

(1995) 03 AHC CK 0024**Allahabad High Court****Case No:** Criminal Appeal No. 2631 of 1978

Jamuna Prasad

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: March 21, 1995**Hon'ble Judges:** Srinath Sahay, J and Kundan Singh, J**Final Decision:** Allowed**Judgement**

1. This appeal is directed against the judgment and order dated 9978 passed by Shri Giriraj Kishore, VI Additional Sessions Judge, Bareilly, in Sessions Trial No. 490/77. Jamuna Prasad, appellant was found guilty under Section 302, I.P.C. and was sentenced to imprisonment for Shiv Lal and Ram Prasad, appellants were further life. Jamuna Prasad, Bhoop Ram, bund guilty under Section 323/34, I.P.C. and each of them was sentenced to rigorous imprisonment for six months. Bhoop Ram, Shiv Lal and Ram Prasad, appellants were not found guilty of the charge of under Section 302/34, I.P.C. and were acquitted.

2. We have heard learned Counsel for the appellants and the State. The record of Sessions Trial No. 490/77 is not available. It is said to have been destroyed in a fire which had broken out in Bareilly judgeship. The order was passed for reconstruction of record. The District Judge reported vide his D.O. letter No. 159/VIII dated August, 26/27, 1983 that the reconstruction of the record is not possible, due to reasons mentioned in the report of Shri Sushil Kumar, VI Additional District and Sessions Judge, Bareilly. The report of Shri Sushil Kumar shows that notices were issued to the accused persons. They were duly served on July 1, 1983. They moved an application through their Counsel that they do not possess any paper pertaining to the aforesaid sessions trial. They also asserted that no paper is available with their Counsel. The D.G.C. criminal was also requested to file the papers relating to the aforesaid sessions trial. He also informed that due to fire which broke out in November, 1979, all the records have been burnt and now no paper is available. The S.S.P., Bareilly was also requested to send the case diary. He informed that in spite

of best efforts, the case diary is not available. Under the circumstances it was reported that the record cannot be reconstructed.

3. Learned Counsel for the appellants has invited our attention to the decision in Sita Ram v. State, 1981, Cr. L. J. 65 and Ram Nath v. State, 1982 AC.C. 128 and has urged that the conviction of the appellants cannot be affirmed in the absence of record and they are entitled to be acquitted in the circumstances of the case. He has submitted that the alleged occurrence had taken place on 6377 and on account of sheer lapse of time it will not be just and expedient to direct retrial. We have considered the facts and circumstances of the case and have come to conclusion that the contention of the learned Counsel for the appellants must be upheld. In the case of Sita Ram, the law is enunciated in the following terms:

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 S.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.

4. The incident had taken place on 23871 and the appellants in the case of Sita Ram, were convicted by sessions court on 181174. Copies of F.I.R. and statements of witnesses recorded under Section 161, Cr. P.C. had been weeded out and were not available at the time of hearing of the appeal. All attempts to reconstruct the record had proved futile. In such a situation it was considered not to be feasible for the appellate court to affirm the order of conviction. The appeal was allowed and the appellants were acquitted and it was not considered to be just or expedient to order for retrial. The law laid down in the case of Sita Ram was followed in the latter case of Ram Nath cited above. In that case also the record of the case could not be reconstructed and since the incident was shown to have taken place more than 11 years earlier, it was found to be not desirable to direct the retrial and the appellants were acquitted. We are facing a similar situation in the present appeal also. The District Judge has reported in clear terms that it is not possible to reconstruct the record. The case diary is also not available and the occurrence is said to have taken

place about 19 years ago. The memory of the witnesses must have faded by now and in the absence of any papers, it is not considered feasible that they would contribute to fair and proper administration of public justice. It has also been pointed out that only three eyewitnesses were examined and two of them were disbelieved by trial court and the conviction of the appellants is based on testimony of the first informant alone. Under the circumstances we consider that it will not be proper nor in the interest of justice to direct the retrial which should have been ordinarily done. In the light of the circumstances of the case which exist at present, there is no option but to allow the appeal, setting aside the conviction of the appellants and to acquit them.

5. For the above reasons the appeal is allowed. The judgment and order under appeal are set aside. All the appellants namely, Jamuna Prasad, Bhoop Ram, Shiv Lal and Ram Prasad are hereby acquitted of all the charges framed against them and the various sections under which they have been convicted by trial court. All of them are stated to be on bail. They need not surrender. Their bail bonds are discharged.