

Bhunda and ors. Vs. State of U.P.

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Court : Allahabad

Decided On : May-16-2001

Reported in : 2001CriLJ3898

Judge : U.S. Tripathi, J.

Acts : Indian Penal Code (IPC) - Sections 143, 147, 148, 149, 307, 323, 324 and 325; Code of Criminal Procedure (CrPC) - Sections 161, 377, 378, 385 and 386

Appeal No. : Cri. Appeal No. 882 of 1981

Appellant : Bhunda and ors.

Respondent : State of U.P.

Advocate for Def. : A.G.A.

Advocate for Pet/Ap. : V.S. Singh, Adv.

Disposition : Appeal allowed

Judgement :

U.S. Tripathi, J.

1.This appeal has been directed against the judgment and order dated 23-3-1981 passed by the First Additional Sessions Judge, Jhansi in S.T. No. 68 of 1976 convicting the appellants Bhunda, Kaluta, Mantola, Hari Ram, Matadin and

Ghansoo under Sections 307 read with Section 149, I.P.C., Section 324 read with Section 149, I.P.C., Section 325 read with Section 149, I.P.C., Section 323 read with Section 149, I.P.C., Sections 148, 147 and 143, I.P.C. and sentencing them to R.I. for a period of 7 years under Section 307/149, I.P.C., R.I. for a period of 3 years under Section 325/149, I.P.C., R.I. for a period of 1 year under Section 324/149, I.P.C. and R.I. for a period of 6 months under Section 323/149 and R.I. for a period of one year under Section 148, I.P.C., R.I. for a period of 6 months under Section 147, I.P.C. and R.I. for a period of 3 months under Section 143, I.P.C. Accused Bhunda and Kaluta were further convicted and sentenced under Section 324, I.P.C. simpliciter and sentenced to one year R.I.

2. The prosecution story, briefly stated, was that Munna (P.W.1) had taken along with accused Bhunda and Kaluta a contract for digging wall Bhunda and Kaluta had realised money from the party concerned and Rs. 700/- were still to be paid by Bhunda and Kaluta to Munna towards his share. On 20-5-1975 Munna demanded money from Bhunda and Kaluta appellants who promised to pay on the following day. On 21-5-1995 when Bhunda was returning home in the evening at about 5.00 p.m. after grazing she goats, all the appellants surrounded him near the village and assaulted him with deadly weapon namely Pharsa, spears, axe and lathi resulting in multiple injuries on his person. It is further alleged that Bhunda was armed with spear, Kaluta with axe and rest of the appellants were armed with lathi.

3. Report of the occurrence was lodged by Babu Lal brother of Munna at about 11.00 p.m. on same day. The injured Munna was medically examined by Dr. S.C. Gurdev (P.W. 8) on same night at 10.45 p.m. who found as many as 23 injuries on his person. Injuries Nos. 1 and 13 to 18 were found to have been caused by some sharp edged weapon and rest by blunt object. Injuries Nos. 8, 19 and 21 were kept under observation and were found grievous.

4. The case was Investigated by Sri Ram Sajeewan Singh (P.W.7) who after investigation submitted charge sheet against the appellants.

5. The appellants were tried. The prosecution examined Munna (P.W. 1), Babu Lal (P.W. 2), Head Constable Kali Charan (P.W. 3), Dr. R.C. Gupta. Radiologist (P.W. 4), Head Constable Ram Bilas Chaturvedi (P.W, 5), Constable Shyam Lal (P.W.

6), Ram Sajeewan Singh. I.O. (P.W. 7) and Dr. S.C. Gurdev (P.W. 8).

6. Considering the above evidence of the prosecution the learned Sessions Judge held that the prosecution successfully proved its case against all the appellants. Accordingly, he convicted and sentenced the appellants as mentioned above.

7. After admission of the appeal, record of the Lower Court was requisitioned from the Sessions Judge concerned. The report of the Sessions Judge, Jhansi dated 19-2-2001 shows that the record of the Lower Court was weeded out on 31-10-1992. The Sessions Judge had ordered reconstruction of the record. According to report of First Additional Sessions Judge, Jhansi reconstruction of the record was not possible as no documents relating to the case were available.

8. The question which crops is as to whether the appeal can be decided for want of record of the Lower Court.

9. Similar situation arose before this Court in the case of Sita Ram v. State of U.P., 1981 Cri LJ 65. The Division Bench hearing the appeal held as below (Paras 4 and 5) :-

Section 385, Cr. P.C. provides that 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. Sub-section (2) provides that the appellate Court shall then send for the record of 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. Section 386 prescribed the powers of the appellate Court. That power has to be exercised after perusing the record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears. In Queen-Empress v. Khirnat Singh, 1989 All WN 55 this Court observed 'the appellant is entitled in law to have a hearing in this

Court of his appeal, but the loss of the record has deprived him of the only means of making good the pleas of the appeal...'. A Division Bench of the Calcutta High Court in *Abbash Ali v. Emperor*, (1913) 19 Ind Cas 182 : 14 Cri LJ 182 observed that the appellate Court must peruse the record before deciding the appeal. A decision upon a perusal only of the Judgment appealed against is not legal.

Since it is incumbent on the appellate Court to send for the record and peruse it and hear the counsel for the parties before it can exercise its power under Section 386, the present appeal cannot possibly be heard and decided on merit.

It was further held as below (Para 11):-

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 under Section 161, Cr. P, C. 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 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 witness 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 statement 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. The above case of Division Bench was further relied on by subsequent Division Bench in the case of Ram Nath v. State, 1982 All Cri C 128.

11. In the instant case the report of the Sessions Judge, Jhansi shows that reconstruction of record was not possible despite of all attempts taken in this regard. this Court, therefore, is not in a position to confirm the conviction recorded by the trial Court.

12. So far as the question of ordering retrial is concerned the occurrence in this case took place as late as on 20-5-1975 i.e. as far back as 26 years. In such situation it will not be justifiable to direct retrial.

13. In this view of the matter, I have no option but to allow the appeal and set aside the conviction and sentence of the appellants.

14. In the result, the appeal is allowed. The conviction and sentence of the appellants are set aside and they are acquitted They are on bail. Their bail bonds are cancelled and sureties are discharged. They need not surrender.

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