnesses under Section 161 Cr.P.C., report 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 FIR 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."

10. 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 reconstructed, the Bench directed acquittal of the accused in that case. The above Sita Ram's case (supra) was again considered in Ram Nath v. State, 1981 Allahabad Criminal Rulings 431 by another Bench of the High Court and the following observations were made:-

"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 reconstructed 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 retrial 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 retrial. 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 to acquit him of the offence with which he has been charged."

11. It also appears to be requirement of law under Section 385 (2) of Cr.P.C. that the decision of appeal must precede the perusal of the original record which include the depositions of witnesses of fact and the witnesses of formal nature, apart from the relevant documents like medical reports etc. It will be very unjust to confirm the conviction unless the entire record is perused. The observations made in the cases of Sitaram and Ramnath (supra) shall also make it clear that in the event of the record having been lost or destroyed, if it is not possible to reconstruct the same, it will not be appropriate or just to direct retrial of the case after a yawning gap of time lapsed after commission of the crime in question.

12. It is also trite law that the evidence on the basis of which the court can act upon and proceed to convict an accused has to be the evidence of the witnesses produced in the trial court. If the incident was witnessed by some people, they must come in the trial court and depose about the same on oath. The testimony of the witnesses, who had the occasion to see the occurrence, is substantive piece of evidence, which may be acted upon by the courts. In order to seek the corroboration of the same, the prosecution may use the previous statement of the witnesses for that purpose under Section 157 of Evidence Act, if it is in the nature of F.I.R. or in the nature of the statement given before the Magistrate recorded under Section 164 of Cr.P.C. The statements of the witnesses given before the investigating officer are not to be used as corroborative material and are prohibited under the law to be used as such. The injury report or the Xray report which may indicate the presence of injuries on the victim, is also useful only as a piece of corroborative piece of evidence and they are not by themselves substantive piece of evidence. If the injured victim is produced in the trial court or if some other witnesses are produced in the trial court deposing about the presence of the injuries on a particular victim or deposing about the assault having been made on the victim by a particular accused, then this evidence given in the court may be corroborated by the injury report of the victim. But if the statements of the witnesses, whether they are the statements of the first informant or the statements of other witnesses or the victim, are themselves not available in the court, it is so obvious that the injury reports of the victim have nothing to corroborate. As has already been pointed out that the lower court's record has already been lost and even the reconstructed file does not contain any statement of the witnesses and therefore, there is absolutely no evidence available on record which may be weighed or relied upon in order to uphold or to test the validity of conviction of the accused. The genuineness or the reasonableness, the validity or the correctness of the judgment can be adjudged only when the same is appreciated in the light of the evidence that has been produced in the court. The evidence produced in the court may justify a particular judicial verdict and the same may also fall short of vindicating the same. The appeal may be allowed or dismissed only on the basis of the perusal of the record of evidence produced in the court which unfortunately, is not before this Court and there is no possible way to obtain or redeem the same.

13. Whenever the courts have confronted such a situation where the loss of record is reported, the very first requirement for the Court has been to make sincere attempts to resurrect the file and retrace the same. If it is found that the same has been lost beyond redemption, the reconstruction of the file must be attempted as has been done in the present matter also. If the court succeeds to get the record reconstructed, the appeal has to be heard on that basis. Sometimes re-constructed files contain sufficient material to help the court to decide the appeal on the basis of the merits. But when the matter becomes older, chances for reconstruction gets more and more bleak. The incident of this case took place in the year 1977 and it is almost 40 years now that have elapsed

since then. In such a situation, as it was so apparent, that the reconstruction of the file from possible original sources was also very unlikely. The presiding judges of this Court had also proceeded in the matter in the same direction as has already been mentioned but the efforts yielded no very fruitful result and only two papers could be brought on record which were the certified copies of the injury report and the Xray report of the victim and nothing more. The testimonies of the eye witnesses and the depositions of other formal witnesses etc. have all been lost and swung into oblivion. In the event of failure to get back the evidence in the form of reconstructed record, the only other course left is to direct a retrial in the case. If this Court undertakes such a course, then in a matter like this which is related to an incident that had taken place 40 years back, there is scarcely any chance for the relevant witnesses to be surviving or being available still. Even if it is presumed that the witnesses are alive and are intact and are also prepared to give evidence before the court, it is very difficult to say as to what shall be the evidenciary value of such witnesses, if they come and depose before the trial court. It may be relevant to mention that the medical report of the victim-first informant indicates that he was 37 years old at that time when he was medically examined. On that reckoning, he would be by now of about 76 or 77 years in age, if he is still surviving. If such a witness is forced or asked to recall the events which took place 40 years back, the recollected narration of the events is very likely to be deceptive or misleading. Memory is a biological process and with the passage of time it obliterates. The impressions get dim and befuddled and the recollected events overlap and impinge upon each other and many of them may even get eradicated altogether beyond redemption. In such a situation, if a man taxes his mind to reconstruct such antiquated old events, this process shall be fraught with the possibility of imaginations and conjectures taking the place of facts. If such a witness is forced to give evidence about the incident which took place 40 years back, the very fact that testimony shall be based on the laboured recollection of such an old incident will make the courts always unsure about the legitimacy of such forced recollection and passing the judicial verdict on such kind of testimony may lead to a misleading injudicious outcome, much more so because there are no previous statements of the witnesses available on record either in the form of F.I.R. or in the form of their statements recorded under Section 161 of Cr.P.C., on the basis of which their testimony may be tested. In the peculiar facts and circumstances of the case, this Court therefore does not deem it appropriate to make a direction of retrial as the same does not appear to be a justifiable course.

14. It is unfortunate that the appeal of a convicted accused has to be allowed even though there is a possibility that the conviction may have been based on worthy material and on merits. But there is no other reasonable or legal option available to be adopted by this Court. This Court can certainly not uphold the conviction of the appellants under the presumption that the evidence produced in the court against them must have been good enough to sustain the conviction. The reliability of the evidence or the sufficiency of the same cannot be presumed

by this Court against the accused and any judicial decision in the matter can be arrived at only after the perusal of the same.

15. In view of the above, this appeal stands allowed. The judgement and order of conviction dated 29.4.1982 passed by VIIIth District and Sessions Judge, Etawah in S.T. No. 123 of 1981 is hereby set aside. The bail bonds of the sureties shall also stand discharged.

16. Before closing on, it appears necessary to direct the District and Sessions Judge, Etawah to set up an inquiry in this matter and find as to how and by whom and at which instance the original record of the case was weeded out. The judgement and order passed by the court was that of conviction and not of acquittal. Even common sense would tell that an appeal must have been filed against the same by the accused. Even the papers regarding the bail or their copies are also kept in concerned court or in the record rooms. It is shocking to see that the original trial court's record got weeded out during the pendency of the appeal which this High Court was to hear and decide. A vigorous fact finding intense inquiry shall be ensured by the Sessions Judge as the incidence of such weeding out is not just a freak solitary dereliction surfacing before this Court in this case alone. Similar recklessness which could have been even deliberate, has been noticed by this Court in some other cases also. After conclusion of the inquiry the needful administrative action shall be taken against the person or persons which may be found liable. The result of the inquiry and the action taken shall be communicated to the Registrar General of this Court preferably within six months from now.

17. The District and Sessions Judge, Etawah is also directed to take adequate measures in order to ensure that no such incidence of weeding out the record during the pendency of the appeal or revision takes place in future. Full-proof machanism must be evolved and ensured by him in this regard.

18. Copy of this order to be certified to the court concerned and the District and Sessions Judge, Etawah forthwith by fastest mode available. A copy of this order shall also be placed before the Registrar General for his perusal so that he may also take necessary steps in this regard in order to avert and preempt any such happening again in the courts below.