
(2010) 08 DEL CK 0115

In the Delhi High Court

Case No : Writ Petition (C) 9835 of 2005 and CMs 7168 and 9984 of 2005

Mohd. Usman @ Haji

APPELLANT

Vs

Commissioner of Police and Others

RESPONDENT

Date of Decision : 19-08-2010

Acts Referred:

Arms Act, 1959 — Section 25
Constitution of India, 1950 — Article 21
Telegraph (First Amendment) Rules, 1999 — Rule 419A, 419A(9)
Telegraph Act, 1885 — Section 5(2)

Citation : (2010) 172 DLT 73

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Nirmal Chopra, for the Appellant; Zubeda Begum, A.S.C. for R-1 to 3, Vikas Pahwa, A.S.C., Saurabh Soni and Sumit Kaul for R-4/State, for the Respondent

Final Decision : Dismissed

Judgement

S. Muralidhar, J.—The grievance of the Petitioner in this petition is about the illegal interception of the telephonic conversations between the Petitioner and his family members which interception he assails as being in violation of his right to privacy under Article 21 of the Constitution. He also challenges the two orders authorizing such interception as being violative of the Indian Telegraph Act, 1885 ("Act") read with Indian Telegraph Rules ("Rules") as amended by the Indian Telegraph (First Amendment) Rules 1999 [hereafter "the amended Rules"].

2. The Petitioner alleges that on 30th April 2005 he was illegally detained and his mobile phone was misappropriated by the police and he was subjected to atrocities. Two separate criminal cases were instituted in connection with the arrest of the Petitioner. The Petitioner alleges that during his detention by the police at the Special Cell, he overheard some police officers saying that the Petitioner's mobile and landline phones were being tapped. It the circumstances the present writ petition was filed on the ground that that the interception of the

Petitioner's mobile and landline phones was contrary to the law as declared by the Supreme Court in People's Union of Civil Liberties (PUCL) Vs. Union of India (UOI) and Another, (hereafter "the PUCL case").

3. Respondent Nos. 1 to 4 are the Commissioner of Police, Deputy Commissioner of Police ("DCP") Special Cell (SB)/N.D.R., the DCP, Central Distt., Daryaganj, Delhi and the Government of National Capital Territory of Delhi ("GNCTD") through its Secretary (Home) respectively. In a counter affidavit jointly filed by them it was stated that on 30th April 2005 at 1 pm. information was received in the Special Cell, Lodhi Colony that one Haji Usman, a notorious criminal of the Old Delhi area dealing in the supply of arms, ammunitions and drugs would be coming to the main gate of Rajghat at about 3.30 p.m. to supply firearms/ammunition to his associates. A raiding party was dispatched and a trap was laid. Haji Usman was apprehended at around 4 pm. One English pistol with six live rounds were recovered from his possession. An FIR No. 65/05 u/s 25 of the Arms Act was registered at Police Station Special Cell against him. It is stated that arising out of the said case, a charge-sheet was filed in the criminal court on 24th October 2005. Annexed to the counter affidavit are the details of around 52 cases involving the Petitioner, some of which are under the Arms Act, NDPS Act, the FERA, the Gambling Act, IPC and the preventive provisions of the CrPC.

4. In para 3 of the para-wise reply, it is stated as under:

...It is submitted that an information was received that mobile phone No. 9811035816 was being used for anti social activities; the interception of this phone was obtained from the competent authority vide orders No. F.5/358/2004/HG/2109 dated 19.04.2004 and order No. F.5/1411/2004/HG/7046 dated 4.12.2004. The allegations regarding intercepting telephone No. 23269363 are false and therefore denied. Requisite permissions obtained on 19.04.2004 and 14.12.2004.

Copies of the aforementioned orders dated 19th April 2004 and 4th December 2004 have been enclosed with the counter affidavit.

5. It is asserted that as on 30th April 2005 neither mobile phone No. 9811035816 nor the landline telephone No. 23269363 were under interception as alleged by the Petitioner.

6. A separate affidavit was filed by Respondent No. 4, i.e., the Deputy Secretary (Home), GNCTD, explaining the procedure adopted by the Principal Secretary (Home), i.e., the Competent Authority to authorize interception of phones u/s 5(2) of Act read with Rule 419A of the Rules as amended by the Amendment Rules of 1999. It is stated that "in order to ensure a proper submission of requests for interception and monitoring of telephones and mobile phones by the Police authorities, the Deputy Secretary (General) of the Government of NCT of Delhi had written vide letter No. 5/132/2000-HG/3723 on 20th June, 2000 to the then Commissioner of Police including a copy of a proforma to be circulated among all concerned police officials, so that information for interception and

monitoring, other particulars like the name of the person to be monitored if available, the nature of information available, and the justification for monitoring were required to be stated. Further it was also prescribed that the prior approval of the Commissioner of Police should be obtained before sending such a request or requisition to the competent authority empowered to authorize such interception or monitoring. Based on this established system proposals are received from the Police Department."

7. It is explained in para 3 of the said affidavit of Respondent No. 4 that in regard to the mobile No. 9811035816, a request had been made by the Deputy Commissioner of Police (Special Cell) Delhi Police on 6th April 2004 requesting for its interception "as the same was being used by a drug smuggler and supplier in Delhi to carry out anti-national activities." The request further stated that there were no other means to acquire the information. It was also stated that as per the established procedure, the request had the prior approval of the Commissioner of Police, and that the interception report was necessary to facilitate the apprehension of the drug smuggler known as one Haji. Permission was granted by the Principal Secretary (Home) on 19th April 2004 in the interest of public safety. The direction for interception was valid for a period not exceeding 90 days and was to remain in force only for the said period unless revoked earlier.

8. Para 4 of the affidavit of Respondent No. 4 states that a request was received several months later on 23rd November 2004 from the JCP Special Cell with the prior approval of the Commissioner of Police for the interception of the same mobile number along with another number (which is not the subject matter of the present writ petition) stating that the said number was being used "by an inter-State criminal who was resident of Rohtak and wanted in many heinous cases of Delhi and UP, to contact his associates". It is pointed out that permission was granted on 14th December 2004 by the Principal Secretary (Home) in the interest of public safety valid for a period not exceeding 90 days, and was to remain in force only for the said period unless revoked earlier. As regards the landline number 23269363, it was denied that any order of interception had been issued in respect of the said number by the Principal Secretary (Home). It was further clarified that as regards the mobile number 9811035816 no further orders of interception have been issued by the Principal Secretary (Home) and as of today no interception orders in respect of the said number were in force.

9. The Petitioner filed a rejoinder to the above counter affidavits denying that there were any valid grounds to intercept his mobile number/telephone number. He questioned the validity of the said interception orders. The Petitioner also filed CM No. 1106 of 2007 seeking amendment of the writ petition to challenge the orders dated 19th April 2004 and 14th December 2004 authorising the interception of the Petitioner's mobile number as noticed hereinbefore. By an order dated 24th January 2007 the said application was allowed and the writ petition was permitted to be amended as prayed for by the Petitioner.

10. A reply has been filed by the Respondents to the amended writ petition more or less reiterating what has been stated earlier.

11. Mr. Nirmal Chopra, the learned Counsel appearing for the Petitioner first submitted that the impugned orders authorizing the interception of the Petitioner's mobile number/telephone number were in violation of the law explained by the Supreme Court in the PUCL case. He submitted that the phrase "in the interest of public safety" occurring in Section 5(2) of the Act was not to be mechanically reproduced in the impugned orders. The impugned orders must themselves set out the grounds on the basis of which such opinion was formed or conclusion arrived at by the competent authority. Otherwise by merely reproducing the words "in the interests of public safety" the fundamental rights of the citizens under Article 21 of the Constitution could be violated with impunity. It is submitted that the orders had to speak for themselves and an explanation for the orders could not be offered in the counter affidavit filed. It is submitted that there was no basis for the apprehension that the Petitioner's use of his mobile phone would endanger public safety. The fifty-two cases listed pertained to minor offences. The case under the NDPS Act was of 1985. Therefore, the inference drawn by the Respondent that the Petitioner was a notorious drug smuggler or that he was indulging in anti-national activities was wholly without basis. It is further submitted that the second authorization made on 14th December 2004 was entirely on non-existent grounds particularly since it referred to some notorious criminal from Rohtak whereas the Petitioner is from Delhi. It showed total non-application of mind by the Respondents.

12. Referring to Rule 419A of the Rules as amended in 1999, it is pointed out by Mr. Chopra that this required the interception order to be forwarded to a Review Committee within seven days. That Committee was required, within a period of 60 days, to make necessary enquiries and investigations and record its findings whether the interception orders were issued in accordance with the provisions of Section 5(2) of the Act. It is submitted that there was no indication in the reply by the Respondent No. 4 that such a Review Committee examined the matter and approved the interception orders. Therefore, there was a clear violation of Rule 419A (9) of the Rules as well. It is submitted that the two interception orders were unconstitutional and the Petitioner was being harassed only because he was a witness in a criminal complaint case filed by the Petitioner's son against the members of the police force. The Petitioner was being victimised on that score.

13. Appearing for the Respondents, Mr. Vikas Pahwa, the learned Counsel, first submitted that the provisions of Section 5(2) of the Act as well as Rule 419A of the Rules were meticulously followed in the instant case. He produced the records in support of the above submission. He also produced the files to show that a Review Committee had indeed been constituted and that it met and reviewed the interception orders and upheld their continuation. He points out that none of the interception orders continued beyond the period for which they

were issued. The intercepts had also been destroyed. He points out that after 2005 when the second intercept order came to an end, no further intercept orders have been issued by the Respondents. He denied that the Petitioner was being harassed only because his son had filed a criminal complaint against the members of the police force. It is submitted that there is no basis for any of the apprehensions expressed by the Petitioner.

14. Section 5(2) of the Act and Rule 419A of the Rules read as under:

5. Power for Government to take possession of licensed telegraphs and to order interception of messages.

...

(2) On the occurrence of any public emergency, or in the interest of the public safety, the Central Government or a State Government or any officer specially authorised in this behalf by the Central Government or a State Government may, if satisfied that it is necessary or expedient so to do in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign states or public order or for preventing incitement to the commission of an offence, for reasons to be recorded in writing, by order, direct that any message or class of messages to or from any person or class of persons, or relating to any particular subject, brought for transmission by or transmitted or received by any telegraph, shall not be transmitted, or shall be intercepted or detained, or shall be disclosed to the Government making the order or an officer thereof mentioned in the order:

Provided that the press messages intended to be published in India of correspondents accredited to the Central Government or a State Government shall not be intercepted or detained, unless their transmission has been prohibited under this Sub-section."

419A (1) Directions for interception of any message or class of messages under Sub-section (2) of Section 5 of the Indian Telegraph Act, 1885 (hereinafter referred to as the said Act) shall not be issued except by an order made by the Secretary to the Government of India in the Ministry of Home Affairs in case of Government of India and by the Secretary to the State Government in charge of the Home Department in the case of a State Government. In emergent cases such order may be made by an officer, not below the rank of a Joint Secretary to the Government of India, Who has been duly authorized by the Union Home Secretary or the State Home Secretary, as the case may be, Such order shall contain reasons for such direction, A copy of such order shall be forwarded to the concerned Review Committee within a period of seven days;

Provided that in emergent cases,-

(i) in remote areas, where obtaining of prior directions for interception of messages or class of messages is not feasible; or

(ii) for operational reasons, where obtaining of prior directions for interception of messages or class of messages is not feasible the officer concerned may carry out the required interception of messages or class of messages subject to its confirmation from the concerned competent officer within a period of fifteen days.

(2) While issuing directions under Sub-rule (1) the officer shall consider possibility of acquiring the necessary information by other means and the directions under sub -rule (10) shall be issued only when it is not possible to acquire the information by any other reasonable means.

(3) The interception directed shall be the interception of any message or class of messages as are sent to or from any person or class of persons or relating to any particular subject whether such message or class of messages are received with one or more addresses, specified in the order, being an address or addresses likely to be used for the transmission of communications from or to one particular person specified or described in the order or one particular set of premises specified or described in the order.

(4) The directions shall specify the name and designation of the officer or the authority to whom the intercepted message or class of messages is to be disclosed and also specify that the use of intercepted message or class of messages shall be subject to the provisions of Sub-section (2) of Section 5 of the said Act and the copies of the intercepted message or class of messages shall be destroyed when no longer required.

(5) The directions for interception shall remain in force, unless revoked earlier, for a period not exceeding ninety days from the date of issue and may be renewed but same shall not remain in force beyond a total period of one hundred and eighty days.

(6) The officer issuing the directions for interception shall also make a request in writing to the Telegraph Authority who shall extend the facilities and cooperation for interception mentioned in the directions.

(7) The officer authorised to intercept any message or class of messages shall maintain proper records mentioning therein, the intercepted message or class of messages, the particulars of persons whose message has been intercepted, the name and other particulars of the officer or the authority to whom the intercepted message or class of message has been disclosed, the number of copies of the intercepted message or class of message made and the mode or the method by which such copies are made, the date of destruction of the copies and the duration within which the directions remain in force.

(8) The Central Government and the State Government, as the case may be, shall constitute a Review Committee. The Review Committee to be constituted by the Central Government shall consist of the following namely:

(a) Cabinet Secretary ... Chairman

(b) Secretary to the Government of India In-charge,

Legal Affairs ... Member

(c) Secretary to the Government of India,

Ministry of Telecommunications ... Member The Review Committee to be constituted by a State Government shall consist of the following, namely:

(a) Chief Secretary ... Chairman

(b) Secretary Law/Legal Remembrancer ... Member

(c) Secretary to the State Government (other than the Home Secretary) ... Member (9) The Review Committee within a period of sixty days from the issue of the directions shall suo moto make necessary enquiries and investigations and record its findings whether the directions issued under Sub-rule (1) are in accordance with the provisions of Sub-section (2) of Section 5 of the Act. When the Review Committee is of the opinion that the directions are not in accordance with the provisions referred to above, it may set aside the directions and order for destruction of the copies of the intercepted message or class of messages.

15. The validity of Section 5(2) of the Act was challenged in the PUCL case before the Supreme Court. While upholding its validity, the Supreme Court explained in great detail the said provision as well as the procedure to be followed thereunder in the following passages (SCC, pp. 313-14):

28. Section 5(2) of the Act permits the interception of messages in accordance with the provisions of the said Section. "Occurrence of any public emergency" or "in the interest of public safety" are the sine qua non for the application of the provisions of Section 5(2) of the Apt. Unless a public emergency has occurred or the interest of public safety demands, the authorities have no jurisdiction to exercise the powers under the said Section. Public emergency would mean the prevailing of a sudden condition or state of affairs affecting the people at large calling for immediate action. The expression "public safety" means the state or condition of freedom from danger or risk for the people at large. When either of these two conditions are not in existence, the Central Government or a State Government or the authorised officer cannot resort to telephone tapping even though there is satisfaction that it is necessary or expedient so to do in the interests of sovereignty and integrity of India etc. In other words, even if the Central Government is satisfied that it is necessary or expedient so to do in the interest of the sovereignty and integrity of India or the security of the State or friendly relations with sovereign States or public order or for preventing incitement to the commission of an offence, it cannot intercept the messages or resort to telephone tapping unless a public emergency has occurred or the interest of public safety or the existence of the interest of public safety requires. Neither the occurrence of public emergency nor the interest of public safety are secretive conditions or situations. Either of the situations would be apparent to a reasonable person.

...

30. The above analysis of Section 5(2) of the Act shows that so far the power to intercept messages/conversations is concerned the Section clearly lays-down the situations/conditions under which it can be exercised. But the substantive law as laid down in Section 5(2) of the Act must have procedural backing so that the exercise of power is fair and reasonable. The said procedure itself must be just, fair and reasonable. It has been settled by this Court in *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, , that "procedure which deals with the modalities of regulating, restricting or even rejecting a fundamental right falling within Article 21 has to be fair, not foolish, carefully designed to effectuate, not to subvert, the substantive right itself. Thus, understood, "procedure" must rule out anything arbitrary, freakish or bizarre. A valuable constitutional right can be canalised only by civilised processes".

16. The Supreme Court laid down the following detailed procedure in para 35:

1. An order for telephone-tapping in terms of Section 5(2) of the Act shall not be issued except by the Home Secretary, Government of India (Central Government) and Home Secretaries of the State Governments. In an urgent case the power may be delegated to an officer of the Home Department of the Government of India and the State Governments not below the rank of Joint Secretary. Copy of the order shall be sent to the Review Committee concerned within one week of the passing of the order.

2. The order shall require the person to whom it is addressed to intercept in the course of their transmission by means a public telecommunication system, such communications as are described in the order. The order may also require the person to whom it is addressed to disclose the intercepted material to such persons and in such manner as are described in the order.

3. The matters to be taken into account in considering whether an order is necessary u/s 5(2) of the Act shall include whether the information which is considered necessary to acquire could reasonably be acquired by other means.

4. The interception required u/s 5(2) of the Act shall be the interception of such communications as are sent to or from one or more addresses, specified in the order, being an address or addresses likely to be used for the transmission of communications to or from, from one particular person specified or described in the order or one particular set of premises specified or described in the order.

5. The order u/s 5(2) of the Act shall, unless renewed, cease to have effect at the end of the period of two months from the date of issue. The authority which issued the order may, at any time before the end of two month period renew the order if it considers that it is necessary to continue the order in terms of Section 5(2) of the Act. The total period for the operation of the order shall not exceed six months.

6. The authority which issued the order shall maintain the following records:

- (a) the intercepted communications,
- (b) the extent to which the material is disclosed,
- (c) the number of persons and their identity to whom any of the material is disclosed.
- (d) the extent to which the material is copied and
- (e) the number of copies made of any of the material.

7. The use of the intercepted material shall be limited to the minimum that is necessary in terms of Section 5(2) of the Act.

8. Each copy made of any of the intercepted material shall be destroyed as soon as its retention is no longer necessary in terms of Section 5(2) of the Act.

9. There shall be a Review Committee consisting of Cabinet Secretary, the Law Secretary and the Secretary, Telecommunication at the level of the Central Government. The Review Committee at the State level shall consist of Chief Secretary, Law Secretary and another member, other than the Home Secretary, appointed by the State Government.

(a) The Committee shall on its own, within two months of the passing of the order by the authority concerned, investigate whether there is or has been a relevant order u/s 5(2) of the Act. Where there is or has been an order whether there has been any contravention of the provisions of Section 5(2) of the Act.

(b) If on an investigation the Committee concludes that there has been a contravention of the provisions of Section 5(2) of the Act, it shall set aside the order under scrutiny of the Committee. It shall further direct the destruction of the copies of the intercepted material.

(c) If on investigation, the Committee comes to the conclusion that there has been no contravention of the provisions of Section 5(2) of the Act, it shall record the finding to that effect.

17. This Court has perused the original records. As regards the intercept order issued on 19th April 2004, it was, as stated in the counter affidavit based on a request made on 5th April 2004 by the DCP (Special Cell). There appears to have been devised a proper proforma which contains columns indicating the number to be intercepted, the name and address where the phone is installed, the "nature of information on the target", the "justification for monitoring", and "whether the proposal has CP's approval". In the case of the order dated 19th April 2004, it was based on the above information provided by the Addl. Commissioner of Police which was then placed before the Principal Secretary (Home) who then passed the order dated 13th April 2004 on the basis of which order dated 19th April 2004 was issued. This Court is unable to find any error having been committed in the procedure adopted. It cannot be said that the conclusion that the intercept was necessary in the interest of public safety, was

given mechanically and without application of mind.

18. Likewise, as regards the order dated 14th December 2004, it again pertains to the above mobile number as well as one other mobile number not being used by the Petitioner but some other person. The Petitioner has wrongly understood the averment in the counter affidavit in relation to the second interception order as referring to the Petitioner. In fact, it refers to some other person who was found using the same mobile number. It is not for the Respondents to explain how such person was using the Petitioner's mobile number. The Respondents have to only show that there was sufficient material on record which formed the basis to intercept the said mobile number. That burden has been discharged by the Respondents.

19. As regards the constitution of the Review Committee and its review of the two intercept orders, the original files have been produced before the court. This Court has perused the minutes of the meeting held on 25th August 2004 and 10th May 2005 in the Chamber of the Chief Secretary, Delhi in this regard. The procedure adopted in reviewing the intercept orders and approving of the same appear to be consistent with the requirement of Rule 419A as explained by the Supreme Court in the PUCL case.

20. Consequently this Court does not find any illegality having been committed by the Respondents in the matter.

21. The writ petition is dismissed, but in the circumstances with no orders as to costs. All the pending applications also stand disposed of.