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WAHEED-UR-REHMAN PARRA

v.

UNION TERRITORY OF JAMMU & KASHMIR

(Criminal Appeal No. 237 of 2022)

B

FEBRUARY 25, 2022

[SANJAY KISHAN KAUL AND M. M. SUNDRESH, JJ.]

C *Code of Criminal Procedure, 1973 – ss.173(6), 207 and 161 – Unlawful Activities (Prevention) Act, 1967 – s.44 – Whether in the case of certain witnesses being declared as protected witnesses in the exercise of powers u/s.173(6) CrPC, read with s.44 of UAPA by the trial court, can the defence seek recourse to the remedy u/ s.207 and s.161 CrPC for obtaining copies of redacted statements of these protected witnesses – Trial Court noted that the prosecution was duty bound to provide the copies of the statements of protected*
D *witnesses to the accused in order to provide a fair trial – In appeal, the High Court held that having allowed the plea of protected witnesses and directing their testimonies to be kept in a sealed cover, permitting copies of redacted statements would amount to revisiting and reviewing its own orders, which was not permissible – Held:*
E *The provisions of s.173(6) CrPC read with s.44 of UAPA and s.17 of the NIA Act stand on a different plane with different legal implications as compared to s.207 CrPC – Consequently, the trial court order allowing the redacted statements u/s.207 CrPC is not an exercise of power of review – The trial court order is both fair and reasonable for the prosecution and defence while protecting*
F *the witnesses and not depriving the defence of a fair trial with the disclosure of the redacted portion of the testimony u/s.207 CrPC.*

Allowing the appeal, the Court

G **HELD: 1. The provisions of Section 173(6) of the CrPC read with Section 44 of the Unlawful Activities (Prevention) Act, 1967 and Section 17 of the National Investigation Agency Act stand on a different plane with different legal implications as compared to Section 207 of the Cr.P.C. The first order was passed at the threshold. There was no notice to the accused. The objective of Section 44, UAPA, Section 17, NIA Act, and Section**

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173(6) is to safeguard witnesses. They are in the nature of a statutory witness protection. On the court being satisfied that the disclosure of the address and name of the witness could endanger the family and the witness, such an order can be passed. They are also in the context of special provisions made for offences under special statutes. [Para 24][112-D-E]

2. The occasion for the appellant/accused to come in and seek redacted statements under Section 207 of the Cr.P.C. arose when the trial was to commence and the appellant was of the view that in order to plead an appropriate defence there should be full disclosure minus the redacted portion so that the testimonies of those witnesses could be utilised without disclosing their identities or their place of residence. This is not an exercise of the power of review but the exercise of powers at two different stages of proceedings under two different provisions. [Para 25][112-F-H]

3. The order passed by the trial court has been cautiously worded. The order has not only permitted redaction of the address and particulars of the witnesses which could disclose their identities but has further observed that even other relevant paras in the statement which would disclose their occupation and identity could be redacted. Thus, a wide discretion has been given and that too for the Special Public Prosecutor to take a call. There could thus have hardly been a grievance raised by the prosecution in this regard. The order of the trial court is both fair and reasonable for the prosecution and defence while protecting the witnesses and not depriving the defence of a fair trial with the disclosure of the redacted portion of the testimony under Section 207 of the Cr.P.C. [Para 27][113-C-F]

Mohd. Hussain v. State (GNCTD) (2012) 2 SCC 584 : [2012] 1 SCR 64; *Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi)* (2010) 6 SCC 1 : [2010] 4 SCR 103; *Jahid Sheikh v. State of Gujarat* (2011) 7 SCC 762 : [2011] 10 SCR 1; *D. Subair T.P. & Ors. v. Union of India* (2021) 1 KLT (SN 17) and *Atul Shukla v. State of M.P. & Anr.* (2019) 17 SCC 299 – referred to.

A	<u>Case Law Reference</u>		
	[2012] 1 SCR 64	referred to	Para 18
	[2010] 4 SCR 103	referred to	Para 18
	[2011] 10 SCR 1	referred to	Para 18
B	(2019) 17 SCC 299	referred to	Para 23

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 237 of 2022.

C From the Judgment and Order dated 11.10.2021 of the High Court of Jammu and Kashmir and Ladakh at Srinagar in Criminal Appeal No.16 of 2021.

Shadan Farasat, Shariq J. Reyaz, Shourya Dasgupta, Advs. for the Appellant.

D Ms. Taruna Ardhendumauli Prasad, Parth Awasthi, Advs. for the Respondent.

The Judgment of the Court was delivered by

SANJAY KISHAN KAUL, J.

E 1. The moot point arising for consideration in the present appeal is whether in the case of certain witnesses being declared as protected witnesses in the exercise of powers under Section 173(6) of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Cr.P.C.'), read with Section 44 of the Unlawful Activities (Prevention) Act, 1967 (hereinafter referred to as the 'UAPA') by the trial court, can the defence seek recourse to the remedy under Section 207 and Section 161 of the Cr.P.C. for obtaining copies of redacted statements of these protected witnesses.

Background:

G 2. A First Information Report (for short 'FIR'), being FIR No.5/2020, was registered on 11.01.2020 under Sections 18, 19, 20, 38 & 39 of the UAPA read with Sections 7/25 of the Arms Act, 1959 (hereinafter referred to as the 'Arms Act') and Sections 3/4 of the Explosive Substance Act, 1908 (hereinafter referred to as the 'ES Act') against one Syed Naveed Mushtaq and others at P.S. Qazigund. The National Investigation Agency (for short 'NIA') took up the investigation into this FIR under H Section 6(4) read with Section 8 of the NIA Act and the FIR was re-

registered as RC/01/2020/NIA/JMU on 17.01.2020. The appellant herein was arrested in the said FIR on 25.11.2020 and the NIA filed the second supplementary chargesheet in the FIR before the Court of 3rd Additional Sessions Judge, Jammu (Special Judge NIA Act) on 22.03.2021 arraying the appellant as accused No.11 in the said supplementary chargesheet. A

3. On 22.12.2020, the respondent filed FIR No.31/2020 under Sections 13, 17, 18, 38, 39, 40 of the UAPA read with Sections 120-B, 121, 121-A and 124-A of the Indian Penal Code, 1860 (hereinafter referred to as the 'IPC') at P.S. CIK, Srinagar without naming the appellant. On the same set of allegations and evidence as that of the NIA chargesheet, the respondent filed another final report/chargesheet in the case arising out of FIR No.31/2020 before the Special Judge (NIA Act), Srinagar where the appellant was arraigned as the sole accused. The charges were framed against the appellant on 20.7.2021. B C

4. The respondent herein moved an application under Section 44 of the UAPA read with Section 173(6) of the Cr.P.C. before the trial court seeking declaration of five witnesses as protected witnesses and for certain documents marked as D-1 to be excluded from the documents to be provided to the accused. The trial court vide order dated 01.06.2021 allowed the application filed by the respondent herein, observing that in view of the sensitivity of the case, it appeared that there was a threat to the life and property of the witnesses and their families. Consequently keeping in view the scope and object of Section 44 of the UAPA, the statements of prosecution witnesses marked as A-1 to A-5 were kept in a sealed cover in view of their declaration as protected witnesses. In addition, the documents marked as D-1 (which were also in a separate sealed cover) were excluded from other documents and were placed in a sealed cover along with the statements of protected witnesses. D E F

Trial Court Proceedings:

5. An application under Section 207 of the Cr.P.C. was filed by the appellant before the trial court praying for a redacted copy of the statements of protected witnesses A-1 to A-5. This was resisted by the respondents herein on the ground that the said application was not maintainable for the reason that whether copies of such statements needed to be furnished to the accused already stood decided by the trial court in terms of its order dated 01.06.2021. It was contended that Section 207 Cr.P.C. was conditional upon Section 173 Cr.P.C. and could not supersede it. The right of the accused to be supplied with all material as G H

A envisaged under Section 207 Cr.P.C. could thus not be inferred to be absolute, which was quite evident from the reading of clause (iii) of Section 207 Cr.P.C.. In addition it was contended that there was no power of review under the provisions of the Cr.P.C. and the prayer of the appellant would amount to seeking review of the earlier order dated 01.06.2021.

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6. The trial court vide order dated 11.09.2021 allowed the application of the appellant while observing that in view of Section 44, UAPA, and Sections 207 and 173(6), Cr.P.C., it was amply clear that the prosecution was duty bound to provide the copies of the statements of protected witnesses A-1 to A-5 to the accused in order to provide a fair trial. Further, the order dated 01.06.2021 passed by the trial court did not restrict or inhibit the powers of the trial court under the aforementioned Sections. It was opined that the object of the application of the prosecution was with the sole purpose of declaring the witnesses A-1 to A-5 as protected witnesses and nowhere did the order opine that the accused were precluded from obtaining the copies of the statements of those protected witnesses.

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The High Court Proceedings:

7. The respondents preferred an appeal before the High Court on the ground that the order dated 11.09.2021 would be in conflict with the earlier order dated 01.06.2021 and would negate the very purpose which was sought to be served in terms of the earlier order. It was further contended that this was essentially a review power which was sought to be exercised, and was procedurally and jurisdictionally not within the competence of the trial court. On the other hand, the appellant pleaded that no appeal was maintainable arising from an interlocutory order.

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8. The High Court of Jammu & Kashmir and Ladakh vide impugned order dated 11.10.2021 allowed the appeal, observing that in the light of Sections 17 & 44 of the UAPA it was clear that the legislature was fully aware of the existence of the general safeguards provided under Section 173(6) Cr.P.C. and found it fit to give additional safeguards as mentioned in the said provisions. The High Court opined in favour of the respondents, stating that the trial court having allowed the plea of protected witnesses and directing their testimonies to be kept in a sealed cover, permitting copies of redacted statements would amount to revisiting and reviewing its own orders, which was not permissible. The same would also expose the protected witnesses to vulnerability.

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The Legal Position:

9. In order to appreciate the controversy we would first set forth the legal position.

10. The initial exercise of the power by the trial court was under Section 173(6) of the Cr.P.C. Chapter XII of the Cr.P.C. deals with “Information to the police and their powers to investigate”. Section 173 refers to “Report of police officer on completion of investigation”. The relevant provisions of Section 173 Cr.P.C. read as under:

“173. Report of police officer on completion of investigation.

(1) Every investigation under this Chapter shall be completed without unnecessary delay.

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(6) If the police officer is of opinion that any part of any such statement is not relevant to the subject-matter of the proceedings or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note requesting the Magistrate to exclude that part from the copies to be granted to the accused and stating his reasons for making such request.”

11. In the normal course of trial, all statements of prosecution witnesses would have to be disclosed to the accused. Section 173(6) is an exception to the said provision. This is applicable in two eventualities, viz.,

- a. Statement is not relevant to the subject matter of the proceedings.
- b. Its disclosure to the accused is not essential in the interests of justice or expedient in the public interest.

It goes on to further state that such part of the statement be appended in a note requesting the Magistrate to exclude “that part from the copies” to be granted to the accused and disclose the reasons for making such a request.

12. A perusal of the application filed would show that the reason for the same as set out by the Investigating Officer (for short ‘IO’) was that it was a high profile case and would attract high public and media attention, apart from some dreaded terrorist organisation(s) being part of the conspiracy and the consequent investigation against them. There

A was perceived to be an imminent danger to the life and property of such witnesses and, thus, in the interest of justice and in the interest of these witnesses they were required to be declared as protected witnesses. In terms of Section 44 of the UAPA, copies of their statements ought to be excluded from the copies to be provided to the accused and be kept in a sealed cover.

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13. We now turn to the second provision, which is Section 44 of the UAPA, which deals with “protection of witnesses” and reads as under:

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“44. Protection of witnesses.—(1) Notwithstanding anything contained in the Code, the proceedings under this Act may, for reasons to be recorded in writing, be held in camera if the court so desires.

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(2) A court, if on an application made by a witness in any proceeding before it or by the Public Prosecutor in relation to such witness or on its own motion, is satisfied that the life of such witness is in danger, it may, for reasons to be recorded in writing, take such measures as it deems fit for keeping the identity and address of such witness secret.

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(3) In particular, and without prejudice to the generality of the provisions of sub-section (2), the measures which a court may take under that sub-section may include—

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(a) the holding of the proceedings at a place to be decided by the court;

(b) the avoiding of the mention of the name and address of the witness in its orders or judgments or in any records of the case accessible to public;

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(c) the issuing of any directions for securing that the identity and address of the witness are not disclosed;

(d) a decision that it is in the public interest to order that all or any of the proceedings pending before such a court shall not be published in any manner.

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(4) Any person, who contravenes any decision or direction issued under sub-section (3), shall be punishable with imprisonment for a term which may extend to three years, and shall also be liable to fine.”

14. In terms of sub-section (2) of Section 44 of the UAPA, if the public prosecutor in relation to such witness pleads as aforesaid, then a court on an application if satisfied that the life of such witness is in danger, may, for reasons to be recorded in writing, take such measures as it deems fit for keeping the “identity and address of such witness secret.” We, thus, may say that the whole objective is that if from the testimony of the witness, their location and identity can be deciphered, that portion of the testimony should not be handed over. We are observing this in the context of the prayer made by the accused before the trial court, where he sought only the redacted statements of protected witnesses. We may also simultaneously note that the order of the trial court dated 11.09.2021 permitted the same with a clear direction that the documents be delivered after expunging the identity (name and address of the protected witnesses) and relevant paras in their statements which disclosed their occupation and identity. Thus, it went as far as to leave it to the Special Public Prosecutor to take a call on what would be taken as relevant paras in their statement which would disclose their occupation and identity, apart from redaction of their names and addresses.

15. We may also note that Section 17 of the NIA Act is in *pari materia* with the aforesaid provision.

16. Section 161 of the Cr.P.C. deals with the “examination of witnesses by police” while Section 207 Cr.P.C. deals with the aspect of “supply to the accused of copy of police report and other documents.” This Section falls in Chapter XVI dealing with “commencement of proceedings before Magistrates” and reads as under:

“207. Supply to the accused of copy of police report and other documents. – In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:-

(i) the police report;

(ii) the first information report recorded under section 154;

(iii) the statements recorded under sub- section (3) of section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub- section (6) of section 173;

A (iv) the confessions and statements, if any, recorded under section 164;

(v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub- section (5) of section 173:

B Provided that the Magistrate may, after perusing any such part of a statement as is referred to in clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused:

C Provided further that if the Magistrate is satisfied that any document referred to in clause (v) is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court.”

D 17. A reading of the aforesaid provision would show that it mandates a Magistrate, by using the word “shall”, without delay to furnish copy of what is specified therein, which would include statements recorded under sub-section (3) of Section 161 of all persons. The first proviso, however, carves out an exception that the Magistrate, in respect of clause (iii), after considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof
E as the Magistrate thinks proper, shall be furnished to the accused.

The Rival Contentions:

18. Learned counsel for the appellant contended that the accused has a statutory right to get a copy of the witnesses’ statements in order to confront the witness during the course of trial in accordance with Sections 161 and 207 of the Cr.P.C. and relied upon the judgment of this Court in *Mohd. Hussain v. State (GNCTD)*¹ to emphasise that the accused has a right under the said provisions to receive copies of witnesses’ statements in order to mount an effective defence.
F Additionally, in *Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi)*², it was opined that the right of the accused to receive the documents and statements submitted before the court was absolute and must be adhered to. This was treated as a part of the requirement of a
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¹ (2012) 2 SCC 584

H ² (2010) 6 SCC 1

fair disclosure in a fair trial. In *Jahid Sheikh v. State of Gujarat*³, this Court expressed a similar view with the conclusion that it was the duty of the Sessions Court to supply copies of the chargesheet and all relevant documents relied upon by the prosecution under Sections 207 and 208 Cr.P.C., and the same could not be treated as an empty formality. A

19. Learned counsel for the appellant requested this Court to strike a balance, so as to not compromise fair trial in cases where special laws require concealment of the identity of witnesses. The counsel for appellant sought to justify the direction of the trial court as a very reasonable one, leaving it to the SPP himself to redact the appropriate information so as to safeguard the witnesses and their identities. B

20. On the aspect of a review power being exercised by the trial court, which was not within its jurisdiction, it was urged that the first direction to designate certain witnesses as protected witnesses was in the absence of the accused. That was a distinct nature of proceedings. Those proceedings could not take away the right of an accused to be supplied with witness statements as the objective was only to protect the witnesses and not to take out the whole statement out of the purview of Section 207 of the Cr.P.C. The second order dated 11.9.2021 was to fulfil the mandate of Section 207 of the Cr.P.C., subject to the precautions to be taken in that behalf. C D

21. Lastly it was sought to be urged that no appeal was maintainable before the High Court appeals against interlocutory orders are barred under Section 21 of the NIA Act, which would equally apply to the prosecution and the defence. To appreciate the contentions, we are reproducing Section 21(1) of the NIA Act, which provides an exception to interlocutory orders and reads as under: E

“21 Appeals. - (1) Notwithstanding anything contained in the Code, an appeal shall lie from any judgment, sentence or order, not being an interlocutory order, of a Special Court to the High Court both on facts and on law.” F

22. Interestingly, a Division Bench of the Kerala High Court in *D. Subair T.P. & Ors. v. Union of India*⁴ has opined on a similar issue by giving similar terms to the accused as the trial court in its order dated 11.09.2021. However, the discretion to redact portions of the statement G

³ (2011) 7 SCC 762

⁴ (2021) 1 KLT (SN 17)

A has been left to the trial court instead of the Special Prosecutor. No judgment of this Court under these provisions has been brought to our notice.

23. On the other hand learned counsel for the respondent resisted the appeal essentially on the ground that the power of review was not available with the trial court (*Atul Shukla v. State of M.P. & Anr.*⁵). It was urged that in view of the charges levelled against the appellant, it was expedient in public interest for certain facts to be excluded from disclosure as there was an imminent threat to the life and safety of witnesses and their families.

C **Conclusion:**

24. On a conspectus of the aforesaid legal position and the limited contours of the facts required for determination of the issue, we are of the view that the provisions of Section 173(6) of the Cr.P.C. read with Section 44 of the UAPA and Section 17 of the NIA Act stand on a different plane with different legal implications as compared to Section 207 of the Cr.P.C. We say so as the first order was passed at the threshold. There was no notice to the accused. The objective of Section 44, UAPA, Section 17, NIA Act, and Section 173(6) is to safeguard witnesses. They are in the nature of a statutory witness protection. On the court being satisfied that the disclosure of the address and name of the witness could endanger the family and the witness, such an order can be passed. They are also in the context of special provisions made for offences under special statutes. These considerations weighed with the trial court while passing the order dated 01.06.2021, and even the appellant has no quibble with the same.

F 25. The occasion for the appellant/accused to come in and seek redacted statements under Section 207 of the Cr.P.C. arose when the trial was to commence and the appellant was of the view that in order to plead an appropriate defence there should be full disclosure minus the redacted portion so that the testimonies of those witnesses could be utilised without disclosing their identities or their place of residence. This is not, in our view, an exercise of the power of review but the exercise of powers at two different stages of proceedings under two different provisions. The plea of the prosecution of this being a review power is, thus misplaced. There is no doubt that the power of review is not available

H ⁵ (2019) 17 SCC 299

with the trial court and the question was whether the exercise of the power by the trial court under the two separate provisions vide orders dated 01.06.2021 and 11.09.2021 can at all be said to be the power of review in the latter order. The answer to this is clearly in the negative. A

26. We may also note another aspect arising from there being no appeal against an interlocutory order. This aspect somehow has not been dealt with by the High Court possibly because it opined that the latter order amounted to a review of the earlier order. The appellant had not challenged the earlier order dated 01.06.2021 and could not have done so. Similarly the latter order could not have been challenged in appeal by the respondents, being in the nature of an interlocutory order given the provisions of Section 21(1) of the NIA Act. B C

27. Having said so, we also come to the order passed by the trial court on 11.09.2021 which has been cautiously worded. The order has not only permitted redaction of the address and particulars of the witnesses which could disclose their identities but has further observed as noted aforesaid that even other relevant paras in the statement which would disclose their occupation and identity could be redacted. Thus, a wide discretion has been given and that too for the Special Public Prosecutor to take a call. There could thus have hardly been a grievance raised by the prosecution in this regard. On query to the learned counsel for the respondent as to how this order can in any manner prejudice or have the propensity to disclose the identity of the witnesses or their families with the possibility of harm being caused to them, there has really been no answer. We believe that the order dated 11.09.2021 is both fair and reasonable for the prosecution and defence while protecting the witnesses and not depriving the defence of a fair trial with the disclosure of the redacted portion of the testimony under Section 207 of the Cr.P.C. D E F

28. The result of the aforesaid is that the impugned judgment of the High Court dated 11.10.2021 is set aside and the impugned order of the trial court dated 11.09.2021 is restored.

29. The appeal is allowed leaving the parties to bear their own costs. G