

CALCUTTA HIGH COURT

Superintendent and Remembrancer of Legal Affairs

Vs.

Satyen Bhowmik

Criminal Revn. Case No. 5 of 1970

(R.N. Dutt and Sarma Sarkar, JJ.)

24.02.1970

JUDGMENT

R.N. Dutt, J.

1. An enquiry under Chapter XVIII of the Code of Criminal Procedure is pending against the opposite parties before a Presidency Magistrate under various sections of the Official Secrets Act. On an application on behalf of the prosecution under Section 14 of the Official Secrets Act the learned Magistrate made an order on April 28, 1969, excluding the public during the trial.

2. On November 19, 1969, opposite party No. 12 filed an application before the Magistrate for "copies of deposition of the witnesses" and opposite party No. 16 filed an application for "copies and for permission to inspect the records and take necessary notes". The learned Magistrate considered these applications and passed an order on November 22, 1969, allowing them under Section 548 of the Code "to take copies of depositions and other documents on payment of proper fees". The State has thereafter obtained this Rule against this order of the learned Magistrate.

3. Mr. Roy appearing on behalf of the State first contends that the commitment enquiry has just started and only a few witnesses have been examined or, in other words, no trial has yet commenced and no "judgment" has as yet been "passed" by the learned Magistrate and so, Section 548 of the Code is not attracted at this stage.

4. Section 548 of the Code reads as follows:

"If any person affected by a judgment or order passed by a Criminal Court desires to have a copy of the Judge's charge to the Jury or of any order or deposition or other part of the record, he shall on applying for such copy, be furnished therewith." Mr. Roy submits that Section 548 of the Code is attracted only after the trial is over and a "judgment" has been passed by the trial Court. We have quoted the Section and it will be seen that a person has been given the right to get copies only when he has been affected by a "judgment passed

by a Criminal Court." There is no doubt that an accused may be affected by a judgment passed by a Criminal Court. But the words used are "passed by a Criminal Court" and not "passed or to be passed by a criminal court"; nor can it be said that the word "passed" here was intended to mean not only passed but also to be passed by a criminal court. If that was the intention of the legislature, the legislature would have made it clear. We cannot for the purpose of interpretation of a statute add words to the statute to find out its real meaning. On the face of it, therefore, it seems that Section 548 of the Code is attracted only after a trial is over and a judgment had been passed. But Section 548 of the Code speaks of not only judgment but "order passed by a criminal court". True, there is no judgment as yet in this case, but there is no doubt that during the course of the proceeding several "orders" have been passed by the learned Magistrate and it cannot be denied that an accused is affected by an order passed by a Magistrate in the course of the commitment proceeding. "Order" here does not mean the final order or the order which finally disposes of the case because that would be "judgment" within the meaning of Section 366 of the Code. Since Section 548 of the Code uses both the words "judgment or order", "order" must be interpreted to mean something different from the final order or judgment and since several orders have been passed by the learned Magistrate in the course of the proceeding before him and since these orders must have affected the accused persons, Section 548 of the Code would be attracted even during the course of this committal proceeding. Furthermore, an accused has the constitutional right to defend himself and to defend himself properly. It may just be necessary for his proper defense that he should get copies of the order-sheet, depositions of witnesses and all documents marked exhibits in the proceeding. Unless the accused gets these copies, which are all part of the record of the case, the accused may be prejudiced in his trial. Thus, even apart from Section 548 of the Code, an accused has an inherent right to obtain copies of the order-sheet, copies of the depositions and copies of documents marked exhibits or, in short, copies of any part of the record of the trial. Rule 308 of the Criminal Rules and Orders framed by the High Court under Article 227 of the Constitution also entitles the parties to a criminal proceeding to obtain copies, certified or uncertified, of any portion of the record of trial or enquiry. Mr. Roy ultimately concedes this but submits that in view of the learned Magistrate's order under Section 14 of the Official Secrets Act to the effect that the public shall be excluded during the hearing, the accused can no longer get the copies. Section 14 of the Act states that "If, in the course of proceedings before a Court against any person for an offence under this Act, or in the course of a trial under this Act, an application is made by the prosecution on the ground that the publication of any evidence to be given or of any statement to be made in the course of the proceedings would be prejudicial to the safety of the State, that all or any portion of the public shall be excluded during any part of the hearing, the Court may make an order to that effect." Here, the prosecution made an application that the publication of any evidence to be given or of any statement to be made in the course of the enquiry would be prejudicial to the safety of the State and the learned Magistrate accepted this contention and excluded the public during

the enquiry. Mr. Roy contends that, if an accused is permitted to obtain copies of depositions or of documents marked exhibits in the case, the purpose of the exclusion of the public from the enquiry would be frustrated and the publication of the evidence to be given in the trial would be prejudicial to the safety of the State. The application of both opposite party No. 12 and opposite party No. 16 is vague inasmuch as it is not clear copy of the deposition of which witness is required or copy of which document is required. The order made by the learned Magistrate is also vague inasmuch as he only permits the accused "to take copies of the depositions and other documents on payment of proper fees". He does not specify the deposition of which witness or copy of which document. Since the enquiry is being held under Section 14 of the Official Secrets Act and since publication of any evidence that may be given in the course of the enquiry would be prejudicial to the safety of the State, which contention the learned Magistrate has accepted, the accused persons cannot be given the right to obtain copies of the depositions of all witnesses or copies of all documents marked as exhibits. Clearly enough, if such depositions or such documents contain matters publication of which would be prejudicial to the safety of the State, grant of copies of such depositions or documents may end in their publication. True, but for the order under Section 14 of the Official Secrets Act in the instant enquiry the accused persons would have been entitled to get copies of order-sheet, deposition of all witnesses and all documents marked as exhibits. But the order made by the learned Magistrate under Section 14 of the Act controls this right of the accused; otherwise, the purpose of excluding the public from the enquiry for the safety of the State will be frustrated. We hold, therefore, that in view of the order made by the learned Magistrate under Section 14 of the Act the accused in the instant enquiry cannot get copies of the depositions or of documents publication of which would be prejudicial to the safety of the State. We do not hold that, merely because there is an order under Section 14 of the Act, the accused would not get copies of any deposition or of any document but we hold that the accused will not be entitled to get copies of depositions or documents publication of which would be prejudicial to the safety of the State. Both Mr. Bose and Mr. Banerjee have argued that in that case the accused would be prejudiced in their defence. So, even though the accused may not get copies of such depositions or documents publication of which would be prejudicial to the safety of the State, the accused should be given all facilities so that the accused may be properly defended. We find that the learned Magistrate had permitted the lawyers of the accused persons to inspect the record of the case. We hold that the lawyers of the accused persons have the right to inspect the record of the case, obviously after obtaining orders from the Magistrate and in presence of the Court officers or particular police officers as may be directed by the learned Magistrate. Mr. Banerjee submits that he was prevented from taking notes from the record. He will seek specific orders of the Magistrate in this respect but he can do no more than take pencil notes of dates or figures but no copies of what is contained in the record.

5. In the result, the Rule is made absolute. The order of the learned Magistrate is set aside but we direct that the learned Magistrate will permit the accused to obtain copies of the order-sheet and of such depositions and documents marked exhibits or such other part of the record publication of which would not be, in his opinion, prejudicial to the safety of the State. The accused will not be entitled to get copies of other depositions, documents or other part of the record. We should make it clear that we have in connection with this proceeding previously held that the accused persons are not entitled to get copies of statements (either) under Section 161 of the Code (or) under Section 173 (4) of 'the Code. The accused will not also get copies of such statements under Section 548 of the Code - such statements not being part of the record. The lawyers of the accused will have the right to make inspection of the record as and when necessary for their proper defence. The learned Magistrate will consider prayers for copies of specific matters or for permission for inspection and pass appropriate orders as and when necessary in the light of the directions and observations made above.

Sarma Sarkar, J.

6. I respectfully agree with the order passed by my Lord but I may be permitted to add a few words.

7. In a proceeding under Section 208 of the Code of Criminal Procedure (hereinafter referred to as the Code) on charges under Sections 3, 9 and 10 of the Official Secrets Act, 1923, (hereafter referred to as the Act) the learned Magistrate has passed an order under Section 14 of the Act that "all or any portion of the public shall be excluded during any part of the hearing" on the ground that the publication of any evidence to be given or of any statement to be made in the course of the proceeding would be prejudicial to the safety of the State. This order is different from an order under proviso to Section 352 of the Code which empowers the Magistrate to pass an order "that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court". When an order is passed under Section 352 of the Code, the exclusion of the public is from the room in the interest of the trial but, when an order is passed under Section 14 of the Act, the exclusion of the public is from the proceeding and from the hearing. Opposite Parties Nos. 12 and 16 filed applications for "copies of depositions of the witnesses" and also for "copies and for permission to inspect the records" and the learned Magistrate passed an order under Section 548 of the Code "to take copies of depositions and other documents on payment of proper fees."

8. It was urged on behalf of the State that the purpose of Section 14 of the Act would be frustrated and safety of the State will suffer if the copies, as prayed for, are granted to the accused persons without any restriction. It was further urged that Section 548 of the Code has no application to the statements and documents collected by the police during investigation. The learned Advocates appearing on behalf of the opposite parties Nos. 12 and 16, on the other hand, contend that the defense would be seriously prejudiced in the preparation of the defense and in cross-examination of the witnesses if such copies are not supplied to them. They relied not only on Rule 308 of the Criminal Rules and Orders made by the High Court but also on the provisions of Sections 74 and 76 of the Indian Evidence Act. It is, therefore, necessary to consider the case in some details both from the standpoint of abstract legal right of the accused to get copies and also from the standpoint of convenience and necessity for proper defense. In coming to our conclusion, we have to consider separately the question of grant of copies with regard to the

various items prayed for by the accused. I shall deal generally first with regard to the statements and documents referred to in Section 173 (4) of the Code and then I shall take up the question of granting copies from the records of the Court.

9. As regards the statements and documents referred to in Section 173 (4) of the Code, an extreme view was taken by a Judge of this Court sitting singly in the case of *Supdt. and Remembrancer of Legal Affairs, West Bengal v. Vimla Dassi*, reported in¹ that even when cognizance was taken on the basis of a complaint under Section 190 of the Code in a case wherein no report under Section 173 of the Code was filed, the accused was entitled to the benefit of Section 173 (4) of the Code. This view was expressly overruled by an unreported Division Bench decision of this Court in Criminal Appeal No. 358/63 decided on May 7, 1969 and it was held that in a case like the present one where the complaint procedure is followed, the accused are not entitled to free copies under Section 173 (4) of the Code. But the question still remains whether the accused persons are entitled to copies outside the provisions of Sections 173 (4) and 548 of the Code. This matter was not directly raised nor decided in this case and it is not necessary to pronounce an opinion on this point. But in this connection I may refer to the provisos to Section 162 of the Code prior to the amendment in 1955 which run as follows:

"Provided that, when any witness is called for the prosecution in such enquiry or trial whose statement has been reduced into writing as aforesaid, the Court shall on the request of the accused, refer to such writing and direct that the accused be furnished with a copy thereof, in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by Section 145 of the Indian Evidence Act, 1872.....

Provided, further that, if the Court is of opinion that any part of any such statement is not relevant to the subject-matter of the enquiry or trial or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interests, it shall record such opinion (but not the reasons therefor) and shall exclude such part from the copy of the statement furnished to the accused."

10. These provisions with some modifications have been incorporated as Section 173 (4) and (5) of the Code after the amendment of 1955. But since the amendment of 1955 there is no provision for getting such copy outside Section 173 (4) or Section 173 (5) of the Code. It may, therefore, be necessary to consider whether, even though a party to a proceeding may not be entitled to get such free copies as of right, a party to such proceeding will be entitled to copies or, at any rate, access to such police papers for the purpose of preparing defence and more particularly, to contradict witnesses with reference to the previous statements under the provisions of Section 145 of the Indian Evidence Act. On these points therefore, no final decision is made in this case and the order proposed does not cover this aspect of the case as the matter was not raised in the Court below and has not been disposed of by the committing Magistrate.

11. I now take up the question of grant of copies from the record of the Court. With regard to such documents there is provision in Section 548 of the Code for granting copies. It is not very necessary, so far as this case is concerned, to interpret the exact scope and effect of Section 548 of the Code. As I find, there is a specific provision in Rule 308 of the Criminal Rules and Orders

framed by the High Court under the provisions of Article 227 of the Constitution. Rule 308 runs thus:

"Parties to a criminal proceeding are entitled to obtain copies, certified or uncertified, of any portion of the record of trial or enquiry including such police papers as may be made use of as evidence at the trial or enquiry and final reports

¹ AIR 1968 Cal 540

submitted by police under Section 173 of the Code of Criminal Procedure.

Note - Police reports on which proceedings are instituted under Chapters VIII, X, XI and XII form a portion of the record of trial or enquiry." Copies are granted in respect of these documents under Rule 310 of the Criminal Rules and Orders. It will be seen that there is some difference in the provisions of Section 548 of the Code and Rule 308 of the Criminal Rules and Orders. Section 548 of the Code is wider and may apply not only to the parties but also to outsiders, but Rule 308 of the Criminal Rules and Orders is confined to the parties in a criminal proceeding. It will be seen that, so far as Rule 308 is concerned, the question whether the parties are affected or not by a particular order is not made a condition precedent to the grant of copies. Parties to a criminal proceeding, therefore, are entitled to copies of the documents mentioned in Rule 308 as a matter of right and as a matter of course subject to any extraneous considerations which may arise apart from Rule 308 of the Criminal Rules and Orders. In my view the opposite parties are entitled to copies covered by Rule 308 as a matter of right subject to any extraneous considerations.

12. The order of the learned Magistrate granting copies of documents from public record may be supported, if not under Section 548 of the Code, at least under Rule 308 of the Criminal Rules and Orders and normally, the opposite parties will be entitled to those copies as a matter of right subject to other considerations, if any.

13. In the present case, as already observed, an order has already been passed under Section 14 of the Act which not only excludes the public from the Court room but also excludes the public from the proceeding or hearing in the Court room. If that be so, it has to be considered whether the granting of such copies will be in conflict with the order under Section 14 of the Act. The learned Magistrate passed a general and vague order granting copies as a matter of course in respect of documents as may be found in his order. But, in my view, such general order of granting or refusing will not be proper in the instant case. The general rule will be that the opposite parties are entitled to such copies but in respect of each individual copy prayed for, the Magistrate has to consider and apply his mind to come to a finding whether the grant of the copy would affect his own order under Section 14 of the Act. If there is no conflict, then the copies may be granted; but, if there is conflict, then the copies cannot be and should not be granted.

14. Even where the copies are not granted, there must be a reasonable opportunity given to the accused persons to prepare for the defense and particularly, to contradict the witnesses with reference to the previous statements under Section 145 of the Evidence Act. For this purpose the opposite parties or their lawyers should have access to the public record of the Court and they may inspect the same and take short notes as restricted by my Lord in his Order.

15. Subject to the reservations and observations made above, I respectfully agree with the proposed order.
Order accordingly.