
(2019) 05 J&K CK 0054

In the Jammu And Kashmir High Court

Case No : Criminal Revisions (CRR) No. 1 Of 2018, IA No. 01 Of 2018

State Of Jammu & Kashmir

APPELLANT

Vs

Abrar Hussain Shah & Anr

RESPONDENT

Date of Decision : 24-05-2019

Acts Referred:

Jammu And Kashmir State Ranbir Penal Code, 1989 — Section 420, 467, 468
Code Of Criminal Procedure, 1973 — Section 173

Citation : (2019) 05 J&K CK 0054

Hon'ble Judges : Sanjay Kumar Gupta, J

Bench : Single Bench

Advocate : Aseem Sawhney, S.H.Rather

Final Decision : Dismissed

Judgement

1. State has filed the present petition for quashing the order dated 17.01.2018, by virtue of which Principal Sessions Judge, Poonch has directed petitioner to deposit an amount of Rs.1,29,000/- within a period of one week.

2. In the petition, it has been stated that the petitioner is a high ranking Government official and holding the post of Sr. Superintendent of Police at District Poonch, as such is entitled to all the fundamental, legal and statutory rights as envisaged under law. It is further stated that an FIR No.04 of 2012 was registered under Sections 467, 468, 420 RPC by the Police Station, Poonch and subsequently, the police filed a final report under Section 173 of Cr.P.C. before the competent court wherein it was stated that out of the account of the complainant an amount of Rs.1,31,700/- was drawn by ATM card. It was found that on 13.09.2017, the accused namely Abrar Hussain Shah by deceitful means got the signature of the complainant and received himself the ATM card of the complainant and thereafter he by misusing the ATM card withdrew the money from the account of the complainant on different dates. On account of the disclosure statement furnished by the accused Rs.1,29,000/- was recovered from his house and was seized.

3. Further stated that on 08.05.2015, the accused died and accordingly the prosecution case against the accused was awaited and file was consigned to records. The seized amount was also stolen from the Malkhana of learned Principal Sessions Judge, Poonch and in this regard an FIR bearing No. 31/2015 was registered at Police Station, Poonch.

4. It is stated that an application for release of Rs.1,29,000/- was filed by the complainant before the learned Principal Sessions Judge, Poonch in which the objections were filed through Public Prosecutor, Poonch in which the ground was taken that as the seized amount has been stolen from Malkhana, therefore, the petitioner is not at all responsible for the release of amount. Further stated that the Malkhana is in the custody of learned Principal Sessions Judge, Poonch and the petitioner's department has no role or control over the articles in the Malkhana.

5. It is stated that the learned Principal Sessions Judge, Poonch vide its order dated 17.01.2018 has directed the prosecution to deposit an amount of Rs.1,29,000/- with the Nazir of this Court within a period of one week.

6. I have considered the submissions made by learned counsel for the State as well as learned counsel for the respondent. Counsel for State has cited AIR 1965 SC 1039 case titled Kasturi Lal Ralia Kam Jain Vs. State of Uttar Pradesh, wherein it has been held that State cannot be made liable for loss of property deposited in police Malkhana on account of negligence on behalf of police incharge malkhana. Whereas counsel for respondent has supported the order and has stated that the police being custodian of property of respondent, is liable to pay the money.

7. I have given my thoughtful consideration to whole aspects of the matter and law on the subject.

8. The relevant para of the order impugned is as under:-

"I have perused the application for release of amount. It has already been proved that money which has been seized in the case belongs to complainant/petitioner and he is entitled to the same. The amount shown to have been stolen from the Malkhana by the

PP but right of the complainant/petitioner has not been stolen. As such, prosecution is hereby directed to deposit Rs.1,29,000/- with the Nazir of this Court within a week's time, otherwise court will have to proceed further in attaching the property of the police department, who is responsible for the safe custody of the seized articles."

9. In Basava Kom Dyamogouda Patil v. State of Mysore & another, (1977) 4 SCC 358, the Supreme Court dealt with a case in which the recovered ornaments kept in a trunk in the police station were found missing and the owner of the property sought indemnification. The question arose with regard to payment of those articles. In that context, the Court observed as under: -

"4. The object and scheme of the various provisions of the Code appear to be that where the property which has been the subject-matter of an offence is seized by the police it ought not to be retained in the custody of the Court or of the police for any time longer than what is absolutely necessary. As the seizure of the property by the police amounts to a clear entrustment of the property to a Government servant, the idea is that the property should be restored to the original owner after the necessity to retain it ceases. It is manifest that there may be two stages when the property may be returned to the owner. In the first place it may be returned during any inquiry or trial. This may particularly be necessary where the property concerned is subject to speedy or natural decay. There may be other compelling reasons also which may justify the disposal of the property to the owner or otherwise in the interest of justice. The High Court and the Sessions Judge proceeded on the footing that one of the essential requirements of the Code is that the articles concerned must be produced before the Court or should be in its custody. The object of the Code seems to be that any property which is in the control of the Court either directly or indirectly should be disposed of by the Court and a just and proper order should be passed by the Court regarding its disposal. In a criminal case, the police always acts under the direct control of the Court and has to take orders from it at every stage of an inquiry or trial. In this broad sense, therefore, the Court exercises an overall control on the actions of the police officers in every case where it has taken cognizance.

5. Coming now to the decision of the High Court that the articles in question were never actually produced by the police before the Court, we find that this is factually incorrect. It appears from the finding of the High Court that immediately after the articles were recovered by the police and the police submitted a charge-sheet to the Chief Judicial Magistrate, it produced the articles before the Court, but the Court directed the Sub-Inspector to retain the property until the same is verified and valued by a goldsmith for which the Court moved the higher authorities for sanction of necessary funds. The Sub-Inspector was also directed to bring the goldsmith. In these circumstances, the Sub-Inspector took back the articles and kept them in the Guard Room of the police station. It would thus appear that the articles were actually produced before the Court but were retained by the Sub-Inspector under the directions of the Court. A production before the Court does not mean physical custody or possession by the Court but includes even control exercised by the Court by passing an order regarding the custody of the articles. In the instant case when once the Magistrate, after having been informed that the articles were produced before the Court, directed the Sub-Inspector to keep them with him in safe custody, to get them verified and valued by a goldsmith, the articles were undoubtedly produced before the Court and became custodia legis.

6. It is common ground that these articles belonged to the complainant/appellant and had been stolen from her house. It is, therefore, clear that the articles were the subject-matter of an offence. This fact, therefore, is sufficient to clothe the

Magistrate with the power to pass an order for return of the property. Where the property is stolen, lost or destroyed and there is no prima facie defence made out that the State or its officers had taken due care and caution to protect the property, the Magistrate may, in an appropriate case, where the ends of justice so require, order payment of the value of the property. We do not agree with the view of the High Court that once the articles are not available with the Court, the Court has no power to do anything in the matter and is utterly helpless.

7. In the instant case it is clear that the value of the property stolen is easily ascertainable on the materials on the record and does not admit of any difficulty. It is true that in the complaint Ext. 9 the total value given by the appellant comes to Rs. 13,320/-. But this cannot be a correct criterion because the Court has to calculate the value of only that property which has been recovered from the accused and seized by the police. It may be that some property may not have been recovered at all. The correct principle, therefore, to apply in this case would be to find out if there is any material to show the value of the articles actually seized by the police from the possession of the accused. It would appear from Ext. 1 the charge-sheet that the total value of the articles which were recovered from the five accused comes to Rupees 10,049/-, which may be rounded off to Rs. 10,000/-. Exhibit 34 which is the report lodged by the police regarding the property having been stolen also shows the value of the property kept in the trunk to be Rs. 10,050/-. This will appear from Ext. 34 which gives a detailed and exhaustive list of the articles kept in the trunk and the value thereof. In these circumstances, therefore, it can be safely held that the value of the property recovered from the possession of the five accused and stolen from the house of the complainant was Rs. 10,000/-. It is also clear that in the instant case, no plea had been taken by the State that the property was lost in spite of due care and caution having been taken by it or due to circumstances beyond its control. On the other hand, while all the articles were stolen from the trunk kept in the Guard Room of the police station, except the formality of a report having been lodged, no action seems to have been taken by the State against the Sub-Inspector or the officers who were responsible for the loss of the property, even to this date. In these circumstances, therefore, the State cannot be allowed to successfully resist the application filed by the appellant. The appellate is entitled to receive the cash equivalent of the property lost which has been held by us to be Rs. 10,000/-, and this amount should be paid to the complainant by the State.

8. The appeal is accordingly allowed, the orders of the High Court as also of the two Courts below are hereby set aside and the State is directed to pay a sum of Rs. 10,000/- to the complainant/appellant. In the circumstances of the case, the appellant shall be entitled to costs throughout from the respondent."

10. In view of above law, it is apparent that in criminal proceedings during investigation or otherwise if any property is seized; kept in police Malkhana and is stolen, then court in appropriate case can order payment of value of properties where State or its officers fail to make out defence that the State or its officers

had taken due care and caution to protect the property; Seizure of the property by the police amounts to a clear entrustment of the property to a government servant, the idea is that the property should be restored to the original owner after the necessity to retain it ceases.

11. In present case, as is evident from impugned order that Rs.1,29,000/-of complainant was illegally withdrawn by accused peron, it was seized and kept in Malkhana under the custody of police from where it was stolen and FIR No.31/2015 was registered. Even after the application for release of amount was filed, PP sought time for arrangement of funds; but instead has filed present petition. The petitioner has, thus, failed to prove any prima facie defence that the State or its officers had taken due care and caution to protect the property, which was lying in the Malkhana. The law cited by learned counsel for the petitioner is not applicable, because it is pertaining to the civil liability.

12. In view of above law, I am of the view that, there is no infirmity of law in the impugned order. It is upheld accordingly. This petition is dismissed. Stay, if any, is vacated.