



F.R.  
[Signature]

**IN THE HIGH COURT OF SIKKIM AT GANGTOK**

**Criminal Appeal No.01 of 2007**

Dilip Kumar Roy  
Son of Rash Behari Roy,  
Resident of Dhaka, Bangladesh  
A/P Rongyek Jail(Sikkim). ...Appellant.

**Versus**

State of Sikkim,  
Through the Chief Secretary,  
Government of Sikkim,  
Gangtok, East Sikkim. ...Respondent.

**For the appellant:** Mr. N. Rai and Ms. Jyoti Kharka, Advocates.

**For the respondent:** Mr. Karma Thinlay, Addl. Public Prosecutor.

**Date of Hearing : 04-05-2009**

**Date of Judgment : 04-05-2009**

**PRESENT: HON'BLE THE CHIEF JUSTICE  
MR. JUSTICE AFTAB H. SAIKIA  
HON'BLE MR. JUSTICE A.P. SUBBA, JUDGE**

**JUDGMENT AND ORDER (ORAL)**

**(Saikia CJ)**

Heard Mr. N. Rai, learned counsel for the appellant as well as Mr.Karma Thinlay, learned Public Prosecutor, Sikkim.

2. This appeal has been directed against the judgment and order dated 30-11-2006 passed by the learned Sessions Judge, East & North at Gangtok in S.T. Case No.3 of 2004 whereby the appellant was found guilty of commission of an offence punishable under

[Signature]



Section 3 of the Official Secrets Act, 1923 (hereinafter referred to as "the Act") under which he was convicted and sentenced to undergo simple imprisonment for a period of ten years.

3. The facts of the case, in brief, as projected by the prosecution during the trial are as under:-

4. The accused who is a Bangladeshi national entered India on espionage mission and collected the important defence related data and information through personal observations and casual conversations with civilians as well as army personnel from different army camps at the behest of one Pakistan Intelligence Official, namely Mr. Farooque and another Mr. Samsed Ali, a resident of Sector II, Road No.5, Dhaka, Bangladesh.

5. The appellant first entered India via Binaguri Harldar Checkpost on 11.03.2003, stayed with his uncle at 24 Parganas and returned to Bangladesh on 17.3.2003.

6. Thereafter the appellant again came to India on 12.4.2003, 15.5.2003, 15.6.2003 and 25.7.2003 i.e. four times within 4 months and on each visit he came to Siliguri, West Bengal where he stayed at Hotel Mapel and indulged in collection of informations in regard to the various Army Units and Establishments located in various places in Siliguri, Kalimpong and Gangtok.

7. On 2-8-2003 the accused was found collecting information pertaining to the Army establishment, deployment and movement near the entrance gate of Army Cantonment at Deorali,



Gangtok from where he was apprehended following a source information received by the Police.

8. Initially charge sheet was laid against the present accused-appellant and two others under Sections 3 and 9 of the Act read with Section 120B IPC. However, since the two other co-accused were never arrested and produced, the present accused-appellant was alone prosecuted. When the charge was framed under Section 3 of the Act and read over to the accused he pleaded not guilty and claimed to be tried.

9. To substantiate its case, prosecution examined as many as 15 witnesses. After the closure of prosecution evidence the accused was examined under Section 313 Cr. P.C. He however, did not examine any witness on his behalf.

10. The learned trial Court on a thorough consideration and appreciation of the evidence of all the witnesses so produced by the prosecution in support of its case and also upon hearing the learned counsel for the parties, found the appellant guilty of the commission of the above offence and convicted and sentenced him as already noted above.

11. Being aggrieved by such conviction and sentence the accused-appellant is before us in this appeal.

12. Mr. N. Rai, learned counsel appearing for the appellant, has forcefully contended that the impugned conviction and sentence of the appellant is based on no evidence and the accused, being a foreign national, has been made a victim of the circumstances



thereby making him scapegoat in the present case without proper foundation.

**13.** Supporting his contention, Mr. Rai has taken us through the entire evidence on record particularly the testimony of PW-1 Balaram Prasad and PW-2 Phu Tshering Bhutia who were examined as seizure witnesses. According to him, PW-3 Rajendra Chettri and PW-4 Binoy Kishore Rai are not reliable and credible witnesses because serious contradictions and inconsistencies are writ large on the face of their depositions. At the same, the deposition of other remaining witnesses also lack credibility and accuracy. It is, thus, submitted that since the evidence of the prosecution witnesses including the two as mentioned above are apparently found to be contradictory to one another, no conviction can be based on this set of testimony of those witnesses and as such, the impugned conviction and sentence, not being sustainable in law, deserve interference by this Court.

**14.** Refuting the submissions and contentions made on behalf of the appellant, Mr. Karma Thinlay, learned Public Prosecutor, on the other hand, has urged that all the witnesses particularly PW-1 Balaram Prasad, PW-2 Phu Tshering Bhutia, PW-3 Rajendra Chettri, PW-4 Binoy Kishore Rai, PW-5 Ravi Saha, PW-8 D.B. Thapa, PW-9 Lt. Col. V.N. Bhardwaj, PW-10 B.R. Dhinal, PW-12 C. Narbu Kazi and PW-14 Narinder Singh have narrated the entire facts within their knowledge and belief in such a way that their testimony fully supports and corroborates the prosecution case and



such being the position, there is no room to disbelieve those witnesses.

15. Drawing our attention to the testimony of PW-1 and PW-2, so relied up by Mr. Rai in support of the appeal, the learned Public Prosecutor has vehemently argued that the appellant was found to be directly involved in collecting secret defence related information which amounts to an offence of spying as laid down by Section 3 of the Act.

16. It is accordingly submitted on behalf of the State that the act of espionage in which the appellant has been found to be involved poses a serious threat to the security, sovereignty and integrity of India and in that view of the matter, the appellant does not deserve any leniency to be shown by this Court. Besides, there is no such good and sufficient ground to disturb the impugned order of conviction and sentence.

17. We have given our thoughtful consideration to the extensive submissions and contentions so advanced and canvassed on behalf of the parties.

18. To appreciate the above rival contention of the parties, it will be useful to quote and reproduce Section 3 of the Act as under:-

**"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 password, 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),

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 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 anything in such a place, or any secret official code or password 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, (information, code or password shall be presumed to have been made), obtained, collected, recorded, published or


A



communicated for a purpose prejudicial to the safety or interests of the State.”

**19.** A bare reading of the above provision makes it clear that the prosecution in order to prove a case under Section 3 of the Act need not prove any particular act of the accused tending to show a purpose prejudicial to the safety or interest of the State. An accused can be convicted if from the proved circumstances of the case or from the proved conduct of the accused or his proved character, it appears that the purpose of the accused was prejudicial to the interest or security of the State.

**20.** Even the act of spying which has been made punishable under the instant Section is not defined. What can be gathered from a plain reading of the Section particularly clause (2) of the Section is that a person shall be guilty of the offence of spying if such person for any purpose prejudicial to the safety or interests of the State approaches, inspects, passes over, or is in the vicinity of, or enters, any prohibited place or 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 obtains, collects, records or publishes or communicates to any other person any secret official code or password, 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.





**21.** In order to satisfy ourselves as to whether the prosecution has successfully proved its case against the appellant under the above provisions of law we have meticulously scanned through the entire evidence of relevant witnesses. The respective statement of such witnesses is as follows:-

**21(a).** Shri D.B. Thapa PW-8 is the Superintendent of Police, Crime Branch, Sikkim Police. According to his statement, on 2-8-2003 he received a source information to the effect that a Bangladeshi national was found collecting information regarding army installation at Gangtok. On receipt of such information he constituted a team of Police Officers and deputed the team to go to the gate of Army Cantonment at Deorali, Gangtok popularly known as Biralu Gate for necessary enquiry.

**21(b).** Shri C. Narbu Kazi PW-12 who was one of the team members so constituted stated that the team reached Biralu Gate at 5.00 p.m. to 5.30 p.m. on the relevant day. The source informer who had accompanied the team identified the appellant Dilip Kumar Roy who was then making out some notes out side of the Biralu Gate. The Police team accordingly arrested the accused and interrogated him during which he confirmed his name as Dilip Kumar Roy son of Rash Behari Roy, a resident of 11/12 Sattar Mollah Road, Pallabi, Mirpur Dhaka 1216 Bangladesh. Thereafter, the Police team conducted search on the body of the accused in presence of two independent witnesses namely Balaram Prasad PW-1 and Phu Tshering Bhutia PW-2 of the adjoining locality and recovered the following items:-



- 21(c) i)** Bangladesh Passport No. R-0746324 dated 30-01-2003 valid up to 21-09-2008 in the name of the accused Dilip Kumar Roy;
- ii) a task slip (handwritten) regarding army deployment/movements (one page);
  - iii) a sketch map (handwritten) about army deployment at Gangtok (one page);
  - iv) a pocket sized diary containing telephone numbers of Farooque and Orbat of Indian Army consisting 17 pages;
  - v) Two slips containing information about army deployment at Gangtok and Siliguri;
  - vi) A loose sheet containing technical numbers of army unit;
  - vii) One pair of spectacles with cover;
  - viii) Cash Rs.660/- and
  - ix) One Quartz wristwatch.

**22.** After the search was made, the team brought the accused to the Crime Branch at Police Headquarters, Gangtok and on the basis of the information gathered by the team the suo-motu F.I.R. was lodged against the accused Dilip Kumar Roy and others for offences under Sections 3 and 9 of the Act read with Section 120(b) IPC and a case being CID PS Case No.6(8)2003 dated 2-8-2003 was registered and investigation of the said case was endorsed to Needup Wangdi of the Crime Branch, Gangtok PW-15.



**23.** Balaram Prasad PW-1 and Phu Tshering Bhutia PW-2 mentioned above and who were attesting witnesses to the seizure had stated that in their presence the Police conducted search on the body of the accused and recovered one Passport and other papers including one rough sketch map from the possession of the appellant. Both of them duly proved the seizure memo Ext.P-1, Ext.P-2 the Pass Book and Ext. P-3 collectively the different papers that were seized by the Police in their presence.

**24.** Shri Narinder Singh PW-14 who is the Govt. Examiner of question documents stated that he had carefully and thoroughly examined the specimen writings of the accused Dilip Kumar Roy marked as S-1 to S-60 in his Laboratory at Kolkata and opined that the person who had written S-1 to S-60 had also written Q-1, Q-2, Q-4 to Q-8, Q-10 to Q-15.

**25.** Lt. Col. V.N. Bhardwaj PW-9 is a General Staff Officer attached to the Headquarters of 17 Mtn. Div. 99 APO, Sikkim at the relevant time. According to him on joining his headquarters on 29-11-2003 he came across the documents and correspondence relating to the matter particularly Ext.-65 a letter addressed by N.P. Lama Lt. Col. The Officiating General Staff Officer of 17 Mtn. Div. addressed to the District Superintendent of Police, Crime Branch, Gangtok. In his statement, he duly confirmed the contents of paragraph 7 of the said letter Ext.-65.

**26.** For the sake of convenience the letter which is marked as Ext.-65 is reproduced below:-

"CONFIDENTIAL"

Headquarters  
17 Mountain Division  
C/O 99 APO

1600/1/GSI

19 Aug 2003

District Superintendent of Police  
(Crime Branch)  
Gangtok

CID PS CASE NO 6(8) 03 DATED 02 AUG U/S 3, 9 OF  
OFFICIAL SECRET ACT, 1923 R/W 120 'B' IPC

Sir

1. Please refer your office letter No 1386/03/CB dated 12 Aug 2003.
2. The documents marked 1, 2, 3, 4 & 5 forwarded to this Headquarters vide your above mentioned letter have been perused from security angle. The documents do have security value and to a military mind these do give a fair amount of information for constructing an over all intelligence picture. Detailed comments are contained in succeeding Paragraphs.
3. Nature of Documents (Paragraph-1).
  - (a) These documents contain the names of units which form part of army formation in this area.
  - (b) The operatives have been asked to confirm the movement of units from this area to J&K.
  - (c) The operatives have been asked to provide a sketch of cantonment which is fairly accurate and can be used for targeting establishment on pick and choose basis.
4. Value of Information (Paragraph-2). The information contained in the documents if disclosed to unauthorized person, could be prejudicial to the safety, security and interest of the army.
5. Useful of Information (Paragraph-3). The information contained in these documents will certainly be useful to an enemy/a potential enemy



country. The very tasking has indicated that person operating has specifically asked the operatives to collect this information.

6. Info being Defence Related (Paragraph-4). The info contained in these documents is directly connected to defence matters of our country.

7. The very intention of collecting such defence related information indicates that the intention is malafied. This info has no civil application and hence can be construed as prejudicial to interests of the country.

Thanking you

Yours faithfully

Sd/-  
(NP Lama)  
Lieutenant Colonel  
Officiating General Staff Officer  
(Intelligence)  
For General Officer Commanding.

CONFIDENTIAL"

**27.** Shri B.R. Dhinal PW-10 who was the Under Secretary to the Government of India, Ministry of Home Affairs Internal Security Division, New Delhi at the relevant time stated that all the documents relating to the case which were forwarded by the State Home Department to the Govt. of India, Ministry of Home Affairs were placed before the competent authority for sanction for prosecution of the accused. He duly proved the letter of sanction marked Ext.-66.

**28.** Shri Needup Wangdi PW-15 is the I.O. who conducted the investigation and submitted the charge sheet.

**29.** Besides, the testimony of the witnesses has also been adequately evaluated and assessed.



**30.** Shri Bijay Krishna Roy PW-13 stated that the accused whom he identified was related to him as nephew being the son of his elder sister. He confirmed that the accused was a citizen of Bangladesh.

**31.** Shri Ravi Saha PW-5 who was the Manager-cum-Receptionist at the Mapel Hotel, Siliguri at the relevant time stated that the accused who he identified in the dock checked in at the Hotel on 12-4-2003m, 15-5-2003, 15-6-2003 and on 25-7-2003. They have also given the detail time of checking in and checking out from Hotel and have proved the entries made in the Hotel Register marked Ext.P-5.

**32.** Anil Choudhury PW-6 and Dinesh Das PW-7 who were the witnesses to the seizure of the Hotel Register by the Police on the irrelevant day stated that they were present when the Police came to the Hotel and seized the Hotel Register and other items like nylon brief case, one cotton bag and some clothings including cash amount of Rs.1,300/-. They duly proved the seizure memo Exts.5 and 6.

**33.** Record shows that the veracity of all the above witnesses were tested through cross-examination but as noted by the learned trial Court in the impugned judgment none of them have been discredited.

**34.** All the witnesses have thus with one voice supported the case of the prosecution that the appellant was involved in an espionage mission of collecting and supplying the important and



valuable documents containing various military related information outside the country.

**35.** Summing up the conclusion arrived at on the basis of the statement of these witnesses and various other materials on record the learned trial Court in paragraph 36 of the judgment observed as follows:-

“36. From what has been stated above it can safely be concluded that the Prosecution has proved beyond reasonable doubt that accused was apprehended on 2-8-2003 around 1750 hours from near Biralu gate, Deorali, Gangtok, Sikkim and on search of his body, documents, papers containing writings, maps, telephone Nos. etc. were recovered and that the said documents do contain sensitive information regarding defence establishments, deployment and movement of the Army etc. Prosecution has further proved that such information if divulged to an unauthorized person or to an enemy country will jeopardize the safety and integrity of the Country. The prosecution has also proved that writings containing such sensitive information are in the handwritings of the accused. Prosecution has also proved that accused being a Bangladesh National entered India many times (which is borne by his own Passport Ext.2 also) within short period and he checked in Hotel Mapel, Siliguri. In over all summation of prosecution case I find that the accused Dilip Kumar Roy, son of Rash Behari Roy, resident of Mirpur, Dhaka, Bangladesh is guilty of offence under Section 3 of the Indian Official Secrets Act 1923. I convict him under the same Section of law.”

**36.** Thus on a due consideration of the facts and circumstances of the case in the light of special provision as contained in Section 3(2) of the Act as highlighted above and the arguments advanced by the parties, we are of the considered view that the above finding and conclusion arrived at by the learned trial Court warrants no interference by this Court.

**37.** Now coming to the quantum of sentence it is the submission of Mr. Rai that though the penalty prescribed under



Section 3 may extend to 14 years, in the instant case, considering the facts and circumstances of the case, the appellant has been sentenced for ten years. According to further submission of Mr. Rai the appellant has already undergone incarceration for more than five years and nine months i.e. more than half of the total period of sentence so handed down to him by the learned trial Court. In this regard it is stated that the appellant has his family consisting of minor children in Bangladesh and they are facing financial hardship as the appellant is the sole bread winner in the family. Drawing our attention to such mitigating circumstances the learned counsel prays that this Court may be pleased to consider reducing the period of sentence to such an extent as may be considered fit and proper.

**38.** Mr. Thinlay has, however, strongly objected to the submissions made by the learned counsel for the appellant stating that the appellant does not deserve any lesser sentence than the one imposed on him keeping in view the seriousness of the offence which poses serious threat to the sovereignty and integrity of India and according to him, it is after taking the mitigating circumstances indicated above into consideration that the appellant was sentenced to 10 years instead of 14 years.

**39.** On due consideration of the submissions made both by Mr. Rai and Mr. Thinlay on the sentence and taking into account the overall circumstances of the case, we are of the considered view that interest of justice will be served if the period of 10 years' simple



imprisonment imposed on the appellant is reduced to 6 years' simple imprisonment. We order accordingly.

**40.** At this stage, mention must be made to one more submission advanced by Mr. Rai. He has submitted that though the appellant is a Bengladeshi National, he must not be denied equal justice from the Court of law as he is, even though a foreign national, also protected by the fundamental rights guaranteed by the Constitution of India as envisaged under Article 14 and 21.

**41.** To bolster up his submission, the learned counsel has referred to the provisions of Articles 14 and 21 of the Constitution of India which may be quoted as under:-

**"14. Equality before law.-** The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

**"21. Protection of life and personal liberty.-** No person shall be deprived of his life or personal liberty except according to procedure established by law."

**42.** There is no doubt that the contention of the learned counsel is fully supported by the above provisions of the Constitution. However, it is not disputed that the trial of the appellant has been held according to the procedure established by law and in the circumstances we fail to see how invoking the above constitutional provisions would further the case of the appellant.

**43.** In the result, the appeal stands partly allowed to the extent of modification of sentence as indicated above.



44. Needless to say that the period already undergone shall be set off against the total period of 6 years.

45. Send down the L.C.R. forthwith.

  
Judge.

  
Chief Justice.