

State v. Rajeev Sharma
FIR No.: 230/2020
U/S: 3/4/5 of Official Secrets Act
P.S: Special Cell

19.10.2020

Vide order nos.12732-12782/Judl./Prin.D&SJ/NDD/2020 dated 29.09.2020, 8336-8448/JUDL/D&SJ/PHC/NDD dt. 27.08.2020, 5837-5927/D&SJ/NDD/2020 dt. 30.05.2020 & 5931-6021/D&SJ/NDD/2020 dated 01.06.2020 of Ld. District & Sessions Judge, Patiala House Court, New Delhi District, New Delhi, the undersigned has been deputed for duty today in pursuance to the directions of Hon'ble High Court of Delhi vide order no.R-1347/DHC/2020 dated 29.05.2020 and in continuation of the previous office order nos.4243-4333/D&SJ/NDD/2020 dated 01.04.2020, 4407-4426/D&SJ/NDD/2020 dated 10.04.2020, 4518-4608/D&SJ/NDD/2020 dated 15.04.2020, 5111-5200/D&SJ/NDD/2020 dated 03.05.2020, 6364-6454/D&SJ/NDD/2020 dated 16.05.2020, 6326-6415/D& SJ/NDD/2020 dated 15.06.2020, 1977-2009/DHC/2020 dated 30.07.2020, 323-355/RG/DHC/2020 dated 15.08.2020, 419-451/RG/DHC/2020 dated 27.08.2020 & 417/DHC/2020 and e-mail dt.20.09.2020 of the Hon'ble High Court of Delhi to combat the pandemic of Covid-19.

Present: Sh. Irfan Ahmed, Ld. Addl. PP for the State.
Sh. Adish C. Aggarwala, Ld. Senior Advocate with
Sh. Karan Ahuja, Ld. counsel for applicant/accused.
Proceedings done through video conferencing.

It is certified that link was working properly and no grievance was agitated by either of the counsel in this regard.

Present is an application moved on behalf of applicant/accused seeking grant of bail. Ld. counsel for applicant/accused has laid great stress to highlight the conduct of the investigating agency. It is submitted that applicant/accused is neither supplied copy of the FIR or copy of the remand application. It is further pointed out that even no information is given to the family member/counsel of the applicant/accused as to when the applicant/accused shall be produced before the Ld. MM for extension of his JC remand. It is further submitted that even no case diaries are produced before the Ld. MM while extending the JC remand of the accused. It is submitted that as per the claim of the prosecution, certain 'sensitive documents' have been recovered from the possession of applicant/accused however the said documents are not Secret or Classified and thus no case under The Official Secret Act (O.S.Act) is attracted in the instant case. It is further submitted that as per the claim of the police, the applicant/accused

had access to Ministry and that is how he came into possession of said sensitive documents. It is submitted that the documents in question are neither secret nor classified. It is submitted that there is a well established procedure to declare the documents as secret or classified. It is submitted that in violation of the said procedure, the documents in question cannot be claimed to be secret. It is further submitted that merely because the applicant/accused is an accredited journalist, he is not entitled to enter the Defence Ministry. It is submitted that there is a very strict and elaborate procedure to enter the Defence Ministry and nobody can enter the Ministry without undergoing the strict procedure for entry. It is submitted that the CCTV footage depicting the entry of the applicant/accused in the Defence Ministry would discredit the entire prosecution claim that he had access to Ministry. It is submitted that arrest of the applicant/accused in the instant matter is pre-mature and the police should have made a thorough probe and after contacting the defence ministry should have apprehended the applicant, in case, if the police comes in possession of some incriminating material against the applicant/accused. It is submitted that an innocent man has been falsely framed by the police in its anxiety to gain some brownie points. It is submitted that no offence u/s 3/4/5 of Official Secrets Act is attracted in the instant case. It is further submitted that the applicant/accused is in jc for past 34 days and investigation qua him is already complete. It is thus prayed that applicant/accused may be released on bail.

On the contrary, Ld. Addl. PP has forcefully argued that applicant/accused is having links with foreign intelligence officer and has been receiving funds from his handler through illegal means and Western Union money transfers platform for conveying sensitive information, having bearing on national security and foreign relations, to his handler based abroad through electronic means. It is submitted that after the registration of FIR on 13.09.2020, applicant/accused was arrested by following all the guidelines as per law and during the search of his house, several articles including sensitive/confidential documents related to Indian Defence

department were recovered at his instance. It is submitted that during investigation, it is found that the applicant/accused is indulged in procurement of secret, confidential and sensitive documents or material information and conveying the same to his handlers (Chinese Intelligence Officer) and in lieu of that, he was getting remuneration through hawala transactions/funds through shell companies being operated through Chinese people in Delhi. It is submitted that applicant/accused was found in contact with Chinese Intelligence Officer through emails and telegram etc. It is submitted that during investigation, co-accused Qing Shi @ Queen Shi and Sher Singh @ Sher Bahadur @ Raj Bohara have also been arrested, who were found to be operating shell companies, namely, MZ Mall Pvt. Ltd and MZ Pharmacy Pvt. Ltd at Mahipal Pur on behalf of accused Jhang Cheng and his wife/Zhang Lixia who are presently in China. It is submitted that investigation is at initial stage. It is submitted that instant matter relates to national security and sensitive documents are still under investigation and if applicant is released on bail, he may try to influence the witnesses which would hamper the fair course of investigation.

I have heard and considered the rival submissions made by Ld. counsel for the applicant/accused as well as Ld. Addl. PP for the State and also gone through the material available on record.

It would be apt to reproduce here in the relevant statutory provisions of The O.S. Act for ready reference :-

Section 3. Penalties for spying.—(1) If any person for any purpose prejudicial to the safety or interests of the State—

(a) approaches, inspects, passes over or is in the vicinity of, or enters, any prohibited place; or (b) makes any sketch, plan, model, or note which is calculated to be or might be or is intended to be, directly or indirectly, useful to an enemy; or

(c) obtains, collects, records or publishes or communicates to any other person any secret official code or pass word, or any sketch, plan, model, article or note or other document or information which is calculated to be or might be or is intended to be, directly or indirectly,

useful to an enemy 1 [or which relates to a matter the disclosure of which is likely to affect the sovereignty and integrity of India, the security of the State or friendly relations with foreign States]; he shall be punishable with imprisonment for a term which may extend, where the offence is committed in relation to any work of defence, arsenal, naval, military or air force establishment or station, mine, minefield, factory, dockyard, camp, ship or aircraft or otherwise in relation to the naval, military or air force affairs of Government or in relation to any secret official code, to fourteen years and in other cases to three years. (2) On a prosecution for an offence punishable under this section 2 ***, it shall not be necessary to show that the accused person was guilty of any particular act tending to show a purpose prejudicial to the safety or interests of the State, and, notwithstanding that no such act is proved against him, he may be convicted if, from the circumstances of the case or his conduct or his known character as proved, it appears that his purpose was a purpose prejudicial to the safety or interests of the State; and if any sketch, plan, model, article, note, document, or information relating to or used in any prohibited place, or relating to any thing in such a place, or any secret official code or pass word is made, obtained, collected, recorded, published or communicated by any person other than a person acting under lawful authority, and from the circumstances of the case or his conduct or his known character as proved it appears that his purpose was a purpose prejudicial to the safety or interests of the State, such sketch, plan, model, article, note, document, 3 [information, code or pass word shall be presumed to have been made], obtained, collected, recorded, published or communicated for a purpose prejudicial to the safety or interests of the State.

Section 4. Communications with foreign agents to be evidence of commission of certain offences.—(1) In any proceedings against a person for an offence under section 3, the fact that he has been in communication with, or attempted to communicate with a foreign agent, whether within or without 4 [India], shall be relevant for the purpose of proving that he has, for a purpose prejudicial to

the safety or interests of the State, obtained or attempted to obtain information which is calculated to be or might be, or is intended to be, directly or indirectly, useful to any enemy.

(2) For the purpose of this section, but without prejudice to the generality of the foregoing provision,—

(a) a person may be presumed to have been in communication with a foreign agent if—

(i) he has, either within or without [India]; visited the address of a foreign agent or consorted or associated with a foreign agent, or

(ii) either within or without 4 [India], the name or address of, or any other information regarding, a foreign agent has been found in his possession, or has been obtained by him from any other person;

(b) the expression “foreign agent” includes any person who is or has been or in respect of whom it appears that there are reasonable grounds for suspecting him of being or having been employed by a foreign power, either directly or indirectly, for the purpose of committing an act, either within or without 1 [India], prejudicial to the safety or interests of the State, or who has or is reasonably suspected of having, either within or without 1 [India], committed, Or attempted to commit, such an act in the interests of a foreign power;

(c) any address, whether within or without 1 [India], in respect of which it appears that there are reasonable grounds for suspecting it of being an address used for the receipt of communications intended for a foreign agent, or any address at which a foreign agent resides, or to which he resorts for the purpose of giving or receiving communications, or at which he carries on any business, may be presumed to be the address of a foreign agent, and communications addressed to such an address to be communications with a foreign agent.

Section 5. Wrongful communication, etc., of information.—(1) If any person having in his possession or control any secret official code or pass word or any sketch, plan, model, article, note, document or information which relates to or is used in a prohibited place or relates to anything in such a place, 2 [or which is likely to assist, directly or indirectly, an enemy or which relates to a matter

the disclosure of which is likely to affect the sovereignty and integrity of India, the security of the State or friendly relations with foreign States or which has been made or obtained in contravention of this Act,] or which has been entrusted in confidence to him by any person holding office under Government, or which he has obtained or to which he has had access owing to his position as a person who holds or has held office under Government, or as a person who holds or has held a contract made, on behalf of Government, or as a person who is or has been employed under a person who holds or has held such an office or contract—

(a) wilfully communicates the code or pass word, sketch, plan, model, article, note, document or information to any person other than a person to whom he is authorised to communicate it or a Court of Justice or a person to whom it is, in the interests of the State his duty to communicate it; or

(b) uses the information in his possession for the benefit of any foreign power or in any other manner prejudicial to the safety of the State; or (c) retains the sketch, plan, model, article, note or document in his possession or control when he has no right to retain it, or when it is contrary to his duty to retain it, or wilfully fails to comply with all directions issued by lawful authority with regard to the return or disposal thereof; or

(d) fails to take reasonable care of, or so conducts himself as to endanger the safety of, the sketch, plan, model, article, note, document, secret official code or pass word or information; he shall be guilty of an offence under this section.

(2) If any person voluntarily receives any secret official code or pass word or any sketch, plan, model, article, note, document or information knowing or having reasonable ground to believe, at the time when he receives it, that the code, pass word, sketch, plan, model, article, note, document or information is communicated in contravention of this Act, he shall be guilty of an offence under this section.

(3) If any person having in his possession or control any sketch, plan, model, article, note, document or information, which relates to

munitions of war, communicates it, directly or indirectly, to any foreign power or in any other manner prejudicial to the safety or interests of the State, he shall be guilty of an offence under this section.

[(4) A person guilty of an offence under this section shall be punishable with imprisonment for a term which may extend to three years, or with fine, or with both.]

I cannot but disagree with the Ld. defence counsel that in order to attract the provisions under the OS Act, the documents in question must be necessarily secret or classified. Reliance is placed upon the judgment of Hon'ble Apex Court in the matter of **Govt. of NCT of Delhi v. Jaspal Singh in Criminal Appeal No. 248 of 2003 (Date of Decision 08.08.2003)** wherein it has been observed by Hon'ble Apex Court that the word '*secret*' in clause (c) of sub-section (1) of Section 3 qualifies official code or password and not any sketch, plan, model, article or note, document or information and as per Section 3(2) of the Act when the accused was found in conscious possession of the material and no plausible explanation has been given for its possession, it has to be presumed that the same was obtained or collected by the appellant for a purpose prejudicial to the safety or interests of the State.

Even if it is presumed for the sake of arguments that the impugned documents were not found to be 'Classified Documents' or were collected from any open source that does not take the case out of the purview of the OS Act.

It has been observed by the Hon'ble Apex court in the matter of **Sama Alana Abdulla vs The State Of Gujarat Equivalent citations: 1996 AIR 569, 1996 SCC (1) 427** that :-

"It was next contended that the High Court has mis-interpreted Section 3(1) (c) and erroneously held that the sketch, plan, model, article or note or other document or information need not be secret for establishing an offence under that section. In order to appreciate this contention, it is necessary to refer Section 3 which reads as follows:- "3. Penalties for spying--(1) If any person for any purpose prejudicial to the safety or interests of the State -

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

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

(c) obtains, collects, records or publishes or communicates to any

other person any secret official code or pass word, or any sketch, plan, model, article or note or other document or information which is calculated to be or might be or is intended to be, directly or indirectly, useful to an enemy or which relates to a matter the disclosure of which is likely to affect the sovereignty and integrity of India, the security of the State or friendly relations with foreign States."

The High Court held that the word 'secret' in Clause (c) qualifies only the words "official code or pass word" and not "any sketch, plan, model, article or note or other document or information". The reason given by the High Court is that after the phrase "any secret official code or pass word", there is a comma and what follows is thus not intended to be qualified by the word 'secret'. The Calcutta High Court in Sunil Ranjan Das vs. The State 77, Calcutta Weekly Note P.106 has also taken the same view. It has held that the word 'secret' in the said section qualifies official code or pass word and not any sketch, plan, model, article or note or other document or information. This is clear from the comma and the word 'or' which comes after the word 'password'.

In our opinion, the view taken by the Gujarat High Court in this case and by the Calcutta High Court in the case of Sunil Ranjan Das is correct. We find that the said interpretation also receives support from sub-section (2) of Section 3. While providing for a presumption to be raised in prosecution for the offence punishable under that section the phraseology used by the legislature is "if any sketch, plan, model, article, note, document or information relating to or used in any prohibited place, or relating to anything in such a place, or any secret official code or password is made, obtained, collected, recorded, published or communicated". From the way the said sub-section is worded it becomes apparent that the qualifying word 'secret' has been used only with respect to or in relation to official code or password and the legislature did not intend that the sketch, plan, model, article, note, document or information should also be secret. As we do not find any substance in the second contention raised on behalf of the appellant it is also rejected. In the result, the appeal fails and is dismissed."

I have gone through the case diary. I am refraining myself from divulging the details or the particulars of the documents seized so as not to unnecessarily prejudice the ongoing investigation as the investigation is at a crucial juncture. However, I am satisfied that there is sufficiently grave and incriminating material available on record against the applicant/accused. Upon perusal of the telegraph chat, statement of witnesses recorded under Section 164 Cr.P.C., information retrieved from the Email account of the applicant accused and the nature of documents seized from the possession of the accused, I am of the considered opinion that the allegations against the applicant accused are well founded.

Recovery of the sensitive documents viewed against

receipt of money by the applicant/accused from tainted sources and his relationship with the foreign agents goes a long way against the plea of his innocence. With regards to the other points agitated by the Ld. Defence Counsel I have been informed by the IO that the Applicant accused has already been provided the copy of the FIR and Ld CMM has also signed the case diary. Even otherwise also the irregularity, if any, is too trivial to have any material bearing upon the outcome of the instant application. Further, from the conduct of the family members of the applicant accused, it is evident that they are attempting to influence the witnesses. Such an approach is really a cause of serious concern.

Considering the seriousness of allegations, enormity of charge and the crucial juncture of the pending investigation, I am of the opinion that applicant/accused does not deserve the indulgence of the court and his bail application is bereft of merits. Reliance is placed upon **Mukesh Saini vs State Govt. of Delhi 2008 SCC Online Del 1391**; **Jasbir Singh vs State 1984 SCC Online Del. 88**; **Kulbhusan Parashar vs State (2007) 59 AIC 301(Del.)**. The application is accordingly dismissed.

Application is disposed off accordingly.

Instant order be uploaded on the court website immediately.

(Dharmender Rana)
ASJ-02/NDD/PHC/ND
19.10.2020