

IN THE HIGH COURT OF DELHI AT NEW DELHI

CRL.REV.P. 641/2008 & CRL.M.A. 13894/2008

Reserved on: 17th April 2009

Decision on: 15th May 2009

VINOD KUMAR JHA Petitioner
Through Mr. Siddharth Aggarwal with
Mr. Manu Sharma, Advocate

versus

CENTRAL BUREAU OF INVESTIGATION Respondent
Through Ms. Mukta Gupta, Sr. Standing Counsel
with Mr. Rajat Katyal, Advocate

and

CRL.REV.P. 11/2009 & CRL.M.A. 233/2008

KULBHUSHAN PARASHAR Petitioner
Through Mr. Siddharth Aggarwal with
Mr. Simon Benjamin, Advocate

versus

CENTRAL BUREAU OF INVESTIGATION Respondent
Through Ms. Mukta Gupta, Sr. Standing counsel
with Mr. Rajat Katyal, Advocate

CORAM:

HON'BLE DR. JUSTICE S. MURALIDHAR

1. Whether Reporters of local papers may be
allowed to see the judgment? No
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in Digest? Yes

JUDGMENT
15.05.2009

S. MURALIDHAR, J.

1. These two revision petitions raise common questions of law of substantial importance and are accordingly disposed of by this common judgment. Inter alia these petitions raise questions concerning the supply of documents by the prosecution to the accused sought to be prosecuted for the offences under the Official Secrets Act, 1923 (OSA).

2. Criminal Revision Petition No.641 of 2008 by Vinod Kumar Jha and Criminal Revision Petition No. 11 of 2009 by Kulbhushan Parashar are directed against the orders dated 10th July 2007, passed by the learned Chief Metropolitan Magistrate (CMM), Delhi in RC-2(A)/2006/CBI/ACU-IX/ND under Section 120B IPC read with Sections 3 and 5 OSA and Section 409 IPC. They are also directed against the order dated and 18th November 2008 passed by the Additional Sessions Judge (ASJ), Delhi disposing of the application filed by the petitioner and the co-petitioner Kulbhushan Parashar, declining to modify the order passed by the learned CMM.

3. The brief background to the present petitions are that upon allegations of leakage of classified information both the Navy as well as the Air Force constituted a Board of Inquiry and a Court of Inquiry respectively. On the basis of the reports by the Board and the Court of Inquiry respectively, which were forwarded by the Ministry of Defence,

Government of India, to the Central Bureau of Investigation (CBI) RC No. 2(A)/2006-ACU-IX/CBI under the aforementioned offences came to be registered.

4. The case of the prosecution is that Wing Commander Sambhajee Lal Surve (A3) of the Air Force, the then Commander Vijender Rana (A4) and then Commander Vinod Kumar Jha (A5) and then Captain Kashyap Kumar, all of the Indian Navy, in collusion with Kulbhushan Parashar (A1), Ravi Shankaran (A2) Wing Cdr. (Retd.) S.K. Kohli, Mukesh Bajaj, Ms. Raj Rani Jaiswal and certain unknown persons of a communication company known as 'Atlas' conspired to unauthorisedly pass on classified documents/information relating to the Ministry of Defence, Government of India and the disclosure of which was likely to affect the sovereignty and integrity of India.

5. The aforementioned RC was registered on 20th February 2006 in ACU-IX Branch of CBI. While A1 was arrested on 5th April 2006, the petitioner (A5) was arrested on 6th April 2006. It is stated that A1 was commissioned to the Indian Navy in the year 1990 and sought premature retirement in 1995. He joined a firm M/s Shanx Oceaneering which belonged to A2 who was five years senior to him in the Navy and who had also taken voluntary retirement. It is further stated that this firm was dealing in trading of equipments and spares related to maritime industry

and was supplying equipments to Navy, Coast Guard, Shipyard, Port Trust, Oil & Natural Gas Corporation, Bhaba Atomic Research Centre, Nuclear Power Corporation etc. The company also undertook the business of ship repair, hull cleaning etc. In 1997, A1 resigned from this company, which was blacklisted due to an explosion during execution of work in an Indian Navy Ship (INS Jyoti). He along with A2 floated another company by the name of M/s Interspiro India Pvt. Ltd., a subsidiary of M/s Interspiro of Sweden, who are manufacturers of breathing, fire fighting, under water equipments etc. In the year 2000, he shifted his base to Delhi and started his own firms by the names of M/s Expert Systems and M/s Unitech Enterprises, which were engaged in trading, consultancy, liaisoning etc. In the year 2003, he started working for M/s Atlas Defence Systems of Atlas Group, which is the company with which co-accused Abhishek Verma was said to be associated.

6. The allegation was that A1 befriended A5 and the other co-accused and supplied them flash/pen drives to enable them to transfer on to and take out classified information which would prejudice the defence interests of the State. Among the articles seized by the Air Force and naval authorities were three pen drives: one Kingston make Data Traveller, a Sandisk pen drive and a Transcend (Jet Flash) pen drive. The Kingston pen drive was surrendered by A3 and the Jet Flash pen drive was surrendered by Vijender Rana (A4). Apart from these, the computer/hard

disks of the office and home computers of A3, A4 and A5 were also seized. The hard disks and pen drives were subject to forensic analysis by the Naval and Air Force Authorities and later by the APFSL. The analysis revealed that the hard disks contained classified information concerning the defence of the country. Although A3 and A4 were not issued any pen drive officially, the pen drives surrendered by them when analysed forensically showed that the Kingston pen drive contained deleted files pertaining to the Directorate of Naval Operations (DNO) where A4 and A5 worked. There were about 28 computers in the DNO at the relevant period. All the computers were on LAN (Local Area Network) except for the Internet PC, Naval e-mailing PC, Conference Room PC and one NCO PC. All officers in the DNO including A-4 and A-5 were provided with an independent computer on the DNO LAN, which were password protected and to be used only by them. These passwords were known only to the concerned officer and the JDNO (Systems). The Electronic Data Processing (EDP) Section which was under the administrative control of A-5 had maintained a diary on the directions of A-5. This contained IP addresses, user names and passwords of various systems installed on the LAN. Evidence was gathered showed that 11 pen drives were obtained during the period 1.8.04 to 15.4.05 but none of them were shown to have been issued.

7. The information on the computers connected to the DNO LAN were

primarily sensitive information having a vital bearing on nation's security, sovereignty and integrity. The information pertained to the present logistics, Naval Operations and future policy of the Indian Navy with regard to logistics, information networks and other operational matters, the leakage of which is prejudicial to the present and future interest of the State. The computers also contained very sensitive information in form of sketches, plans, articles, notes, documents or in text format could be accessed by anyone working in the DNO and connected on the LAN.

8. The charge sheet was filed enclosing therewith the particulars of documents. This list contained nearly 116 documents. It also enclosed a list of 63 witnesses.

9. An application was filed by the CBI under Section 173(5)(a), 173(6) and 207 CrPC on 12th July 2006 (and a similar application was filed subsequently on 15th October 2006) before the trial court praying that parts of the statements of certain witnesses, the copies of sensitive documents of the defence recovered forensically from the pen drives and official computers of the accused persons and certain other official documents received and collected during the investigation which are classified or were dealt with in the classified files of the originating Department i.e. Ministry of Defence should not be provided to the

accused persons since the disclosure of the same would not be in the interest of the safety and security of the State. Applications were also filed by the accused under Section 207 CrPC for supply of the documents and the statements of the witnesses.

10. By an order dated 10th July 2007, the learned CMM allowed the application of the CBI and rejected the applications of the accused. After referring to the judgment of the Supreme Court in *Superintendent & Remembrancer of Legal Affairs, West Bengal v. Satyen Bhowmick (1981) 2 SCC 109* it was observed by the learned CMM as under:

“No doubt, in the said judgment, the Hon’ble Supreme Court does observe that Section 14 of the OS Act which gives the additional power to the court trying the case under OS Act to hold the proceedings in camera, does not in any way hamper or take away from the right of the accused from being supplied the statements of the witnesses and copies of the documents which were collected during the course of investigation by the IO, but in a State case, as is the present case, when Section 201 CrPC becomes applicable, it is the provisions of Section 173 CrPC together with the object which was in the minds of legislators that has to be kept foremost in one’s mind before all these Sections are given effect to.”

11. As regards the CBI’s application, the following order was passed by the learned CMM partly allowing the request:

“9. I also find it worth mentioning that vide the present

application, the CBI prayed that the Board of Inquiry report of Indian Navy dated 24.8.05 and Board of Inquiry report of Indian Air Force dated 25.5.05 be also not supplied to the accused persons [mentioned at item No.3 & 4 Annexure (1)]. Ld. PP for CBI had intimated to the Court vide an application moved on the last date of hearing that the writ petition preferred by accused S L Surve requesting the court to direct the Air Force Authority to provide him the Board of Inquiry Report has been allowed to the extent that the Air Force Authorities have been directed by the Hon'ble High Court vide order dated 8.5.07 to furnish to the accused/petitioner Sh S L Surve the report of the Board of Inquiry held against him excluding such portions from the same as are considered to be sensitive from the security point of view and the decision of the Chief of Air Force regarding the portions of Board of Inquiry Proceedings to be withheld from the accused/petitioner therein shall be final and binding on the petitioner. Keeping this mandate of the Hon'ble High Court in mind, I allow the application of the CBI in part, directing the CBI:

- (i) To supply the Board of Inquiry Reports (Both Navy & Air Force) mentioned at item no. 3 & 4 of the Annexure (1) to the accused persons excluding such portions from the same as are considered to be sensitive from the security point of view **after consulting the matter with the Chief of Air Force and Navy as to the portions which are to be excluded. The decision of the Chief of Air Force and Navy shall be final and binding upon the accused.** The CBI shall ensure that the said Inquiry Reports are supplied to the accused persons after preparing the requisite sets

thereof **excluding the sensitive portions as
aforementioned.**

(ii) The statement of witness Manish Kumar u/s 161 CrPC and 164 CrPC be supplied to the accused persons excluding the portions thereof which in the opinion of the Investigating Officer/Prosecution would be inexpedient to be supplied to the accused persons.

(iii) The remaining 23 Items comprising of reports and the letters which contain sensitive and classified information need not be supplied to the accused persons but any covering letter in which the detailed sensitive information does not find a mention and the supply of which, is not likely to affect the safety and security of the country, be however given.

With these directions the application of the CBI is allowed in part. The directions given as regards the supply of documents enlisted in Annexure (1) be supplied to the Accused persons by the next date of hearing, or at the earliest.” (emphasis supplied)

12. Thereafter by an order dated 18th November 2008, the learned ASJ declined the request of A1 and A5 “for supply of documents which are part of the judicial record but have not been supplied to the accused persons as disclosure of the same is prejudicial to the safety and security of the state.” It was held by the learned ASJ as under:

“The Naval Authorities vide its letter dated 27.07.2007 had

written that Competent Authority had considered the matter in its entirety and decided that Subject Board of Inquiry Report be not made available to the accused persons as it contains sensitive information, the disclosure of which could affect the security of the country. It had however, opined that copy of COP letter No. DL/3599/1237, dated 21.04.2006 may however, be supplied to the accused persons.”

13. Likewise, the Air Force Authorities also declined the supply of copies of the documents. It was ultimately concluded by the learned ASJ as under:

“Perusal of the record thus, clearly reveals that the Id. Chief Metropolitan Magistrate has not allowed supply of certain documents to the accused persons for the reason that they are sensitive and secret in nature and cannot be made public. Opinion of Ministry of Defence, Air Force as well as Naval Authorities was also sought in this regard and they have also opined that certain documents are very sensitive in nature and should not be supplied to the accused persons. The matter regarding supply of copies was agitated number of times before the Id. Chief Metropolitan Magistrate and vide his orders dated 10.07.2008 and 11.08.2008, he has held that documents which are sensitive and secret in nature cannot be supplied to the accused persons. However, he has allowed inspection of these documents in the interest of justice. Thereafter, my Id. Predecessor has also allowed Id. defence counsels as well as accused persons to inspect the documents and to take rough notes. In my opinion, **there was no occasion to re-agitate this matter as the point**

already stands settled that copies of the documents which are secret and sensitive in nature cannot be supplied to the accused persons. As discussed earlier, the order passed by the Id. Chief Metropolitan Magistrate for not supplying the copies of secret and sensitive documents has been modified to the extent that Id. defence counsels and accused persons have been allowed inspection of the documents. Thus, even those documents which were considered by the Ministry of Defence, Air Force and Naval Authorities as well as CBI as secret, sensitive and classified, have been shown to the accused persons as well as to Id. Defence counsels. The Id. predecessor of this court in the interest of justice has even allowed Id. defence counsels to take rough notes also so that they can present the case effectively at the time of consideration of charge. In my opinion, no further interference or modification is required in the orders already passed by my Id. Predecessor. Accused persons as well as the Id. defence counsels have been given liberty to inspect the documents for preparing their case subject to conditions mentioned earlier. In these circumstances, the applications of the Id. Defence counsels for supply of documents for which inspection has been allowed, cannot be allowed and the same is, therefore, dismissed. It is, however, again made clear that **whenever the Id. Defence counsels intend to refer to the documents, they can inspect the judicial record and the court will allow the inspection subject to the conditions imposed by my Id. predecessor.**” (emphasis supplied)

circumstances this Court had directed supply of the documents to the accused facing prosecution under the OSA. Learned counsel for the CBI however pointed out that the said decision has been appealed against in the Supreme Court and was stayed. The pendency of the SLP in the Supreme Court in the aforementioned case led to the present petitions being adjourned on several dates. However, at one stage since an early disposal of the case in the Supreme Court appeared unlikely and the trial was over three years in progress the learned counsel for the petitioners urged that they would be able to make out a case independent of the decision of this Court in *Ujjal Dasgupta*. This Court wishes to clarify that the present revision petitions have been decided independent of the decision in *Ujjal Dasgupta*.

15. Mr.Sidharth Agarwal, learned counsel for the petitioners pointed out that the requirement that documents relied upon by the prosecution should be supplied to the accused was in terms of Section 207(v) CrPC mandatory. He submitted that specific to the OSA, the Supreme Court had in *Satyen Bhowmik* already held that supply of documents was mandatory and that decision was still good law. Even if one went by the requirement of Section 208 CrPC, if the trial was considered to be before a court other than the Court of Sessions, the mandatory nature of the requirement was no different. Reference is made to the judgment of this Court in *M/s Viniyoga International, New Delhi v. State 1985 Cri. L.J.*

761 to contend that in such event Section 208 CrPC gives no option not to supply the documents to the accused. It is pointed out that by consent of the APP before the trial court the learned counsel for the accused have in any way been permitted to inspect the documents. A reference is made to the order dated 10th September 2008 passed by the learned trial court in this connection.

16. The learned counsel for the petitioners assails the impugned orders by submitting that the discretion whether to order furnishing of copies of the documents relied upon by the prosecution to the accused is a matter entirely within the domain of the trial court concerned. This essential function cannot be delegated, as has been done by the impugned orders, to the Air Force or Naval Authorities. Reliance is placed upon the judgment of the Supreme Court in ***SBP & Co. v. Patel Engineering Ltd. (2005) 8 SCC 618*** to urge that there cannot be delegation of the essential judicial function of the court to any other authority. Finally it is submitted that the provisions of Sections 464 and 465 CrPC cannot be invoked to cure the material irregularity in not supplying documents to an accused. Particularly the documents that are being relied upon by the prosecution. In any event, it is submitted that those provisions cannot be invoked at an interlocutory stage but only at the final stage at the conclusion of the trial. Reliance is placed on the decisions in ***Banarsi Lal v. Neelam AIR 1969 Delhi 304*** and the Full Bench of the Allahabad

High Court in *Sri Ram Varma v. State 1956 Allahabad 466*.

17. On behalf of the CBI, Ms. Mukta Gupta, the learned Senior Standing Counsel submitted that exceptions can be carved out in Section 207(v) CrPC where the documents are voluminous and where the denial of the information sought would not vitiate the entire trial. As regards the failure to supply documents to the accused it is sought to be contended that this was not a material irregularity which will cause prejudice to the accused and therefore Section 464 CrPC can be invoked. She maintains that documents which are of a sensitive nature, particularly in the context of the OSA, can be withheld from the accused. She submits that in any the requirement of natural justice has been met as the counsel for the accused have been permitted inspection of the entire record and this therefore satisfies the spirit of the law.

18. In the impugned order dated 18th November 2008, the learned ASJ has noted that in terms of an order dated 13th August 2007, the learned CMM had separated documents into two categories: Annexures A and B. Annexure A contained those documents in which secrecy was claimed by the Naval and Air Force Authorities and other Government agencies. Annexure B were those documents to be supplied to the accused. These documents were supplied. However, as regards the documents in Annexure A, which included the forensic analysis of the pen drives and

hard disks and the Court of Inquiry proceedings, and even the Board of Inquiry proceedings it was held that these were sensitive documents of which copies could not be given but inspection alone was allowed. Further defence counsel were permitted to take rough notes. The learned ASJ considered no further modification necessary to those orders.

19. It is plain from the impugned order of the learned CMM that the opinion formed about the necessity to supply those documents was based on the view expressed by the Naval Authorities and the Air Force Authorities that the documents were of a sensitive nature. What seems to have weighed with the learned CMM is that this Court by an order dated 8th May 2007 directed the Air Force authorities to furnish to A-3 report of the court of enquiry in a writ petition filed by him challenging his dismissal. This Court had directed that a copy of the said report should be supplied 'excluding such portions from the same as are considered to be sensitive from the security point of view' and further directed that the decision of the Chief of Air Force regarding the portions to be withheld "shall be final and binding on the Petitioner." This Court fails to understand how an order passed in a writ petition concerning disciplinary proceedings can govern the interpretation to be placed on Section 207 (v) CrPC. This approach of the learned CMM was therefore clearly erroneous.

20. At one stage of the proceedings, the court enquired from the learned counsel for the CBI if any of the documents in the list of documents sought by the petitioner could be furnished to the petitioner. After seeking some adjournments, the learned counsel for the CBI stated on instructions that none of the documents could be supplied.

21. Since the controversy in the present case concerns the supply of documents relied upon by the prosecution a reference may be made to Section 207 (v) CrPC which reads as under:

“(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.”

22. The only exception for not supplying copies of the documents is that they are voluminous. It is seen that while statements of witness can be withheld in public interest by the police officer in terms of Section 173(6) CrPC there is no such corresponding clause as regards the documents to be supplied to the accused under Section 207 (v) CrPC. It would appear therefore that unless the documents are voluminous they cannot be denied to an accused.

23. In *Satyen Bhowmick* the question that arose for consideration was whether Section 14 OSA could be invoked by the prosecution to deny the accused copies of the documents being relied upon by it. This was negated by the Supreme Court in *Satyen Bhowmick* by holding as under:

“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 thereunder.

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 Code of Criminal Procedure 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 Code of Criminal Procedure.

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.

4. That there was absolutely no impropriety on the part of the Magistrate in not taking action against the defence lawyer for his refusal to show his register because the lawyer had rightly claimed privilege under Section 126 of the Evidence Act as the register contained instructions given by the client which being privileged could not be disclosed to the Court. On a parity of reasoning we find no impropriety on the conduct of the lawyer in refusing to show the statement of witnesses recorded by the Court in extenso in order to prepare himself for an effective cross-examination of the witnesses. Hence the strictures passed by the High Court on the Magistrate as also on the lawyer of the defence were, in our opinion, totally unwarranted.

5. That if the lawyer of the defence or staff of the Court or any one who was not excluded from the hearing of the case made any attempt to disclose the contents of the documents or the statements of the witnesses exposed himself to a prosecution on a charge under Section 5 of the Act.”

24. As regards the safety of such information, the complete answer is provided in *Satyen Bhowmick* case. It was held in para 20 as under (AIR @ p.922-23):

“20. The question, however, is: does the first part of Section 14 empower the court to take away the valuable right of an accused of getting copies of the statements recorded by the Magistrate before the Court? Even before the amending Act of 1955, under the criminal rules framed by various High Courts, an accused was undoubtedly entitled to have copies of the statements of witnesses recorded by the police. This is a very valuable right because without having the statements recorded by the police in his possession, it would be difficult, if not impossible, for an accused to defend himself effectively. It is well settled that fouler the crime the higher should be the proof. If an accused is not supplied either the statements recorded by the police or the statements of witnesses recorded at the inquiry or the trial, how can he possibly defend himself and instruct his lawyer to cross-examine the witnesses successfully and effectively so as to disprove the prosecution case. We, therefore, think that Section 14 could never have intended to take away or deprive an accused of this valuable right which has been conferred on him by the criminal law of the land. The legislature when it passed the Act in 1923 was aware of the provisions of the CrPC which had conferred the valuable right on an accused in order to defend himself. Indeed, if any of these rights were to be taken away, we should have expected a clearer and more specific

language used in Section 14 to connote such an intention. Our reading of Section 14 is merely this : that the first part of the section does not prohibit or exclude giving to an accused copies of the statements of witnesses either during police investigation or in court but is mentioned merely as a motive or reason for holding the proceeding in camera. The entire sentence starting from '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 has to be read conjunctively as one composite sentence and there is no warrant for truncating it into two separate parts dealing with different subject-matters. The words 'publication of any evidence' on which great stress has been laid by Mr. Mukherjee and the High Court do not indicate that the accused should not be allowed access to the evidence recorded by the Court, (they) are merely made to highlight the ground for holding the proceedings in camera because if public are allowed to be present during the hearing the evidence which is recorded in their presence it will amount to publication and it is in that sense alone that the word 'publication' has been used in Section 14.”

25. The only protection given in para 25 which reads as under (AIR @ p.923-24):

“25. The High Court had been rather bitter on the trial Magistrate when it observed that he could compel the

lawyer to submit his register. The observations made by the High Court on the conduct of the Magistrate or on the lawyer were not at all called for because both of them were doing their duties according to law. On the view that we have taken, the Magistrate was fully justified in not compelling the lawyer to surrender his register which undoubtedly contained a part of the privileged communication and even if the lawyer had taken down the evidence in extenso for the limited purpose of using it to defend the accused or cross-examine the witnesses he could not be prevented from doing so, nor does Section 14 contemplate or envisage such a course of action. The Magistrate also in declining to give copies of the statements concerned to the accused, took an erroneous view of Section 14 of the Act which, as we have already held, did not debar the Magistrate from giving copies to the accused for the purpose of his offence. Thus, we are satisfied that the judgment of the High Court under appeal is vitiated by an error of law and it has not correctly interpreted Section 14 of the Act. Similarly, the earlier decision of the Calcutta High Court in *Superintendent and Remembrancer of Legal Affairs, West Bengal v. Satyen Bhowmik*, AIR 1970 Cal 535 cannot be held to be good law and must be overruled.”

26. This Court finds that the decision in *Satyen Bhowmick* is a complete answer to the contention of the CBI. The learned counsel for the petitioner is right in his contention that Section 207(v) CrPC does not give an option to the trial court not to supply to the accused the

documents being relied upon by the prosecution. In *Dharambir Khattar v. CBI 148 (2008) DLT 289* this Court has held that copies of documents in electronic format cannot be denied to the accused, if in fact the prosecution is relying upon such documents and they form part of the charge sheet. There is no provision for claiming privilege as regards these documents. The supply of copies of such documents, being relied upon by the prosecution to establish the guilt of the accused, is essential for the purposes of a fair trial.

27. Even if one were to consider that the trial in the instant case is proceeding before the CMM and not the Sessions Court, the provisions of Section 208 CrPC mandate the supply of copies of the documents. The only exception is that if the documents are voluminous their inspection can be permitted. It may be noticed that in the instant case the prosecution is not invoking this exception of the documents being voluminous. According to them, it is the nature of the documents that justifies the denial of the copies being furnished to the accused. In the considered view of this Court, neither Section 207 nor Section 208 CrPC permits such denial. The rationale behind the statute mandating supply of documents has been aptly explained by the Division Bench of this Court in *Viniyoga International* in the following words:

“9. It thus appears that, while there is no statutory right to disclosure at the threshold, in cases instituted otherwise

than on a police report, such a right would be available to an accused even in such cases, on the application of the principles referred to above unless one takes the view that the procedure prescribed by the Code, for the trial of cases otherwise than on a police report, expressly or by necessary implication excludes the operation of these principles. There is obviously no express provision in the Code dealing with this class of cases excluding the operation of the principles of natural justice, and the other principles which would justify a complete disclosure. It is also not possible to read into any provision of the Code an implied exclusion of the operation of these principles. It is also well known that the exclusion of fundamental principles of natural justice and the requirements of a fair trial, and the requirement of a "just, fair and reasonable" procedure is not to be readily inferred from statutory provisions. These principles and requirements are so well entrenched in the jurisprudence of this country that their exclusion can be justified only with reference to the express provisions or by necessary intendment. In this view of the law, the accused person would have the right, albeit a non-statutory right, to complete disclosure of material, at the threshold of a trial, even in cases otherwise than on a police report if the proceedings were preceded by police investigation."

28. The learned counsel for the petitioner is also right in the contention that the essential function of the court cannot possibly be delegated to any other authority. While the opinion of an authority can be sought by

the Court on whether the document is a classified document, the question whether copies thereof should be supplied to the accused is not a question that can be delegated by the court to any other authority. That question has to be decided only by the court in terms of Sections 207 and 208 CrPC.

29. In the instant case, there was no question of the learned CMM making the decision of the Chief of Air Force or the Navy final and binding on whether the accused should be supplied copies of the documents being relied upon by the prosecution. The CrPC does not permit such a course. Moreover, these provisions also do not permit the prosecution to claim privilege to not to disclose the documents to the accused. After the judgment of the Supreme Court in *Satyen Bhowmick*. Which is still good law, the documents in question have to be supplied to the accused for an effective opportunity of defending themselves at the trial subject to the safeguards mentioned in *Satyen Bhowmick*.

30. The basic principle of the natural justice is that the material which is sought to be used against the accused, must be provided to him by the prosecution in order to enable him to effectively defend himself in the proceedings. The mere taking down of notes of such documents will hardly serve the purpose of using such documents during cross-examination of the witnesses. The learned counsel for the petitioner was

right in his comment that while the prosecution is able to keep the copies of those documents and prepare themselves during the trial of the case even for examination of witnesses, the defence would be deprived of such an opportunity and therefore incapable of effectively cross-examining the prosecution's witnesses. The criminal trial is to be strictly proceeded with in terms of the procedure laid down in the CrPC. Any dilution of the minimum standards laid therein will deny the right of a fair trial. Where the offence is grave and the consequences for the accused severe, the greater should be the insistence by the courts upon by the strict adherence to both the letter and the spirit of the various provisions of the CrPC. The offence under Section 3 the OSA Act is doubtless a grave one entailing rigorous imprisonment up to 14 years'. Viewed from this angle, this Court is unable to countenance the submission of the learned counsel for the CBI that it would be permissible for the CBI in the instant to deny the accused of the copies of the documents sought to be relied upon by the prosecution for proving the guilt of the accused, on the ground that the documents are of a sensitive nature.

31. The learned counsel for the petitioners is also was right in his contention that non-supply of documents to the accused is not a curable illegality in terms of Sections 460 or 464 CrPC. Also in terms of the judgment in *Banarsi Lal v. Neelam AIR 1969 Delhi 304* and the Full

Bench of the Allahabad High Court in *Sri Ram Varma v. State* 1956 *Allahabad* 466, it is plain that Section 464 cannot be invoked at an intermediate stage.

32. The revision petitions are accordingly allowed and the impugned order dated 18th November 2008 passed by the learned ASJ and order dated 10th July 2007 passed by the learned CMM are set aside.

33. It is directed that the copies of the documents filed along with the charge sheet be furnished by the CBI to each of the petitioners subject to the condition that neither of the petitioners nor their respective counsel will further shall make copies thereof or in any manner transfer any part or whole of such documents or allow it to be accessed/ inspected by any person other than the petitioners concerned or their respective counsel. This direction by this Court will apply both to hard copies and the electronic (soft) copies of such documents. The copies of the documents in terms of this order will be supplied to each of the petitioners by the CBI within a period of ten days from today and in any event not later than 25th May 2009.

34. In view of the directions given by this Court the time limit for passing an order on charge will have to be extended. The trial court is requested to pass the said order within a period of two months from

today and in any event not later than 31st July 2009.

35. The petitions are accordingly allowed with no orders as to costs. A certified copy of this order be sent to the trial court concerned forthwith. Order dasti to the parties.

S. MURALIDHAR, J

MAY 15, 2009
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