Jitendra Kumar Rode vs Union Of India on 24 April, 2023

Author: Sanjay Karol

Bench: B.R. Gavai, Sanjay Karol

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO……OF 2023
Arising out of
SPECIAL LEAVE PETITION (CRL.) NO. 2063 OF 2023

JITENDRA KUMAR RODE …Appellant

VERSUS

UNION OF INDIA …Respondent

JUDGMENT

SANJAY KAROL, J.

1. Leave granted.

2. The questions which arise for our consideration are; One, whether, in the absence of the records of the Court of Trial, the appellate Court could have upheld the conviction and enhanced the quantum of fine? And Two, whether, given the language employed under Section 385 of the Code of Criminal Procedure, 1973, the present situation constitutes a violation of the accused's fundamental rights under Article 21 of the Constitution of India?

3. The captioned appeal arises out of the final judgment in Criminal Appeal No. 625 of 1999 dated 23.11.2022 passed by the High Court of Judicature at Allahabad at Lucknow by which the Appellant's conviction by the Special Judge, (Prevention of Corruption Act, 1988) Lucknow in Case No. 7 of 1996 was upheld.

4. To facilitate effective adjudication of the present lis, it is essential to appreciate the judgments rendered by the learned courts below.

5. The Trial Court, in its judgment dated 04.12.1999, convicted the Appellant herein, under Sections 7, 13(1) and 13(2) of the Prevention of Corruption Act, 1988 (hereafter, PC Act for short). After analysing the evidence on record, the Trial Court concluded as under:

> "The prosecution has been successful in proving that accused J.K Rode being working at the post of a Public Servant as Assistant Commercial Manager, Northern Railway, Lucknow made a demand of Rupees Five Hundred from Chief Ticket Inspector Shri Jai Prakash Narayan Upadhyay on 03.05.95 to dispose of the charge sheet issued against him and he was caught red handed receiving the bribe on 03.05.95 and he received Rs. 500 (Rupees five hundred) from said J.P.N Upadhya being posted as a public servant misusing his post as public servant for his gain in corrupt and illegal manner. Thus, the offence under section 7, 13(1) and 13(2) of the PC Act 1988 is proved against the accused and he is liable to be punished for these charges. Accused is on bail and his bail bonds are discharged.
>
> Accused should be taken into custody immediately."
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> (Emphasis supplied)

6. Having so recorded, the Trial Court sentenced the Appellant to rigorous imprisonment of one year and rupees five hundred by way of fine (in default thereof, further imprisonment of six months) under Section 7 of the PC Act and rigorous imprisonment of two years and rupees five hundred by way of fine (in default thereof, further imprisonment of six months) under Section 13(2) of the PC Act.

Proceedings before the High Court

7. Assailing the judgment of conviction and sentence, the High Court admitted the petitioner's appeal on 07.12.1999. A perusal of the Order dated 04.03.2016 reveals that despite repeated summoning of records of the trial, no reply was received from the Court concerned and as a result, the District Judge was asked to furnish an explanation and, in any event, take steps for reconstruction of the record. 7.1 The record further reveals that "the entire record has been lost and is not traceable" and the documents sent as "reconstructed documents" do not constitute the relevant trial court record. They were found to be not to be in accordance with Rules nor endorsed by the Central Bureau of Investigation.

8. The High Court, vide the impugned judgment dated 23.11.2022, upheld the conviction despite having noted on an earlier occasion that the reconstruction of records was not in accordance with rules and the admission of non-availability of material on record, for which the Appellant herein was in no manner responsible. Significantly, despite arguments, the Court did not discuss the merits

of conviction.

9. However, the conviction was upheld and taking note of the decision of this Court in V.K. Verma v. Central Bureau of Investigation1, the sentence was reduced to time already 1 (2014) 3 SCC 485, Paragraphs 8 – 13.

undergone and the fine enhanced to Rupees Twenty Five Thousand.

The Present Appeal

10. Being aggrieved by the Order of conviction being upheld, the Appellant has preferred the present appeal.

It is apparent on the face of the record that the record could never be reconstructed in its entirety, especially the relevant ones by the concerned District Court. The Court, nonetheless, found sufficiency in the partly reconstructed record, which included only a few documents, such as the FIR and upheld the conviction on merits.

11. The learned counsel for the Appellant states that the law is settled on the issue, and in the absence of such records, a conviction cannot be stated to be on firm grounds and is liable to be set aside. The learned counsel places reliance on Shyam Deo Pandey and Others v. State of Bihar2, State of U.P. v. Abhai Raj Singh and Another3. He further placed reliance on High Court decisions, namely Ramesh Kaushik v. State of Delhi4 of the Delhi High Court; Raghuvir Sahai and Others v. 2 (1971) 1 SCC 855 3 (2004) 4 SCC 6 4 2022 SCC Online Del 4185 State of U.P.5, Avdesh Rai and Others v. State of U.P. 6 and Tej Pal Singh and Others v. State of U.P. 7 of the Allahabad High Court.

Consideration by this Court

12. A conviction of any nature permanently marks a person's character. It would be, in the specific circumstances of this case, unjustified. This is not to say that five hundred rupees as far back as 1995 was a small or insignificant amount; however, when the possibility of appeal is extinguished due to the absence of essential material, the perusal and consideration of which is required to take stock of the matter and then uphold or reverse, as the case may be, then the benefit of the doubt has to be extended to the accused when he is in no manner responsible for the same.

13. We must consider whether the non availability of trial court records before the High Court and upholding conviction, despite the absence thereof, infringes the right to life and liberty of the accused enshrined under Article 21 of the Constitution of India.

5 Criminal Appeal No.786 of 1979 6 Criminal Appeal No.346 of 1984 7 2015 SCC Online All 6581

14. It is well settled that following “procedure established by law” in a criminal prosecution is a sacrosanct requirement.

15. In M.H. Hoskot v. State of Maharashtra8 (three□Judge Bench), Krishna Iyer J. writing for the Court observed that:

> "11. In short, a first appeal from the Sessions Court to the High Court, as provided in the Criminal Procedure Code, manifests this value upheld in Article 21."

16. It was further observed that every step that makes the right of appeal fruitful is obligatory, and every action or inaction which stultifies it is unfair and, ergo, unconstitutional.

17. In Manu Sharma v. State (NCT of Delhi)9(two□Judge Bench), this Court has also noted that the due process of law shall deem to include fairness in trial. The Court gives a right to the accused to receive all documents and statements and move applications for the production of records relating to the case.

18. If a right of production of documents at the trial stage exists, it is a natural corollary that the High Court, sitting in appeal, must benefit from those documents. In the considered view of 8 (1978) 3 SCC 544 9 (2010) 6 SCC 1 this Court, this is a demand of the abovementioned sacrosanct requirement.

19. As we have noted earlier, in the present case, despite efforts, documents such as the witness statements, statements under Section 313 Cr.P.C. are neither available nor have been able to be reconstructed. Therefore, upholding conviction in the absence of such documents cannot be said to be in consonance with due process of law and fairness.

20. Once a violation of a right under Article 21 is established, that is undoubtedly sufficient to set aside a conviction. Nonetheless, it is essential to appreciate what the law of procedure says in this regard. After all, it cannot be gainsaid that personal liberty cut down in the absence of fair legal procedure is an affront to the sanctity of Article 21. To this effect, the bench in M.H Hoskot (supra) said:

> "24. We may follow up the import of Maneka Gandhi and crystallise the conclusion. Maneka Gandhi case has laid down that personal liberty cannot be cut out or cut down without fair legal procedure. Enough has been set out to establish that a prisoner, deprived of his freedom by court sentence but entitled to appeal against such verdict, can claim, as part of his protection under Article 21 and as implied in his statutory right to appeal, the necessary concomitant of right to counsel to prepare and argue his appeal."

21. The instant case is governed by Section 385 of the Code of Criminal Procedure, 1973, which is extracted for ease of reference:

> "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 on 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 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.

(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." (Emphasis supplied)

22. A bare reading of the provision makes it clear that when appeals are not dismissed summarily, the Appellate Court shall call for the records of the Court below except in cases where the question for consideration is the legality of a sentence. There is undoubtedly a compulsion upon the Appellate Court to call for the record and then proceed to examine the merits of a case before it. That, as is prima facie observable, is not the case before us.

23. One of the earlier cases on this issue is the judgment of the Calcutta High Court in Queen Empress v. Khimat Singh10, wherein the District Judge failed to trace or discover the lost records. The Court observed that this loss of records has lost the Appellant, a right he is entitled to, that of hearing by a higher court. In such situations, no other recourse remains than to order trial de□novo. The judgment in Khimat Singh (supra) has been followed by this Court in Abhai Raj Singh (supra).

24. The abovementioned requirement is found in the Old Code (Criminal Procedure Code, 1898, now repealed), under Section 423 as well. Section 423 of the 1898 Code, corresponds to Section 385 of the Code of Criminal Procedure, 1898.

25. The Privy Council in King – Emperor v. Dahu Raut11, stated that where a conviction is appealed against, once summary 10 1889 A.W.N. 55 11 AIR 1935 PC 89 dismissal fails, the provision of Section 423 as to sending for the record are clearly "peremptory", and there can be no room for revision at that stage. This has been reiterated by this Court in In Shyam Deo Pandey (supra), observing that, calling for the record of the Court below is an obligation, in the following terms:

"18. Coming to Section 423, which has already been quoted above, it deals with powers of the appellate Court in disposing of the appeal on merits. It is obligatory for the appellate Court to send for the record of the case, if it is not already before the Court. This requirement is necessary to be complied with to enable the Court to

adjudicate upon the correctness or otherwise of the order or judgment appealed against not only with reference to the judgment but also with reference to the records which will be the basis on which the judgment is founded. The correctness or otherwise of the findings recorded in the judgment, on the basis of the attack made against the same, cannot be adjudicated upon without reference to the evidence, oral and documentary and other materials relevant for the purpose. The reference to "such record" in "after perusing such record" is to the record of the case sent for by the appellate Court." (Emphasis supplied)

26. This Court in Biswanath Ghosh v. State of W.B.12 (two□Judge Bench) observed that an Appellate Court allowing a conviction without having the records before it and the evidence adduced by the prosecution is a flagrant miscarriage of justice.

12 (1987) 2 SCC 55

27. This Court in Abhai Raj Singh (supra) (two□Judge Bench) while dealing with a conviction by the Trial Court under Section 302 of the IPC, 1860, while remanding the matter for consideration afresh by the High Court observed:

"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 AWN 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 Sevugaperumal, Re [AIR 1943 Mad 391 (2) : 44 Cri LJ 611] . The view has been reiterated by several High Courts as well, even thereafter.

9. The High Court did not keep the relevant aspects and considerations in view and came to the abrupt conclusion that reconstruction 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 No. 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 reconstruction 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.

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 reconstruction 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 their 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 the High Court to hear and dispose of the appeals and the further course of retrial and fresh adjudication by the 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." (Emphasis supplied)

28. Recently, this Court in Dhananjay Rai alias Guddu Rai v. State of Bihar13 (two-Judges) took note of a Judgment rendered in Bani Singh v. State of U.P.14, as under :

> "14. We have carefully considered the view expressed in the said two decisions of this Court and, we may state that the view taken in Shyam Deo case [(1971) 1 SCC 855 : 1971 SCC (Cri) 353 : AIR 13 2022 SCC Online 880 14 (1996) 4 SCC 720 1971 SC 1606] appears to be sound except for a minor clarification which we consider necessary to mention. 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 record and Section 386 mandates that after the record is received, the appellate Court may dispose of the appeal after hearing the accused or his counsel.

Therefore, the plain language of Sections 385-386 does not contemplate dismissal of the appeal for non-prosecution simpliciter. On the contrary, the Code envisages disposal of the appeal on merits after perusal and scrutiny of the record. The law clearly expects the appellate Court to dispose of the appeal on merits, not merely by perusing the reasoning of the trial court in the judgment, but by cross-checking the reasoning with the evidence on record with a view to satisfying itself that the reasoning and findings recorded by the trial court are consistent with the material on record." (Emphasis supplied)

29. In a case with similar circumstance, we notice that the Allahabad High Court in Sita Ram & Others v. State15 has held that when the entire record was lost or destroyed and the reconstruction of the record was not possible, the Appellate Court shall order retrial provided the time lag date of incident and the date of hearing of appeal is short. If the same is long and/or the FIR, statement, of witnesses under Section 161 and other relevant papers are not available, the Appellate Court should

not order retrial.

15 1981 Cr.LJ, 65

30. In numerous judgments rendered by various High Courts, a similar view to the effect that a conviction cannot be upheld in the absence of the records of the Court below has been expressed. Taking note of Sita Ram (supra), the time elapsed between the occurrence of the offence and the appeal being finally decided, these courts have held that in the absence of essential documents such as the FIR or witness statements, a retrial too cannot be said to be serving the ends of justice. [Khalil Ahmad v. State of U.P.16; Vir Pal v. State17; Hira Lal v. State of U.P.18 and Bhunda and Ors. V. State of U.P.19]

31. In the present case, the impugned judgment of the High Court records the statement of the CBI that the records have "got lost". The "reconstructed" record consists of the following:

i. FIR of RC 18(A)/95-LKO;
ii. Complaint dated 03.05.1995 of Sri J.P.N. Upadhyay, CIT, Varanasi (2 pages);
iii. Photocopy of S.F.-II dated 24.03.1995 (one page);
iv. Pretrap memorandum dated 3.5.95 (4 pages);
v. Recovery memo dated 3.5.1995 (5 pages);
vi. Search list dated 3.5.95 (5 pages);
vii. One file containing charge-sheet (SF-II) of Sri JPN

Upadhyay and Notesheet. (Pages 1 to 6 & Notesheet PP□2);

viii. Search list dated 4.5.95 (1 sheet);

ix. Site plan dated 3.5.95 (1 sheet);

16 1986 SCC OnLine All 211
17 1999 SCC OnLine All 1348
18 1999 SCC OnLine All 1392
19 2001 SCC OnLine All 864

x. Misc. Papers containing Draft charge-sheet etc. (7 sheets);
xi. Sanction order dated 28.12.95.

Sub□section, 2 of Section 385, requires that the parties are heard in light of the records received by the Court. The documents undoubtedly need to include the essential documents necessary to properly appreciate the appeal on its merits. Even the depositions of the witnesses, both prosecution and defence, have not been re□constructed and are not available for the Court. This position of disposal of an appeal on merits being only after perusal of record, has been held by a three□Judge Bench in Bani Singh (supra).

32. The Court below, in our considered view, by taking a mutually contradictory view, proceeded to decide the appeal on merits sentencing the accused, forgetting that the challenge was also for conviction. And yet did not deal with the merits of the appeal, laying specific challenge to the judgment of conviction. The whole approach is illegal and erroneous. Firstly, it is observed that the record was missing, and then it casts the onus to produce the same on the Appellant.

33. In light of the abovementioned discussion, the Accused, in appeal, has a right to have the record perused by the Appellate Court and, therefore, upholding a conviction by merely having noted that the counsel for the accused not having the record at the time of filing the appeal is “doubtful” and that “no one can believe” the appeal would have been filed without perusing the record, as observed by the High Court is not correct. The job of the Court of Appeal is not to depend on the lower Court's judgment to uphold the conviction but, based on the record available before it duly called from the Trial Court and the arguments advanced before it, to come to a conclusion thereon.

34. In the facts at hand, the alleged offence in question was committed on 21.3.1995, and the judgment of the Trial Court was delivered on 7.12.1999. More than 28 years have passed since the commission of the offence. As already indicated, the relevant Trial Court record has not been able to be reconstructed, despite the efforts of the courts below. Hence, in our considered view, as discussed above, ordering a retrial is not in the interest of justice and will not serve any fruitful purpose. The time elapsed must be taken into consideration by the Court, and we may stress on that, only after taking due note of and taking steps to abide by the warning issued by this Court in Abhai Raj Singh (supra), as was correctly done in Sita Ram (supra).

Conclusions

35. Protection of the rights under Article 21 entails protection of liberty from any restriction thereupon in the absence of fair legal procedure. Fair legal procedure includes the opportunity for the person filing an appeal to question the conclusions drawn by the trial court. The same can only be done when the record is available with the Court of Appeal. That is the mandate of Section 385 of the CrPC. Therefore, in the considered view of this Court, it is not within prudence to lay down a straightjacket formula, we hold that non□compliance with the mandate of the section, in certain cases contingent upon specific facts and circumstances of the case, would result in a violation of Article 21 of the Constitution of India, which we find it to be so in the instant case.

36. The language of Section 385 shows that the Court sitting in appeal governed thereby is required to call for the records of the case from the concerned Court below. The same is an obligation, power coupled with a duty, and only after the perusal of such records would an appeal be decided.

37. In the view of the aforesaid, the appeal is allowed. The impugned judgment and the conviction dated 07.12.1999 passed by Special Judge (Prevention of Corruption Act, 1988), Lucknow, in Case No.7/1996 is set aside, subject thereof, is set aside.

38. The impugned judgment had directed the accused to pay, by way of an enhanced fine, Rupees 25,000. Given the above, the fine, be it of whatever amount, if deposited, is liable to be returned to

the Appellant.

39. Before parting with the present leave petition another important issue must be dealt with, i.e. the digitization of records. Technology has, in the present time become increasingly enmeshed with the systems of dispute resolution and adjudication with the trends pointing leading to all the more interplay, both supplementary and complimentary between technology and law.

40. On 24.9.2021, the learned E□committee of the Supreme Court of India issued an SOP for digital preservation. Step by step implementation of the digitization process involves eighteen steps therein. Primarily, it requires all High Courts to establish Judicial Digital Repositories (JDR) as well as the standardized system therefor; A digitisation cell at each of the High Courts is to be established to monitor the progress on day to day basis; It is the work of the cell to manage contracts with vendors for specialized services; an online data tracking system to keep track of the data transferred to the High Courts and to facilitate the receipts for each set of transferred records to the District Courts as well; District Courts to have back□ups of all data transferred to the High Court on a monthly basis while maintaining an independent record thereof.

41. It cannot be doubted that had there been properly preserved records of the Trial Court, the issue in the present appeal as to whether the High Court could uphold a conviction having not perused the complete Trial Court record, would not have arisen. Judicial notice can be taken of the fact that, in accordance with the SOP issued, private entities providing specialized service have been contracted, and therefore considering the importance and essentiality of such record, a robust system of responsibility and accountability must be developed and fostered in order to ensure the proper protection and regular updation of all records facilitating the smooth functioning of the judicial process.

42. Therefore, this Court finds it fit to issue the following directions:

> 1. The Registrar General of the High Courts shall ensure that in all cases of criminal trial, as well as civil suits, the digitization of records must be duly undertaken with promptitude at all District Courts, preferably within the time prescribed for filing an appeal within the laws of procedure.
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> 2. The concerned District Judge, once the system of digitization along with the system of authentication of the digitized records is in place in their judgeship, to ensure that the records so digitized are verified as expeditiously as possible.
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> 3. A continually updated record of Register of Records digitized shall be maintained with periodic reports being sent to the concerned High Courts for suitable directions.
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> 4. Interlocutory application(s), if any, shall stand disposed of.

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Place : New Delhi.