(2001) 05 DEL CK 0044

Delhi High Court

Case No: Criminal W. No. 40 of 2000

Dr. Narayan Waman Nerurkar	APPELLANT
Vs	
State	RESPONDENT

Date of Decision: May 30, 2001

Acts Referred:

- Constitution of India, 1950 - Article 21
- Criminal Procedure Code, 1973 (CrPC) - Section 197
- Official Secrets Act, 1923 - Section 2(5), 3, 5, 5(3), 5(4)
- Penal Code, 1860 (IPC) - Section 120B

Citation: (2002) CriLJ 826 : (2001) 59 DRJ 447

Hon'ble Judges: Usha Mehra, J; S.N. Kapoor, J

Bench: Division Bench

Advocate: Mr. Amit Chadha and Mr. Rajnish Ranjan, for the Appellant; Mr. K.K. Sud, A.S.G. and Mr. Neeraj Kaul, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

Usha Mehra, J.

Dr. Narayan Waman Nerurkar was advisor in the Department of Electronics, Government of India. On 17th April, 1987 a criminal case was registered by the Special Investigation Cell, Central Bureau of Investigation (in short CBI) u/s 12B of the Indian Penal Code read with Section 3 & 5 of the Official Secrets Act, 1923. The said case was registered on the basis of a complaint filed by the Regional Manager of a courier company, M/s Trident Express. As per the complaint on 4th April, 1987 a letter addressed to one Mr. Marc De Saint Denis, M/s Coprint Paris was received by the said courier company for dispatch. Another letter addressed to Mr.J.W.H. Weavers, Netherlands was received on 13th April, 1987. These letters were picked up by the couriers from M/s William Jacks and the particulars of the sender were given on the Airway Bills. The courier company got suspicious and opened the letter

and inside the covers addressed to the person in Paris was xerox copy of User Evaluation Trial Report on R.A.T.AC-S Battlefield Surveillance Radar BFSR Phase-I. The other cover addressed to person in Netherland contained draft letters in 13 pages containing details of some radars Fly Catchers for detection and tracking of low level enemy aircrafts. Matter was reported. Accordingly the raids were conducted in the premises of various officers including that of the petitioner. During the search conducted on 25th October, 1988 nothing incriminating was found from the premises of the petitioner. However, he was arrested on 11th November, 1988. Case by the CBI was registered in 1987. On 7th February, 1989 CBI filed a complaint in the Court of Chief Metropolitan Magistrate, Delhi. Learned Chief Metropolitan Magistrate took cognizance u/s 120B IPC read with Sections 3/5 of the Official Secrets Act, 1923 (hereinafter called the Act) against the petitioner and other accused persons. Proceedings continued. On 11th July, 1995 petitioner and other accused persons were discharged on the ground of lack of sanction u/s 197 Cr.P.C. On 17th December, 1996 CBI again filed a complaint before the learned Chief Metropolitan Magistrate, Delhi under the same provisions as quoted above. The learned Chief Metropolitan Magistrate took cognizance and after appearance of the accused persons committed the case to the court of Sessions on 1st February, 1997. Second time also the petitioner and other accused persons were discharged for lack of valid sanction. The Magistrate, however, while discharging the accused persons gave liberty to the CBI to file the complaint third time after complying the requirement of law. The said order was passed on 30th May, 1998. On 1st July, 1999 fresh complaint was filed by the CBI before the learned Chief Metropolitan Magistrate. When third time the complaint was filed the petitioner filed an application that he should be heard before cognizance is taken. The grievance of the petitioner was that proceedings had been pending for a period of over 12 years and that there was bleak possibility of his conviction. That the sanction which had been granted third time was not by any independent assessment but a bye product of a direction by the learned C.M.M. The said application was rejected vide order dated 16th August, 1999 and cognizance was taken by the Magistrate by issuing summons to the accused persons on 23rd September, 1999.

2. It is in this backdrop that this writ petition has been preferred seeking quashing of the order dated 16th August, 1999 by which the cognizance had been taken, and also on the ground that due to delay in proceedings the fundamental right of the petitioner as provided under Article 21 of the Constitution of India has been infringed. Furthermore the reports of trial of a proto-type (pre-production mode) was incomplete, non-militarised and non-rugged version. Document related to part of a trial conducted by the manufacturers of the equipment. The information, if any, relates to "munition of war" which is covered by Section 5(3) of the official Secret Act, 1923 (hereinafter called the Act). Maximum punishment for that offence is 3 years whereas petitioner has suffered the agony of proceeding for more than 12 years. He is more than 70 years old.

3. First objection taken by the petitioner is with regard to the delay of the proceedings which according to him resulted in deprivation of his fundamental right. In order to determine the delay and the consequential impact of the same on the proceedings, we have first to determine whether the case of the petitioner is covered u/s 5(3) of the Act or u/s 3 of the Act. If it is u/s 5(3) of the Act then maximum punishment is 3 years. But if it is covered u/s 3 of the Act then the punishment is 14 years. To us it appears to be a relevant consideration in the facts of this case to determine the impact of the delay in proceedings.

4. Mr. Amit Chadha appearing for the petitioner contended that the document in question i.e. "User Evaluation Trial Report" indicated that the equipment was never inducted in Army. The User Evaluation Trial Report on RATACS-S Battle Field Surveillance Radar (BFSR) Phase-1 shows that the same was rejected being incomplete and proto-type only, the army authority did not go ahead for the purchase of the said equipment. Moreover, details of the equipment were given due publicity in various magazines so much so the said details were displayed in international fairs prior to the date of testing the equipment by the Indian Army.

5. Since due publicity was given in international magazines and newspapers giving details fo the equipment, Therefore, according to petitioner there was no question of any secrecy attached to this document. Global tenders were invited about this equipment which were not a secret tender. The mere fact that the word "secret" was written on the document would not make it a secret document particularly when the details of the said equipment and the literature of the same was readily available and published in the magazines and the newspapers and the global tenders were invited.

6. On the other hand, Mr.K.K.Sud, Addl. Solicitor General, appearing for the CBI contended that publication of details in newspapers and magazine cannot be treated as an evidence nor the contents thereof can be compared, tested with the test conducted by Indian Army of the equipment nor the same can be appreciated in writ jurisdiction. Even for the sake of arguments it is believed that there were publications of details even then those reports appearing int he magazine and displayed in international fair can''t be used by way of evidence by the petitioner for asking this Court to quash the proceedings because the veracity, authenticity and correctness of the source has to be verified either by the Investigating Agency or before the Trial Court but by no stretch of imagination in writ jurisdiction. Moreover, there was no global tender for this equipment. It is, however, admitted that the equipment was incomplete nad proto-type only. It was never inducted by the Indian Army. Therefore, relying on these facts Mr.Sud contended that the case of the petitioner is covered u/s 3 of the Act.

7. Section 3 of the Act deals with the penalties for spying. Extracts for Section 3 which are relevant for our purpose are reproduced as under:-

3. Penalties for spying,-(1) If any person for any purpose prejudicial to the safety or interests of the States-

(a) approaches, inspects, passes over or is in the vicinity of, or enters, any prohibited place; or

(b) makes any sketch, plan, model, or note which is calculated to be or might be or is intended to be, directly or indirectly, useful to an enemy; or

(c) obtains, collects, records or publishes or communicates to any other person any secret official codes or password, or any sketch, plan, model, articles or note or other document or information which is calculated to be or might be or is intended to be, directly or indirectly, useful to an enemy [or which relates to a matter the disclosure of which is likely to affect the sovereignty and integrity of India, the security of the State or friendly relations with foreign State or friendly relations with foreign States]

he shall be punishable with imprisonment for a term which may extend, where the offence is committed in relation to any work of defense, arsenal, naval, military or air force establishment or station, mine, minefield, factory, dockyard, camp, ship or aircraft or otherwise in relation to the naval, military or air force affairs of Government or in relation to any secret official code, to fourteen years and in other case to three years.

8. To strengthen his arguments Mr. Sud, Addl. Solicitor General Relied upon the decision of this Court in Rama Swaroop Vs. The State (Delhi Administration)and others reported in 1986 Crl. L.J. 526 where it has been held that is it not necessary that information sent should be secret to as to constitute offence u/s 3 of the Act. Even an information which may not be secret but it relates to a matter the disclosure of which is likely to affect the sovereignty and integrity of India, the security of the State or useful to an enemy is an offence u/s 3 of the Act. We find no quarrel with the proposition. But on facts of this case the proposition does not apply. The question that arises in this case is when the details of the equipment which had not been purchased by the Army nor used being incomplete and proto-type only, were available 4;79H7m7m9;10H in magazines and international fairs will it amount to be an information which was prejudicial to the sovereignty and integrity of India, the security of the State or friendly relations with foreign State? The answer in the facts of this case would be in the negative. Hence reliance on Rama Swaroop''s case (Supra) is misplaced. Having admitted that before the test being carried out the equipment was never purchased and the details of the equipment were available in the magazines and international fair for that reason case of the petitioner from that of Rama Swaroop is distinguishable. Contention of Mr. K.K. Sud, Addl. Solicitor General that publication of details in magazines and international fair cannot be treated as evidence, may be technically correct but at the same time it cannot be ignored that the details of the equipment were available

even before the test was conducted by the Indian Army. Further Indian Army did not induct nor purchase this equipment, Therefore, at best the case could not covered under-section (3) of Section 5 of the Act. Sub-section (3) of Section 5 is reproduced as under:-

Section 5, Wrongful communication, etc., of information:-

Sub-section (3) If any person having in his possession or control any sketch, plan, model, article, note, document or information, which relates to munitions of war, communicates it, directly or indirectly, o any foreign power or in any other manner prejudicial to the safety or interests of the State, he shall be guilty of an offence under this section.

9. Under sub-section (4) of Section 5 of the Act a person who is guilty of an offence under this Section shall be punished with an imprisonment of three years or fine or with both.

10. Admittedly the equipment for which the trial was conducted namely RATAC-S-Battlefield Surveillance Rader BFSR Phase-I related to "munition of war. "This can be inferred from the bare reading of the complaint filed by the CBI, photocopy of which is annexed with this petition was annexure P-2 at page 36. Reading of para 4 of this report indicates that the said report dealt with about battlefield equipment proposed/intended to be introduced in Indian Army. From this complaint it is clear that the equipment was intended or proposed to be introduced in the Army. Section 2 (5) of the Act defines what is "munitions of war". Section 2(5) is reproduced as under:-

2(5) "munitions of war" includes the whole or any part or any ship, submarine, aircraft, tank or similar engine, arms and ammunition, torpedo, or mine intended or adopted for use in war , and another article, material or device, whether actual or proposed, intended for such use;

11. Reading of this shows that any arm or ammunition, ship, submarine, aircraft, tank or similar engine, torpedo or mine intended or adopted for use in war or proposed or intended to be used in war would be called munition of war. Sub-section (3) of Section 5 stipulates that if a person is in possession or control or any secret document relating to munition of war then he shall be guilty of punishment the maximum punishment of which would be three years. As per the respondent''s own showing the equipment was intended to be used or proposed to be introduced for munition of war. Therefore, prima facie case of the petitioner would fall u/s 5 sub-section (3) the punishment for which is prescribed three years, whereas the petitioner has already undergone two and half year in custody.

12. It is in this background we have to see the alleged delay in proceeding with the case. It is an admitted fact on record that about 100 witnesses from all over India have to be examined in this case but till dated even the charge has not been framed.

As already pointed out above complaint was lodged on 15th April, 1987. Petitioner was arrested on 11th November, 1988.Complaint in Court was filed on 7th February, 1989. Petitioner was discharged on 22nd July, 1995 because there was no sanction u/s 197 Cr. P.C. Second complaint was filed in court on 17th December , 1996 but against petitioner was discharged because of defective sanction. Third time complaint was filed in court on 1st July, 1999 and case is still at committal stage. Mr. K.K.Sud, ASG urged that the delay in proceeding with the case cannot be totally attributed to the States. Sanction for prosecution was not felt necessary hence when first time complaint was filed sanction had not been obtained. But due to the interpretation given by Supreme Court it became necessary. Therefore, petitioner was discharged on 22nd July, 1995.This was on account of judgment which came in 1993 in the case of State of Maharashtra Vs. Dr. Budhikota Subbarao reported in 1993 (3) SSC 339. Subsequent thereto on 30th May, 1998 petitioner was discharged because of defective sanction.

13. Why defective sanction was given there is no justification or reason explained. For the defective sanction petitioner cannot be blamed. This cannot be attributed to the Court or to the lawyers or to the petitioner. If defective has been granted it must be due to non- application of mind. For that the prosecution is solely to be blamed. Supreme Court in the case of Raj Deo Sharma Vs. The State of Bihar, while dealing with constitutional right of the accused under Article 21 for a speedily trial, laid down the guidelines and proposition in addition to the one laid down by the Constitution Bench in Abdul Rehman Antulay Vs. R.S. Nayak and another etc. etc., . It supplemented those proposition by laying down:

(i) In cases where trial is for an offence punishable with imprisonment for a period not exceeding seven years, whether the accuse is in jail or not, the Court shall close the prosecution evidence on completion of a period of two years from the date of recording the plea of the accused on the charges framed whether the prosecution has examined the witnesses or not, within the said period and the court can proceed to the next step provided by law for the trial of the case.

(ii) In such cases as mentioned above, if the accused has been in jail for a period of not less than one half of the maximum period of punishment prescribed for the offence, the trial court shall release the accused on bail forthwith on such conditions as it deem.

(iii) If the offenses under trial is punishable with imprisonment for a period exceeding seven years, whether the accused is in jail or not, the Court shall close the prosecution evidence on completion of three years from the date of recording the plea of the accused on the charge framed, whether the prosecution has examined all the witnesses or to within the said period and the Court can proceed to the next step provided by law for the trial of the case, unless for very exceptional reasons to be recorded and in the interest of justice the Court considers it necessary to grant further time to the prosecution to adduce evidence beyond the aforesaid time limit.

(iv) But if the inability for completing the prosecution within the aforesaid period is attributable to the conduct of the accused in protracting the trial, no court is obliged to close the prosecution evidence within the aforesaid period in any of the case covered by clauses (i) to (iii).

(v) Where the trial has been stayed by orders of Court or by operation of law such time during which the stay was in force shall be excluded from the aforesaid period for closing prosecution evidence. The above directions will be in addition to and without prejudice to the directions issued by this Court in Common Cause A Registered Society through its Director Vs. Union of India (UOI) and Others, as modified by the same Bench through the order reported in Common Cause A Registered Society Vs. Union of India and others, .

14. Relying on the observations and on the facts of this case it can be said that the right of speedy trial of the petitioner has been infringed. Earlier he was discharged on account of decision of Apex Court in the case of State of Maharashtra Vs. Dr. Budhikota Subbarao (Supra) but there was no justification of giving defective sanction second time by the State. We are also of the opinion that 100 witnesses spread all over India will not be examined during the life time of this petitioner who is above 70 years old. The case is still at committal stage and the sword of prosecution has been hanging over him since April, 1987 or since November, 1988 when he was arrested and stated to have been released on bail on 13.2.1991. He has thus spent in custody more than two years as against the maximum punishment of three years in addition to the agony of undergoing the agony of 12 years of intermittently facing prosecution for the last 12 years.

15. Hence taking these factors into consideration we feel that there is a sufficient material on record to come to the conclusion that trial has unnecessarily been delayed by the prosecution. That there are bleak chances of its conclusion during the life time of this petitioner.

16. For the reasons stated above we order for the quashing of the proceedings emanating from case bearing No. RC-4(S) 187/SIU-I in respect of this petitioner.