

Superintendent and Remembrancer of Legal Affairs, West Bengal

Vs

Satyen Bhowmick and Others

Criminal Appeal No. 368 of 1975

(Syed M. Fazal Ali, A. Veradarajan JJ)

15.01.1981

JUDGMENT

FAZAL, J. -

1. This appeal by special leave is directed against a judgment dated April 5, 1974 of the Calcutta High Court by which the order of the trial Court was set aside and the case was remitted for fresh hearing in the light of the directions given by the High Court.. the High Court further directed that the commitment inquiry held by Mr. R. P. Roy Chowdhury, who was the trial Magistrate, should be held by some other magistrate.
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 March 20, 1969 against 38 accused persons under Section 120-B 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 out country. Of the 38 accused persons named in the charge-sheet, 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 statement is 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 fro the hearings of the proceedings, the accused should not be allowed to have access to, or be given copies of, the statements of the witnesses recorded by the magistrate of those recorded earlier during police investigation. The magistrate partly allowed the application but permitted the defence lawyer to take copies 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 or the statement had been taken in extend in which case it would amount to publication and, therefore, would be barred by Section 14 of the Act. The lawyer of the defence 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 lawyer to cross-examine the witnesses without impounding the notes comprising the statement of the witness taken down in extenso by the lawyer.

4. The High Court after hearing the Counsel for the parties thoroughly examined the entire position and ultimately came to a finding that the magistrate should have taken legal action against the lawyer for floating the orders of the court by not producing the notebook on the plea of privilege which did not hold any water. The High Court was further of the opinion that in view of the provisions of Section 14 of the Act not only could the public be included - from taking part at the hearing but even the statement 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.. in this view of the matter, the High Court quashed the order of the magistrate and remitted the case to the trial Court to be heard by some other magistrate in view of the directions given by it. Hence, this appeal to this Court.

5. We have been through the entire judgment of the High Court by the learned counsel for the parties. The two judges who decided the case agreed in the conclusion but have given separate reasons for coming to the conclusion arrived at by them.

6. The only question that is to be determined in the present appeal is as to the scope and ambit of section 14 of the Act. Mr. Mukherjee, appearing for the State, however, submitted that on a close scrutiny of the language employed in Section 14, it would appear that the statute contains a two-fold-bar-(1) that publication of any evidence cannot be given, and (2) that public should be excluded from attending the hearing of the proceedings. The learned counsel appearing for the respondents submitted that Section 14 does not in any way deprive the valuable right of the accused to get copies of the statements of witnesses recorded during the commitment inquiry documents or statements recorded by the police which a statutory right conferred on the accused under the code of Criminal Procedure and the Criminal Rules framed thereunder by various High Courts, All That Section 14 prohibits is that the public be excluded from attending the harangues of the inquiry. Since the magistrate had already acceded to this prayer of the accused, there was nothing more that could be due by him.

7. It appear that the Calcutta High Court has been consistently taking the view as adumbrated by the learned counsel for the appellant, viz, that the court has a discretion under Section 14 of the Act not only to hold the proceedings in camera by excluding the public but also has the discretion to prohibit publication of any evidence given in the course of the proceedings.

8. In Ramendra Singh v. Mothi Choudhary, a Division Bench of the Calcutta High Court went to the extent of holding that the Act prescribes a special procedure and, therefore, overrides the procedure for trial under Section 251-A or 252 of the Code of Criminal Procedure as amended by the Act of 1955. In this connection, the High Court observed as follows :

The prosecution is under the Official Secrets Act and it is unlikely that the legislature would provide for a camera trial and at the same time provide for giving copies of all documents under Section 173 to the accused. This strikes at the root of security and goes counter to the provisions of trial in camera and this is why the legislature purposely regarding cognisance. This view finds support from the provisions of Section 14 of the Act providing for camera trial.

The Official Secrets Act provides for a special procedure of complaint and if it was upon a

complaint by a person authorized under the Act, cognisance was taken under Section 190(1) (a) and not under Section 190 (1) (b). The procedure for trial would therefore, be under Section 251-A. in respect of prosecution under Section 252 of the Code of Criminal Procedure there is no compulsory provision for giving copies of document referred to under Section 173 and the opposite parties are not, therefore, entitled to copies as of right.

9. The decision under appeal follows the aforesaid decision and has taken the same view. In a later decision in *In Re Anthony Allen Fletcher v. State*, the Calcutta High Court seems to have struck a slightly different note. In that case, the court was considering the question of bail and the exclusion of the public from attending the hearing of the case, where the following observations were made :

On a consideration of the provision of the statute as also the imprimatur of the judicial decisions, we ultimately hold that in view of the specific provisions contained in Section 14 of the official Secrets Act, 1923 when it reasonably appears to the court that a trial *catiiis apertis* would have the risk of any publication of any evidence to be given or any statements to be made in course of the proceedings would be prejudicial to the safety of the State, the court in exercise of its discretion can exclude the public from such proceedings and that this power is in addition to the inherent power exercised by the court to do justice.

10. It may be noticed that the High Court did not go to the extreme extent of holding that even the statements or evidence recorded by the magistrate in the course of the proceedings would have to be excluded under Section 14. All that was held by the High Court was that the court has a discretion to exclude the public from the proceedings and that this power of exclusion was available to the court apart from the inherent power which every court possessed in this matter. With due respect we find ourselves in agreement with the view taken by the Calcutta High Court in *Fletcher* case as mentioned above. However, we find ourselves unable to agree with the view taken by the High Court in the judgment under appeal for the reasons that we shall give hereafter.

11. We might also mention that section 14 was interpreted by this Court in *Naresh Shridhar Mirajkar v. State of Maharashtra*, where this Court while dealing with the question of holding proceedings in camera observed as follows :

Having thus enunciated the universally accepted proposition in favour of open trials, it is necessary to consider whether this rule admits of any exceptions or not. Cases may occur where the requirement of the administration of justice itself may make it necessary for the court to hold a trial in camera. While emphasising the importance of public trial, we cannot overlook the fact that the primary function of the judiciary is to do justice between the parties who bring their causes before it. If a judge trying a case is satisfied that the very purpose of finding truth in the case would be retarded, or even defeated if witnesses are required to give evidence subject to public gaze, is it or is it not open to him in exercise of his inherent power to hold the outright in camera wither partly or fully? That is why we feel no hesitation in holding that the High Court has inherent jurisdiction to hold the trial in camera if the ends of justice clearly and necessarily require the adoption of such a course... it is the fair administration of justice which is the end of judicial process, and so, if ever a real conflict arises between fair administration of justice itself on the one hand, and public trial on the other, inevitably, public trial may have to be regulated or controlled in the interest of administration of justice.

12. While interpreting the scope and ambit of Section 14 this Court in *Naresh Shridhar Mirajkar*

case observed as follows :

It would be noticed that while making a specific provision authoring the court to exclude all or any portion of the public from a trial, Section 14 in term recognises the existence of such inherent powers by its opening clause.

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 part of the section amounted to a non obstinate clause not that the section in any way deprived the accused of the right of getting copies of the statements of witnesses recorded the court of 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 a 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.

15. It is true that offenses under the Act are very serious offenses and maintenance of secrecy is of the very essence of the matter but that by itself will not justify the legislature to pass an Act so as to deprives and accused of the valuable right to defend or, for that matter to stifle the defence itself. The importance of holding trial in camera in case under the official Secrets Act has been emphasised in *R. v. Socialist Worker Printers and Publishers Ltd.*, where Lord Widgery, C. J., observed as follows :

When one has an order for trial in camera, all the public and all the press are evicted at one fell swoop and the entire supervision by the public is gone.... The actual conduct of the trial, the success or otherwise of the defendant, does not turn on his kind of thing, and very often the only value of the witness's name being given as opposed to it being withheld is that if it is published up and down the country other witnesses may discover that they can help in regard to the case and come forward.

16. With this background we shall now proceed to examine the language of Section 14 of the Act itself which may be extracted thus :

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 a order to that effect, by the passing of sentence shall in any case take place in public.

17. To begin with, the opening words of the section, namely, "In addition and without prejudice to any powers which a court may possess clearly reveal that the intention of the legislature was to give only an enabling additional power to the court regarding holding that proceedings in camera, In other words, the legislature never intended that the inherent powers possessed by the way affected by Section 14 but the intention was merely to give an additional power to strengthen the hands of the court for holding the proceedings in camera where the necessities of the situation demanded, Thus, to begin with, Section 14 is merely an enabling and not a barring provision. Mr. Mukherjee argued that the opening words of Section 14, referred to above, really amount to a non obstinate clause overriding the provisions of all Acts including the Code of Criminal Procedure and the mode of trial provided by Section 251-A or 251 of the Code of Criminal Procedure. We are, however, unable to agree with this extreme argument which in fact overstates the law. It is well settled that a non obstinate clause has doubtless the effect of overriding the provisions of a law or of the law in which the said clause is inserted. Sarathi in INTERPRETATION OF STATUTES defines a non obstinate clause thus :

A Section sometimes begins with the phrase 'notwithstanding anything contained etc., such a clause is called a non obstinate clause and its general purpose is to give the provision contained in the non obstinate clause an overriding effect in the event of a conflict between it and the rest of the section.

18. In *Aswini Kumar Ghosh v. Arbinda Base, Sastri, C. J.*, held that the non obstinate clause cannot reasonably be read as overriding anything contained in relevant existing law which is inconsistent with the new enactment. These are the well settled rules of interpretation of a non obstinate clause. Normally, a non obstinate clause is always expressed in a negative form, that is to say, by using the words 'notwithstanding anything contained' or 'anything contained in a previous law shall not affect the provision of a particular Act' and so on. In the instant case, the words 'in addition and without prejudice to any powers' cannot be construed to be a non obstinate clause at all so as to override other provisions of the Act or those of the Code of Criminal Procedure. In these circumstances, therefore, the argument of Mr. Mukherjee that the opening words of Section 14 amount to a non obstinate clause cannot be accepted on a simple and plain interpretation of the opening part of Section 14.

19. This takes us to the substantive portion of the Act on which reliance was placed both by Mr. Mukherjee and by the High Court so as to hold that the section not only conferred powers on a court for holding the trial but also includes the right of the accused to get copies of the statements recorded during police investigation or during the inquiry or during trial. With great respect to the learned Judges of the Calcutta High Court, we feel that the main purpose of the section has not been correctly interpreted by them. The High Court seems to have taken for granted that section 14 consists of two separate parts, one, providing for a trial in camera, and the other prohibiting publication of evidence. By the expression 'publication of evidence' is meant, according to the High Court, the power to deprive an accused of the right to get copies of the evidence recorded by the court or the statements recorded during the police investigation. We might mention here that as Section 13(3) of the Act clearly provides that no court shall take cognizance of any offence under the Act except upon a complaint made by or under the authority of the government or any person empowered by it, it is manifest that Section 251-A of the Code of Criminal Procedure, as amended by the Act of 1955, will not apply because the present case was not instituted on a police report but on the basis of a complaint. As the offence had taken place before the Code of 1973, therefore, the provisions of section 207 of the Code of 1973 would not apply to the present case.

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 statement recorded by the magistrate before the Court? Even before the amending Act of 1955, under the criminal rules framed by various High Court, 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 Code of Criminal Procedure 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 thus : 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 proceedings 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 set of the State, that all or any portion of this public shall be excluded during any part of the hearing" has to be read conjunctival 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 had 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.

21. Indeed, if the interpretation put by the High Court or by Mr. Mukherjee is accepted then the provisions of Section 14 will have to be struck down as being violative of Articles 14 and 21 of the Constitutions of India.

22. This Court has now widened the horizon of the concept of liberty as contained in Article 21 so as to give the word 'procedure' a very wide connotation. In *Maneka Gandhi v. Union of India*, while detailing the attributes of a fair trial as contemplated in Article 21 this Court observed as follows : (SCC p. 284, para)

The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied.

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 Code of Criminal Procedure 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 pervasions 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 case came much later.

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 the 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.

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 or cross-examine the limited purpose of using it to defend 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 defence. 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 & Remembrancer of Legal Affairs, W. B. v. Satyen Bhowmick cannot be held to be good law and must be overruled.

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 the proceedings the court may be held in camera under the circumstances mentioned in the section, does not in any way affect or overrate 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 statements 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 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 anyone who was not excluded from the hearing of the case made any attempt to disclose the contents of the documents or the statement of the witnesses (sic) exposed himself to a prosecution on a charge under Section 5 of the act.

27. For the reason given above, we overrule the view of the High Court and the reasons given thereof that Section 14 of the Act prohibits the giving of copies of the statement concerned to the accused or that the lawyer is prohibited from taking the statements in extenso and had a duty to show the same to the court. We also overrule the view taken by the High Court regarding their interpretation of Section 14 of the act. We do not agree with the High Court that the case should be tried by some other magistrate but as lot of time has elapsed, surely the magistrate against whose orders revision was taken to the High Court must have been transferred by this time. Therefore, the case will now be inquired into by a magistrate who is available in the light of the observations made by us.

The appeal is disposed of accordingly.

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