

94 CWN 350

Calcutta High Court

Case No: Matter No. 3191 of 1987

Mohammad Zahoor
and Others

APPELLANT

Vs

The State of West
Bengal and Others

RESPONDENT

Date of Decision: June 30, 1989

Acts Referred:

- Constitution of India, 1950 - Article 19(1)(g)
- Wild Life (Protection) Act, 1972 - Section 44, 50, 51

Citation: 94 CWN 350

Hon'ble Judges: Bhagabati Prasad Banerjee, J

Bench: Single Bench

Advocate: Mrinmoy Ghosh, for the Appellant; P.K. Roychowdhury for State of W.B., for the Respondent

Judgement

Bhagabati Prasad Banerjee, J.

This writ application was moved by the petitioners with notice to the Respondents, against the search, seizure, arrest and initiation of criminal case being No. 44 before the Additional Chief judicial Magistrate, Sealdah on the basis of the complaint dated 2nd July 1987 filed by Dilip Chakraborty Forest Ranger attached to the Office of the Conservation of Forests. Wild life and E. Q. The case of the petitioners in short is that the petitioners are engaged in trading in caged (Aviary Bred) birds and mammals as their only source of livelihood. It appears that the petitioners No. 1 and 2 obtained licences under the provisions of the Wild Life (Protection) Act, 1972 and that the original licences were lying in the custody of the Licensing Authorities. The petitioners no. 3 to 6 deal with some kinds of birds which do not require for obtaining of licences under the said Act. The petitioners no. 7 to 9 are stated to be the associates of the petitioners no. 1 to 3 as they help in transporting feeding, watering the caged (Aviary Bred) birds and that was their means of livelihood. It is stated that the petitioners have been in this profession for generations

and they have no other means of livelihood. During the Ratha Jatra Festival in the year 1987 the petitioners no. 1 to 6 duly applied to the Calcutta Municipal Corporation for sanction of stall in the Motali area, Calcutta, where such festivals are held in each year and that the stalls were allotted in the said Ratha Jatra Festival where the petitioners were trading in the caged birds. On 1st July 1987 at about 5 p.m. the Respondent no. 4 accompanied by a large number of police force and people raided the said Mela and seized a large number of caged birds and took them away and also arrested the petitioners, on the ground that the petitioners have violated the provisions of Wild Life (Protection) Act 1972. On the next date, the petitioners were produced before the Chief-Judicial Magistrate, Sealdah 24-Parganas and they were all released on bail. At that time, before the learned Magistrate Shri Dilip Chakraborty, a Forest Ranger prayed for permission to issue order for release of the birds and to put the same under the control of the director of Zoological Garden, Alipore and whereupon the learned Magistrate inter alia passed the following order:

Dilip Chakraborty, Forest Ranger, Prays for permission to issue order to release the birds to the aviary under control of the Director Zoological Garden Alipore. Heard. No regular complaint within the meaning of the Cr. P.C. forthcoming Detention for the purposes of investigation is not necessary Let the seized birds and the monkey be kept in the safe custody of the director Zoological Garden until further order.

2. On 2nd July, 1987 the said Dilip Chakraborty, Forest Ranger filed a complaint before the learned Second Chief Judicial Magistrate, Sealdah, 24 Parganas u/s 51 of the Wild Life (Protection) Act, 1972 alleging that the petitioners were arrested u/s 50 of the said Act as the petitioners were found to carry on business on selling of wild animals at the C.I.T. Road (Moulali) and on the crossing of A.J.C. Bose Road and that the petitioners could not produce licence u/s 44 of the said Act for the purpose of carrying on business in the said premises. In the said complaint it was also stated that besides the business premises owned by the petitioners there were more business premises where wild animals were found but the owners were found to have run away. The wild animals seized from the aforesaid three unowned shops are also detailed in three seizure list under Head "Unclaimed". The total number of wild animals was 3725 and one monkey. In the said complaint it was also alleged that the birds and animals seized, were collected illegally because the arrested persons failed to produce documents of collection of birds and animals from other States.

3. In the affidavit-in-opposition filed by the said Dilip Chakraborty, Forest Ranger, Respondent no. 4 it was stated that every person who carries on business as dealer of captive animals must obtain a licence from the appropriate authority before dealing with the captive animals. The dealer was also required to specify the place of his business and the authority only allowed the said dealer to deal with captive animals from that specified place only. It was stated that Mohammad Zahoor and Mohammad Jalil were granted licences previously and that the said licence issued in favour of Md. Jalil has not been renewed with effect from 5/6/74 and the same was communicated to the said Md. Jalil,

and regarding licence obtained by the petitioner No. 1, Md. Zahoor, it is stated that the licence expired on 1/6/85. But the same had not been renewed since the said date.

4. At the time of hearing of the matter the record of the case was produced and the original licences as aforesaid were in the custody of the Respondents, but those were not current ones. In the affidavit-in-opposition it was stated that "it appears that the petitioners were dealing with these captive animals without any valid licence and documents in violation of the provisions of the Wild Life (Protection) Act 1972. The said captive animals were seized in presence of the petitioners and they were requested to sign the seizure list, but they refused to do so. We have made proper inventory of the said captive animals in presence of the police authority and also in presence of other Government Officials and subsequently handed over those captive animals which were seized from the petitioners to the aviary under control of the Director, Zoological Garden, Alipore. I further state that some imported birds which were in the custody of the petitioner were left in their custody as they are not captive animals within the meaning of the said Act and the petitioners kept them in their possession and custody."

5. In the said affidavit it was further stated that on 2/7/87 no complaint was lodged but the same was a forwarding report for presentation of accused at the court and that the same was not a complaint. The complaint was submitted only on. 15/7/87. Along with the affidavit-in-opposition a chart was issued giving brief particulars of the birds and animals which were seized from each of the petitioners, and those animals were stated under serial nos. 19, 20, 40, 44, 50, 73 and 77 of Schedule (IV) and serial No. 1B, Schedule I, Part III, Serial no. 17A, Schedule II, Part I.

6. Section 44 of the Wild Life (Protection) Act (referred to as the said Act) provides that-

Except under and in accordance with a licence granted under sub-section (4), no person shall commence or carry on the business as a dealer in captive animals. It is provided that every application referred to in sub-section(3) shall be made in such form and on payment of such fee as may be prescribed to the Chief Wild Life Warden or the authorised officer and that it is provided that no licence should be granted unless the Chief Wild Life Warden or the authorised officer having regard to such matters as may be prescribed in this behalf and after making such inquiry in respect of those matters, the licence should be granted.

The licence is valid for one year and shall be renewable for a period not exceeding one year at a time, and that no application for renewal of a licence shall be rejected unless the holder of such licence has been given a reasonable opportunity of presenting his case and the authority concerned is satisfied that there are grounds of rejection as specified in different clauses in sub-section (7) of section of the said Act.

Section 50 of the said Act provides that-

Power of entry, search, arrest and detention of any person who has committed offence under the said Act.

7. It is the case of the petitioners that no proper inventory as required under the law and had been made and it was specifically alleged that the inventories were not prepared in the presence of any independent witnesses. In this regard the allegation of the respondents is that the petitioners were present but refused to sign the inventory. The petitioners have strongly alleged that there had been deliberate misdescription of the birds etc. in the seizure list and further contended that at the time of seizure because of sudden police raid in such festival where 1000 people assembled, there was some pandemonium and in that process some other persons who are dealing with birds but who had no connection with the petitioners, their birds had been included together with the birds of the petitioners. It was specifically stated that it is not disputed that the petitioners are all illiterate persons and earn their livelihood from such trade.

8. The learned Advocate appearing on behalf of the petitioners contended that the trial had become more or less a farce and/or empty formality, inasmuch as, the birds have been handed over without any proper identification mark to the Zoological Garden authorities and under such circumstances, it is alleged that the petitioners have been deprived of proving their case that the birds which were seized, had been deliberately and motivatedly misdescribed so as to bring them within the mischief of the said Act. The petitioners' case is that the petitioners were not dealing with the captive animals as defined under the said Act. The captive animals being any animals specified in Schedule I, II, III or IV which are captured, in other words, it is specific case of the petitioners that birds which were not scheduled birds, were wrongly described as scheduled birds by giving names of the scheduled birds mechanically preventing the petitioners from carrying on business. It was further submitted by the learned Advocate on behalf of the petitioners that the respondents are harassing the petitioners in various ways and were not allowing the petitioners to carry on the trade or business and thus the respondents have infringed the petitioners' right guaranteed under Article 19(1)(g) of the Constitution of India. Several birds which have been captive birds, have been specified in Schedule I, II, III and IV of the said Act. After perusing the said Act, it appears to me that only in respect of birds specified in Schedule I, II, III and IV licence were required if anybody wants to deal with the same but there are various birds which were beyond those scheduled birds in respect of which license was not required.

Mr. Roy Chowdhury learned Advocate appearing on behalf of the Respondents produced file relating to the licence. I have perused the file and from the file it appears that the original licences are lying in the custody of the Licensing Authority, inasmuch as, when renewal was granted, the same was endorsed on the body of the licences. It further appears that in case of the petitioner no. 1 whose file was produced before this Court, the licence for the period of 30th June 1966 was made ready, but was not handed over as there were some delay on the part of the petitioners and thereafter on the part of the Licensing Authorities and in that process the licence for the next period came in and for

that reason, the licence though renewed, was not given to the petitioners and it was decided to issue a show cause notice. From the file it appears, that thereafter no steps whatsoever were taken by the respondents wither issuing show cause notice or giving any intimation to the petitioners about the fate of the earlier renewal licences. From the said file it appears to me that the Licensing Authorities" action in the matter is not at all happy. After all, the petitioners and others who are engaged in such trade, are all illiterate persons and in any event, the respondents being public servants discharging public duties must discharge their duties in a manner which creates confidence of the public in the administration. If the original licence had been kept in the custody of the Licensing Authorities, even though renewed, but the petitioners did not get the opportunity to know the fate of their licences and further even though the licence was renewed, the same was infructuous, because the petitioners were to apply for renewal for subsequent years year wise. This was a state of affairs.

9. Considering this state of affairs, I by my order dated 13th July 1988 passed an order directing the Respondents to grant licence purely on ad-hoc basis for a month to be effective from 15th July 1988 in accordance with the provisions of the said Act subject to any orders that may be passed under the Act and the respondents were also directed to permit the petitioners to carry on their trade or business in those birds for which licence were not required and the respondents were directed not to create any impediment on their right and. that pursuant to that order the Respondents had granted temporary licence to carry.

10. The admitted position is that in this case, the birds whether scheduled birds or not and whether the licence was required in respect of those birds, cannot be. made available before the criminal court before whom the case is pending, inasmuch, as, those birds which were seized from the custody of the petitioners and from the said festival on 1st July 1987, have been made over to the authorities of the Zoological Garden, Alipore for their custody and admittedly, it would not be possible to produce those birds which were seized at the time of trial. Secondly, the search and seizure were not properly held, inasmuch as, independent witnesses were not there and the petitioners admittedly were illiterate and were dealing with such business from generations. It the birds were seized without keeping identification marked on the body of such birds, in whatever means it is possible and if those seized birds were also handed over to the authorities of the Zoological Garden on the next date without keeping any identification mark and under such circumstances, it is not possible to produce those birds at the trial to prove that those were scheduled birds and on the contrary, the petitioners who are accused, are being prevented also to prove their case that those were not scheduled birds as those birds could not be produced. Under such circumstances, in my view, it would be contrary to justice and fair play to allow the continuation of the said criminal case. The version of the prosecution may be corrected and at the same time the version given by the petitioners who are the accused, could not be ruled out altogether and I do not think that any useful purpose would be served by keeping criminal case pending, inasmuch as, in

my view, the same had become an idle formality. Of course it was not proper on the part of the respondents to seize and hand over the seized birds to the Zoological Garden without keeping any identification mark, inasmuch as, these birds are admittedly relevant exhibits and evidence for the purpose to bring-home the charges by the prosecution and that on the contrary, if they are produced, in that event, the petitioners' defence could have succeeded or failed. Under such circumstances, in my view, the trial cannot be allowed to proceed any further. A criminal trial should not be allowed to continue knowing fully well any party cannot place their case and defence of the accused have been made nugatory. The petitioners who are the accused, had been made defenceless and on the contrary, the prosecution would be unable to prove that those birds were scheduled birds. Particularly in the background of the case that at the time of search and seizure, there was no independent witness and that merely on the basis of the seizure list prepared in such a manner, a person cannot be penalised or be prosecuted for committing an offence under the law. It is the cardinal principle of criminal jurisprudence that the onus of proof that the accused had committed an offence under the law, is on the prosecution. But in the instant case, the prosecution, because of their own conduct, had created a situation under which they were unable to discharge this onus. It is also firmly established principle that a person cannot be penalised in the case which is doubtful, whether the accused person had committed or not, cannot be proved. Under such circumstances, the criminal case must come to an end. Accordingly, after considering the facts and circumstances of the case and the submission of the respective Counsels, I must hold that the criminal case cannot be allowed to proceed any further and accordingly, the same stand quashed, without prejudice to the rights and contentions of the parties. Further without going into the vires and/or the validity of the relevant provisions of this Act, it is clear that the petitioners have a right to carry on trade guaranteed under Article 19(1)(g) of the Constitution of India and further the petitioners have also right to carry on trade or business of the captive birds after obtaining licence from the Licensing Authorities.

11. Accordingly, after considering the facts and circumstances of the case, I dispose of this writ application by the following order:

- a) Criminal Case being Case No. 44 of Wild Life (Protection) Act 1972 pending before the Additional Chief Judicial Magistrate, Sealdah, stand quashed and the petitioners are discharged from the said criminal case.
- b) That the Respondents shall permit the petitioners to carry on their trade or business in those birds for which licences are not required and the Respondents shall not create any impediment on their right which was not prohibited under the law.
- c) That the Respondents shall forthwith grant licence purely on ad-hoc basis for a period of 2 months to be effective from 15th July 1989 this year by waiving the normal requirement and that within a period of fortnight from to-day the petitioners shall also apply for licences for the purpose of carrying on business in the captive animals which the

Respondents are directed to dispose of in accordance with law sympathetically without taking into consideration the search and seizure and the criminal case which was the subject matter of the writ application.

As those are unidentified birds they cannot be found out and restored, the respondents are directed as special case to take a lenient view in the matter, particularly in view of the fact the petitioners are poor and illiterate persons who are engaged in such business for generations in this state. The purpose of the Act would not be frustrated, if the licence is given to these persons, who are birds" lovers and who want to keep the caged birds in respective houses in the matter of their hobbies would be purchasing birds from them. The Act is for the purpose of protection of the birds and when the petitioners are not being anything contrary to spirit and object of an Act, the respondents must take into consideration in this factor while considering their applications for grant of licence for a period beyond the period of two months in respect of which the Respondents are directed to grant licences on ad-hoc basis. The identified birds could not be restored but the birds which had been seized, should be treated to have been lost. No order could be passed in this regard because that will create complication and the same cannot be carried out by the Respondents, ever though they were bound to restore the birds under the law. The petitioner"s also undertake not to violate any of the provisions of the said Act. While dealing with the birds in case, the said birds are covered under the said Act in respect of which licence is granted. This order is passed considering the facts that every person has right to earn his livelihood and it is fit and proper case that some orders are required to be passed, otherwise the preamble of constitution which guarantees justice, social and economic, would become an empty slogan. This order is also passed because in the fact that since the search and seizure took place on 1st July, 1987 the petitioners could not carry on their business except for period a period of fortnight, that too in terms of the interim order passed by this court last year.

The writ application is thus disposed of in terms of the order. There will be no order as to costs.