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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 28.11.2022

+ **CRL.A. 736/2003**

RAMESH KAUSHIK Appellant

Through: Mr. Jayant Sud, Sr. Adv. with Mr. Sarthak Maggon, Mr. Kartik Jasra, Mr. Randeep Sachdeva, Advs.

versus

STATE OF DELHI Respondent

Through: Mr. Aashneet Singh, APP
ASI Sanjeev Malik, PS Crime Branch

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

: **JASMEET SINGH, J (ORAL)**

1. This is an appeal challenging the conviction and order of sentence passed by the ASJ, Delhi dated 20.10.2003 and 23.10.2003. The appellant has been held guilty of charges under Section 304(Pt. II)/34 IPC and sentenced to 6 years rigorous imprisonment along with fine of Rs. 25,000/-, which stands paid. In addition, the appellant was acquitted of the charges under Section 201 IPC.
2. The appeal was admitted on 07.11.2003 and the LCR and the Nominal Roll were called for. Since the LCR was not placed along with the appeal, on 03.12.2003, the LCR was again called for.
3. On 09.02.2009, the Court called for a report from the Registry regarding tracing out of the Trial Court record. Thereafter, the matter was re-notified for the concerned dealing assistant for tracing out the Trial Court Record.

4. On 18.02.2009, the Registry was directed to trace out the Trial Court record and prepare the compilations of paper book and furnish copies to both sides.
5. On 14.07.2009, this Court directed the concerned Deputy Registrar to hold an enquiry as to why despite directions, the LCR has not been placed before the Court. In addition, it was also directed that every effort would be made to produce the LCR before the next date of hearing.
6. On 22.10.2009, it was directed that that the counsel of the appellant should approach the counsel for the respondent and get the re-constructed record as supplied by the counsel of the appellant duly certified by the counsel for the respondent, so that this Court could proceed with hearing of the appeal.
7. On 12.11.2009, it was recorded that the counsel for the parties will make endeavour to re-construct the record and place it before the concerned Registrar to facilitate re-construction of the Trial Court record.
8. On 19.08.2010, another attempt was made to re-construct the Trial Court record by examining the Case Diary.
9. On 30.09.2010, whatever the Trial Court record could have been re-constructed was re-constructed and a paper book based on the re-constructed record was required to be compiled by the Registry. Thereafter, the matter was adjourned from time to time and on 26.07.2022, the appeal was directed to be listed for hearing. The appellant was entitled to get the entire Trial Court record in accordance with the High Court procedures.

10. Mr. Sud, learned senior counsel for the appellant states that a bare perusal of the paper book would show that it is incomplete in almost all aspects.
11. My attention has been drawn to the LCR, wherein a list has been given of the documents which could not be filed due to their non-availability with the Police and which were part of the Trial Court record (since destroyed):-
 - i. Inquiry Report of the ACP.
 - ii. Final Inquiry Report of the S.D.M. (South).
 - iii. D.D. Entries.
 - iv. Seizure Memos.
 - v. Arrest Memos.
 - vi. List of Witnesses.
 - vii. Post Mortem Report.
 - viii. FSL/Viscera Report.
 - ix. Inquest Report
 - x. M.L.C.
 - xi. Roznamcha.
12. Besides the above documents, it is also an admitted case that even the depositions of the witnesses, both prosecution and defence, have not been re-constructed and are not available on the Court record.
13. Mr. Sud, learned senior counsel has relied upon judgments titled “*Shyam Deo Pandey and Ors. v. The State of Bihar*” [(1971) 1 SCC 855], “*Sukhlal and Other v. State of U.P.*” [(2014) SCC OnLine All 14965], “*Mauji Lal and Ors. v. State of UP*” [Crl. Appeal No. 474 of

1980], “*Akalesh Kumar v. State of Maharashtra*” [(2010) 3 AIR Bom R 532] and lastly upon “*State of UP v. Abhai Raj Singh and Anr.*” [(2004) 4 SCC 6].

14. Mr. Singh, learned APP does not dispute the legal position. In “*State of UP v. Abhay Raj Singh and Anr.*” (supra), where the Hon’ble Supreme Court has stated as under:-

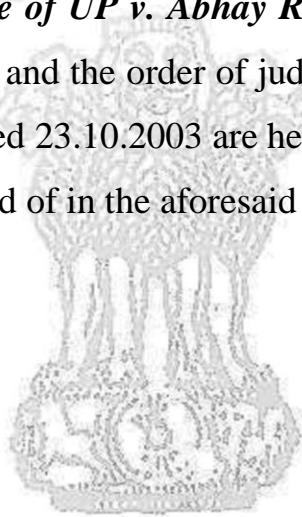
“10. We, therefore, set aside the order of the High Court and remit the matter back for fresh consideration. It is to be noted at this juncture that one of the respondents i.e. Om Pal has died during the pendency of the appeal before this Court. The High Court shall direct re-construction of the records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

15. In the present case, the impugned judgment is dated 20.10.2003 and the order of sentence is dated 23.10.2003. The appeal was filed immediately thereafter and was admitted. Despite the repeated efforts of this Court, the Trial Court record has not been re-constructed. The material documents including the depositions of the witnesses are not available despite the best efforts.
16. As already indicated, the order dated 12.11.2009 categorically states that the Trial Court record has been lost.
17. I am of the view that in the present case, every possible effort has been made to re-construct the Trial Court Record. Despite all the efforts by this Court, the Registry, the learned counsel for the parties, the Trial Court record has not been re-constructed as the same is lost.
18. I am in agreement with the submission of Mr. Sud, learned senior counsel that in the present case, the witnesses had already turned hostile and the impugned judgment is based upon preponderance of probabilities. In addition, re-trial is also not in the interest of justice as the material documents such as Inquiry Report of the ACP, Final Inquiry Report of the SDM, Seizure Memos, Post-Mortem Report, FSL/Viscera Report, Inquest Report, MLC and depositions of the witnesses are not available.
19. I am of the view that in order to affirm the conviction of the appellant, the perusal of the Trial Court Record is the essential element of

hearing of the appeal. Every appellant has a right to satisfy the Appellate Court that the material evidence available on record did not justify his conviction and this is a valuable right which cannot be denied to an appellant.

20. As per settled principles of criminal jurisprudence, every accused carries with him the presumption of innocence even at the appellate stage.
21. For the aforesaid reasons and as per the guidelines laid down in the judgment titled “*State of UP v. Abhay Raj Singh and Anr.*” (supra), the appeal is allowed and the order of judgment dated 20.10.2003 and order of sentence dated 23.10.2003 are hereby set aside.
22. The appeal is disposed of in the aforesaid terms.



JASMEET SINGH, J

NOVEMBER 28, 2022 / (MS)

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