

Email no. 497, Date . 06.02.2026



Through e-mail

From,

Manjeet Singh Sheoran, HJS
Registrar General
High Court of Judicature at,
Allahabad

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To,

All the District and Sessions Judges/OSD
All the Principal Judges, Family Courts
All the Presiding Officers of Commercial Courts, MACTs & LARRAs
State of Uttar Pradesh

No. 1505 /Admin G-II Dated 03/02/2026

Sub: Compliance of the order dated 15.03.2022 passed by the Hon'ble Court in
Criminal Appeal No. 474 of 1980 titled *Mauji Lal & Others Vs. State of U.P*

Madam/Sir,

Kindly refer to abovementioned order/judgment dated 15.03.2022, whereby Hon'ble Court has laid down a course of action for reconstruction of records (paragraph- 16) and also issued certain guidelines for preserving and upkeeping of the records of Trial Courts (paragraph-37).

In this regard, I am directed to send a copy (in pdf) of aforesaid judgment to your goodself for information and necessary compliance.

You are also requested to ensure circulation of the same amongst all the Judicial Officers working under your supervision, for information and compliance of the same, in letter and spirit.

Encl:- As above

With Regards,

Yours faithfully,

03.2.26

Registrar General

Seen circulate amongst all the
Judicial Officers for strict compliance
in letter & spirit.
Matter be put up in monthly meeting & maintain cell
weety & Upload this order on the official website
of D.C. Kasganj. for compliance in letter & spirit.

DJ/KSJ
06/2/26

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1. The first part of the book is devoted to a general survey of the history of the world from the beginning of time to the present day.

2. The second part of the book is devoted to a detailed account of the history of the world from the beginning of time to the present day.

3. The third part of the book is devoted to a detailed account of the history of the world from the beginning of time to the present day.

4. The fourth part of the book is devoted to a detailed account of the history of the world from the beginning of time to the present day.

5. The fifth part of the book is devoted to a detailed account of the history of the world from the beginning of time to the present day.

6. The sixth part of the book is devoted to a detailed account of the history of the world from the beginning of time to the present day.

1872

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AFR

Reserved on 25.10.2021

Delivered on 15.3.2022

Court No. - 43

Case :- CRIMINAL APPEAL No. - 474 of 1980

Appellant :- Mauji Lal And Others

Respondent :- State of U.P.

Counsel for Appellant :- R.K. Saxena, Bal Mukund, Mohd. Naushad Siddiqui, Satya Dheer Singh Jadaun

Counsel for Respondent :- D.G.A.

Hon'ble Vivek Kumar Birla, J.

Hon'ble Shree Prakash Singh, J.

(Delivered by Hon'ble Shree Prakash Singh, J)

1. Heard Sri S.D.S. Jadaun, learned counsel for the appellants and Sri L.D. Rajbhar, learned A.G.A. for the State.
2. This appeal has been preferred against the Judgment and order dated 6.3.1980 passed by Second Additional Sessions Judge, Non-Metropolitan Area, Kanpur in Sessions Trial No. 189 of 1978, convicting and sentencing the appellants no.1 and 2 to undergo imprisonment for life under Section 302/34 I.P.C. and to undergo one years rigorous imprisonment under Section 323/34 I.P.C.; and further convicting and sentencing the appellant no.3 to undergo one year rigorous imprisonment under Section 323/34 I.P.C.
3. Perused the record. From the perusal of the order sheet, it is evident that on 9.2.2015, the lower court record was summoned. Later on, after certain correspondence, it was reported by the office on 7.11.2019 that the Record Room, Kanpur Nagar, vide report dated 31.10.2019, informed through the C.J.M. concerned that the lower court record in Sessions Trial No. 189 of 1978 is not available and the departmental enquiry in this regard has been initiated. Thereafter, on 21.1.2020, the District Judge, Kanpur Dehat, vide covering letter dated 21.1.2020, has intimated that the enquiry in the said matter was done and it was found that one class-III employee Kailash Nath Yagik, the then clerk of Second Additional

District and Sessions Judge, Kanpur Dehat, who retired on 31st of March 2008 from service and also died on 4th May 2010, was found responsible for missing of the aforesaid lower court record as the record reveals that he had received said lower court record on 20.7.1992 during his posting as clerk with the Second Additional District and Sessions Judge, Kanpur Dehat. Later on, vide letters dated 17.3.2020 and 21.3.2020, it has been reported that the reconstruction of record and retrial in the aforesaid matter are not possible.

4. After taking into consideration of the aforesaid facts, this Court has passed an order on 20.9.2021 wherein the District Magistrate, Kanpur Dehat and the Senior Superintendent of Police/Superintendent of Police, Kanpur Dehat were directed to inform as to whether papers regarding Sessions Trial No. 189 of 1978 under Sections 302/34 and 323/34 I.P.C. are available with their office so that hearing of the case may proceed. Report dated 21.10.2021 was received from the office of the District Magistrate, Kanpur Dehat wherein it has been stated that no paper is available with regard to the Sessions Trial No. 189 of 1978 in his office including the case diary of the case. After perusal of the aforesaid report, this Court has proceeded to decide the instant appeal.

5. In the aforesaid circumstances, issue of construction of records pertaining to criminal trial has arisen before the Appellate Court on account of situation in which the record of Trial Court pertaining to the Criminal Trial is unavailable or destroyed during the pendency of the criminal appeal before the Appellate Court.

6. Before discussing the legal remedies permissible in law in the situation where Trial Court Records pertaining to Criminal Trial are destroyed, it is significant to elaborate the legal provisions enumerated in the Code of Criminal Procedure, 1872 (hereinafter referred to as the Cr.PC) for adjudication of Criminal Appeal by Appellate Court.

7. Sections 385 and 386 Cr.P.C. deal with the "procedure for hearing

appeals not dismissed summarily” and “powers of Appellate Court”, which are quoted as under:-

Section 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 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.

(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.

Section 386. Power of the Appellate Court. After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may-

(a) in an appeal from an order or acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction-

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re- tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or

(ii) alter the finding, maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the Same;

(c) in an appeal for enhancement of sentence-

(i) reverse the finding and sentence and acquit or discharge the accused or order him to be re- tried by a Court competent to try the offence, or

(ii) alter the finding maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, so as to enhance or reduce the same;

(d) in an appeal from any other order, alter or reverse such order;

(e) make any amendment or any consequential or incidental order that may be just or proper; Provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement: Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal. **[Emphasis supplied]**

8. Thus, from bare perusal of the provisions of Sections 385 and 386 of Cr.P.C., it emerges that the powers of the Appellate Court while dealing with an appeal arising out of a conviction are delineated in sub-clauses (i),(ii) and (iii) of clause (b) of Section 386 of the Code. The Appellate Court is empowered by Section 386 to reverse the finding and sentence and acquit. Therefore, the acquittal is possible when there is reversal of the finding and sentence. The Appellate Court is also empowered to discharge the accused. The third category which seems to be applicable to the present case is a direction for re-trial by a court of competent jurisdiction subordinate to the Appellate Court. For exercise of the powers

in cases of first two categories, obviously a finding on merits after consideration of the materials on record is imperative. Where that is not possible because of circumstances like the case in hand i.e. destruction of the records, the proper course for the Appellate Court would be to direct re-trial after reconstruction of the records if in spite of positive and constructive efforts to reconstruct the records the same was impossible. If on the other hand, from the copies available with the prosecuting agency or the defence and/or their respective counsel, reconstruction is possible to be made, said course should be adopted and the appeal can be disposed of as it deserved under course indicated in clauses (i) and (ii). After perusal of the records and hearing appellant's pleader and public prosecutor under Section 377 or 378, the exercise of power as indicated above can be resorted to. Hon'ble Apex Court was pleased to observe in **Bani Singh and others Vs. State of U.P. (1996 (4) SCC 720)** that 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 records and Section 386 mandates that after record is received, the Appellate Court may dispose of the appeal after hearing as indicated.

9. Prior to deal with the situation where the records of Trial Courts are unavailable or destroyed due to natural or unnatural calamities, it would be fruitful to discuss the nature of documents known or called as records of Lower/Trial Court.

10. The proviso appended to Chapter XII of the General Rules (Criminal), 1977, deals with the Rules with respect to "Destruction of Records". The relevant Rules of Chapter XII of the General Rules (Criminal), 1977 pertaining to Records are as under –

- i. Rule 117. Classes of Records
- ii. Rule 118. Destruction of paper
- iii. Rule 119. Destruction of paper

iv. Rule 120. Retention of Retention of register books, etc.

v. Rule 121. Retention of other papers.

vi. Rule 122. Retention of other papers.

vii. Rule 123. Destruction of register, book

viii. Rule 124. Notice to be given before destruction of original documents.

11. The Trial Court Records may be segregated/classified in two parts. The first part of the records are in form of the police report filed after the investigation by the police U/s 173 (2) of Cr.P.C. containing the First Information Report, chick FIR, statements of witnesses recorded during investigation U/s 161 of Cr.P.C., inquest report, post mortem report, medical/injury reports, site plan, statement recorded U/s 164 Cr.P.C. etc. as well as other documentary evidences collected by investigating officer during investigation depending upon the veracity of case. To be more precise, the police report submitted by police after conclusion of investigation before the Court of competent jurisdiction, which requires to be served upon accused in compliance of section 207 of Cr.P.C., can be termed as first part of the Trial Court Record.

12. The second part of the Trial Court Record is the record containing the testimonies of prosecution witnesses deposed before Trial Court, statement of accused recorded U/s 313 of Cr.P.C., testimonies of defence witnesses, Court witnesses examined before Trial Court.

13. Now, addressing to the situation where the Trial Court record is unavailable or destroyed due to natural calamities or otherwise, the Appellate Court is left with three options (i) to direct for the reconstruction of records, (ii) to direct for re-trial of the case and (iii) to set aside the judgment of Trial Court.

14. Dealing with the situation where the original records are destroyed on account of natural or unnatural calamities, the Appellate Court should

always order for reconstruction of the records. 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 Vs. Khimat Singh (1889 A.W.N. 55)**, the view taken was that the provisions of Section 423 (1) of the Criminal Procedure Code, 1898, make it obligatory for the Court to obtain and examine the record at the time of hearing. In case when it is not possible to do so, the only available course was a direction for re- construction. The said view was reiterated more than six decades back in **Re Sevugaperumal and Ors. (AIR 1943 (Madras))**. The view has been reiterated by several High Courts as well, even thereafter.

15. At many a times, the records of the pending appeals before this Court are missing at the district level and after enquiry, it is found that either the record keeper or such employee, who had been entrusted to keep the records, has retired or died. But, in such a situation, the ultimate goal of dispensation of justice is hampered and if it is not being taken seriously or if it is not stopped, this practice would become a module for delinquent persons who are involved to get the record destroyed.

16. In the light of the facts and circumstances discussed as above, all possible endeavour should be made for reconstruction of record and, in our opinion, following recourse shall be adopted prior to coming to the conclusion of disposal of such appeals:-

- i. Notice shall be issued to Officer of the record room of the concerned District to provide the duplicate copy of the original records.
- ii. Notice shall be issued to concerned police station/prosecuting agency to provide the copy of police report filed after investigation U/s 173 (2) of Cr.PC.
- iii. Notice shall be issued to concerned public prosecutor who has contested the case on behalf of State/prosecuting agency to provide the copy of record.

- iv. Notice shall be issued to first informant of the case to furnish the records available with him.
- v. Notice shall be issued to the counsel for the first informant (if any) who has contested the case on his behalf to furnish the records available with him.
- vi. Notice shall be issued to accused/accused persons of the case to furnish the records available with him.
- vii. Notice shall be issued to counsel of the accused who has contested the case on his behalf to furnish the records available with him.
- viii. Notice shall be issued to the son or legal heir of the appellant in case appellant is dead.
- ix. All such notices shall be issued through proper channel.

17. After adopting the aforementioned recourses if records are made available and produced before the Appellate Court, the appeal shall be heard and decided by Appellate Court in terms of sections 385 and 386 of Cr.P.C.

18. Now, dealing with the situation where records pertaining to the case diary/police report filed by prosecuting agency U/s 173 (2) of Cr.P.C. and which are served upon the accused by Court in compliance of section 207 of Cr.P.C. are only made available, it would be expedient in the interest of justice for the Appellate Court to order for re-trial of the case for the reason that those basic documents pertaining to evidence collected by the prosecuting agency along with the list of witnesses upon which prosecution is relying to prove its case against accused are available. In such a case, re-trial from the stage of serving police report to accused in compliance of Section 207 Cr.P.C. followed by procedure of sections 226, 227 and 228 of Cr.P.C. shall be ordered by Appellate Court to secure ends of justice.

19. It is relevant to mention here that the police report filed by prosecuting agency in compliance of section 173 (2) of Cr.P.C. contains First Information Report, chick F.I.R., statements of witnesses recorded

during investigation U/s 161 of Cr.P.C., inquest report, post mortem report, medical/injury reports, site plan, statement recorded U/s 164 Cr.P.C. etc. and are for the limited purposes of omissions, corroborations, improvement and contradictions only when confronted to the witnesses in the Trial Court by defence and, therefore, their duplicate copies will have the same relevancy and admissibility as of being original one. It is the ocular testimonies of witnesses recorded on oath before Trial Court as well as the documents/records of the police report or otherwise proved by the related witness leads to the conviction or acquittal of the accused. After the order of re-trial, ocular testimonies of witnesses recorded on oath before Trial Court will lead to the fate of Trial.

20. Now, the point of consideration is that if it is not possible to reconstruct any record pertaining to trial then what legal recourse shall be adopted by Appellate Court ? Hon'ble Supreme Court of India as well as this High Court has propounded the legal proposition in the aforesaid regard in catena of judgments, which are discussed as follows:-

21. In **Shyam Deo Pandey Vs. State of Bihar, 1971 (1) SCC 855**, the Apex Court held that fulfillment of requirement for availability of record is necessary 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. Relevant part of the judgment is extracted as under:-

"18. Coming to Section 425, 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."

22. In **Sita Ram and Others Vs. State 1981 Cri.L.J. 65**, the Court held that in absence of the original record, it is not possible to arrive at a decision that impugned judgment is supported by the evidence on record and order of conviction passed and the sentence imposed on the appellants is legally justified and proper. 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. The relevant part of the judgment reads as under :

"4. 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 prescribes 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. Khimat Singh 1889 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.

5. *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.*

6. *The appellants have a right to show to this Court that the decision arrived at by the court below was not supported by the evidence on record. They can legitimately contend that material evidence and circumstances have either been ignored or incorrectly appraised. This right cannot be denied to the appellants. In the absence of the original record it is not possible for us to arrive at a decision that the impugned judgment is supported by the evidence on record and the order of conviction passed and the sentence imposed on the appellants is legally justified and proper.*

7. *In such a situation two courses are open to the Court; (1) to order retrial after setting aside the impugned judgment; or (2) to acquit the appellants. A situation like the present one arose before Courts earlier also. In re Sevugaperumal AIR 1943 Mad 391 (2) : 44 Cri LJ 611 the accused were convicted under Sections 457, 395 and 397 Penal Code, and sentenced to various terms of imprisonment. Following the decision of this Court in Queen-Empress v. Khimat Singh 1889 All WN 55 (supra) the Madras High Court ordered retrial after setting aside the convictions. From the reports of these decisions it is not clear how much time had elapsed between the incident and the date when retrial was directed. In the Madras case the impugned order of the trial court was dated 22-6-1942. The appeal was filed on 6-8-1942 and the original record was destroyed by fire on 17-8-1942. The appeal came up for hearing on 5-11-1942. It may be that the time lapse between the date of the incident and the date of decision by the appellate court was not long. Moreover the Public Prosecutor conceded in those cases that no other course was possible under the circumstances.*

8. *In Madhusudhan v. State 1963 (2) Cri LJ 103 (Orissa) the appellant was convicted under Section 302, I.P.C. and sentenced to imprisonment for life by an order of the Sessions Judge dated 17-4-1962. The incident had taken place on 29-3-1962. The appeal came up for hearing on 12-12-1962. The appellate court directed retrial of the case. It may be noted that the order for retrial was passed well*

within two years of the incident.

9. A similar situation arose before this Court in *Zillar v. State* 1956 All WR (HC) 613. In this case the appellants were convicted by the Sessions Judge on 21-1-1951 under Sections 304 and 148, I.P.C. in respect of the offence committed on 2-4-1950. The appeal was filed in this Court on 24-1-1951 which came up for hearing in April 1956 when it was brought to the notice of the Court that the entire record of the case had been lost. Attempt was made to reconstruct the record but it proved futile. This Court refused to direct retrial of the case on the reasoning that the case related to an offence which was committed more than six years ago and five years had elapsed since the judgment of the Sessions Judge convicting the appellants was passed. The court took into account the further fact that even the copies of the F.I.R. and the statements of witnesses taken under Section 161 Cr. P.C. were not available as they had been weeded out in the ordinary course.

10. A Division Bench of this Court in Criminal Appeal No. 3235 of 1971 (*Jit Narain v. State*) decided on 15-3-1978 in similar circumstances allowed the appeal and acquitted the appellants instead of directing their retrial.

11. On a careful consideration of the relevant statutory provisions and the principle laid down in the cases cited before us we are of the opinion that 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 unduely 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 witnesses 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 statements 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.

12. In the present case the incident took place on 23-8-1971. The appellants were convicted by the Sessions Court by an order dated 18-11-1974. The appeal has been pending in this Court for about six years. We are informed that copies of the First Information Report and statements of witnesses recorded under Section 161, Cr. P.C. have been weeded out and are not available. All attempts to reconstruct the record have proved futile. In such a situation it is not permissible for us to affirm the order of conviction of the appellants, since in the absence of the record we cannot possibly feel satisfied that the appellants have been rightly convicted. Due to lapse of time and non-availability of papers like First Information Report, statements under Section 161, Criminal Procedure Code etc, we do not consider it either just or expedient to order retrial of the case."

23. In **Bhunda and Others Vs. State of U.P., 2002 Cri.L.J. 3898**, the Court observed and held as under :

"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.

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."

24. In *State of U.P. v. Abhai Raj Singh* (2004) 4 SCC 6, the Court observed and held as under :

"The powers of the appellate court when dealing with an appeal from a conviction are delineated in sub-clauses (I), (ii) and (iii) of clause (b) of section 386 of the code. The appellate court is empowered by section 386 to reverse the

finding and sentence and acquit. Therefore, the acquittal is possible when there is reversal of the finding and sentence and acquit. Therefore, the acquittal is possible when there is reversal of the finding and sentence. The appellate court of competent jurisdiction subordinate to the appellate court or committed for trial. For exercise of the powers in cases of first two categories, obviously a finding on merits after consideration of the materials on record is imperative. Where that is not possible because of circumstances like the case at hand i.e. destruction of the records, the proper course for the appellate court would be to direct retrial after reconstruction of the records the same was impossible. If on the other hand, from the copies available with the prosecuting agency or the defence and/or their respective counsel, reconstruction is possible to be made, the said course indicated in sub-clause (i) and (ii). After perusal of the records and hearing the appellant's pleader and Public Prosecutor under section 377 or 378, the exercise of power as indicated above can be resorted to. As was observed in *Bani Singh v. State of U.P.* (1996) 4 SCC 720. 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 records and section 386 mandates that after record is received, the appellate court may dispose of the appeal after hearing as indicated.

A question would further arise as to what happens when reconstruction is not possible. Section 386 empowers the appellate court to order that the case be committed for trial and this power is not circumscribed to cases exclusively triable by the Court of Session. (See *State of U.P. v. Shankar* AIR 1962 SC1154).

It has been the consistent view taken by several High court 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 *Sevuaperumal*, Re AIR 1943 Mad 391(2). The view has been reiterated by several high Courts as well, even thereafter.

The High court did not keep the relevant aspects and

consideration in view and came to the abrupt conclusion that reconstruction was not possible merely because there was no response from the Session Judge. The order for reconstruction was 1-11-1993 and the judgement 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 16-9-1995. it is not clear as to why the high court did not require the session 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 ordering retrial interest of justice could be better served-adopt that 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 judgement shall operate and the matter shall stand closed. The appeals are accordingly disposed of."

25. In **Pati Ram & Another Vs. State of U.P.**, 2010 Cri.L.J. 2767, the Court observed and held as under :

"12. 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 judgement only, but in my considered opinion, the appeal can not be decided on merit in the absence of lower court record. Unless the evidence is available for perusal, in my opinion, the appeal can not be considered and decided on merit merely on the basis of the lower court judgement, as evidence is essentially required to consider the merit of the impugned judgement and merely on the basis of the said judgement, no order on merit can be passed in the appeal.

13. As is evident from the report of IVth Addl. Sessions Judge, Bareilly, no paper of the case is available. In spite of best efforts made by the courts below, the lower court record could not be reconstructed. Since no paper of the case is available, hence there is no possibility of re-trial at this stage after more than thirty years. Therefore, in view of the observations made by the Hon'ble Apex Court in the case of State of U. P. Vs. 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. can not be made and retrial also is not possible.

14. Consequently, the appeal is allowed. The impugned judgement and order are set aside and the appellants-accused Pati Ram and Ram Swarup are hereby acquitted of the offence under section 304 read with section 34 ipc for want of trial court record and there being no possibility of retrial."

26. In **Laukush and Another Vs. State of U.P., 2013 (7) RCR(Cri) 493**, the Court observed and held as under :

"2. These two criminal appeals emanate from the same judgment and order dated 30.7.1982 passed in Session Trial No. 496 of 1981-State Vs. Laukush and others, by IXth Additional Session Judge, Kanpur Nagar, whereby the appellants Basdeo, Chhedi Lal, Beni, Shiv Ram, Ramesh, Shyam Lal (appellants in Criminal Appeal No. 1877 of 1982) and two other appellants Laukush and Chhote Lal, who are appellants in Criminal Appeal No. 1878 of 1982, were convicted under Sections 302/149, 147, 307/149, 323/149 I.P.C. and were sentenced to life imprisonment, one year R.I., five years R.I. and six months R.I. respectively. Thus, the appellants have challenged the impugned judgment and order

dated 30.7.1982 whereby their conviction and sentence as stated above, was recorded.

3. Both the appeal Nos. 1878 of 1982 and 1877 of 1982 were admitted on 11.8.1982 and at the time of admission, the appellants were granted bail by this Court and since that date, the appellants continued to be on bail.

4. For disposal of these appeals, the lower court record was requisitioned which could not be available inspite of best possible efforts. As per report of the then District Judge, Kanpur Nagar dated 19.6.2003, the original record was received by the then Assistant Record Keeper Sri Mahesh Katiyar on 30.5.1983 who expired 7-8 years ago. The report to this effect was sent by the District Judge, Kanpur Nagar. The report of the District Judge, Kanpur Nagar dated 19.6.2003 was put up before the Division Bench of this Court on 23.8.2007 when this Court passed the following order:-

"In this view of the matter, the District Judge, Kanpur Nagar shall immediately take steps for trying to get the record of the case reconstructed and utilise the assistance of the counsel for the accused and State and submit compliance report to this Court within four weeks.

List on 24.9.2007."

5. A reminder was issued to the District Judge, Kanpur Nagar by this Court on 24.9.2007 directing the case to be listed on 29.10.2007. The District Judge, Kanpur Nagar vide his report dated 12.2.2008 apprised this Court that efforts for reconstruction of the record were entrusted to Sri R.P. Pandey, Additional District & Sessions Judge, Court No. 9, Kanpur Nagar. Sri Pandey could not complete the work of reconstruction of the record. The report of the District Judge, Kanpur Nagar dated 12.2.2008 was put up before this Court on 10.4.2012. When this Court was not satisfied with the reasons mentioned in the report for not reconstructing the lower court record, the District & Sessions Judge, Kanpur Nagar was directed to take effective steps in reconstruction of the lower court record without fail within two months and the case was directed to be listed on 10.7.2012. It was further directed that in case lower court record is not reconstructed, the District & Sessions Judge, Kanpur Nagar shall appear in person to explain the reasons as to why the lower court record has not been reconstructed.

6. It is in compliance of the order dated 10.4.2012, passed by

this Court, that a report dated 9.7.2012, sent by the Incharge District Judge, Kanpur Nagar to this Court has been placed before us. This report is taken on record which shall form part of this appeal.

7. According to the report dated 9.7.2012, sincere efforts were made at different levels including C.M.O., C.M.S., Superintendent Hallet Hospital, S.H.O. Sachendi, Kanpur and D.I.G., Kanpur Nagar but the reconstruction of the record of the said Sessions Trial could not be possible despite multi pronged approach. According to this report, Smt. Janak Dulari, informant of this case had died long back and it was also informed by the injured persons of this case that their counsel was quite aged and was not practising for last several years and no document was available with them. A letter was also written by enquiry officer/ Additional District & Sessions Judge, Court No. 9, Kanpur Nagar to D.G.C. (Crl.), Kanpur Nagar for furnishing original/ copy of the case diary of the said case. The D.G.C. (Crl.), Kanpur Nagar has also informed that no document is available in the office relating to the said Sessions Trial. The report dated 9.7.2012 of the Incharge District Judge is detailed one mentioning of all efforts made by the Inquiry Officer/ Additional District & Session Judge, Court No. 9, Kanpur Nagar.

8. Affidavits of six accused persons have been filed to the effect that the documents of the aforesaid case are not available with them and their counsel had died long back. According to this report, two accused persons Shiv Ram and Shyam Lal had died. This lengthy and detailed report of the Incharge District Judge, Kanpur Nagar dated 9.7.2012 makes it evident that reconstruction of the said record is not possible.

9. In the absence of original record, since reconstruction is not possible, remanding the appeal back for retrial will not serve any useful purpose at all.

10. From the impugned judgment, it transpires that the incident had occurred on 8.6.1979, more than 30 years ago and the appellants were released on bail in the year 1982 by this Court.

11. Since reconstruction of the record is not possible, we apply the decision of the Apex Court in State of U.P. Vs. Abhai Raj Singh (2004) 4 SCC 6, wherein the Hon'ble Apex Court has been pleased to observe as under :-

"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."

12. In view of the aforesaid, we allow both the appeals and the impugned judgment of conviction and sentence of the appellants are hereby set aside and they are set at liberty and are acquitted of the charges. The appellants are on bail, they need not surrender. Their bail bonds and surety bonds are discharged."

27. In **Sukhlal and others Vs. State of U.P., 2014 (5) All LJ 485**, the Division Bench of this Court held as under:-

"As discussed above, re-trial of the case is not possible on account of absence of the essential prosecution papers i.e. first information report, Chik FIR, site plan, inquest report, post mortem examination report, charge sheet, case diary, injury reports etc. Even affidavit filed by Sri N. Kolanchi, Superintendent of Police, Pilibhit dated 13.02.2014 unambiguously discloses information regarding the period for preservation of the prosecution papers and consequent thereto weeding out of the same after lapse of the stipulated period. In para 9 of the affidavit, it has been disclosed that the relevant prosecution papers have been weeded out due to which the deponent is handicapped to reconstruct the documents pertaining to the present case. In view of the above particular circumstances, the order of re-trial will not serve any purpose after gap of around 35 years when the incident took place on 12.05.1978.

In view of the relevant case law discussed hereinabove and particularly guidelines provided by Hon'ble Apex Court in the case of *Abhai Raj* (supra), it is our considered opinion that all the three options open in such case virtually impel us to conclude that but for loss of the missing prosecution papers, it would not be feasible to record any finding on merits of the appeal. As per the settled principles of criminal jurisprudence, every accused carries with him presumption of innocence even at appellate stage. Therefore, as per guidelines laid down in the case of *Abhai Raj* (supra), we conclude that the lower court judgment of conviction and sentence dated 29.01.1980 is liable to be set aside."

28. In **Bani Singh and others Vs. State of U.P., 1996 AIR (SC) 2439**, the Hon'ble Apex Court has elaborated meaning of Section 385 of Criminal Procedure Code 1973 in Para No. 8 of the Judgment which is being reproduced hereinbelow:-

"Section 385 (2) clearly states that if the Appellate Court does not dismiss the appeal summarily, it 'shall', after issuing notice as required by sub-section (1), send for the record of the case and hear the parties. The proviso, however, posits that if the appeal is restricted to the extent or legality of the sentence, the Court need not call for the record. On a plain reading of the said provision, it seems clear to us that once the Appellate Court, on an examination of the grounds of appeal and the impugned judgment, decides to admit the appeal for hearing, it must send for the record and then decide the appeal finally, unless the appeal is restricted to the extent and legality of the sentence. Obviously, the requirement to send for the record is provided for to enable the Appellate Court to peruse the record before finally deciding the appeal. It is not an idle formality but casts an obligation on the court to decide the appeal only after it has perused the record. This is not to say that it cannot be waived even where the parties consent to its waiver. This becomes clear from the opening words of Section 386 which say that 'after perusing such record' the Court may dispose of the appeal. However, this Section imposes a further requirement of hearing the appellant or his pleader, if he appears, and the public prosecutor, if he appears. This is an extension of the requirement of Section 385(1) which requires the Court to cause notice to issue as to the time and place of hearing of the appeal. Once such a notice is issued the accused or his pleader, if he appears, must be heard."

29. In **State of U.P. Vs. Malooka, 2013 (3) All Cri 3051**, Division Bench of this Court in para 15 held as under:-

"15. Now reverting back to the same bizarre situation involved in the present appeal, again we find that except the certified copy of the impugned judgement & order there is no other record available before us. FIR, post mortem report, site plan, inquest report, recovery memos, and all other documentary pieces of evidence are traceless and unavailable. None of the depositions of the witnesses produced in the court are on the record. As has already been narrated above, the efforts to get the record reconstructed

also could not bear any fruit. There is no way to reassess the evidence and find whether the findings recorded by the trial Judge are in consonance with the evidence produced or not. Reappraisal of the evidence can simply not be done in the absence of evidence itself. As we also had the occasion to observe in the case of *Om Prakash (Supra)*, in this matter too more than 32 years have elapsed after the incident. What shall be the prospect of retrial and what shall be the legitimacy of its outcome are serious questions to be pondered over. Even in *Abhai Raj Case* the Apex Court had entertained the possibility of retrial only in the event of the availability of 'vitally important basic documents' and had not recommended the retrial in their absence. If at all we decide to order the retrial after 32 years of the incident in question, it is not very difficult to understand that in the total absence of all previous statements of all the witnesses and also in absence of all other contemporary documentary evidence, there shall be scarcely any basis to adjudge the reliability of the depositions made in the court. Even otherwise what shall be the trustworthiness of the deposition of witnesses, if at all they are found alive and forced to recapitulate the events that took place more than three decades ago, is a self defeating question."

30. In **Brahmanand Shukla Vs. State of U.P., 2010 (69) ACC 749**, the Division Bench of this Court in para 15 held as under:-

"In the present case, as we have mentioned in the earlier part of the judgment only a copy of the trial Court's Judgment is available and no other documents like FIR, post-mortem report, copies of the documents which had been filed by the prosecution and were exhibited during trial, the statement of the witnesses recorded under Section 161, Cr.P.C. are available despite various attempts to reconstruct the record. The incident is of the year 1979 i.e., the incident took place about 30 years back. In these circumstances, no fruitful purpose would be served by ordering retrial as the same cannot be conducted at all in absence of these documents."

31. Law framed by Hon'ble the Apex Court as well as the High Courts on the law point, i.e., where Lower Court Record is not traceable; reconstruction of same is not possible and even retrial is not possible is to the effect that in such case, the judgment of the Trial Court shall be quashed and appellant shall be acquitted for all charges.

32. Reasons for reaching to the aforesaid conclusion is that in the absence of original record, it is not possible to arrive at a decision that impugned judgment passed and sentence awarded against appellant is legally justified and in conformity with law. Where the reconstruction of record is not possible 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 hearing of the appeal. Further, appellant has a right to satisfy the Appellate Court that the material or evidence available on record did not justify his/her conviction and this right cannot be denied to the appellant.

33. In view of the above mentioned discussions and observations and in light of settled proposition of law propounded by Hon'ble Supreme Court of India as well as this High Courts, we are left with no other option but to quash the impugned judgement passed by Trial Court and to acquit the appellant.

34. Resultantly, the present Criminal Appeal is allowed. The impugned judgment and order dated 6.3.1980 passed by Second Additional Sessions Judge, Non-Metropolitan Area, Kanpur in Sessions Trial No. 189 of 1978 is hereby quashed.

35. Before parting with the order, we are cautious that orders passed by Appellate Court acquitting the Appellants for the reason of destruction or unavailability of records are likely to be misused. The same stand has been taken by Hon'ble Supreme Court in case of **Akalesh Kumar @ Mithun Sharad Mishra Vs. State of Maharashtra 2010 SCC 390** wherein the Hon'ble Supreme Court in paragraph no. 10 has held :

"Though in this case, we may have to adopt the course of acquitting the appellant, we are conscious of the fact that such orders are likely to be misused. It is possible for a person who is involved in a gross case of murder and who has least chance of success, not to file appeal for a long period and then after

destruction of record, come to this court and pray that he may be acquitted. As per Chapter XV of the Bombay High Court Appellate Side Rules, 1960, papers which are required to be preserved permanently shall be classified "A" and kept in File "A". Papers, which are required to be preserved for 30 years shall be classified "B" and kept in File "B". Papers which are required to be preserved for 5 years shall be classified "C" and kept in File "C" and papers which are required to be preserved for one year are classified as "D" and kept in File "D".

36. It is relevant to mention here that there are certain Rules enacted for the preservation and upkeep of the record, which are duly inserted in the General Rule Criminal 1977. They are applicable to all the criminal courts subordinate to High Court of Judicature at Allahabad and the same is expected to have been circulated or communicated to all the District Courts existing within the State of Uttar Pradesh. The cases have been classified according to the nature of offences not only as per the Indian Penal Code but also other various provisions amendable to Criminal Court whether it is being tried either by the Court of Sessions or Court of Magistrate. According to Rule 118, record of the cases, which are triable by courts of sessions, shall be retained and be preserved in some of the situations upto 50 years irrespective of nature of conviction or quantum of punishment. The records are to be weeded out in accordance with the norms and procedures framed for weeding out the same. While weeding out the file, the records are to be weeded out under certain orders, preserving the stamp, court fees, original documents, papers forming part of the record, certified copy of each documents and papers with regard to list of notes of fact. From the Rules framed under the General Rule (Criminal), it is evident that any record which is purported to be weeded out, responsibility lies upon the District Judge to enquire the pendency of the proceedings before this Court before directing the office concerned to weed out the record.

37. Therefore, we are inclined to frame certain guidelines for preserving and upkeeping the records of Trial Court which are as follows:-

- i. In terms of the Rule 118, record of the cases, which are triable by courts of sessions, shall be retained and preserved for 50 years irrespective of nature of conviction or quantum of punishment.
- ii. The records are to be weeded out in accordance with the norms and procedures framed for weeding out the same.
- iii. While weeding out the file, the records are to be weeded out under certain orders preserving the stamp, court fees, original documents, papers forming part of the record, certified copy of each documents and papers with regard to list of notes of fact.
- iv. In terms of the Rules framed under the General Rule (Criminal), if any record, which is purported to be weeded out, the District Judge shall enquire the pendency of the proceedings before this Court before directing the office concerned to weed out the record.
- v. While transmitting the original Trial Court Record to Appellate Court as called upon by Appellate Court the Trial Court shall ensure to retain duplicate copy of entire records in two sets and shall ensure the retention/upkeep of duplicate copy.
- vi. Trial Court shall maintain a register in which the details of Trial Court Records transmitted to the Appellate Court shall be entered.
- vii. District Judge shall, on regular basis, supervise the up keep and retention of duplicate copies of Lower Court Records transmitted to Appellate Court.
- viii. The investigating agency shall procure/retain the duplicate copy of the police report filed before the Court U/s 173 (2) Cr.PC for a period of 50 years and shall transmit the same to the Court concerned whenever called for.
- ix. The prosecuting agency shall maintain a data of the duplicate police report retained after filing the original before Court.
- x. As far as possible now the records shall be digitized before sending notice so that it may be retrieved, if needed.

38. The Registrar General of this Court is directed to circulate a copy of this order to all District Judges subordinate to High Court of Allahabad and to Chief Secretary to the State of U.P for its necessary compliance.

Order Date :-15.3.2022

Ram Murti