

(1999) 03 AHC CK 0010
In the Allahabad High Court
Case No : Criminal Appeal No. 1572 of 1978

Shanker Lal and Mohan Lal (In Jail)	Vs	APPELLANT
State of U.P.		RESPONDENT

Date of Decision : 18-03-1999

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161
Penal Code, 1860 (IPC) — Section 307, 34

Citation : (1999) 1 ACR 703

Hon'ble Judges : B.K. Sharma, J

Bench : Single Bench

Advocate : Ram Jee Saxena, for the Appellant; A.G.A., for the Respondent

Judgement

B.K. Sharma, J.—This is an appeal against the judgment and order dated 6.5.1978 passed by Sri V.N. Mehrotra, the then IIIrd Additional Sessions Judge, Bareilly, dated 6.5.1978 in S.T. No. 607 of 1975. Whereby he convicted the accused-Appellants Shanker Lal and Mohan Lal of the offence u/s 307/34, I.P.C. and sentenced them to undergo R.I. for a period of 3 years each,

2. Heard the learned Counsel for the Appellants and the learned A.G.A.

3. In this case, as per the report of the District Judge, the entire record of the trial court has been burnt in a fire in the judgeship and that it could not be reconstructed though an effort was made to do the same. All that is available to this Court is the certified copy of the judgment of conviction passed by the learned Sessions Judge. The learned Counsel for the Appellants has claimed that in the absence of the record of the trial court, the conviction of the accused-Appellants cannot be maintained and that it is such a case in which the remand of the case for retrial ought not to be made because the occurrence took place on 3.1.1975. the conviction of the accused-Appellants was made by the learned Sessions Judge on 6.5.1978 and the accused-Appellants were admitted to bail by this Court on 5.6.1978. He has placed reliance on the following observations of a Division Bench authority Sita Ram and Ors. v. State, 1981 CriLJ 65 , in which it

has been held:

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 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 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 F.I.R., statements of witnesses u/s 161, Code of Criminal Procedure, reports 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 F.I.R. and statements of witnesses u/s 161, Code of Criminal Procedure 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.

4. He has also placed before this Court another Division Bench authority of this Court Ram Nath v. State 1981 ACR 431, in which the earlier Division Bench authority of Sita Ram's case, was followed. He has also relied on two more subsequent Division Bench authorities:

(i) Daya Ram v. State 1992 ACC 219.

(ii) Aziz Khan v. State of U.P. 29 1992 ACC 223.

In which the earlier authorities aforesaid were followed. The defense in this case was of denial and false implication.

5. In view of these authorities, it is plain that the conviction of the accused-Appellants cannot be affirmed in the absence of hearing of the appeal on merits with the help of the trial court record. Now the other question is as to whether a retrial should be ordered.

6. In the case of Sita Ram, the occurrence has taken place in the month of August, 1971. The conviction was made in the year 1974 and the matter came up for hearing before the Division Bench in the month of August, 1980 and the

Division Bench declined to order retrial in view of the long gap of time elapsing between the date of incident and the date when the appeal came up for hearing.

7. In the case of Ram Nath, the time gap was of eleven years.

8. In the case of Daya Ram, the occurrence was of the year 1976. The conviction was made in the year 1978 and the appeal came up for hearing on 24.2.1992 and the Court set aside the conviction and sentence of the accused-Appellants and did not direct retrial.

9. In the case of Azia Khan, the occurrence had taken place in the year 1976 and the appeal had come up for hearing on 22.1.1992 and the original record was lost and was reconstructed only in part and the Court did not direct retrial.

10. In the present case, the occurrence had taken place on 3.1.1975 and the conviction had been made by the learned Sessions Judge on 6.5.1978 and on 5.6.1978, the accused-Appellants were admitted to bail by this Court and now this appeal has come up for hearing before this Court today on 18.3.1999, i.e., after 24 years of the date of occurrence. Under these circumstances, the retrial would be futile and it would neither be just nor proper to direct retrial in this case.

11. Consequently, the appeal is allowed. The conviction of the accused-Appellants Shanker Lal and Mohan Lal for the offence u/s 307/34, I.P.C. is set aside and both of them are acquitted of the said offence. They are on bail from this Court. They need not surrender to it. Their bail bonds are cancelled and sureties discharged.

12. Let a copy of this judgment be sent to the learned Sessions Judge, Bareilly, for information and necessary compliance in the records.