
(2019) 03 J&K CK 0088

In the Jammu And Kashmir High Court

Case No : Miscellaneous Criminal Cases (CRMC) No. 9900003 Of 2012 IA No. 99001 Of 2012

Basharat Hussain

APPELLANT

Vs

State Of Jammu & Kashmir

RESPONDENT

Date of Decision : 25-03-2019

Acts Referred:

Jammu And Kashmir State Ranbir Penal Code, 1989 — Section 120B, 121, 122, 212, 216
Code Of Criminal Procedure, 1973 — Section 196, 196A
Code Of Criminal Procedure, 1898 — Section 517, 561A
Jammu And Kashmir High Court Rules, 1999 — Rule 138(3)

Citation : (2019) 03 J&K CK 0088

Hon'ble Judges : Rashid Ali Dar, J;Sanjay Kumar Gupta, J

Bench : Division Bench

Advocate : Anil Sethi, A.M.Malik

Final Decision : Disposed Off

Judgement

1. Prayer is made in terms of instant petition (filed under Section 561-A CrPC) for quashing of order dated 25.07.2009 passed by the learned Additional Sessions Judge, Rajouri in an application seeking release of an amount of Rs.3.08 lac (Rupees three lacs eighty hundred only) and a Nokia Mobile by virtue of which the said application has been dismissed.

2. It is being contended in the petition that the petitioner has been arraigned as accused in a case which was registered by the Police Station, Budhal and the final report accordingly submitted before the competent court of law. On consideration of the material produced by the Investigating Agency, the petitioner was discharged from the case vide order dated 28.10.2004 passed by the learned Sessions Judge, Rajouri.

3. The case of the investigating agency has been that on 01.12.2003 the Army authorities had approached the Police Station, Budhal with an application wherein

it was stated that Security Forces along with Police Authorities during checking operation in Mobile vehicle check-post intercepted two persons on a motorcycle on 28.11.2003 in Dandote village, Budhal. On search of these individuals (petitioner herein and one Shoket Ali), Nokia Mobile set along with mobile charger and Indian currency notes worth Rs.3,00,800/- and Hero Honda motorcycle were recovered.

4. On investigation police filed challan against accused Basharat Hussain only. He was alleged to have waged war against Government of India and as also collecting material for preparation to wage war against Government of India. Accused was further charged of harbouring offender and as well as harbouring offender who had escaped from the lawful custody. The challan had been presented before the learned Judicial Magistrate 1st Class, Budhal wherefrom committed to the court of learned Sessions Judge, Rajouri with the allegations of commission of offence under Sections 212, 216, 120-B, 121 and 122 RPC.

5. The learned Sessions Judge, Rajouri after examining the material on record discharged the accused vide order dated 28.10.2004 with the observations

"In so far as offences under Sections 121, 122 RPC are concerned there is no material on record to make out a prima facie case against the accused that he has waged war or is attempting to wage war against Government of India and as also collecting material to wage war against the Govt. of India. The items recovered from the accused can in no manner be termed as collection of material with which he is to wage war against Govt. of India. Even so offence under Section 121, 122 RPC is punishable under Chapter 6 of the Ranbir Penal code and as per Section 196 CrPC no Court can take cognizance of any offence punishable under Chapter 6 of Ranbir Penal Code unless upon complaint made by the order of, or under authority from government or District magistrate or such other officer as may be empowered by the Government in this behalf. As per Section 196-A, the same principle equally applies to offence under Section 120-B RPC alleged against the accused.

In the circumstances of the case and in view of the afore mentioned reasons, I am of the opinion that no prima facie case is made out against the accused Basharat Hussain under Sections 212, 216, 120-B, 121 and 122 RPC. Hence accused is discharged from these offences. He shall be released from judicial custody forthwith provided he is not involved in any other offence. File to go to records under rules."

6. The said order of discharge is stated to have been challenged before the High Court in a criminal revision which according to the petitioner was dismissed on 08.09.2005.

7. An application came to be presented before the learned Pr. Sessions Judge, Rajouri on 28.06.2005 wherein the petitioner, namely, Basharat Hussain prayed for release of the seized property in his favour later transferred to the Additional Sessions Judge, Rajouri. Statement of the petitioner, co-accused, namely,

Shoukat Ali and one witness namely Fazal Hussain were recorded by the learned Additional Sessions Judge, Rajouri. The learned Sessions Judge in pursuance of the order impugned passed on 25.07.2009 dismissed the application as according to him no ground has been made out for release of the amount and other items of the petitioner herein. It was also directed that the seized property shall stand forfeited in favour of the State of J&K. Pertinent to refer some of the observations of the learned Additional Sessions Judge, Rajouri made in order dated 25.07.2009 as under:

"Co-accused Shoukat Ali came to be summoned by this court, who appeared and put forward no claim to the seized property rather stated on oath that the amount and the Mobile has been recovered from the possession of applicant Basharat Hussain that he has got nothing to do with the said amount. The applicant in order to make out a case of seized property has examined himself on oath as well as examined one Fazal Hussain as witness.

Applicant witness Fazal Hussain described that money belong to the applicant which he was carrying for his own business, portion whereof amounting to Rs.One lac he gave as loan to the applicant.

On cross-examination, the witness did not admit that he is having Bank Account No.3784 at J&K Bank Jawahar Nagar where around Rs.20,000/30,000/- stands deposited as saving amount; that witness also received Rs.1,40,000/- as compensation. When asked by the prosecution as to whether he did loan Rs.One lac to the applicant, the witness denied having paid any such amount.

The applicant himself in support of the application stated on oath that he was dealing in the business of steel work and used to run welding shop, on the date of occurrence he was carrying the seized amount towards Jammu, so as to purchase the steel and another allied material of business activity but on way he was intercepted by the police.

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Though the recovery was effected from the possession of the applicant on 28.11.2003 but pending investigation, filing of challan and the pendency of the challan before the court of Principal Sessions, Rajouri neither the applicant filed any application for release of the amount nor claimed that amount belongs to him and police has wrongfully seized the amount from his possession. It is only after he was discharged by the court vide order dated 28.10.2004 that applicant filed the present petition after one year on 15.07.2005. No plea is put forwarded as to what prevented the applicant from claiming this amount during intervening period of 28.11.2003 to 15.07.2005, only ground on which the application is moved, is that since the applicant has been discharged, so he is entitled to the seized amount. Though after being discharged applicant was required to bonafidely explain as to what prevented him from getting the amount released

from the court, if he was the owner of that property. He claims that on that day he was on way from Budhal to Jammu carrying the seized amount for the purpose of effecting purchase of steel items, whereas as per challan he was on way from Budhal towards Mahore and while on way he was intercepted by the Army at village Bandote of Budhal. Though he did plea that he was running, a shop at Budhal but failed to produce any receipt that applicant was certainly having a rental shop at Budhal where he used to carry steel repairing, welding shop against monthly rent of Rs.1000/-. Under Section 517 CrPC the applicant was required to show that he was the bonafide owner of the seized amount and that claim to be forwarded by him is not illusory but based on cogent/relevant material. In my view, applicant has failed to produce any material substantiating that amount of Rs.3,00,800/- that came to be recovered from his possession was bonafidely owned and possessed by him. Merely, that such amount has been recovered from him he cannot be held to be entitled to such an amount because applicant has not led documentary or material evidence that such amount belongs to him. As regards, the seized Nokia Mobile telephone to that extent also no voucher or bill has been produced evidencing that seized mobile set actually belong to the applicant.

In view of the discussion recorded above, I am of the considered view that no good ground is disclosed for release of the amount and other items. This application is accordingly dismissed. The seized amount shall stand forfeited in favour of the State of J&K. Ld. PP shall ensure that amount is deposited in the District Treasury as per the prevailing rule. Application is accordingly disposed of and be consigned to records. Main file be sent back to records."

8. This order being assailed in terms of the instant petition and seeks quashment of the impugned order dated 25.07.2009 passed by the trial court, is accordingly sought on the following grounds:

- i) That the order impugned is contrary to law and facts.
- ii) That the evidence available on record has not been considered. Admitted case of the prosecution was that the petitioner herein was discharged of the offences mentioned in the FIR bearing FIR No.74/2003. The seized property of the petitioner had to be released in favour of the petitioner. The petitioner has given sufficient account of transaction from where the money became available to him. It is not the case of the prosecution that the currency seized was fake.
- iii) That the order impugned does not make a specific mention of the discussion of the evidence.
- iv) That the evidence lead by the petitioner clinchingly established that he is owner of the seized goods.
- v) That the seized property in any case could not become property of the "State nor is it a property which can be ordered to be destroyed after the period of limitation. The seized property is currency notes and mobile phone which

continued to have value and are not hazardous for public.

vi) That the petitioner has right to get his property back after the prosecution failed before the court.

9. Learned counsel for the petitioner has contended that there are no basis for forfeiting the property as has been done by the learned trial court, in view of the fact that the investigating agency has failed to prove same being proceed of any crime or the petitioner herein having no entitlement to such property under law. The allegations leveled against the petitioner for the commission of offences under Sections 212, 216, 120-B, 121, 122 RPC proved abortive pursuant to discharge of the petitioner herein. No orders were passed with regard to disposal of the property at the time the petitioner was discharged on 28.10.2004 by the learned Principal Sessions Judge, Rajouri, though the court had a duty at that time to pass final orders with regard to disposal of the property. The final order of discharge of the petitioner was passed on order dated 28.10.2004 and same was assailed by the State before the High court which, however, was without any result and so the order of discharge according to him having attained finality, the property could not be confiscated on a mere surmise. An application has been filed for release of the property before the Principal Sessions Judge, Rajouri on 28.06.2005 and later it was transferred to the learned Additional Sessions Judge, Rajouri who passed the impugned order. Even if there was some delay in filing the petition that itself was not suffice to hold a property liable for confiscation. These are some additional points canvassed by learned counsel for the petitioner.

10. On the other hand, Mr. A.M.Malik, learned Dy AG submitted that the order has been within the parameters of law and need not to be disturbed.

11. For appreciating the contentions raised in the instant petition it would be proper to have reference of Section 517 of the Code of Criminal Procedure. It provides that when an inquiry or a trial in any Criminal Court is concluded, the Court may make such order as it thinks fit for the disposal by destruction, confiscation, or delivery to any person claiming to be entitled to possession thereof or otherwise of any property or document produced before it or its custody or regarding which any offence appears to have been committed, or which has been used for the commission of any offence.

11. The Hon'ble Apex Court in N.Madhavan vs State of Kerala, reported in 1979 0 AIR (SC) 1829, while commenting upon the scope of Section 517 CrPC enunciated the words "may make such order as it thinks fit" in the section, vest the Court with a discretion to dispose of the property in any of the three modes specified in the Section. But the exercise of such discretion is inherently a judicial function. Notice of the fact was taken by their Lordships that since the property which was sought to be released, was proved to be not involved in the commission of offence, so custody of property had to be restored to the accused. It has also been observed by their Lordships that a well-recognized principle regarding choice of the mode or manner of disposal of the property is that when

after an inquiry or trial the accused is discharged or acquitted, the court should normally restore the property (which is produced before the court or which is in custody of the court) to person from whom it was recovered. Departure from this salutary rule of practice is not to be lightly made, when there is no dispute or doubt, as in the instant case, that the property in question was seized from the custody of such accused and belonged to him.

12. The impropriety of the order impugned is manifest on a summary examination. There was no provision enabling the learned Additional Sessions Judge to order for the confiscation of the property when admittedly the offences which were alleged to have been committed by the accused petitioner herein could not be proved. It was also not the case of the prosecution that the property recovered was stolen one the entitlement of the petitioner herein was not disputed by any rival claimant. No obligation was cost on the petitioner herein under law to show the source from which he had acquired the mobile phone or cash referred supra. The findings of the learned Sessions Judge so is contrary to law. The learned court may have acted in a different way in case the prosecution had been able to prove the petitioner guilty.

13. In light of what is stated above, I am of the opinion that a case has been made out for exercising inherent powers under Section 561-A CrPC as patently the order impugned has occasioned failure of justice. Accordingly, the order dated 25.07.2009 is quashed and it is directed that the property should be restored to the possession of the petitioner herein.

14. Disposed of.

Pronounced this judgment today in terms of Rule 138(3) of the J&K High Court Rules, 1999.