CALCUTTA HIGH COURT

Anthony Allen Fletcher

Vs

The State

(N.C. Talukdar and A Benerjee, JJ.)

06.12.1973

JUDGMENT

N.C. Talukdar, J.

1. This is an application for bail on behalf of the accused-applicant, Anthony Allen Fletcher, with notice to the State. The application is opposed.

2. The applicant was arrested on 26-4-1973 from the Waverley Hotel, Calcutta, on charges under Sections 3 and 9 of the Official Secrets Act, 1923 and Section 120-B of the Indian Penal Code. The investigation is still pending. Applications for bail were made on his behalf before the learned Chief Presidency Magistrate, Calcutta as well as the learned Judge, City Sessions Court but were rejected. An application for bail was thereafter filed in the High Court from an order passed by the learned Chief Presidency Magistrate, Calcutta rejecting bail. Our learned brothers, the Chief Justice and A. K. De. J., by their order dated 25-9-1973, rejected the prayer but granted liberty to the applicant to make a fresh application for bail after 15-11-1973. The present application was filed thereafter on 22-11-1973.

3. Before the hearing of the application, Mr. Dipankar Gupta, Standing Counsel (with Mr. Promode Ranjan Roy, Junior Government Advocated made a prayer under Section 14 of the Official Secrets Act, 1923. for excluding the public from the hearing of the application: but the same was strongly opposed by Mr, Amal Dutta, Senior Advocate (with M/s. Alok Kumar Sengupta and S. Dudewalla, Advocates) appearing on behalf of the Accused-Applicant.

4. The learned Standing Counsel pressed his prayer for a hearing in

camera

on the ground that in the facts and circumstances of the case, the publication of the statements to be made in course of the hearing would be prejudicial to the safety of the State and to support his contention, he briefly indicated the nature of the allegations levelled against the accused-

applicant. Mr. Gupta further submitted in this context that the provisions of Section 14 of the Official Secrets Act are wide enough, conferring a discretion with the Court to decide, on proper grounds, that the hearing of a trial or a proceeding is to be held in camera and that this is independently of the inherent powers of the Court to direct so in the interests of justice. Several cases were cited and the same will be considered at the proper stage. Mr. Amal Dutta joined issue and besides making a broad submission that an open trial is one of the most valued rights of the citizen and should not be denied by a direction for hearing in camera, he raised an objection of four dimensions.

5. The point raised is of some importance and we will proceed to determine the same, in the first instance. In support of the first dimension of his objection, Mr. Dutt. relied on the provisions of Section 14 of the Official Secrets Act. 1923 (Act XIX of 1923) read with Chapters IV and XI, Part II of the Rules of the High Court at Calcutta, Appellate Side, laving down general rules of applications and affidavits and contended that the expression 'application' used in Section. 14 of the Official Secrets Act, 1923 refers to a petition in writing and not an oral prayer. The learned Standing Counsel joined issue and contended that the interpretation given by Mr. Dutt will merely circumscribe the meaning of the word 'application', which in legal parlance stands both for an oral prayer as well as a written petition. In support of his contentions he relied on the definition of the word 'application' as given in the Law Lexicons and the Dictionaries In this context he referred to the Shorter Oxford English Dictionary, revised and edited by C. T. Onions, wherein the word 'application' has been defined as "the action of making an appeal, request or petition to a person: the request so made". He next referred to Wharton's 'Law Lexicon (14th Edn.) wherein the word 'application' has been defined as "a request, a motion to a Court or Judge". He also referred to the 'Legal and Commercial Dictionary' by S. D. Mitra wherein it has been stated that " 'apply' means to make a prayer or request orally or in the form of a written application", The provisions again of Chapters IV and XI. Part II of the Rules of High Court at Calcutta, Appellate Side, are in a different context, providing for a different contingency and do not enjoin that an "application" under Section 14 of the Official Secrets Act, 1923 must necessarily be a petition in writing. On ultimate consideration we find it difficult to agree with the steps of reasoning put forward by Mr. Dutt and we hold that there is a considerable force behind the submissions of Mr. Dipankar Gupta. In our view the word 'application' in Section 14 of the Official Secrets Act XIX of 1923 denotes not only a petition in writing but also an oral prayer made to the court directing the exclusion of the public from any proceeding. The first dimension of Mr. Dutt's objection accordingly fails.

6. Mr. Dutt based his next objection that an application for bail does not come within the ambit of Section 14 of the Official Secrets Act, 1923 on the ground that the same is not covered by any of the three alternatives contained therein, viz., (a) in course of the proceedings before a Court against any person for an offence under this Act; or (b) the proceedings of appeal; or (c) in

course of the trial of a person under this Act. The learned Standing Counsel submitted that the interpretation given by Mr. Dutt is unwarranted and untenable, inasmuch as the terms of Section 14 of the Act are wide enough to include a proceeding, alleging offences under this Act, in course whereof an application is made for bail. A bail application is a part or a continuation of the proceedings before a Court against any person for an offence under this Act and accordingly a prayer under Section 14 of the Act can be made, in connection with the hearing of such application, for excluding the public from the hearing. We agree with the submissions made by the learned Standing Counsel and hold that the interpretation sought to be given by Mr. Amal Dutt is de hors the provisions of Section 14 of the Act XIX of 1923. The second dimension also of Mr. Dutt's objection accordingly fails.

7. The third branch of Mr. Dutt's objection is that the prosecution has not disclosed any specific ground on which this Court can reasonably hold that "the publication of any evidence to be given or of any statements to be made in course of the proceedings would be prejudicial to the safety of the State". The learned Standing Counsel in his replies contended that the test to be applied at this stage is of a prima facie satisfaction on the part of the Court as to the nature of the case and the materials outlined; and that he had already indicated the nature of the case and all the statements recorded, on the basis of which such a prima facie satisfaction can be broad-based. We agree with the submissions of Mr. Gupta and we hold that at this stage any detailed delineation would merely be begging the question and frustrate the very intention behind a prayer for holding a trial or hearing in camera. The satisfaction of the Court enjoined under Section 14 of the Official Secrets Act, 1923 Is therefore a prima facie satisfaction and the Court need not proceed to hear ostiis apertis the submissions made by the respective parties in details with reference to the statements adapted in connection with the case collected in course of the investigations, in order to arrive at its ultimate satisfaction within the bounds of Section 14 of the Official Secrets Act. 1923. There is no force therefore behind this branch of Mr. Dutt's objection.

8. The fourth and last dimension of Mr. Dutt's objection relates to the apprehension of prejudice being caused to the Accused-Applicant if the hearing is held in camera under Section 14 of the Official Secrets Act, 1923. He contended that an order made under Section 14 of the Act would control the right of the Accused-Applicant to obtain even a copy of the order passed by this Court, operating thereby to his serious prejudice. He referred in this context to the case of Supdt. and Remembrancer of Legal Affairs, *West Bengal v. Satyen Bhowmick, reported in*[1] and relied on the observations made by Mr. R. N. Dutt at p. 51 that "True, but for the order under Section 14 of the Official Secrets Act in the instant enquiry the accued 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". This is not really so and even if the observations referred to above be deemed to have

raised a cloud, the ultimate position in law has been made quite clear. Mr. Justice Dutt proceeded to observe at p. 52 : (at d. 1633 of Cri LJ) as follows: 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. We therefore do not agree with the contentions raised by Mr. Dutt. The Accused will not be entitled, in the case of a hearing not ostiis apertis, to get copies of depositions or documents, publication of which would be prejudicial to the safety of the State and the order passed by the High Court on the application for bail does not come within the ambit thereof. The apprehensions of the Accused-Applicant accordingly are misconceived and based on a misinterpretation of the ratio underlying the judgment of the Division Bench referred to above, We have given our anxious consideration to this branch of Mr. Dutt's objection as it involves the question of prejudice in a criminal proceeding caused to the accused, whose rights should always be safeguarded. But we find on ultimate analysis that such an apprehension is unwarranted and untenable and the fourth dimension also of Mr, Dutt's objection fails.

9. We will now proceed to consider the broad submissions made by Mr. Amal Dutt that an open trial being one of the most valued rights of the citizen should not be denied by a direction for hearing in camera. To lend assurance to his contention Mr. Dutt relied on the language of the provisions contained in Section 14 of the Official Secrets Act, 1923, Rule 63 of the Criminal Rules and Orders of the Calcutta High Court and Section 352, Criminal Procedure Code. The learned Advocate for the Accused-Applicant also pin-pointed the use of the words 'ordinarily' in Rule 63 of the Criminal Rules and Orders and "may" in Section 14 of the Official Secrets Act, 1923. It is quite true that judicial work should ordinarily be done in public court house and the trial or the hearing should be held in open court. There are however, exceptions warranted by the exigencies of the case and accordingly the legislature in its wisdom laid down specific provisions in the different Acts for holding a trial or hearing in camera, if the court, in its discretion, considers it proper to do so. Such provisions are to be found, amongst others, in Section 53 of the Indian Divorce Act, 1869, Section 22(1) of Hindu Marriage Act, 1955, proviso to Section 352 Criminal Procedure Code, and Section 151, Civil Procedure Code. This is apart from the inherent powers of the Courts to direct a trial not Ostiis Apertis in the interest of justice.

10. The first part of the provisions contained in Section 14 of the Official Secrets Act, 1923 viz., "in addition to and without prejudice to any powers which a court may possess to order the exclusion of the public from any proceedings" makes it abundantly clear. A reference may be made in this context to a decision under Section 352 of the Code of Criminal Procedure and Rule 63 of the Criminal Rule viz., the case of Kumar Purnendu Nath Tagore v. Kalipada Dutt, Mr. Justice K C. Das Gupta (as his Lordship then was) delivering the judgment of the Division Bench

undoubtedly observed at p. 514 that "Hallowed by the administration of justice for long years gone by and by the promise of administration of justice for years to come, public court houses may well be said to be 'temples of justice' ....". The Division Bench however proceeded to observe that "the use of the word "ordinarily" makes it clear that in extraordinary circumstances the Magistrate may do judicial work in places other than the public court houses". The test laid down however is that "to justify any departure from the Rule, circumstances must be very very extraordinary indeed". We respectfully agree and we hold that in this case the circumstances referred to by the learned Standing Counsel are exceptional circumstances in the context of which the departure may be allowed, more so in view of the specific provisions of Section 14 of the Official Secrets Act, 1923 and the inherent powers of this Court to hold such trials in camera as recognised by the aforesaid provisions. We would now refer to a more recent decision by the Supreme Court in the case of Naresh Shridhar v. State of Maharashtra, . In that case the majority view of Gajendragad-kar, C, J.. and Wanchoo, Mudholkar, Sikri (as their Lordships then were) and Ramaswami, JJ., while emphasising the importance of public trial, held at pp. 8 that "if the primary function of the Court is to do justice in causes brought before it, then on principle, it is difficult to accede to the proposition that there can be no exception to the rule that all causes must be tried in open court". The majority view further proceeded to hold that "That is why we feel no hesitation in holding that the High Court has inherent jurisdiction to hold a trial in camera if the ends of justice clearly and necessarily require the adoption of such a course". Mr. Justice Hidayatullah also in his dissentient judgment observed that "where the legislature felt the special need it provided for it". Although he held ultimately that inherent powers can only be exercised on well-recognised principles and they cannot be assumed to exist where they do not. A reference in this context may be made to Halsbury's Laws of Eng., 2nd Edn. Vol. X and the provisions of Official Secrets Act, 1920 in Eng. (10 and 11 Geo 5C 75). It has been observed in Article 750 in Halsbury that "As a general rule, all persons have a right to be present in court, provided there is sufficient accommodation and there is no disturbance of the proceedings". A reference was made this context to the case of Scott v. Scott (1913) AC 417. H. L... wherein it was observed that "there is, however, an inherent jurisdiction in the court to exclude the public if it becomes necessary to do so for the administration of justice." It was further observed in Halsbury that "To the general rule there are some statutory exceptions" and that "on a trial under the Official Secrets Act, the court, on the application of the prosecution, may order all or any portion of the public to be excluded during any portion of the hearing, if the publication of any evidence to be given or statement to be made would be prejudicial to the national safety. The sentence must, however, be passed in public." The provisions of Section 8(4) of the Official Secrets Act, 1920 in England (10 and 11 Geo. 5C. 75) are similar to those of Section 14 of the Official Secrets Act, 1923, in India (Act XIX of 1923).

11. On a consideration of the provisions 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 ostiis 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. Each case ultimately must depend on its own facts and the prayer made on behalf of the prosecution on the basis of the specific provisions of a special Act and the facts and circumstances of the particular case cannot be jettisoned merely on the ground that an open trial is one of the most valued rights of the citizen and should not be denied by a direction for hearing in camera. The broad submission made by Mr. Dutt in support of the objection raised to a trial in camera is accordingly not maintainable on ultimate analysis.

12. We will now turn to the merits of the application for bail. Mr. Dutt has pressed the application on two grounds firstly on the ground of the absence of any materials establishing the offences alleged; and secondly, on the ground of an inordinate delay in completing the investigation. The learned Standing Counsel joined issue on both the grounds.

13. As regards the first ground relating to the merits, the learned Standing Counsel placed before us several documents and statements taken during the investigation and contended that the same rules out the submissions of Mr. Amal Dutt made in this behalf. The test required in this case is undoubtedly a prima facie test and the investigation is still pending. We are therefore unable to agree with Mr. Dutt that the materials so far collected do not make out a prima facie case. The first contention of Mr. Dutt on merits therefore fails.

14. The second branch of Mr. Dutt's submission relates to the delay in investigation, prejudicing an accused in detention. The accused-applicant was arrested on the 26th April, 1973 and since then he is in jail. An application for bail was filed before the High Court earlier and our learned Brothers the Chief Justice and Mr. Justice A. K. De. while rejecting the prayer for bail, gave liberty to the applicants to make a fresh application for bail after the 15th November. 1973. Mr. Dutt contended that the intention behind the order is that the investigation would be completed by that time. The learned Standing Counsel contended however that it is not so, and that in a case where the field of investigation is very wide, extending beyond West Bengal, and numerous documents have to be taken into consideration as well as a number of statements has to be taken from different persons, the period taken for investigation since 26th April, 1973. cannot be reason-, ably held to have been a considerable one* He also submitted that further materials had cropped up, after the 25th September, 1973. calling for further investigation and he referred in this connection to the apprehension of one absconding accused, Mr. Gupta ultimately submitted that out of the six accused persons, two are still absconding. The question of delay in

investigation in a case is a relative one, depending on various factors, including the nature and extent of the particular case. In view of; the submissions made above, it is premature to hold at this stage that the investigation has been, dilatory. We hold, on an anxious consideration of the submissions made and the materials placed before us, that due opportunity should be given to the prosecution to complete the investigation.

15. A reference in this context may be made to the observations made by Lord Porter in the case of *King Emperor v. Nazir Ahmad, reported in*[2] that "the functions of the judiciary and the police are complementary, not overlapping, and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function always, of course. subject to the right of the Court to intervene in an appropriate case when, moved under Section 491 of the Criminal Procedure Code to give directions in the nature of habeas corpus". The powers of the Court to interfere at the stage of investigation by the police are indeed limited and the same should not overlap the other, excepting for limited purposes, amongst others, of bail or writs of habeas corpus under Section 491, Criminal Procedure Code or a writ of mandamus if the investigation be mala fide. While we agree that an undue and prolonged delay in investigation will be a ground in favour of the defence prayer for bail, more so when liberty was given by the Division Bench earlier to renew the prayer for bail after the specified period, we ultimately hold that, in the facts and circumstances of the case and in view of the submissions made, there has been no unnecessary delay or dilatory investigation and we accept the explanation submitted in this behalf by the State. The learned Standing Counsel further submitted that the investigation will not take long and it is expected to be completed within about three months. The second contention therefore of Mr. Dutt on merits also fails.

16. Before parting with the application, we make it clear that we have made no observations as to the merits of the case, which is still in the stage of investigation, excepting holding that the prayer for bail at this stage is premature.

17. In the result, the application is rejected as premature.

A. N. Banerjee, J.

I agree.

Cases Referred.

175 Cal WN 48 : (1970 Cri LJ 1631)
271 Ind App 203 at p. 212 : 46 Cri LJ 413 at p. 417 -AIR 1945 PC 18 at p. 22