

CASE NO.:  
Appeal (crl.) 1243-1244 of 1997

PETITIONER:  
State of U.P.

RESPONDENT:  
Abhai Raj Singh & Anr.

DATE OF JUDGMENT: 08/03/2004

BENCH:  
DORAISWAMY RAJU & ARIJIT PASAYAT

JUDGMENT:  
J U D G M E N T

ARIJIT PASAYAT, J.

In these appeals the question of seminal importance which arises is whether in exercise of power under Section 386 of the Code of Criminal Procedure, 1973 (in short 'the Code'), the Appellate Court would be justified in directing acquittal, where the records of the Trial Court are not placed before it on some ground or the other. The Allahabad High Court by the impugned judgment directed acquittal of the accused persons (present respondents) who were appellants before it.

Background facts need be noticed are essentially as follows:

Accused persons faced trial for alleged commission of offences punishable under Section 302 read with Section 34 of the Indian Penal Code, 1860 (in short the 'IPC'). According to prosecution, Shakuntla Devi and Munni Devi were sleeping on the roof of the second storey of their house. Kanti Devi was sleeping on the open roof in front of the southern verandah on the first floor of the house. The main door of the house on the east was closed. There were no other persons in the house because Nathoo Singh and Brij Pal Singh were both in jail being accused of the murder of Jogendra Singh. It is said that these accused belonged to the party of Dafedar Singh who had secured his bail in the case of Gajju Singh's murder, before the present incident in question. The allegation was that the three accused and the deceased accused Jagannath Singh scaled over the uppermost roof of Shakuntla Devi's house from its south-western side and reached the place where only Munni Devi and her step-mother were sleeping on separate beds near each other. Munni Devi was, in the process, awakened. On hearing sounds, she flashed a torch, in the light of which she saw and recognised all the four accused. She also noticed that Om Pal Singh had a knife about one foot long, while the other three held guns. Abhai Raj Singh immediately fired at the sleeping Shakuntla Devi. Munni Devi raised alarm. Undeterred, Ved Pal Singh and Jagannath Singh also fired shots at Shakuntla Devi, and Om Pal Singh repeatedly stabbed her with the knife. On hearing gun shot sounds villagers

arrived and knocked at the main door. The miscreants escaped the way they had come. Kanti Devi opened the door to let in the villagers who saw Shakuntla Devi dead. Munni Devi dictated the FIR Ex. Ka.1 to her cousin Om Parkash Singh and handed it to village Chowkidar to lodge it. At 4.30 a.m. in the same night it was registered at Bhamora Police Station. The police after recording the FIR, started investigation, arrived at the spot, performed the inquest and sent the dead body for autopsy. After completion of investigation, charge sheet was placed. Accused persons pleaded innocence and faced trial. The present respondents were found guilty, convicted and sentenced as afore-noted. Before commencement of trial accused Jagannath died.

Two appeals against the common judgment and order dated 23.6.1979 were filed by the respondents Om Pal Singh, Abhai Raj Singh and Ved Pal Singh. After admission of the appeal, registry of the High Court sent for the records from the Trial Court. By letter dated 27.6.1984 the office-in-charge (Record room) Judges Court Bareilly informed the High Court that the records of the case were not available having been destroyed in the fire that broke out in the night between 18/19.11.1979. Nothing seems to have been done thereafter, though we feel that the registry should have placed the matter before the appropriate Bench for further directions to explore the possibility of reconstructing the records, to effectively dispose of the appeals. Be that as it may, by order dated 1.11.1993 i.e. more than 9 years after the letter was received from the lower court, 3 months time was allowed for reconstruction of the record at the Sessions Judge level. The High Court while disposing of the appeal on 25.2.1994 noted that no communication had been received about the reconstruction of the record, and inference was therefore drawn that it was not possible for the Sessions Judge to reconstruct the record. It was in this background it was held that the mandate of law contained in Sections 385 and 386 of the Code cannot be complied with and, therefore, directed that the appellants were not to be arrested in pursuance to the judgment and order, and were not required to surrender also and the bail bonds were to be cancelled.

Learned counsel for the appellant submitted that the approach of the High Court is not correct and is not legally sustainable. The course adopted by the High Court is not permitted under Section 386 of the Code. In response, learned counsel for the respondents submitted that after long passage of time when reconstruction of the records is not possible or practicable, the only course which was available to be adopted has been followed by the High Court.

Sections 385 and 386 of the Code deals with "procedure for hearing appeals not dismissed summarily" and "powers of the Appellate Court". They read as follows:

"Section 385- Procedure for hearing appeals not dismissed summarily: (1) If the Appellate Court does not dismiss the appeal summarily, it shall cause notice of the time and place at which such appeal will be heard to be given-

- (i) to the appellant or his pleader;
- (ii) to such officer as the State

Government may appoint in this behalf;

(iii) if the appeal is from a judgment of conviction in a case instituted upon complaint to the complainant;

(iv) if the appeal is under Section 377 or Section 378, to the accused, and shall also furnish such officer, complainant and accused with a copy of the grounds of appeal.

(2) The Appellate Court shall then send for the record or the case, if such record is not already available in that Court and hear the parties:

Provided that if the appeal is only as to the extent or the legality of the sentence, the Court may dispose of the appeal without sending for the record.

(3) Where the only ground for appeal from a conviction is the alleged severity of the sentence, the appellant shall not except with the leave of the Court urge or be heard in support of any other ground".

Section 386- Powers of the Appellate Court- After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and in case of an appeal under Section 377 or Section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may-

(a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction-

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or

(ii) alter the finding, maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same;

(c) in an appeal for enhancement of sentence-

(i) reverse the finding and sentence and acquit or discharge the accused or order him to be re-tried by a Court competent to try the offence, or

(ii) alter the finding maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, so as to enhance or reduce the same;

(d) in an appeal from any other order, alter or reverse such order;

(3) make any amendment or any consequential or incidental order that may be just or proper:

Provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement:

Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal".

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.

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).

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.

The High Court did not keep the relevant aspects and considerations in view and came to the abrupt conclusion that re-construction was not possible merely because there was no response from the Sessions Judge. The order for reconstruction was on 1.11.1993 and the judgment of the High Court is in Criminal Appeal 1970 of 1979 dated 25.2.1994. The order was followed in Criminal Appeal No.1962 of 1979 disposed of on 16.8.1995. It is not clear as to why the High Court did not require the Sessions Court to furnish the information about re-construction of records; and/or itself take initiative by issuing positive directions as to the manner, method and nature of attempts, efforts and exercise to be undertaken to effectively achieve the purpose in the best interests of justice and to avoid ultimately any miscarriage of justice resulting from any lapse, inaction or inappropriate or perfunctory action, in this regard; particularly when no action was taken by the High Court to

pass necessary orders for about a decade when it received information about destruction of record. The course adopted by the High Court, if approved, would encourage dubious persons and detractors of justice by allowing undeserved premium to violators of law by acting hand in glove with those anti social elements coming to hold sway, behind the screen, in the ordinary and normal course of justice.

We, therefore, set aside the order of the High Court and remit the matter back for fresh consideration. It is to be noted at this juncture that one of the respondents i.e. Om Pal has died during the pendency of the appeal before this Court. The High Court shall direct re-construction 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 re-construction is not practicable but by order 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. The appeals are accordingly disposed of.