

(2019) 01 P&H CK 0276

In the Punjab And Haryana At Chandigarh

Case No : Criminal Reference No. 1 Of 2018 (O&M)

Court On Its Own Motion

APPELLANT

Vs

State Of Haryana

RESPONDENT

Date of Decision : 07-01-2019

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 377, 378, 385, 386, 386(i)(b), 386(ii)(b), 386(iii)(b), 423(1)

Citation : (2019) 01 P&H CK 0276

Hon'ble Judges : Inderjit Singh, J

Bench : Single Bench

Advocate : Deepak Balyan, Samir Rathaur, Sumeet Goel, Rohit Kaushik, Tanuj Sharma

Judgement

Inderjit Singh, J

Learned District and Sessions Judge, Panchkula has forwarded letter No.574 dated 22.12.2017 submitted by Special Judge(CBI), Haryana at Panchkula, wherein, the officer has stated the facts in detail. As per letter sent by Special Judge, CBI, accused Radhey was declared proclaimed offender on 19.04.2006 during the course of trial in a CBI case re-registered as RC-09(S)/94/SIU-V/CBI/SC-II. Thereafter, said accused is stated to have been apprehended on 01.07.2017. Accordingly CBI/prosecution sought to put said accused on trial after securing presence through production warrants. As per above letter, accused Radhey was produced in custody before the Court on 07.12.2017 in pursuance to the production warrants. However, entire case file of that case could not be reconstructed despite associating all the concerned persons/officials in the process of reconstruction and therefore, necessity of making a reference to this Court has arisen as under:-

"As to whether accused Radhey son of Dani, who had absconded during trial of the case and later on apprehended after many years, can be put on trial in the absence of complete case file before the trial Court, especially when accused has

suffered a statement that he is not having any papers pertaining to this case."

In the end, the officer submitted before this Court to guide the trial Court in the matter, so that further necessary proceedings be conducted in the matter.

In this case, Mr. Deepak Balyan has been appointed as Amicus Curiae. Learned State counsel, learned counsel for CBI and learned counsel for the accused also appeared.

I have heard learned counsel for the parties and have gone through the record.

Amicus Curiae has cited law laid down by the Hon'ble Supreme Court in State of U.P. vs. Abhai Raj Singh and another, AIR 2004 SC 3235, wherein, it is held as under:-

"6. The powers of the Appellate Court when dealing with an appeal from a conviction are delineated in sub-clauses (i), (ii) and (iii) of clause (b) of Section 386 of the Code. The Appellate Court is empowered by Section 386 to reverse the finding and sentence and acquit. Therefore, the acquittal is possible when there is reversal of the finding and sentence. The Appellate Court is also empowered to discharge the accused. The third category which seems to be applicable to the present case is a direction for re-trial by a court of competent jurisdiction subordinate to the Appellate Court or committed for trial. For exercise of the powers in cases of first two categories, obviously a finding on merits after consideration of the materials on record is imperative. Where that is not possible because of circumstances like the case at hand i.e. destruction of the records, the proper course for the Appellate Court would be to direct re-trial after reconstruction of the records if in spite of positive and constructive efforts to reconstruct the records the same was impossible. If on the other hand, from the copies available with the prosecuting agency or the defence and/or their respective counsel, reconstruction is possible to be made, said course should be adopted and the appeal can be disposed of as it deserved under course indicated in clauses (i) and (ii). After perusal of the records and hearing appellant's pleader and public prosecutor under Section 377 or 378, the exercise of power as indicated above can be resorted to. As was observed in Bani Singh and Ors. v. State of U.P. (1996 (4) SCC 720) the plain language of Section 385 makes it clear that if the Appellate Court does not consider the appeal fit for summary dismissal, it must call for the records and Section 386 mandates that after record is received, the Appellate Court may dispose of the appeal after hearing as indicated.

7. A question would further arise as to what happens when the reconstruction is not possible. Section 386 empowers the Appellate Court to order that the case be committed for trial and this power is not circumscribed to cases exclusively triable by the Court of Sessions. (See State of U.P. v. Shankar and Anr. AIR 1962 SC 1154).

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."

I find that in the above-cited case, the appeal was filed against conviction, where, record of the trial Court was destroyed. The Hon'ble Apex Court held that order of acquittal is not proper and proper course is to direct re-trial after reconstruction of record and if reconstruction is not possible, then case be committed to trial.

I have gone through the law laid down by the Hon'ble Supreme Court in the above-cited case. That case relates to appeal and record was lost and Hon'ble supreme Court has held that for hearing appeal, direction should be given to the lower Court for re-construction or for committing the case for trial. In the present case in hand, the record has been lost during the trial of accused Radhey, who had earlier absconded from the proceedings. As per reference, some of the material documents could not be re-constructed. This Court is not knowing that which material documents could not be re-constructed and which are required for proceeding with the trial. As per the law laid down, in appeal the accused cannot be acquitted outrightly for the loss of record. It is for the trial court now to go through the documents, which have been re-constructed, whether from those documents the trial can proceed against the accused and Court can take cognizance, in other words, whether from the documents available on record which have been re-constructed, any prima facie case is made out or not. Therefore, it is for the trial Court to give the opportunity of being heard to the prosecution as well as accused and then to find out from the documents available on record, whether the Court can take cognizance of the offences or not and whether any offence, prima facie, is made out or not but the trial Court outrightly cannot acquit the accused only on the ground that some of the material documents could not be re-constructed.

The reference stands answered accordingly.