

IN THE HIGH COURT OF DELHI AT NEW DELHI

CRL.A. 572 of 2010 & Crl. M.(B) 1982 of 2011, 113 of 2012

Reserved on: 26th May 2014

Decision on: 30th May 2014

MOHD. NASEEM

..... Appellant

Through: Mr. M.S. Khan and Mr. Akram
Khan, Advocates.

versus

STATE

..... Respondent

Through: Ms. Aashaa Tiwari, APP.

CORAM: JUSTICE S. MURALIDHAR

J U D G M E N T

30.05.2014

1. This appeal is directed against the judgment dated 7th April 2010 passed by the learned Additional Sessions Judge ('ASJ') in Sessions Case No. 12 of 2008 convicting the Appellant for the offences under Section 3(1)(c) and 5(c) of the Official Secrets Act, 1923 ('OSA') and the order on sentence dated 9th April 2010 whereby the Appellant was sentenced to five years rigorous imprisonment ('RI') for the offences under Sections 3 and 3 years RI for the offence under Section 5 of the OSA and to a pay fine of Rs.10,000 and in default to undergo RI for six months with both sentences being directed to run concurrently.

2. The case of the prosecution is that Inspector Brahmjit Singh (PW-10) of Special Cell of Delhi Police received information on 29th June

2007 at around 9 am that the Appellant, a Lance Naik in the Indian Army posted at JAK LI Unit in Jammu & Kashmir, was in Delhi on long leave and would be supplying documents to some foreign agent at 11.30 am near Metro Station, Shastri Park, Delhi. The information was recorded in Daily Diary No. 4 (Ex.PW-10/A). A raiding team consisting of PW-10, HC Shivbir (PW-8), SI Pankaj Kumar (PW-9), SI Naresh Kumar (PW-11) and HC Preet Singh was constituted.

3. The team reached the place of occurrence around 12.10 pm. The Appellant is stated to have been arrested on the pointing out of the secret informer. The Appellant was carrying a shoulder bag (Ex.P-2). From the bag the following documents were seized:

- (i) Photocopy of a booklet titled 'Restricted' and with the further warning 'This Document must not fall into enemy hands' giving notes to instructors prepared by the Military Training Directorate bearing 30 pages.
- (ii) 2 pages of writing in Urdu in blue-black ink.
- (iii) Photocopy of movement order in the name of Lance Naik Mohd. Naseem.
- (iv) Inventory for QRT. Building No. P-284, behind Commandant House.
- (v) Nominal roll of ISCOT bank account with pay demand.
- (vi) Photocopy of a communication dated 17th October 2006 with the subject matter "forwarding of verification roll: recruit".
- (vii) Photocopy of ordinary/special family pension booklet of late Tariq Mehmood.

4. According to the prosecution upon interrogation, the Appellant is stated to have disclosed that for the past one and a half years he was in contact with one Ali Jadoon of the Pakistani Embassy and had been supplying information relating to defence matters to him for a price. The Appellant is stated to have disclosed 5 mobile numbers through which he had been communicating and the said numbers when investigated were found to be used from the same IMEI number in the area of Chanakya Puri. The Appellant was found using another mobile number belonging to his colleague Kasim in the JAK LI. The documents were seized and sent for an opinion to Army officials. Two of the documents were found to be prejudicial to the safety, security and interest of the State. After obtaining sanction for prosecution, a charge sheet was filed and charges were framed against the Appellant on four counts:

(i) that he entered into a criminal conspiracy with one Kasim and Ali Jadoon to collect and communicate documents relating to defence of India and supplied the same to foreign agents punishable under Section 120 B IPC.

(ii) that he had committed the offence under Section 379 read with 120 B IPC for being in possession of the photocopy of a booklet 'Restricted' MGS, one letter written in Urdu and five other documents.

(iii) that he had committed the offence under Section 5 of the OSA read with Section 120 B IPC for gathering and communicating information to the enemy by using mobile phones.

(iv) that he had committed the offence under Sections 3 and 9 of the OSA read with Section 120 B IPC for being found in possession of the above documents and supplying information contained in such documents to foreign agents and enemies of the State was were likely to prejudice the sovereignty, integrity and security of the State.

5. The prosecution examined 17 witnesses. In his statement under Section 313 Cr PC, the Appellant admitted that he had checked into Zum-Zum Guest House near Jama Masjid on 28th June 2007. He stated that he had been unlawfully arrested from the said hotel on that day by the police. He denied having been arrested at the Shastri Park Metro Station or that any documents were seized from him. As regards the document in Urdu, of which a Hindi transcript was made by Constable Roshan Lal Tikoo (PW-7), the Appellant stated “I was forced to write the Urdu letter (Ex.P-5) while in custody of the police”. When he was confronted with the evidence that he was in contact with a mobile number which was traced to one Ruksana wife of Liyakat Ali of Pakistan Embassy, Chanakya Puri, Delhi, he stated that it was incorrect and that Ruksana was the wife of one Nazir Ahmed Khan at whose instance he had come to Delhi. When asked to state why the police witnesses had deposed against him, he stated that he had been falsely implicated at the behest of one Nazir Ahmed Khan. When asked if he wanted to lead any evidence, he stated that he wanted to examine Nazir Ahmed. When asked whether he had anything further to state in his defence, the Appellant stated as under:

“I am innocent. Nazir Ahmed was operating an agency by the name of Tours and Travels at Matia Mehel, Jama Masjid. We had given him Rs. 1.5 lakhs for facilitating the travel documents including Visa for my brother to travel and get an employment in UAE. Nazir Ahmed was involved in some criminal case and he was in jail and migration of my brother to UAE got delayed. I had been in regular touch with him to get my brother the necessary documents or else seeking to refund our money. It is at the instance of his wife Ms. Rukhsana that I came to Delhi to meet Nazir Ahmed along with his partner Zulfikar so that the travelled documents of my brother could be expedite but at their instance I was falsely implicated in this case.”

6. Nazir Ahmed Khan was examined as DW-1. Significantly, he was produced from Jail No. 1, Tihar, Delhi. He stated that in April 2005, the Appellant along with his father came to the office of Zulfikar Ali Mumtaz who was running a travel agency in Jama Masjid under the name of Samar Kand Tour & Travels and that DW-1 was working with the said Zulfikar Ali Mumtaz. The Appellant's father had come to the said office in connection with a visa of employment in United Arab of Emirates for his son Mohd. Naseer, the brother of the Appellant. The Appellant's father handed over Rs.1.5 lakhs in cash along with the passport of Mohd. Naseer to the said Zulfikar Ali Mumtaz at the instance of DW-1 and in his presence. DW-1 further disclosed that Zulfikar Ali Mumtaz assured the Appellant and his father that the visa would be obtained at the earliest. Thereafter the

Appellant and his father returned to their village in district Poonch, Jammu & Kashmir.

7. In his cross-examination by the learned APP, DW-1 stated that he lived close to the village of the Appellant and knew him for about 10 to 12 years. As regards the transaction, Zulfikar Ali Mumtaz did not make any entry on any register with regard to the amount paid to him. Since DW-1 was arrested by the Delhi Police on 8th May 2005, he was not aware of whether the Appellant's father was in fact issued a visa for UAE or not.

8. The trial Court on an analysis of the evidence concluded as under:

(i) The Appellant had not been able to explain how he was in possession of printed booklet (Ex.P-4) and while he was carrying the Urdu letter (Ex. P-5). Consequently, the prosecution under Section 3(2) OSA was attracted.

(ii) On account of being found in possession of the aforementioned two documents which he was retaining without lawful authority, he was also guilty of the offence under Section 5(c) OSA.

(iii) Since the offences under Sections 3 and 5 OSA were complete by themselves, recourse to Section 120 B IPC or Section 379 IPC was not warranted and, therefore, the Appellant was acquitted of those offences.

9. By the order on sentence dated 9th April 2010, the Appellant was sentenced as noticed earlier. It may be noted at this stage that the
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Appellant has served out his entire sentence. Meanwhile against the orders dated 7th December 2011 and 16th January 2012 declining advancement of the date of hearing, SLP (Crl.) No. 1702-03 of 2012 was filed in the Supreme Court. An order was passed in the said SLP on 16th March 2012 noting that while the Petitioner had already served out his entire sentence on 28th February 2012 and had been released from jail, the High Court should consider taking up the appeal for hearing so that the issue of the Petitioner's service in the Army is settled without any further delay.

10. The appeal was received on transfer by this Court on 22nd May 2014 and the hearing commenced on that day itself. This Court has heard the submissions of Mr. M.S. Khan, learned counsel appearing for the Appellant and Ms. Aashaa Tiwari, learned APP for the State.

11. Learned counsel for the Appellant first doubted the prosecution story as regards the arrest of the Appellant and seizure of documents from the bag he was carrying. He submitted that although the seizure memo (Ex. PW-9/A) mentions a mobile phone and there is also a separate seizure memo for the said mobile phone (Ex.P-3), the rukka prepared (Ex.PW-9/E) did not mention any such mobile phone. He next submitted that the Appellant is stated to have been arrested during day time around noon at the Metro Station, Shastri Park, Delhi and the raiding party is shown to have remained at the spot till the evening and yet no public witnesses were associated in the arrest or during the seizure of the documents. The existence of Mr. Ali Jadoon

or Ruksana was not proved. The mobile phone was not in the name of the Appellant. He submitted that the evidence produced by the prosecution could only lead to the conclusion that the mobile phone was planted on the Appellant.

12. Referring to the opinion Board set up by the Army to examine the documents, learned counsel submitted that only two of the documents i.e. photocopy of the printed booklet (Ex.P-4) and the Urdu letter (Ex.P-5) were relevant. As regards Ex. P-4, it was only a 'Restricted' document and the restriction was only against publication or communication of said document to anyone. In the present case, it was not contended by the prosecution that the said documents were in fact published or communicated by the Appellant.

13. As regards the Urdu letter (Ex.P-5), it was submitted by learned counsel for the Appellant that the police compelled the Appellant to write it in his own handwriting while in police custody i.e. between the time he was picked up from the hotel and when his arrest was formally recorded and, therefore, the mere fact that the report of the handwriting expert (PW-3) of the Forensic Science Laboratory ('FSL') proved that the said writing was that of the Appellant was to no avail. In support of his defence that he was falsely implicated, the Appellant had examined DW-1 however for some reason the impugned judgment fails to discuss the defence evidence.

14. In reply Ms. Aashaa Tiwari, learned APP for the State submitted that the non-association of public witnesses in a matter of this nature is not fatal to the case of the prosecution. The Appellant could not furnish any valid explanation as to how he came into possession of sensitive documents which clearly compromised the security of the country since it related to an assessment of the Army strength, preparedness and progress on the basis of training manuals. One of the mobile numbers was traced to Ruksana wife of a Pakistan Embassy staff and those documents formed part of the record of the trial Court. She submitted that the translation of the Urdu writing clearly showed that they related to troop movements and deployment and, therefore, the offences under Section 3 and 5 of the OSA were clearly attracted. She also pointed out that there was no challenge to the evidence of the handwriting expert which confirmed that the writing thereon matched the specimen writing of the Appellant in Urdu. The non-mention of the mobile phone in the rukka was perhaps due to oversight but was not fatal to the case of the prosecution.

15. The above submissions have been considered. The words ‘obtains’ and ‘collects’ occurring in Section 3 (1) (c) of the OSA contemplates the offence being attracted even if a person is found to be in possession of sensitive documents i.e. documents containing information which “might be or is intended to be directly or indirectly, useful to an enemy or which relates to a matter the disclosure of which is likely to affect the sovereignty and integrity of India, the security of the State...”. Likewise, under Section 5 (1) (c) of the OSA, the

retention of a document which a person has no right to retain or is “contrary to his duty to retain it” and attracts the offence.

16. In the present case as rightly pointed out by the trial Court, the two documents found in possession of the Appellant viz., the photocopy of the printed booklet (Ex.P-4) and the Urdu note (Ex.P-5) were of a nature that would attract Section 3 (1) (c) and 5 (1) (c) of the OSA. Even if, as pointed out by learned counsel for the Appellant, the printed booklet was only a photocopy, and the original was not produced, it did contain information which attracted the offence under Section 3 (1) (c) of the OSA.

17. The non-association of public witnesses has been explained by the IO by stating that despite requests no member of the public was willing to join. The Court finds that this is a routine explanation offered by the police in most cases and a more serious effort should have been made to record the names of the persons who were refusing to be the part of the investigation particularly since the place of arrest was a Metro Station and during busy hours. However, two factors are sufficient to prove the guilt of the Appellant.

18. The first is regarding the Appellant being found in possession of Ex.P5, the document in Urdu, the translation of which into Hindi (Ex.PW7/A) shows that it concerns the movement of troops. PW7,

who translated it, was examined but his evidence has not been challenged. The fact that the Urdu writing in the seized document was that of the Appellant has been proved by PW3, Mr. Dev Karam, Senior Scientific Officer at FSL, Rohini, New Delhi. He has proved the report dated 16th August 2007 (Ex. PW3/C), which has confirmed the above fact. Nothing has been elicited from his cross-examination to doubt his opinion.

19. The explanation offered by the Appellant, when he was confronted with the above evidence under Section 313 Cr PC was that he was compelled to write the said document while in police custody. However, he has not been able to make good this defence. No complaint was made at the earliest opportunity before the Court although he was represented by counsel right from the second hearing of the case. Also, his contention that he was arrested from Zum Zum Guest house at Jama Masjid, Delhi has not been supported by PW1 Mirajuddin who was running the said guest house. PW-1 stated that the Appellant left the guest house after leaving the key at the counter. It was only on the next date, i.e., 29th June 2007, that the Appellant was brought there by the police after his arrest.

20. The evidence of the prosecution shows that the arrest of the accused took place outside Metro Station, Shastri Park. The seizure memo prepared at the time of the arrest mentions the handwritten Urdu document which the raiding team found in the bag carried by the

Appellant. In the circumstances, the question of the Appellant being compelled to write the said document while in police custody does not find support from the evidence on record. The fact of a handwritten document, disclosing the details of movement of troops, being found in possession of the Appellant certainly attracts the offences under Section 3(i) (c) and Section 5 (i) (c) of OSA.

21. The second factor is that the Appellant was unable to make good the case put forth by him that he was falsely implicated by the Appellant, at the instance of Nazeer Ahmed. His specific case was that Nazeer Ahmed had been given Rs. 1,50,000 for a UAE work visa for his brother, and when he came to Delhi seeking return of the said money, he was falsely implicated. No question has been put to Nazeer Ahmed, who has been examined as DW1, to substantiate any of the above pleas. In fact, no question was put to him that his wife was Rukhsana. What has emerged from his evidence is that the money was paid to one Zulikhar Ali Mumtaz, at the instance of DW1 and in his presence it was the said Zulikhar Ali who had assured the Appellant and his father that the visa would be obtained at the earliest.

22. The Court, therefore, finds that even without going into the aspect of whether the photocopy of the booklet, which was described as a 'restricted' document being found in possession of the Appellant, would attract Sections 3 and 5 of the OSA, the fact that the Appellant was found in possession of Ex.P5 was, by itself, sufficient to bring

home the guilt of the accused for the offences under Sections 3 and 5 of the OSA.

23. In that view of the matter, no grounds have been made for interference with the impugned judgment dated 7th April 2010 passed by the learned trial Court. The appeal is accordingly dismissed, but in the circumstances, with no order as to costs. The pending applications are disposed of.

MAY 30, 2014
dn/tp



S. MURALIDHAR, J.