

(2010) 03 AHC CK 0275

Allahabad High Court

Case No: Criminal Appeal No. 1905 of 1981

Briskshbhan alias Birkhey and
Others

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: March 16, 2010

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 386
- Penal Code, 1860 (IPC) - Section 147, 149, 225, 307, 324

Citation: (2010) 7 RCR(Criminal) 1675

Hon'ble Judges: Vijay Kumar Verma, J

Bench: Single Bench

Advocate: G.S. Chaturvedi, Rahul Mishra and Apul Mishra, for the Appellant; Bhanu Pratap Singh and Dharam Pal Singh and A.G.A., for the Respondent

Final Decision: Allowed

Judgement

Vijay Kumar Verma, J.

Heard Sri Rahul Mishra, advocate holding brief of Sri Apul Mishra, counsel of the Appellants and A.G.A. for the State.

2. This appeal has been preferred by the Appellants Briskshbhan alias Birkhey, Ram Prasad, Meharban, Lalta, Jagdish, Pratap, Rajendra Singh, Ram Swaroop, Siyaram alias Siya, Girwar Sahai, Jamuna and Har Prasad against the judgment and order dated 25.8.1981, passed by the I Ind Addl. Sessions Judge, Jhansi in S.T. No. 9 of 1980, State v. Briskshbhan and others, whereby the Appellants have been convicted and sentenced to undergo rigorous imprisonment for two years u/s 147, I.P.C., two years rigorous imprisonment u/s 353 read with Section 149, I.P.C., five years rigorous imprisonment u/s 307 read with Section 149, I.P.C. and three years rigorous imprisonment u/s 225, I.P.C. The Appellant Harprasad has been further convicted and sentenced to undergo rigorous imprisonment for two years u/s 324,

I.P.C.

3. After admission of the appeal, the record of Session Trial No. 9 of 1980 was summoned from the Sessions Judge, Jhansi. In response to the letter issued by the office for sending the lower court record, it was reported by the District Judge, Jhansi vide his letter No. 332/XV, dated 27.12.2001 that record of session trial has been weeded out on 6.11.1992 and original judgment only is available in the record. Thereafter, direction was issued to the Sessions Judge, Jhansi to reconstruct the record. In response to the letter issued in this regard, the Sessions Judge, Jhansi vide letter No. 1758/XV dated 15.9.2007 has reported that reconstruction of the record is not possible. Since the papers of Session Trial are not available, hence after a gap of about 29 years, retrial of the accused persons is also not possible.

4. Placing reliance on State of U.P. v. Abhay Raj Singh and Anr. 2004 (50) ACC 591: 2004 (2) ACR 1491 (SC), it is submitted by learned Counsel for the Appellants that for want of lower court record, the appeal cannot be heard on merit and hence, the Appellants are liable to be acquitted. It is also submitted by learned Counsel that after a gap of about twenty nine years, retrial of the accused persons is also not possible, because no vital paper of the case is available and hence, no useful purpose would be served to direct retrial of the Appellants.

5. On the other hand the learned A.G.A. drawing my attention towards Raj Narain Pandey v. State, 2010 (1) ADJ 53: 2010 (1) ACR 408, has submitted that this Court can decide the appeal on merit on the basis of the certified copy of the judgment, as has been done by another Bench of this Court in aforesaid case.

6. I have given my thoughtful consideration to the rival submissions made by the parties counsel. It is true that another Bench of this Court in the case of Raj Narain Pandey (supra) has decided the appeal on merit in the absence of lower court record on the basis of the impugned judgment only, but in my considered opinion, the appeal cannot be decided on merit in the absence of lower court record. Unless the evidence is available for perusal, in my opinion, the appeal cannot be decided on merit merely on the basis of the lower court judgment, as evidence is essentially required to consider the merit of the impugned judgment and merely on the basis of the said judgment, no order on merit can be passed in the appeal.

7. From the report made by the Sessions Judge, Jhansi, this fact is borne out that the record of Session Trial No. 9 of 1980 was weeded out in the year 1992 and original judgment only is available in the file. From the report dated 15.9.2007 of the Sessions Judge, Jhansi, this fact is also borne out that reconstruction of the record is not possible. I agree with the submission of the learned Counsel for the Appellant that no useful purpose would be served after a gap of about twenty nine years to direct retrial of the accused persons, as no paper of the case is available. Therefore, having regard to the observations made by the Hon"ble Apex Court in the case of State of U.P. v. Abhay Raj Singh (supra) there is no alternative except to acquit the

Appellants, as hearing of the appeal in accordance with the arrangement made in Section 386, Cr. P.C. cannot be made and retrial also is not possible.

8. Consequently, the appeal is allowed. The impugned judgment and order are set aside and the surviving Appellants-accused are hereby acquitted of the offences with which they have been charged for want of trial court record and there being no possibility of retrial.

9. The Appellants-accused are on bail. They need not to surrender. Their personal and bail bonds are cancelled and the sureties are discharged.

10. Office is directed to send a copy of this judgment to the trial court concerned for information.