

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

Reserved on: 27.02.2024
Pronounced on: 07.03.2024

CRA No.54/2009

Mohd. Jameel S/o Mohd. Hussain R/o Metka
Tehsil Kalakote, District Rajouri, Aged 33 years
Presently lodged at Central Jail, Kot-Bhalwal, Jammu

...Appellant(s)

Through:- Mr. K.M.Bhatti, Advocate

V/s

1. The State of Jammu and Kashmir,
Through Public Prosecutor, Sessions Court, Rajouri.
2. The SHO Police Station,
Kalakote, District Rajouri.

...Respondent(s)

Through:- Mr. Bhanu Jasrotia, GA

Coram: HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE

JUDGMENT

1. This appeal by a convict, namely, Mohd. Jameel is directed against a judgment dated 2nd June, 2009 passed by the Court of Principal Sessions Judge, Rajouri [“the trial Court”] in file No.13/Spl.challan titled State v. Mohd. Jameel, whereby and whereunder the appellant has been convicted for commission of offences under Sections 3/25 and 7/25 Arms Act and sentenced to rigorous imprisonment of three years and fine of Rs.2,000/- for commission

of an offence under Section 3/25 Arms Act and rigorous imprisonment of five years and fine of Rs.2000/- for commission of an offence under Section 7/25 Arms Act. The judgment impugned further provides that in case of default in payment of fine, the appellant shall further undergo imprisonment for two months more in each case. Both the sentences, however, have been made to run concurrently.

2. Before advertng to the grounds of challenge urged by Mr. K.M.Bhatti, learned counsel appearing for the appellant, a brief resume of the prosecution case put up before the trial Court needs to be noticed.
3. On 21st May, 1997 at about 0400 hours, a search and cordon operation in village Sadah and its adjoining areas was conducted by the Special Operation Party of Border Security Force, Bn 56, on the basis of intelligence inputs provided by the JAD(G) Rajouri. During the course of said operation, the appellant was found moving out of an abandoned Dhok (seasonal hut) located near Sadah forest in suspicious condition. He was apprehended by the operation party of the BSF and questioned. On questioning the appellant, and at his instance, a huge cache of arms and ammunition was recovered from his possession. On further questioning, the appellant also confessed that he belonged to HM outfit and had also undergone fifteen days training of handling of weapons in Pakistan. On such disclosure being made by the

appellant and consequent upon the recovery of arms and ammunition at his instance, the appellant was handed over to the local police for further necessary action.

4. On the basis of a written report made by the Commandant, 56 BN BSF on 24.05.1997, Station House Officer, Police Station, Kalakote registered FIR No.26/1997 dated 24.05.1997 for commission of offences under Section 2/3 of Egress and Internal Movement (Control) Ordinance, 2005, 120, 122, 124-B, 153-A RPC and 3/5 of the Enemy Agents Ordinance, 2005. The police concluded the investigation after collecting the relevant evidence and established the commission of offences under Section 7/25 Arms and 153-A RPC. The offences under Section 2/3 EIMCO, 120-B, 122, 123 RPC and 3 EAO were dropped and, accordingly, Final Report was submitted against the appellant before the trial Court.
5. The trial Court after hearing the prosecution and the appellant found the charge under Section 3/25, 7/25 Arms Act, 2/3 & 3-A E&IMCO prima facie made out against the appellant and accordingly, charges were framed against the appellant. The appellant pleaded not guilty to the charge and opted to be tried.
6. With a view to bring home the charge against the appellant, the prosecution examined PW- Ajay Lotra, Assistant Commandant 56 BN BSF, Sh. S. A. Qadir, Commandant, 56 BN BSF, Constable

Om Parkash, L/Nk Manna Ram, Nanak Chand, Sgct. Akbar Ali and Hav. Masila Mani.

7. On closure of the prosecution evidence, the appellant was examined under Section 342 Cr.P.C. Since the trial Court did not find it a case of acquittal at this stage, therefore, the appellant was given an option to lead defence evidence, if any. The appellant, though, availed several opportunities to lead his evidence but did not produce any evidence in his defence. The trial Court closed the defence evidence on 01.08.2003 and set down the case for final arguments. The matter was ultimately heard and vide judgment impugned the appellant was convicted for commission of offences under Sections 3/25 & 7/25 Arms Act and the other charges were held not proved against the appellant. The appellant was, thus, convicted for the aforesaid offences and sentenced to rigorous imprisonment of three years with fine of Rs.2000/-and two years with fine of Rs.2000/- respectively. It is this judgment of the trial Court which is called in question by the appellant in this appeal.
8. The impugned judgment is challenged inter alia on the following grounds:
 - a) That the recovery of arms and ammunition allegedly at the instance of the appellant was made without associating independent persons and, therefore, vitiated in law.

- b) That the recovery of weapons made allegedly from the possession of the appellant is surrounded by suspicious circumstances, in that, despite the fact that recovery was made from a thickly populated area, yet no local person was involved in the process.
- c) That the appellant was arrested on 24.05.1997 whereas fard-e-jabti was prepared by the police on 28.05.1997, which creates serious doubt about the manner in which the investigation has been conducted and the alleged recovery of weapons made from the appellant.
- d) That the recovery of weapons allegedly made at the instance of the appellant and from the possession of the appellant is not in terms of Section 27 of the Evidence Act and, therefore, vitiated in law.
9. *Per contra*, learned counsel appearing for the respondents submits that the recovery of arms and ammunition was made from an isolated Dhok (seasonal hut) where there was no population around and, therefore, it was not possible for the Operation Party of BSF to involve locals in the process of recovery. He argues that the Special Operation Party of the BSF, which stopped the appellant leaving the abandoned seasonal hut in suspicious circumstances and ultimately recovered arms and ammunition from his possession, cannot be terms as “police officers” within the meaning of the term contained

in Section 27 of the Evidence Act and, therefore, the recovery of arms and ammunition made from the possession of the appellant is not required to be tested on the touchstones of Section 27 of the Evidence Act.

10. Having heard learned counsel for the parties and perused the entire material on record, the first question that begs determination in this case is as under:-

“whether the Special Operation Party of BSF, which conducted search and cordoned operation on 21.05.1997 leading to the recovery of huge cache of arms and ammunition from the possession of the appellant, can be termed as “police officer” within the meaning of the term contained in Section 27 of the Evidence Act.”

11. Sections 24, 25, 26 and 27 of the Indian Evidence Act read thus:-

“24. Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding.—A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him

25. Confession to police-officer not to be proved.—No confession made to a police-officer, shall be proved as against a person accused of any offence.

26. Confession by accused while in custody of police not to be proved against him.—No confession made by any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

[Explanation.—In this section “Magistrate” does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882 (10 of 1882).]

27. How much of information received from accused may be proved.—Provided that, when any fact is discovered in consequence of information received from a person accused of any offence, in the custody of a police-officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.”

12. As is evident from Section 25, the confession made by a person accused of any offence before a police officer is not admissible in evidence. Similarly, under Section 26, confession made by any person whilst he is in custody of a police officer, unless it is made in the immediate presence of a Magistrate, is also not admissible in evidence. Sections 25 and 26 of the Evidence Act, although seek to achieve the same purpose but they operate in somewhat two different fields. Section 25 raises an embargo as regard the admissibility of the confession made by a person accused of an offence before a police officer and such person at the time of

confession need not be in police custody. However, under Section 26, the statement made by any person in police custody is rendered inadmissible in evidence. The principle underlying Sections 25 and 26 is to make it a substantive law that confession whenever and wherever made to the police, or while in custody of the police to any person whosoever unless made in immediate presence of a Magistrate, shall be presumed to have been obtained under the circumstances postulated under Section 24 of the Evidence Act.

13. The term 'police officer' used in Sections 25 and 26 is not to be construed in a narrow and pedantic way. It needs to be construed in a wide and popular sense. However, the expression 'police officer' cannot be unduly stretched to include within its scope persons on whom certain police powers are conferred. The expression 'police officer' used in Sections 25, 26 and 27 of the Evidence Act refers to an officer of police, who is conferred powers of investigation of the crime and presenting the Final Report before the competent Court of criminal jurisdiction. The expression 'police officer' is neither defined in the Indian Evidence Act, 1872 nor in the Code of Criminal Procedure, 1973. Section 2(o) of the Code of Criminal Procedure, however, defines an officer incharge of Police Station in the following manner:-

“2(o) Officer in charge of a police station", includes when the officer in charge of the police station is absent from the station-house or unable from illness or other cause to perform his duties, the police officer present at the station-house who is next in rank

to such officer and is above the rank of constable or, when the State Government so directs, any other police officer so present.”

It is, thus, evident that officer incharge of a Police Station includes any other police person present at the Police Station performing the duties in the absence of incharge of the Police Station. In terms of Section 154 Cr.P.C., it is an officer incharge of Police Station, who is enjoined a duty to register an FIR on receiving information relating to commission of cognizable offence. Similarly, Section 156 vests officer incharge of police Station power to investigate cognizable offence without order of a Magistrate provided it is committed within the jurisdiction of the Police Station.

14. Sections 161 and 162 Cr.P.C. also refer to the police officer, who is vested with the power of investigating the crime under Chapter XII of the Code of Criminal Procedure. Section 163 Cr.P.C. makes reference to Section 24 of the Indian Evidence Act, 1872 and provides that no police officer or other person in authority shall offer or make, or cause to be offered or made, any such inducement, threat or promise as is mentioned in section 24 of the Evidence Act so as to extract confession from the accused. Obviously, there should be no confusion that the expression ‘police officer’ used in Section 163 Cr.P.C is a police officer invested with the power of investigation under Chapter XII of the Code of Criminal Procedure. The expression ‘police officer’ used in Sections 24 to 27 of the Evidence Act is, thus, required to be construed to mean a police

officer or any other officer invested with the power of investigation under Chapter XII of the Code of Criminal Procedure.

15. Viewed thus, Special Operation Party of BSF, recovering arms and ammunition at the instance of the appellant during search and cordon operation, cannot be said to be invested with the power of investigation of crime as are conferred upon a police officer under Chapter XII of Cr.P.C. As is explained by the Hon'ble Supreme Court in the case of **State of Punjab v. Barkat Ram, AIR 1962 SC 276**. The expression 'police officer' used in Sections 25 to 27 of the Evidence Act cannot be restricted to a police officer of a jurisdiction Police Station investigating crime but it could be any other person conferred with power of such investigation under Chapter XII of the Code of Criminal Procedure, though he may not be appointed as police officer, as is referable to the Police Act.

16. In the case of **Barkat Ram** (supra), the Supreme Court has elaborately discussed as to who could be a police officer within the meaning of the term used in Section 25 of the Evidence Act and has held thus:-

"The foregoing consideration of the case law and the statutory provisions yields the following results: The term "police officer" is not defined in the Evidence Act, or, as a matter of fact, in any other contemporaneous or subsequent enactment. The question, therefore, falls to be decided on a fair construction of the provisions of s. 25 of the Evidence Act, having regard to the history of the legislation and the meaning attributed to term in and about the time when S. 25 of the Evidence Act came to be inserted therein. If a literal meaning is given to

the term "police officer" indicating thereby an officer designated as police officer, it will lead to anomalous results. An officer designated as a police officer, even though he does not discharge the well understood police functions, will be hit by S. 25 of the Evidence Act, whereas an officer not so designated but who has all the powers of a police officer would not be hit by that section; with the result, the object of the section would be defeated. The intermediate position, namely, that an officer can be a police officer only if powers and duties pertaining to an officer in charge of a police station within the meaning of the Code of Criminal Procedure are entrusted to him, would also lead to an equally anomalous position, for, it would exclude from its operation a case of an officer on whom specific powers and functions are conferred under specific statutes without reference to the Code of Criminal Procedure. The Code of Criminal Procedure does not define a "Police officer" and is 5(2) thereof makes the procedure prescribed by the Code subject to the procedure that may be prescribed by any specific Act. This construction would make the provisions of S. 25 of the Evidence Act otiose in respect of officers on whom specific and incontrovertible police powers are conferred. But the third position would not only carry out the intention of the Legislature, but would also-make the section purposive and useful without doing any violence to the language of the section. A police officer within the meaning of S. 25 of the Evidence Act may be defined thus : An officer, by whatever designation he is called, on whom a statute substantially confers the powers and imposes the duties of the police is a police officer within the meaning of S. 25 of the Evidence Act.

17. After detailed discussion, as is referred to herein above, the Supreme Court concluded that an officer by whatever name and designation he is called and whom a statute substantively confers the power and impose duty of the police is a police officer within the meaning of Section 25 of the Evidence Act. Obviously, no different meaning can be given to the expression 'police officer' used in Section 27 of the Evidence Act.

18. The Border Security Force (BSF) is an armed force of the union created under the Border Security Force Act, 1968 for ensuring security of the borders of India and for matters connected therewith. The BSF Act does not confer any power of police officer in relation to detection and investigation of a crime by civilians. The BSF Act does confer power on the officers of the Force to investigate and try the members of the Force, who are found guilty of misconduct or commission of offence under the BSF Act or under Indian Penal Code or any other law in force constituting an act of a member of the Force a culpable offence. However, in view of promulgation of the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990, [“the Special Powers Act”] the armed forces of the Union which would obviously include BSF have been conferred certain special powers. These powers are conferred on any Commissioned Officer, Warrant Officer, Non-commissioned Officer or any other officer of equivalent rank in the armed force in a disturbed area, which has been so declared by the Governor of the State or the Central Government. With a view to understanding the extent of powers conferred upon the aforementioned officers of the armed forces, it is necessary to set out Sections 3 to 6 of the Armed Forces (Jammu & Kashmir) Special Powers Act, 1990 herein below:-

“3. Power to declare areas to be disturbed areas.—If, in relation to the State of Jammu and Kashmir, the Governor of that State or the Central Government, is of opinion that the whole or any part of the State is in such a disturbed and dangerous condition that the use of armed forces in aid of the civil power is necessary to prevent—

(a) activities involving terrorist acts directed towards overawing the Government as by law established or striking terror in the people or any section of the people or alienating any section of the people or adversely affecting the harmony amongst different sections of the people;

(b) activities directed towards disclaiming, questioning or disrupting the sovereignty and territorial integrity of India or bringing about cession of a part of the territory of India or secession of a part of the territory of India from the Union or causing insult to the Indian National Flag, the Indian National Anthem and the Constitution of India, the Governor of the State or the Central Government, may, by notification in the Official Gazette, declare the whole or any part of the State to be a disturbed area.

Explanation.—In this section, “terrorist act” has the same meaning as in Explanation to article 248 of the Constitution of India as applicable to the State of Jammu and Kashmir.

4. Special powers of the armed forces.

Any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces may, in a disturbed area,—

(a) if he is of opinion that it is necessary so to do for the maintenance of public order, after giving such due warning as he may consider necessary, fire upon or otherwise use force, even to the causing of death, against any person who is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or of fire-arms, ammunition or explosive substances;

(b) if he is of opinion that it is necessary so to do, destroy any arms dump, prepared or fortified position or shelter from which armed attacks are made or are likely to be made or are attempted to be made, or any structure used as a training camp for armed volunteers or utilised as a hide-out by armed gangs or absconders wanted for any offence;

(c) arrest, without warrant, any person who has committed a cognizable offence or against whom a reasonable suspicion exists that he has committed or is about to commit a cognizable offence and may use such force as may be necessary to effect the arrest;

(d) enter and search, without warrant, any premises to make any such arrest as aforesaid or to recover any person believed to be wrongfully restrained or confined or any property reasonably suspected to be stolen property or any arms, ammunition or explosive substances believed to be unlawfully kept in such premises, and may for that purpose use such force as may be necessary, and seize any such property, arms, ammunition or explosive substances;

(e) stop, search and seize any vehicle or vessel reasonably suspected to be carrying any person who is a proclaimed offender, or any person who has committed a non-cognizable offence, or against whom a reasonable suspicion exists that he has committed or is about to commit a non-cognizable offence, or any person who is carrying any arms, ammunition or explosive substance believed to be unlawfully held by him, and may, for that purpose, use such force as may be necessary to effect such stoppage, search or seizure, as the case may be.

5. Power of search to include powers to break open locks, etc.

Every person making a search under this Act shall have the power to break open the lock of any door, almirah, safe, box, cupboard, drawer, package or other thing, if the key thereof is withheld.

6. Arrested persons and seized property to be made over to the police.

Any person arrested and taken into custody under this Act and every property, arms, ammunition or explosive substance or any vehicle or vessel seized under this Act, shall be made over to the officer-in-charge of the nearest police station with the least possible delay, together with a report of the circumstances occasioning the arrest, or as the case may be, occasioning the seizure of such property, arms,

ammunition or explosive substance or any vehicle or vessel, as the case may be.”

19. In terms of Section 3 of the Special Powers Act, power to declare a particular area to be disturbed area is vested with the Governor of Jammu & Kashmir or the Central Government. Once a particular area is declared as disturbed area, the armed forces shall have, in terms of Section 4 of the Special Powers Act, special power to fire upon or otherwise use force even to the causing of death, against any person who is acting in contravention of any law or order for the time being in force in the disturbed area. The power extends to destroy any arms dump, arrest without warrant any person, who has committed any cognizable offence, enter and search, without warrant, any premises to make such arrest or to recover any arms, ammunition or explosive substances believed to be unlawfully kept etc. etc. Section 6 further provides that the person arrested and the property seized by such armed force(s) of the Union in the disturbed area is to be made over to the police for further appropriate action under law.
20. From a reading of Section 4 of the Special Powers Act, it transpires that certain powers akin to the powers conferred upon the police officer under Code of Criminal Procedure are conferred upon the armed force(s) of the Union in respect of an area declared as disturbed area under the Special Powers Act, 1990 but such powers are limited to the extent aforementioned and do not extend to enter

upon investigation, detection of crime or making over the accused to the competent Court of criminal jurisdiction for trial. In such situation when an armed force of the Union exercising power under the Special Powers Act, 1990 in respect of disturbed area arrests a person or makes recovery of any arms and ammunition from him does not strictly act as a police officer, a term used in Section 27 of the Indian Evidence Act. The person arrested as also the arms and ammunition, if any, seized are required to be made over by the armed force to the concerned police for registration of the FIR and taking up investigation. It is in these circumstances, it can safely be concluded that while effecting recovery of arms and ammunition from the appellant, the BSF's Special Operation Party headed by its Commandant did not act as a 'police officer' attracting the mischief of Section 27 of the Evidence Act.

21. The recovery of arms and ammunition from the possession of the appellant and his arrest by the BSF in the exercise of power conferred upon it under the Special Powers Act, 1990 ultimately became an information with the police to register an FIR and enter upon investigation. The police of Police Station concerned, which took over the investigation, has made seizure memo in respect of seized arms and ammunition under the provisions of the Code of Criminal Procedure which was later on proved before the trial Court by leading evidence by the prosecution. I am, thus, of the considered opinion that the recovery of the arms and ammunition made from

the appellant by the Special Operation party of the BSF was not hit by Section 27 of the Evidence Act and, therefore, the trial Court has rightly relied upon the evidence led before it during trial to prove that the recovery of arms and ammunition was indeed made from the possession of the appellant. No plausible explanation has been tendered by the appellant during his examination under Section 342 Cr.P.C.

22. Learned counsel for the appellant could not point out any major contradiction or discrepancy in the prosecution evidence, which was sufficient to put the recovery of arms and ammunition from the appellant in serious doubt. The findings of fact recorded by the trial Court are in consonance with the evidence on record.
23. For these reasons, I find no merit in this appeal, the same is, accordingly, dismissed. The bail bonds of the appellant, who was released on bail by this Court vide order dated 01.10.2010 are forfeited. The appellant shall surrender before the jail authorities for undergoing the remaining period of sentence.

Trial Court record be sent back.

(Sanjeev Kumar)
Judge

JAMMU
07.03.2024
Vinod.

Whether the order is speaking : Yes
Whether the order is reportable: Yes