

Ujjal Dasgupta Vs. State

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Court : Delhi

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Judge : S. Muralidhar, J.

Acts : [Official Secrets Act, 1923](#) - Sections 3, 4, 5, 9, 10, 13(3) and 14; [Information Technology Act, 2000](#) - Sections 2 and 2(1); [Prevention of Corruption Act, 1988](#); [Evidence Act, 1872](#) - Sections 3 and 126; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 154, 158, 161, 161(3), 164, 170, 173, 173(2) to 173(6), 207, 482 and 548; Indian Penal Code (IPC) - Sections 120B, 201 and 409; [Constitution of India](#) - Article 21

Appeal No. : Crl. M.C. 1255/2008 and Crl. M.A. 4760/2008

Appellant : Ujjal Dasgupta

Respondent : State

Advocate for Def. : Mukta Gupta, Sr. Standing Counsel and ; Pawan Behl, A.P.P.

Advocate for Pet/Ap. : Sidharth Luthra, Sr. Adv.,; P.K. Dubey and; Anurag Ahluwalia

Judgement :

S. Muralidhar, J.

1. This petition under Section 482 of the Code of Criminal Procedure, 1973 ('Cr PC') challenges an order dated 19th April 2008 passed by the learned Additional Sessions Judge ('ASJ'), Delhi dismissing an application filed by the Petitioner, who is an accused facing trial in FIR No. 42 of 2006 under Sections 3, 4, 5 and 9 of the [Official Secrets Act, 1923](#) ('OSA') and 409/201/120-B of the Indian Penal Code ('IPC') registered at Police Station Special Cell, for the supply of certain documents relied upon by the Respondent State.

2. A significant question of law that arises in this matter concerning the right of an accused facing trial under the OSA to be provided with the copies of the documents relied upon by the prosecution which are in digital form in pen drives and hard discs. The case of the prosecution is that under Section 14 OSA even documents gathered during investigation can, if they are classified or secret, be withheld from the accused although they are relied upon by the prosecution.

3. The brief facts relevant for the present petition are that the FIR No. 42 of 2006 dated 11th June 2006 was registered in the Police Station Special Cell in respect of the collection and dissemination of certain of secret defense related information. Separate complaints were filed against the co-accused. As regards the petitioner, a complaint dated 16th October 2006 under Section 13(3) OSA was filed by the Deputy Commissioner of Police ('DCP') Special Cell, New Delhi in the court of the learned Chief Metropolitan Magistrate. A charge sheet was filed the next day i.e. 17th October 2006.

4. The background to the complaint against the petitioner is that acting on the basis of some secret information about the co-accused Shib Shankar Paul having illegally procured certain classified documents from his office at the National Security Council Secretariat for being supplied to foreign agents, a search of Mr. Paul's house was conducted on 10th June 2006 and certain classified documents and a circular were recovered. The investigation of the case was taken up and the co-accused Mukesh Saini was arrested and at his instance certain further classified data was recovered. The interrogation of Mukesh Saini revealed that the petitioner, who was a retired Brigadier and working with the Research and Analysis Wing ('R&AW;'), was in close touch with Ms. Rosanna Minchew with

whom he came into contact during a training course of the Indo US Cyber Security Forum in September 2005. The arrest and interrogation of the Petitioner led to the recovery of three pen drives in which he had stored the secret information. It was further found that the Petitioner had in possession classified data on his official laptop. He brought it to his residence, worked on the data on his home PC and transferred information on to pen drives. The case of the prosecution as regards the contents of the hard discs and is evident from paras 11,12 and 13 of the Complaint which read as under:

11. The recovered hard disk drives and pen drives recovered from accused Ujjal Dasgupta were analysed in Cyber Lab of Special Cell. During analysis the steganography software 'Stegno_tesec version 1.0' developed by 'FCE, MCTE', Faculty of Communication Engineering Military College of Telecommunication Engineering, Mhow (An Army Institution). TCPDUMP version 3.9.2005.05.24, 'C Cleaner' and 'Eraser' along with many other files were recovered from one pen drive make CommunicAsia 2005. About 50 presentations relating to NSCS and 'Special Action Plan and Follow ups 29 Sept 2004 (3PPs) and 'Project Anveshak' related 3PPs accessed from F Drive relating to R&AW; were recovered from the hard disk of his home computer. 19 PP's relating to 'Project Anveshak' were also recovered from the hard disk of his official laptop computer.

12. Documents/information relating to 'Project Anveshak' recovered from the house computer and laptop computer of accused Ujjal Dasgupta were sent to Cabinet Secretariat (R&AW;) for opinion on classification and authorization of possession. R&AW; categorically opined that Project 'Anveshak' is a classified project. Ujjal Dasgupta had access to the software developed under this project. Ujjal Dasgupta was not allowed to take the software or its populated contents outside the office. He was also not allowed to connect his official laptop computer of PC computer to an internet connection. The project is related to the security/defense matters of the country. IF the project or its details were passed on to an unauthorised person or foreign agent, it could be prejudicial to the safety or interest of the State.

13. All the recovered hard disc drives, pen drives, CDs recovered from all the accused persons have also been sent to CFSL, Chandigarh for forensic analysis. The result is awaited.

5. Along with the chargesheet the prosecution appended a list of witnesses as well as a list of documents being relied upon. The list of documents includes the following which are relevant to the case on hand:

(6) Report of Cyber Lab dated 21.7.2006 with (Envelope W) 1 PP(7) Report of Cyber Lab dated 2.8.2006 (Envelope X) 3 PPs(8) CFSL report No. 635/06 dated 28.7.2006 3 PPs(9) CFSL report No. 669 dated 18.8.2006 4 PPs

6. The Petitioner filed two applications before the learned trial court on 12th January 2007 praying that the prosecution should supply 'clones of the alleged hard disk drive of the office laptop and home computer allegedly of the accused' as well as the following documents:

A Documents

(i) D-6: Envelope (W) not supplied.

(ii) D-7: Envelope (X) not supplied.

(iii) D-10: Pages 3-5 not legible.

(iv) D-11' The list of documents says there are 2 + 33 pages but the 2 + 66 pages are filed.

(v) D-17: Annexures A and B as mentioned in the letter have not been filed or supplied.

(vi) D-2,8,19-24 not supplied.

B Statements of witnesses(i) Statements of PW 1-7,9, 10 and 12 have not been supplied.

7. By an order dated 12th January 2007 the application was rejected by the learned CMM for the following reasons:

An application Under Section 207 Cr.P.C. has been moved on behalf of the accused Ujjal Dasgupta for supply of the clone of the hard disk recovered on the instant case copy of the same has been given to APP for State.

Heard. Since the said hard disk form the case property of the case, the clone can neither be prepared and as reported by the IO, the hard disk are likely to get tampered with if the clones are ever ventured to be prepared. In any case the same the case property, same cannot be cloned and supplied to the accused persons. The application is, thereforee, dismissed.

Another application Under Section 207 Cr PC has been moved on behalf of accused Ujjal Dasgupta for supply of certain deficient documents. The IO is present in person and has supplied the deficient documents mentioned in Sl. No. 1 and 2 mentioned in the application in para 3 (a) of the said application. Since the said documents are classified documents, the recovery of which from the accused persons have brought about the institution of the criminal proceeding against them in the instant case, the same cannot be supplied to the accused. The remaining documents have already been supplied compliance of Section 207 Cr PC qua all the accused persons in complete.

8. The Petitioner then filed a petition Crl. M.C. No. 206 of 2007 in this Court challenging the said order. By an order dated 13th February 2008 the said petition was dismissed by this Court as withdrawn with liberty to the Petitioner to file a fresh application before the learned trial court for supply of documents. This court by a separate order dated 19th February 2008 rejected the prayer made by the petitioner for grant of bail but observed that since the petitioner had been in custody for over 18 months, the trial court should be directed to proceed with the arguments on charge and pass an order thereon by 30th April 2008. On 4th March 2008, pursuant to the liberty granted by this Court, the Petitioner filed a fresh application before the trial court praying that the prosecution should be directed to supply the documents mentioned in paras 3, 4 and 7 of the said application which read as under:

3. It is stated in the first application by the Applicant that prosecution has allegedly relied on the purported hard disk, purported office laptop and home computer

purportedly of the Applicant but same were not supplied to the accused/applicant till date. The said hard disk allegedly form part of the evidence against the applicant but the same had neither been produced/filed before the Hon'ble Court of learned CMM nor have the clone/copy of the same been supplied to the applicant/accused.

4. In the 2nd application, the applicant had sought following documents, inter alia:

(a) D-6: envelope (W) not supplied.

(b) D-7: envelope (X) not supplied.

(c) D-17: Annexure A & B, as mentioned in the letter have neither been filed nor supplied by the prosecution.

7. That during the pendency of the said petition before the Hon'ble High Court of Delhi the applicant had filed a Miscellaneous Application under Section 482 Cr PC bearing Criminal Miscellaneous No. 7266/2007 seeking inter alias therein amendment of the Petition under Section 482 Cr PC. In the said Criminal amendment Petition Criminal M.A. No. 7266/07 applicant had sought following documents:

(a) Pen drives (i) CommunicAsia 2005 IXIA 128 MB, (ii) Afilia 64 MB, (iii) Kingston Data Traveler 256 MB DTI/256/CN 102205 05317-101-ADOLF SV CHINA, which were allegedly recovered vide recovery memo dated 20.7.2006. Clones/mirror images of the above pen drives may be supplied.

(b) Hard disk of the alleged office PC of the Petitioner allegedly recovered vide Memorandum dated 31.7.2006. Clones/mirror image of the said hard disk may be supplied.

(c) Details (including the file name, date of creation, date last accessed, file size and path) of the documents as mentioned in D-6 and D-7 of the chargesheet dated 17.10.2006.

(d) Certified/authenticated print out of screens mentioned in D-6 of the chargesheet dated 17.10.2006.

(e) Certified/authenticated print outs of screens mentioned in D-7 of the chargesheet dated 17.10.2006.

(f) Complete list of subfolders/documents found in Volume 'PHY-109-6 (PENDRIVE - 1)' as mentioned in D-9 of the chargesheet dated 17.10.2006.

(g) Complete forensic report given by CFSL in D-8 and D-9 i.e. CFSL Report No. 635/06 dated 28.7.2006 and CFSL Report No. 639 dated 18.8.2006 respectively.

9. By an order dated 10th March 2008 the said application was rejected by the trial court inter alia on the ground that 'the pen drive and its contents are the exhibits and the copies thereof cannot be supplied.' Copies of the documents contained in a hard disk were also declined to be supplied. However, the trial court did not have the benefit of a decision of this Court delivered the next day in Dharambir v. Central Bureau of Investigation : 148(2008)DLT289 , where, inter alia, this Court held [paras 13 (i) and (ii)]:

13 (i) As long as nothing at all is written on to a hard disc and it is subjected to no change, it will be a mere electronic storage device like any other hardware of the computer. However, once a hard disc is subject to any change, then even if it restored to the original position by reversing that change, the information concerning the two steps, viz., the change and its reversal will be stored in the subcutaneous memory of the hard disc and can be retrieved by using software designed for that purpose. thereforee, a hard disc that is once written upon or subjected to any change is itself an electronic record even if does not contain any accessible information at present. In addition there could be active information available on the hard disc which is accessible and convertible into other forms of data and transferable to other electronic devices. The active information would also constitute an electronic record.

(ii) Given the wide definition of the words 'document' and 'evidence' in the amended Section 3 the EA, read with Sections 2 (o) and (t) IT Act, a Hard Disc which at any time has been subject to a change of any kind is an electronic record would thereforee be a document within the meaning of Section 3 EA.

10. The Petitioner challenged the order dated 10th March 2008 of the trial court by way of CrI. M C No. 893 of 2008 in this Court. By an order dated 28th March 2008 this Court set aside the order dated 10th March 2008 and remanded the application to the learned trial court for a fresh decision in light of the decision in Dharambir. Thereafter the impugned order dated 19th April 2008 was passed by the learned ASJ again dismissing the application. Before the learned ASJ, reliance was placed by the Petitioner on the decision of the Supreme Court in *The Superintendent and Legal Remembrancer of Legal Affairs v. Satyen Bhowmick* : 1981 CriLJ341 and the judgment of this Court in Dharambir. The learned ASJ opined that the decision in Dharambir concerned a case under the [Prevention of Corruption Act, 1988](#) ('PC Act') and not the OSA. As regards the judgment in *Satyen Bhowmick* the learned ASJ took the view that the issue before the Supreme Court in that case 'was not with regard to the supply of the incriminating documents to the accused under Section 207 Cr PC.' Thereafter in para 14 the learned ASJ concluded:

14. Giving a direction to the prosecution to supply the mirror images of the pen drives and the hard disc or the print outs of the contents thereof would mean that that Court is indirectly allowing the circulation of the documents, the possession thereof has been made the basis of prosecution of the accused/ applicant under the Official Secret Act. Such could not have been the intention of the Legislature while incorporating Section 207 Cr PC. It is one thing to say that such and such documents or evidence collected by the prosecution independently is incriminating and it is other thing to say that the possession of the documents recovered from the accused would by itself constitute an offence punishable under the Official Secret Act. In my humble opinion, the accused is not entitled to the mirror images of the pen drives or the hard discs or the print outs thereof. The application is, therefore, dismissed.

11. It is submitted by Mr. Sidharth Luthra, learned Senior counsel appearing on behalf of the Petitioner that the learned ASJ erred in rejecting the prayer for supply of documents to the accused which were being relied upon by the prosecution as was evident in the list of documents enclosed with the chargesheet. With reference to the requirement of the law under Section 173(5) read with Section

207(v) Cr PC, he submits, relying on the decision in Dharambir, that copies of the documents forwarded to the trial court by the prosecution along with the chargesheet can be denied only on an extremely limited ground that the documents are voluminous in which case the accused will only be allowed inspection either personally or through the lawyer. As far as the stand of the prosecution taken during arguments before the learned trial court that the documents are privileged and secret, he points out that no such application was filed at any point of time by the prosecution in the trial court either under Section 173 Cr PC or Section 14 OSA claiming privilege. According to him, the judgment of the Supreme Court in Satyen Bhowmick answers the question in favor of the petitioner when it holds that Section 14 OSA does not take away the right of the accused to the copies of those documents which the prosecution claims are secret documents for the purpose of OSA.

12. Ms. Mukta Gupta, learned Standing counsel appearing on behalf of the State did not dispute that the decision in Dharambir concludes the issue that the hard discs and pen drives in the present case are documents within the meaning of Section 3 of the Indian [Evidence Act, 1872](#) ('EA') and Sections 2(o) read with Section 2(1) of the [Information Technology Act, 2000](#) ('IT Act'). She submitted that the prosecution would have no objection to providing the petitioner the following documents:

(i) the copies of the pen drives mentioned in para 7(a) of his application before the trial court [extracted in para 8 of this order],

(ii) the details concerning the file name, date of creation, date last accessed, file size and path in relation to D-6, D-7 [as mentioned in para 7 (c) of the application] and also of the hard disc

(iii) Copies of the documents listed at Sl. Nos. 1 to 51 of D-7

(iv) the certified print out of screens mentioned in D-6 and D-7 [mentioned in paras 7 (d) and (e) of the application]

(v) the list of subfolders/documents of the pen drive in D-9 [mentioned in para 7 (f) of the application]

(vi) the complete forensic report of the Central Forensic Science Laboratory ('CFSL') in D-8 and D-9 [mentioned in para 7 (g) of the application]

According to her, the prosecution has already provided the petitioner with the documents in paras 7(f) and (g) of the application but the petitioner denies this.

13. Ms. Gupta opposes the plea for supply of the other documents on the ground that some of these documents are secret and classified, and if given to the accused would themselves attract the prohibition of the OSA. According to her the documents can further get disseminated thereby encouraging further contravention of the OSA. She submits that while there would be no objection to providing the petitioner the documents D-6, D-7 and D-17, the Petitioner can at best be permitted only inspection of the hard copies of the contents of Envelope (W) [which is paper print out of the pen drive recovered from the Petitioner] Envelope (X) [which is also paper print out of details concerning 'Project Anveshak' which is certified to be a classified document] and Annexures A & B [containing 'sensitive information']. The prosecution was not willing to give the petitioner the following document in D-7:

52. Project Anveshak related pages 3 pages accessed from F: drive.

And copy of

Another Hard Disk Drive make 'Travestor' Sr. No. 2N8500JJN501TR Model 25NO30ATS)4-0 capacity 30 GB reportedly used by Ujjal Dasgupta at his office in his laptop is checked using Cyber tools and many documents/data were found stored in the hard disk drive. They were displayed on the monitor and 19 pages relating to 'Project Anveshak' accessed from E: drive.

She clarifies that although the prosecution would be relying upon the said documents for the purpose of the present case, their copies can nevertheless not be provided to the petitioner. She contends that it is open to the prosecution in terms of Section 173(6) Cr PC to withhold these documents from the petitioner on

the ground that their 'disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest.' She submits that the words 'such statement' occurring in Section 173(6) Cr PC cannot be restricted to the statements recorded under Section 161 Cr PC which are referred to Section 173(5)(b); they should be interpreted to cover the documents referred to in Section 173(5)(a) Cr PC. She further relied upon a short order dated 30th July 2004 passed by the learned Single Judge of this Court in Pookat Gopalan v. State Crl Appeal No. 571 of 2002 and submitted that normal practice that is usually followed in trials under the OSA was only to permit inspection of the classified seized documents to the accused and nothing more.

14. From the above submissions it appears that the controversy regarding supply of copies of documents to the petitioner is confined to those mentioned in para 13 above. The questions that arise in this petition are therefore in relation only to those documents. As regards the documents mentioned in para 12 of this order, the prosecution has no objection to the petitioner being provided with the copies thereof and therefore, the trial court should ensure that the petitioner is provided those copies, if not already provided, without delay.

15. That brings us to the principal issue raised in this petition concerning supply of those documents to the petitioner which according to the prosecution is secret and privileged. It is not disputed that the prosecution never filed any application in the trial court claiming privilege in terms of section 173(6) Cr PC. That provision requires the police officer to give reasons in writing why he is objecting to giving copies of certain statements in a note to the trial court. However, in the instant case, no such note was given and the objection was taken only during arguments. Without going into the question whether the prosecution would therefore be precluded from claiming privilege, this Court proposes to nevertheless examine the merits of the objection. In the first place the distinction between the two types of material, i.e. statements of witnesses recorded by the police under Section 161 Cr PC and the documents gathered during investigation, which are forwarded to the trial court by the police along with the charge sheet, requires to be noticed. Section 173 and 207 Cr PC are relevant in this context and they read as under:

173. Report of police officer on completion of investigation.

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

(2)(i) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating-

(a) The names of the parties;

(b) The nature of the information;

(c) The names of the persons who appear to be acquainted with the circumstances of the case;

(d) Whether any offence appears to have been committed and, if so, by whom;

(e) Whether the accused has been arrested;

(f) Whether he has been released on his bond and, if so, whether with or without sureties;

(g) Whether he has been forwarded in custody under section 170.

(ii) The officer shall also communicate, in such manner as may be prescribed by the State Government, the action taken by him, to the person, if any whom the information relating to the commission of the offence was first given.

(3) Where a superior officer of police has been appointed under Section 158, the report shall, in any case in which the State Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer in charge of the police station to make further investigation.

(4) Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit.

(5) When such report is in respect of a case to which Section 170 applies, the police officer shall forward to the Magistrate along with the report-

(a) All documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;

(b) The statements recorded under Section 161 of all the persons whom the prosecution proposes to examine as its witness.

(6) If the police officer is of opinion that any part of any such statement is not relevant to the sub-matter of the proceeding 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 exclude that part from the copies to be granted to the accused and stating his reasons for making such request.

(7) Where the police officer investigating the case finds it convenient so to do, he may furnish to the accused copies of all or any of the documents referred to in Sub-section (5).

(8) Notwithstanding in this section shall be deemed to preclude further investigation in respect of an offence after a report under Sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed and the provisions of Sub-section (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under Sub-section (2)

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 there from 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.

(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:

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:

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.

16. This Court in Dharambir after analyzing the two provisions concluded:

8.2 The scheme of the above two Sections indicates that the Legislature has intended to differentiate between documents forwarded to a court by the police along with the charge sheet or sent to it earlier during the course of investigation on the one hand and the statements of prospective witnesses recorded by the police during investigation under Section 161 Cr PC, copies of which are also forwarded to the Court along with the charge sheet, on the other. This is plain from the language of Section 173(5)(a) when compared with that of Section 173(5)(b) read with Section 173(6) and the first and second provisos to Section 207(v) Cr PC. For instance, the reference in Section 173(6) to 'any such statement' is to the statement of witnesses referred to in Section 173(5)(b) Cr PC, i.e statements recorded of prospective witnesses under Section 161 Cr PC. In relation to these statements the police office has a discretion under Section 173(6) Cr PC to

withhold a part thereof if he forms an opinion that it is inexpedient in public interest to do so and inform the Magistrate accordingly. Further, the first proviso to Section 207(v) gives a discretion to the Magistrate to provide to the accused even those statements which 'the Magistrate thinks appropriate' shall be furnished.

8.3 This is in contrast to the position regarding documents. Section 173(5)(a) Cr PC refers to documents 'on which the prosecution proposes to rely' other than 'those already sent to the Magistrate during the investigation'. These documents are to be forwarded to the Magistrate along with report. thereforee at the stage when the supply of documents has to be made in terms of Section 207(v) Cr PC what the Magistrate has with him are those documents which have already been sent to the Magistrate during the course of investigation and those documents that are forwarded by the police officer along with the charge sheet. Under Section 207(v), the Magistrate has no discretion in the matter of not supplying such documents. The only limited discretion that the Magistrate has in terms of the second proviso to Section 207(v) Cr PC is if the documents are so voluminous he can direct that the accused will be permitted only an inspection of the documents.

17. Section 207(iii) Cr PC also brings out the above distinction. thereforee, it is not possible to accept the submission of Ms. Mukta the word 'such statement' occurring in Section 173(6) Cr PC should be given wide interpretation to also include documents forwarded by the prosecution along with the chargesheet to the learned trial court in terms of Section 173(5)(a) Cr PC.

18. The other ground on which the prayer of the petitioner for supply of copies of the documents referred to in para 13 above is based on Section 14 OSA which reads as under:

Section 14 - Exclusion of public from proceedings.

In addition and without prejudice to any powers which a court may possess to order the exclusion of the public from any proceedings if, in the course of proceedings before a court against any person for an offence under this Act or the proceedings on appeal, or in the course of the trial of a person under this Act, application is made by the prosecution, on the ground that the publication of any

evidence to be given or of any statement to be made in the course of the proceedings would be prejudicial to the safety of the State, that all or any portion of the public shall be excluded during any part of the hearing, the court may make an order to that effect, but the passing of sentence shall in any case take place in public.

It is submitted that since the above provision talks of even 'publication of evidence', it would be open to the trial court, on an application by the prosecution to refuse the request of the petitioner accused to supply of copies of documents on the ground that their publication 'would be prejudicial to the safety of the State.' Again, it is not disputed that in the instant case no such application was made by the prosecution before the trial court. The objection was raised orally during arguments. Still, this Court proposes to examine the merits of the objection as it involves an important question of law.

19. The decision of the Supreme Court in *Satyen Bhowmick* relied upon by the Petitioner, appears to cover the issue and therefore requires to be discussed in some detail. The facts of the said case are set out in paras 2 and 3 of the judgment which are reproduced for easy reference:

2. The facts of the case lie within a very narrow compass and the central controversy turns upon the interpretation of Section 14 of the [Official Secrets Act, 1923](#) (hereinafter referred to as the 'Act'). It appears that a complaint was filed on the 20th March 1969 against 38 accused persons under Section 120B of the Indian Penal Code read with Sections 3, 9 and 10 of the Act. The charges against the accused were no doubt very serious and concerned the security of the State, as the accused persons are alleged to have passed on some military secrets to the enemy resulting in serious detriment to the safety and security of our country. Of the 38 accused persons named in the chargesheet, only 17 were in custody and a commitment inquiry into the charges was held against them by the trial Magistrate.

3. During the commitment inquiry the State filed an application under Section 14 of the Act praying that the proceedings be held in camera and public should be excluded from attending the hearings of the case because the statements made in

the course of the proceedings would be prejudicial to the safety of the State. It was also prayed that apart from excluding the public from the hearings of the proceeding, the accused should not be allowed to have access to, or be given copies of, the statements of the witnesses recorded by the Magistrate or those recorded earlier during police investigation. The Magistrate partly allowed the application but permitted the defense lawyer to take copious notes of the statements of witnesses in order to be in a position to cross-examine the witnesses. Subsequently, the Magistrate directed the lawyer to produce his notebook so that the Magistrate may examine if only a summary of the evidence had been taken by the lawyer of the statements had been taken in extenso in which case it would amount to publication and, therefore, would be barred by Section 14 of the Act. The lawyer of the defense appearing before the Magistrate first agreed to show his notebook but later claimed privilege under Section 126 of the Evidence Act on the ground that the register in which he had taken down the notes of the evidence also contained certain instructions given to him which amounted to a privileged communication and could not be looked into by the Court. In this view of the matter the Magistrate found himself helpless and proceeded with the Inquiry. As the prosecution was not satisfied with the procedure adopted by the Magistrate, the State filed a revision before the High Court for quashing of the order of the Magistrate in allowing the lawyer to cross-examine the witnesses without impounding the notes comprising the statements of the witnesses taken down in extenso by the lawyer.

20. The High Court of Calcutta took the view that in view of Section 14 OSA 'not only could the public be excluded from taking part at the hearing but even the statements of witnesses recorded by the court or other documents could not be made available to the accused or his counsel nor could copies of the said documents be given to the accused.' This was challenged in appeal before the Supreme Court.

21. The Supreme Court then proceeded to discuss in paras 13 and 14 of the judgment the scope and ambit of Section 14 OSA as under:

13. It may be pertinent to note that while this Court was fully alive to the contents of Section 14 it neither held that the opening part of the section amounted to a non obstinate clause nor that the section in any way deprived the accused of the right of getting copies of the statements of witnesses recorded by the court or before the police. In the aforesaid case, the Supreme Court was concerned with a divorce case but the observations made by this Court fully apply to the facts of the present case also on the view that we take on the scope and ambit of Section 14 of the Act.

14. There can be no doubt that an open trial held in public is the general rule and seems to be the very concomitant of a fair and reasonable trial. Yet the public can be excluded from the hearings of the trial and the proceedings can be held in camera only under very exceptional circumstances as pointed out by this Court in the aforesaid case. This being the position, Section 14 must be interpreted so as to fall in line with the observations made and the test laid down by this Court regarding the doctrine of holding proceedings in camera. A close and careful scrutiny of Section 14 would itself clearly show that the section does not contemplate the type of exclusion that the High Court seems to think.

22. Thereafter, the Supreme Court interpreted Section 14 OSA as not prohibiting and precluding giving to the accused copies of the statements of the witnesses recorded during investigation. In para 23 it held:

23. Thus, if we hold that Section 14 by using the word 'publication' deprives an accused of getting any copies of the statement of witnesses or of the judgment under Section 548 of the Cr PC or Criminal Rules 308 and 310 framed by the Calcutta High Court, then it would be difficult to uphold the constitutional validity of Section 14 because then the procedure would become extremely unreasonable, harsh and prejudicial to the accused as a result of which the case would have been tried according to a procedure which was not in consonance with the provisions of Article 21 of the Constitution. This aspect of the matter does not appear to have been considered by the High Court perhaps because Maneka Gandhi's case (supra) came much later.

25. Ultimately the Supreme Court reached the following conclusion in para 26(1), (2) and (3):

26. Thus on an overall consideration of the facts and circumstances of the case and a true interpretation of the language employed in Section 14 of the Act, we reach the following conclusions:

1. That Section 14 apart from providing that proceedings of the Court may be held 'in camera' under the circumstances mentioned in the section, does not in any way affect or override the provisions of the Criminal Procedure Code relating to enquiries or trials held there under.

2. That Section 14 does not in any way deprive the valuable rights of the accused to get copies of the statement recorded by the Magistrate or statements of witnesses recorded by the police or the documents obtained by the Police during the investigation as envisaged by Criminal Rules 308 and 310 framed under the Cr PC by various High Courts nor does Section 14 in any way affect the right of the accused to get copies under Section 548 of the Cr PC

3. That the opening words of Section 14 do not amount to a non obstante clause but are merely in the nature of an enabling provision reserving the inherent powers of the Court to exclude the public from the proceedings if the Court is of the opinion that it is just and expedient to do so.

26. The purport of the judgment of the Supreme Court in *Satyen Bhowmik* is that Section 14 OSA does not take away the right of the accused to get copies of either the statements recorded by the police or the documents gathered by it during investigation. The apprehension expressed in the present case by the prosecution that the documents are themselves classified containing sensitive information and therefore cannot be further disseminated as that would amount to publication of sensitive information which was prohibited by Section 5 OSA, was answered in para 24 of *Satyen Bhowmik* in the following words:

24. Mr. Mukherjee submitted that if the accused is allowed to have access to the statements recorded by the police or is given a copy of the statement recorded by

the Magistrate, then it will amount to publication and will endanger the safety and security of the country because the accused or the lawyer who is defending the accused may publish the statements or disclose the same to other persons. This apprehension, in our opinion, is not well founded. The Act itself takes particular care of such a situation because under the provisions of Section 5 of the Act any person who is found in possession or control of any document or information and makes it public would also be deemed to have committed an offence under that section and would be prosecuted and entitled to a heavy penalty. This, therefore, prohibits even the lawyers from disclosing the evidence outside the court. So far as arguments and the discussion of the evidence inside the court is concerned, so long as the proceedings are in camera the danger of publication is completely excluded.

27. In view of the authoritative pronouncement of the Supreme Court in *Satyen Bhowmik* the objections raised by the prosecution in the present case are not well founded in law. As long as the prosecution is relying upon the documents forwarded by it to the trial Court along with the chargesheet it will not be open to the prosecution to deprive the accused the copies of those documents. As explained in *Satyen Bhowmik* merely because the case is under the OSA, the legal position cannot be different. The only difference is that the prosecution can insist and rightly so that neither the accused nor the lawyer of the accused will be permitted to make the documents public or pass them on to any person or disseminate them in any manner whatsoever. If in fact either the accused or the lawyers of the accused do not observe this prohibition they run the risk of committing an offence under the OSA.

28. In that view of the matter, the impugned order to the learned ASJ is unsustainable in law and is hereby set aside by this Court.

29. The question that arises as to the manner in which the petitioner can be provided copies of documents sought by him. As regards the documents already agreed to be supplied by the prosecution as mentioned in para 12 above, the trial court will ensure that these are provided, if not already, to the petitioner by the prosecution without delay. As regards the hard disc of the office PC of the

Petitioner and the details of the documents in D-6 and D-7, Ms. Gupta states that the prosecution will have no objection to running a software on the hard discs of the home and office PCs which will indicate the various charges the hard disc has been subject to indicating the file name, date of creation, date last accessed, file size and path of the contents of the hard disc. The print out of the results of the software so run on the hard disc authenticated and certified, should be handed over to the accused.

30. As regards the documents mentioned in para 13, i.e. Envelopes (W), (X) and Annexures A, B if it they are in the form of hard copies, then the certified/authenticated copies of the hard copies will be furnished to the Petitioner but this is subject to the condition that neither the Petitioner nor his counsel will further disseminate or in any manner transmit such document or allow it to be accessed or read/write or inspected by any person other than the Petitioner and counsel for the Petitioner. Apart from the hard copies of Envelopes (W), (X) and Annexures A, B, the copies of the documents in the hard disc being relied upon by the prosecution duly authenticated should be supplied to the petitioner. As regards the home PC is concerned, the hard disc thereof if it any documents being relied upon by the prosecution then authenticated hard copies thereof should be provided to the Petitioner. If these directions are complied with the cloned copies of the pen drives and hard discs need not be provided.

31. All the documents as referred to hereinabove should be provided by the prosecution to the Petitioner within a period of ten days from today and in any event not later than 5th May 2008.

32. In view of the directions passed today, the deadline of 30th April 2008 for the trial court to pass an order on charge is required to be extended. It is now directed that the trial court will recommence arguments on charge on 12th May 2008 after the petitioner has been supplied with the documents as directed in this order and pass the order on charge on or before 23rd May 2008.

33. The petition and the pending application stand disposed of.

34. A copy of order be given dusty to learned Counsel for the parties.

35. The Registry will deliver a certified copy of this order by Special Messenger to the concerned trial court immediately.

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