

(2009) 04 DEL CK 0102

In the Delhi High Court

Case No : Bail Application No. 874 of 2008

Sambhaji Lal Surve

APPELLANT

Vs

Central Bureau of Investigation

RESPONDENT

Date of Decision : 09-04-2009

Acts Referred:

Citation : (2009) 04 DEL CK 0102

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

Bench : Single Bench

Advocate : S.S. Voditel, for the Appellant; Mukta Gupta, Senior Standing Counsel and Rajat Katyal, for the Respondent

Judgement

S. Muralidhar, J.—The Petitioner is facing trial in RC No. 2(A)/2006 ACU-IX/CBI under Sections 3(1)(c) and (5) of the Official Secrets Act 1923 (OSA) and Section 120B Indian Penal Code (IPC). He has been in custody since 9th April 2006. By this application, he seeks release on regular bail.

2. The Petitioner was commissioned in the Indian Air Force as a Pilot Officer in December 1983. In December 2001, the Petitioner was posted at the College of Military Engineering, Pune at the faculty of Nuclear and Biological Warfare (NBC). He was posted as Joint Director (Air Defence) (JDAD) (Camouflage) in the Directorate of Operations Air Defence with effect from 29th March 2004. The Charter of Duties of the Petitioner included all matters on camouflage, concealment and deception, project Akash (Ops matters), project Trishul (Ops matters), Pechora upgrade (Ops matters), P-18/P-19 upgrade (Ops matters), new inductions of LLQRMs, MRSAM (Medium Range Surface to Air Missile) and IGLA, OSA-AK-M (missile) upgrade, parliament questions on missiles, Secretary-JSSG (Join Services Study Group) on GBADWS (Ground Based Air Defence Weapon System) and Administrative matters of the Directorate. The specific allegations against the petitioner

3. According to the prosecution, the Petitioner while working as JDAD

(Operations) Indian Air Force ("IAF") was suspected by the Air Force Intelligence of leaking vital information. Consequent thereto, his house and office were searched by the Air Force Intelligence on 21st May 2005. During this search, one Kingston pen drive was seized. This when analysed was found to contain the active Standard Operating Procedure ("SOP") Pechora (a surface to air missile used in the IAF) file which was classified information. The remaining part of the pen drive when analysed showed that it had contained a large number of deleted files pertaining to the DNO. It was further found that the petitioner had unauthorisedly carried a JSSG presentation, which was a top secret document, from the office to the home personal computer (PC) in a pen drive. A Court of Inquiry was constituted by the Air Force on 25th May 2005. It is stated that during this Court of Inquiry, another Sandisk pen drive was recovered from the Petitioner. The forensic analysis revealed that the deleted layers of the first pen drive of Kingston make contained sensitive defence information pertaining to the Directorate of Naval Operations (DNO). Consequently, information was given to the Naval officials along with the seized pen drive for examination and necessary action. As regards the Sandisk pen drive, the petitioner admitted that this pen drive was collected back from Lt. (Retd) Kulbhushan Parashar, a former Indian Navy Officer with whom he had contacts. On forensic analysis this pen drive was found to have been tampered with in order to destroy all the data therein which was not possible to be recovered forensically. After the conclusion of the Court of Inquiry, the Petitioner was dismissed from service on 20th October 2005 with due approval of the competent authorities.

4. The Naval authorities also instituted a Board of Inquiry. The forensic analysis of the clone of the pen drive of Kingston make recovered from the Petitioner, was undertaken. On the basis of the findings of the Board of Inquiry Commander V.K. Jha, Commander Vijender Rana and Captain Kashyap Kumar were dismissed from service on 28th October 2005 with due approval of the competent authorities.

5. On 18th February 2006, the Ministry of Defence sent a reference to the Central Bureau of Investigation (CBI) stating that in May 2005, the Court of Inquiry conducted by the Air Headquarters had established that the Petitioner had obtained a pen drive from Lt. (Retd.) Kulbhushan Parashar, a former Indian Navy Officer which was found to contain classified information pertaining to the DNO. It was stated that the Board of Inquiry instituted by the Naval authorities had established that there had been a leakage of information to unauthorized persons. The aforementioned three Naval officers were indicted. The Naval Headquarters had pointed out that considering the seriousness of the offences, the said three officers were liable to be tried by Court Martial. However, the trial by Court Martial was considered to be impracticable since other retired Naval Officers and civilians were not subject to the Navy Act. Accordingly, it was requested that criminal proceedings be instituted against each individual. It is submitted that the reports of the Air Force Court of Inquiry and the Naval Board of Inquiry were scrutinized and since the facts disclosed a cognizable offence

under OSA as well as 120B IPC, an FIR was registered.

6. The allegations in the FIR were that the Petitioner, Vijender Rana, Vinod Kumar Jha and Kashyap Kumar in collusion with Kulbhushan Parashar, Ravi Shankaran, Wing Commander (Retd.) S.K. Kohli, Mukesh Bajaj, Ms. Raj Rani Jaiswal and other unknown persons of a communication company called "Atlas" conspired to unauthorizedly trade off classified documents/information relating to the Ministry of Defence, the disclosure of which was likely to affect the sovereignty and integrity of India. Searches were carried out at 20 different locations in the country. One of the accused persons Ravi Shankaran is stated to be staying outside the country and evading the process of law. A red corner alert notice has been issued against him.

7. A complaint was filed by the CBI under the OSA on 1st July 2006 in the Court of the Chief Metropolitan Magistrate (CMM) with due authority from Ministry of Home Affairs along with the application u/s 210 of the Code of Criminal Procedure (CrPC) informing the Court that an FIR registered with the CBI was still under investigation and for clubbing of the complaint with the charge sheet after it was filed by the Investigating Officer (IO). The IO filed the charge sheet on 3rd July 2006 with the request to allow further investigation u/s 173(8) CrPC. He also filed a status report on 4th July 2006 informing the Court that the charge sheet filed on 3rd July 2006 was against 5 persons and that investigation was continuing. The learned CMM took cognizance of the offences under Sections 3 and 5 OSA on 10th July 2006. On the basis of the complaint filed on 1st July 2006 and charge sheet filed on 3rd July 2006, an order was passed by the learned CMM on 10th July 2006 granting CBI the liberty to file a supplementary charge sheet u/s 173(8) CrPC. The learned CMM also ordered clubbing of the complaint and the charge sheet.

8. It is stated by the prosecution that during further investigation, the role of one more accused, Abhishek Verma, surfaced. It came to light that he was closely associated with the Atlas Group of Companies. Kulbhushan Parashar was working with co-accused Ravi Shankaran and the Atlas Group of companies which were interested in supply of communication equipments to the Ministry of Defence. It is stated that the majority of the information retrieved from the two pen drives in question mainly related to the communication networking project and was of vital importance for the Atlas Group of Companies. A second complaint under the OSA and a second charge sheet against Abhishek Verma was filed on 18th and 19th October 2006 respectively and cognizance was taken of those offences against Abhishek Verma as well. Grounds on which bail is sought by the petitioner.

9. Mr. S.S. Voditel, learned Counsel for the petitioner submitted that the Petitioner did not file any bail application earlier since the filing of the charge sheet against him. One of the grounds on which bail is sought is that the investigating authorities have already recorded the statements of all the material witnesses. The Petitioner is no longer serving with the IAF. He is, therefore, not

in a position to tamper with the evidence, intimidate any witness and influence the outcome of the trial. It is submitted that from the date of the commencement of the Court of Inquiry on 24th May 2005 and till date of his dismissal from service on 17th October 2005, the petitioner had access to his work place as well as work place of his colleagues but did not commit any overt act to tamper with any evidence. Further, for a period of 5 1/2 months thereafter till the registration of the FIR against him i.e. 20th March 2006, the Petitioner was a free person but he never committed any overt act in the IAF or contacted any of his serving colleagues. He also did not visit any of the establishments of the IAF during this period. The Petitioner was arrested on 9th April 2006 and after undergoing police custody remand for 9 days was lodged in Tihar Jail on 18th April 2006.

10. The case of the Petitioner in the bail application is that he himself was the target of an espionage racket and was sought to be spied upon. For this purpose, Kulbhushan Parashar (A-1) was introduced to him by Ex.Wing Commander S.K. Kohli who was then a senior colleague of the Petitioner. During friendly interaction with A-1 and S.K. Kohli some indiscretions were committed by the Petitioner without realising their actual intentions. According to the petitioner, Raj Rani Jaiswal and her foster father Mukesh Bajaj were planted on him by A-1 and S.K. Kohli. They were successful in making the Petitioner have a physical relationship with Raj Rani Jaiswal and this led to the Petitioner being blackmailed. He, however, disclosed the complete truth to his wife and parents and therefore the conspiracy of making the Petitioner a part of the espionage racket on the basis of the threat of disclosing the illicit relationship with Raj Rani Jaiswal to his wife and parents did not materialize. It is submitted that out of sheer vengeance an anonymous letter was sent to the Air Headquarters possibly by Raj Rani Jaiswal in order to falsely implicate the Petitioner. It is pointed out that although Mukesh Bajaj, S.K. Kohli and Raj Rani Jaiswal were named as accused in the FIR, no chargesheet has been filed against them.

11. It is submitted that the petitioner never really passed on the information concerning the SOP Pechora to anyone and handed over the Kingston pen drive voluntarily to the raiding party of the Air Force Intelligence by calling them back. As regards the JSSG presentation, it is submitted that this was not classified information and in any event the act of bringing the presentation home to his PC can at best be an unauthorised act and not an espionage activity. Moreover there were practical difficulties in working since the entire Air Headquarters had just one pen drive and since the petitioner was permitted to work after office hours, this became inevitable. There is nothing to show that this information was passed on to anyone. As regards the allegedly deleted information on the Kingston pen drive pertaining to the DNO, it is submitted that this also did not attract Section 3(1)(c) OSA and at the highest Section 5 thereof.

12. There are several other grounds urged. It is submitted that the Court of Enquiry found that the petitioner was indeed trapped by Mukesh Bajaj, S.K. Kohli

and Raj Rani Jaiswal; that the petitioner did not actually destroy any evidence on 24th May 2005; that he did not possess assets disproportionate to his known sources of income; that the pen drives seized from the petitioner were not in a sealed condition when handed over to the CBI by the Air Headquarters and the Naval authorities. It was shown that the Kingston pen drive seized from the petitioner on 21st May 2005 was handed over to the CBI in an unsealed condition on 15th June 2005. Further it was shown that files were created on it on 3rd June 2005. It is accordingly submitted that the pen drive was tampered and therefore unreliable. Relying on the decision in State (N.C.T. of Delhi) Vs. Navjot Sandhu @ Afsan Guru, it is submitted that the allegations against the petitioner of leaking sensitive information are too improbable for prosecuting him for the offence u/s 120B. On the other hand, if he had not voluntarily handed over the Kingston pen drive without realising the nature of its deleted files, the fact that an espionage activity was being carried on by Kulbhushan Parashar with the help of naval officers may not have come to light.

13. It is submitted that unlike the recommendations of the Board of Enquiry instituted by the Naval authorities, the Court of Inquiry instituted by the Air headquarters made no recommendation for court martialing the petitioner. On the same material, the CBI could not have proceeded to charge sheet the petitioner. Counsel for the petitioner also referred to Section 122 of the Air Force Act to contend that cognisance of the acts of an officer in service Constituting the alleged offences is required to be first examined by the Competent Authority of the Air Force. If a Court of Enquiry recommends that it is inexpedient to hold a court martial against the officer and instead recommends only to take disciplinary action against the petitioner by invoking Section 19 of the Air Force Act read with Rule 16(4) of the Air Force Rules and that recommendation is accepted by the central government by removing him from service, then the petitioner cannot be prosecuted for the OSA offences and the offence u/s 120B IPC without the previous sanction of the central government u/s 126 of the Air Force Act. It is submitted that in the instant case no such sanction was obtained.

14. Finally it is submitted that the petitioner has completed nearly three years of pre-trial detention and the case has progressed only to the stage of arguments on charge. There is no prospect of the trial commencing and concluding in the near future. Considering that the maximum sentence prescribed for the offence u/s 3(1)(c) OSA (assuming that he can be said to have leaked a non-official secret code) and for the offence u/s 5 OSA is three years, the petitioner cannot be denied bail any further. Case of the prosecution.

15. Ms. Mukta Gupta, learned Senior Standing Counsel appeared for the CBI. The resistance by the CBI to the grant of bail is based on the fact that the Petitioner is accused of grave offences u/s 3(1)(c) and (5) OSA. Reliance is placed on the judgment in The Government of N.C.T. of Delhi Vs. Jaspal Singh, wherein it was held that a statutory presumption u/s 3(2) OSA that the information that was obtained or collected was for a purpose prejudicial to the safety or interests of

the State is attracted. The mens rea has to be presumed once it was proved that the accused was found in conscious possession of classified material and no plausible explanation is given for its possession.

16. It is submitted that as far as the SOP Pechora files were concerned, the petitioner had unauthorisedly copied them on to a pen drive not officially issued to him and for which no permission had been granted by his superior. Classified files could not be worked directly on the hard disk but only on a floppy. He was found having loaded the Nokia PC Suite on his official computer and possessed a Nokia mobile phone through which by using the blue tooth mechanism he could easily transmit and store data. The JSSG files were classified as top secret as they pertained to vulnerable areas (Vas) and vulnerable points (VPs). The analysis of the Sandisk pen drive which he admittedly got back from Kulbhushan Parashar showed that the JSSG presentation had been removed. The petitioner's close association with Kulbhushan Parashar was proved by the statement u/s 164 CrPC by Manish Kumar, who worked for the latter and Mrs. Mrudula Surve, the wife of the petitioner.

17. It is submitted that the Court of Enquiry in fact recommended that further investigation into the role of the conspirators should be undertaken by an external agency and therefore it had not exonerated the petitioner. Further it held that he had knowingly or unknowingly passed on classified information to Kulbhushan Parashar while exchanging pen drives. As regards the procedure under the Air Force Act it is submitted that the Defence Ministry which referred the case to the CBI is in fact part of the central government and therefore no separate sanction to prosecute the petitioner was required. The findings of the Court of Enquiry, which were in the nature of a preliminary enquiry, could be dealt with either in a court martial or trial by the criminal court. Reliance is placed on the judgments in *Balbir Singh v. State of Punjab* 1994 (3) Crimes 900 (SC) and *Saliman Bibi Vs. Hafiz Mohammad Taqi*, . General principles concerning grant of bail.

18. In *State Vs. Amarmani Tripathi*, , the Supreme Court in Para 18 set out the factors to be considered for grant of bail as under:

18. It is well settled that the matters to be considered in an application for bail are (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the charge; (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing, if released on bail; (v) character, behavior, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being tampered with; and (viii) danger, of course, of justice being thwarted by grant of bail see *Prahlad Singh Bhatt v. NCT, Delhi* and *Gurcharan Singh v. State (Delhi Administration)*. While a vague allegation that the accused may tamper with the evidence or witnesses may not be a ground to refuse bail, if the accused is of such character that his mere presence at large would intimidate the witnesses or if there is material to

show that he will use his liberty to subvert justice or tamper with the evidence, then bail will be refused. We may also refer to the following principles relating to grant or refusal of bail stated in Kalyan Chandra Sarkar Vs. Rajesh Ranjan @ Pappu Yadav and Another, :

The law in regard to grant or refusal of bail is very well settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the court granting bail to consider among other circumstances, the following factors also before granting bail; they are: a. The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence. b. Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant. c. Prima facie satisfaction of the court in support of the charge. see Ram Govind Upadhyay Vs. Sudarshan Singh and Others, , and Puran Vs. Rambilas and Another etc. etc., .

19. In Chenna Boyanna Krishna Yadav Vs. State of Maharashtra and Another, , it was observed that although mere period of incarceration and/or likelihood of delays in conclusion of trial are not by themselves singly or conjointly enough for grant of bail, yet both these factors may be taken into consideration.

20. In the background of the aforementioned principles, and in light of the submissions of counsel for the parties, one of the primary factors to be considered is the gravity of the offence itself. The OSA Provisions

21. Section 3 OSA itself admits of two possible kinds of offences; one which attracts the more severe punishment of 14 years and the other with a lesser punishment of 3 years. Where the offence is in relation to affairs of defence involving the integrity and security of the country, the greater punishment stands attracted. However, what is important for the purposes of Section 3(1)(c) is that the accused should obtain, collect record or publish or communicate to any other person "any secret official code or password or other document or information" and the intention of such obtaining and collecting of information has to be "for any purpose prejudicial to the safety or interest of the State." In order to attract the offence u/s 3(1)(c) OSA it has to first be shown that there was an actual passing on of the sensitive or "classified" information. For the more severe punishment to be attracted it has to be shown that what was passed on relates to a matter the disclosure of which is likely to affect the sovereignty and integrity of India or the security of the State and is committed in relation to a defence establishment. Whether the information is classified or not would be a matter of certification by the competent authorities and further subject to such opinion being tested at the trial. At the initial stage for the grant of bail, it has to be only

seen if the information has been certified to be a classified one and it has been shown to have been passed on by the accused to any other person.

22. u/s 3(2) OSA, in order to attract the offence u/s 3(1) it is not necessary to show that the accused was guilty of any particular act tending to show a purpose prejudicial to the interest of the State. This can be presumed if it appears "from the circumstances of the case or his conduct or his known character as proved" "that his purpose was a purpose prejudicial to the safety or the interests of the State." Such presumption therefore hinges on the prosecution "proving" the known character of the accused or his conduct. This in turn requires the trial to be gone through. It would be unsafe to straightaway presume, without even charges being framed, that Section 3(2) stands attracted to the facts of the case. The decision in Jaspal Singh has to be understood in that context of the presumption to be drawn in that behalf at the conclusion of the trial.

23. On the other hand, when Section 3(1) OSA is compared with Section 5 OSA, it appears that when such information found in possession of a person who is "entrusted" with it "in confidence" by virtue of his "holding office under (Government)" and such person passes on such information to any person other than a person to whom he is authorised to communicate, then the punishment is for a term which may extend to 3 years. The court when considering the question of grant of bail to a person who at the time of the commission of the alleged offence was working in an official capacity in government, has to satisfy itself prima facie as to which of the offences is attracted.

24. In light of the above legal position, this Court first proposes to examine the nature of the offence in light of the allegations made against the petitioner and in light of the material available on record at this stage. The SOP.Doc Pechora file on the Kingston pen drive.

25. One of the classified documents alleged to have been unauthorisedly possessed by the Petitioner is the SOP.DOC (Pechora) file which was unauthorisedly carried by him on a pen drive from the office to his residence. The records show that the tour programme of the petitioner for the period March 2004 to July 2005 was fixed in advance on the day of his joining Air Headquarters at New Delhi with effect from 29th March 2004. He travelled to ITR Chandipur on 27th April 2005 and returned on 4th May 2005 after witnessing the firing of Akash Surface to Air Missile. From 17th May 2005 till 21st May 2005, he went on a tour programme to Pathankot for inspecting the Pechora Missile Squadron Station.

26. It is the case of the Petitioner that as per the directions of the Principal Director (Operations) Air Defence he was instructed to carry whatever material was necessary for making the inspection. It is submitted that for this purpose, the Petitioner copied the Standard Operating Procedure (SOP) Pechora file, which was a classified file, on a pen drive. For the sake of easy reference for preparing an inspection report, the petitioner carried with him a report of inspection of

2204 Squadron Air Force. It was a disbanded Squadron from the Air Headquarters, Vayu Bhawan. He states that he was contemplating to prepare a report on the lines of the said report after his inspection of Pechora Missile Squadron at Pathankot. That the Petitioner was sent to Pathankot for official work on 17th May 2005 is evident from the tour programme enclosed with the letter dated 18th May 2006 of the Air Commodore PD (Operations) addressed to the Director (CI and Desk).

27. In response to a question to the Principal Director Air Commander by the CBI on 25th May 2006 whether "SL Surve permitted by written orders to carry the document SOP. Pechora on a Pen Drive on temporary duty to Pathankot on 17.5.05", the answer was "information to be provided." Interestingly this officer informed the CBI that the Directorate was having only one pen drive and that the Petitioner was not provided any separate pen drive. The statement of Group Captain Rajesh Kumar was to the effect that "SL Surve was also assigned to work on Standard Operating Procedures (SOP) of Pechora Missile in the absence of Wg. Cdr. SK. Bhatt, much before the incident of 17.5.05. Similarly, SL Surve was working on the entire cases of JS GG (Joint Service Study Group)." Captain Rajesh Kumar also confirmed that "the Directorate has one Official Pen Drive, which is shared by Officers of Directorate and it was not allowed to carry this Pen Drive without Official permission." This officer stated to the CBI that SOP Pechora file was a classified document and that the document on the pen drive recovered from Surve i.e. SOP.Doc. was "created on 17.5.05, time 9:21:26 AM". He, however, added as per guidelines SOP-Pechora being a classified document should not have been on a personal pen drive. S.L.Surve was also not granted permission to carry SOP file to him as per guidelines. The other file on this pen drive are not related to the Directorate of OPS.

28. From the above statements made to the CBI, it appears that the Petitioner was in fact on an official tour to Pathankot from 17th May 2005 onwards. The classified document in question was possibly got copied by him on the pen drive on 17th May 2005 in the morning hours. Although Captain Rajesh Kumar states that he was not granted permission to carry the SOP Pechora file home, there was no denial by Air Commodore R. Pratap, Principal Director (Operations) when asked whether the Petitioner had been permitted to carry the said document to Pathankot for work. Thus, it appears that on 17th May 2005, the Petitioner got the said file copied on his pen drive and straightway proceeded to Pathankot on his official work.

29. What happened on his return is evident from the seizure memo at the time of the search of his premises by the Air Headquarters Intelligence on 21st May 2005. Squadron Leader Sujata Tiwari stated that she was directed to accompany Wing Commander H.S.Reen on 21st May 2005 to escort the Petitioner from the airport to his residence and act as a witness to the search of the house of the Petitioner located at 22, Princess Park, New Delhi around mid-noon. They seized one CPU, 59 CDs and two pen drives. A panchnama was drawn on the spot. As

her residence was nearby, after the panchnama was drawn she and Wing Commander H.S.Reen left the place. After about half-an-hour, after reaching her home, she was informed by Wing Commander H.S.Reen that Petitioner had called him and they would have to go again to the residence of the Petitioner "as one more pen drive is required to be collected". They accordingly went to the Petitioner's house where he gave them a pen drive which was grey in colour with blue colour strip on the sides. She further added that at that time Reen was told by the Petitioner that the earlier two devices were not pen drives but IR Port and blue tooth device. Accordingly, the panchnama was amended and two pen drives were corrected to one pen drive.

30. It is plain from the above statement of Squadron Leader Sujata Tiwari, which is corroborated by the statement of Wing Commander H.S. Reen, that it was the Petitioner who called Wing Commander H.S. Reen and asked them to come back to collect the pen drive. Therefore, the Petitioner really did not keep the pen drive at his residence. It is sought to be contended by the CBI in its written submissions that petitioner was not directly reporting to Air Commodore R.Pratap, Principal Director (Operations) but to Group Captain Rajesh Kumar. This does not really change the position very much. Even if the Petitioner was not permitted to carry the information to his residence, it appears he did go on official work to Pathankot in connection with the SOP-Pechora and that no sooner he returned to Delhi he called the officers and handed over to them the pen drive. On the status of the present evidence, there is nothing to show that the Petitioner passed on the SPO.DOC Pechora files to any other person other than the Air Force Officers themselves. Also, from the report of the Court of Enquiry it appears that the petitioner was found having done an unauthorised act but not of the kind that called for his being court martialled or tried by a criminal court. The JSSG Presentation.

31. The second document with which the Petitioner is accused of unauthorisedly possessing and attempting to pass on to others is the JSSG presentation. It was retrieved from the hard disk of the home computer of the Petitioner. In response to a specific question, Air Cmdr R.Pratap states that "JSSG presentation is classified document". In response to a question whether permission as per procedure was given to the Petitioner to carry the presentation of JSSG home to work on, the answer was in the negative. This much was certain that the Petitioner's work involved being part of the JSSG itself. According to Group Captain Rajesh Kumar, the petitioner was working on the entire case of JSSG.

32. The Petitioner refers to the dismissal order dated 17th October 2005 wherein in Para 8 it is stated that the Court of Inquiry found "Although the JSSG presentation is not stated to bear TOP SECRET classification, it related to information on Vulnerable Areas and Vulnerable Points (Vas and VPs), update on threat perceptions, marking of Vas/VPs on the maps, updating Intelligence etc. which was compiled in a TOP SECRET file". It was further stated therein that the Court of Inquiry had established that the petitioner had worked on a TOP SECRET

document on 21st April 2005 and then carried it home and that when the said information was merged with other commands, the entire document became TOP SECRET. The Court of Inquiry therefore found that the Petitioner had "by unauthorisedly copying classified information and carrying out home on his personal pen drive breached computer security and thus violated provisions of IAP 3903, Chapter II, Para 7 (d)."

33. It is seen that in its recommendations, the Court of Inquiry did not advise the trial of the Petitioner for any offence. It was noted that he had loaded from a CD the Nokia phone PC Suite 5 software on his office PC and that he was found using the Nokia mobile phone in his office and the said mobile was capable of data transfer. The Court of Enquiry recommended "Greater awareness of IAP 3902 and IAP 3903 be emphasized in the IAF and steps to introduce certification of the same be evolved". There is force in the Petitioner's contention that till this incident there was no authorised procedure which would tell the officers what they should and should not do in relation to computers and pen drives and taking work home. Again, there is nothing to show that the Petitioner in fact passed on this information to anyone else. At the highest it only shows that he unauthorisedly took work home.

34. The case of the prosecution is that during the Court of Inquiry, the Petitioner produced a further pen drive given by the Petitioner to Kulbhushan Parashar and retrieved from him subsequently. The case of the Petitioner is that the JSSG presentation which was on this pen drive was deleted and a blank pen drive was given to Kulbhushan Parashar for recording some music.

35. From the statement of Squadron Leader Prince Devraj recorded by the CBI on 23rd May 2006, it is seen that the said witness was a member of the Court of Inquiry. He was asked by Director (CI & S) to analyse the hard disk of the computer installed in the office of the Petitioner. He also did the forensic analysis of the home PC of the Petitioner. When in the Court of Inquiry, the Petitioner was asked about the mode of transferring the JSSG presentation to his home PC, he produced a UMAX (Sandisk) pen drive which was found to be brand new and unused.

36. Reliance is placed by the CBI on the statement made by the Petitioner's wife Mrs. Mrudula Surve. She states that during the course of the Air Force Court of Inquiry, Air Commander Nigam asked the Petitioner to bring a pen drive in which he took the JSSG presentation home. The Petitioner informed the Court of Inquiry that he had given the said pen drive to Kulbhushan (for loading music) after deleting the JSSG presentation but Air Commander Nigam insisted that the Petitioner should bring the said pen drive and even told him that "said pen drive will be his ticket to heaven". The Petitioner then contacted Kulbhushan Parashar who fixed a place at Lajpat Nagar. Kulbhushan Parashar assured that he would hand over the said pen drive at Bengali Market some time in June 2005. Manish who worked with Kulbhushan Parashar handed over the pen drive to Mrs. Surve. It was then handed over to the Court of Inquiry. Mrs. Surve's statement as to

what transpired thereafter reads as under:

Later on Mr. Surve told me that the Court of Inquiry told him that the said Pen drive has nothing in it and the date time was changed due to which they could not retrieve anything from it.

37. It is sought to be contended on behalf of the CBI that this is evident that the said presentation was tampered with and that if the JSSG presentation would have been deleted before handing over the pen drive to Kulbhushan Parashar, the same could not have been retrieved scientifically like the information about the DNO from the Naval War Room which was available in the deleted form in the Kingston make pen drive. The conclusion sought to be drawn is that the JSSG, a classified file, was therefore passed on to Kulbhushan Parashar through a pen drive. This Court is unable to appreciate the submissions. The pen drive stated to have been obtained back by the Petitioner from Kulbhushan Parashar did not contain the JSSG presentation. The forensic analysis also did not substantiate this. As of now therefore there is nothing to show that the Petitioner passed on JSSG presentation to Kulbhushan Parashar through a pen drive or otherwise. Information pertaining to the DNO.

38. The third document which the petitioner is accused of unauthorisedly possessing is the information pertaining to the DNO which was found in the deleted form in the Kingston pen drive seized from the petitioner. The prosecution does not say that Petitioner passed on the information pertaining to the DNO to Kulbhushan Parashar. Rather it is that he obtained from the latter information concerning the DNO without even realising it. The Kingston pen drive when analysed revealed that apart from the SOP Pechora document "all other documents recovered from the said Pen drive were related to the Navy." The clone of the pen drive and the other relevant documents were sent to the Naval authorities who instituted their own Board of Enquiry. There is force in the contention that but for the petitioner drawing attention of the Air Intelligence to the Kingston pen drive which he voluntarily handed over to them, the espionage activity at the Naval War Room involving Kulbhushan Parashar may not have been unearthed.

39. This Court has also not had a satisfactory explanation from the side of the CBI as regards the contention of the Counsel for the petitioner that the pen drives seized from the petitioner were handed over in an unsealed condition to the CBI. The Kingston pen drive seized on 21st May 2005 was handed over to the CBI in an unsealed condition on 15th June 2005. Further it was shown that files were created on it on 3rd June 2005.

40. The net result of the above discussion is that as determined in the Court of Inquiry, two sets of information i.e. the POC.DOC of Pechora, the JSSG presentation were perhaps unauthorisedly taken by the petitioner on pen drives. But there is no evidence to show that he passed it to anyone. It is not the case of the prosecution that the Petitioner passed on any information constraining the

DNO to anyone. It is perhaps why unlike the Board of Inquiry set up by Naval authorities which made a specific recommendation that its three officers should be sent for trial, the Court of Inquiry instituted by the Air Force Headquarters did not make any such recommendation in relation to the Petitioner.

41. This Court is therefore satisfied *prima facie*, and for the limited purposes of considering the case of the petitioner for grant of bail, that the prosecution has not been able to show that the offence u/s 3(1)(c) OSA is attracted vis-a-vis the petitioner. At the highest the offence u/s 5 OSA could be said to be attracted. AS regards the charge u/s 120B IPC, the statement of Manish Kumar u/s 164 CrPC is the only piece of evidence that shows the association of the petitioner and Kulbhushan Parashar. The petitioner himself does not deny having been introduced to Kulbhushan Parashar. But the statement of Manish Kumar u/s 164 CrPC does not show him being in criminal conspiracy with the latter to commit the OSA offences. This is however only a *prima facie* view and is not intended to influence the opinion to be formed by the trial court at the stage of charge or any of the subsequent stages.

42. Numerous other points have been argued on behalf of the Petitioner including whether in terms of the Air Force Act 1950, he could be subject to a trial at all. However, in light of what has been held hereinbefore concerning the *prima facie* nature of the offence, this Court is not examining those points for the present. Those contentions are left open to be urged by the petitioner at the appropriate stage. Factors for grant of bail

43. There are certain other factors that have weighed with this Court in considering the case of the petitioner for grant of bail. The Petitioner has already completed three years of pre-trial detention. An order on charge is yet to be passed although arguments thereon are stated to be in progress. This is an indication that trial is unlikely to commence in the near future and given the trend of similar trials, it is unlikely to conclude within a reasonable time frame.

44. At the present stage on a conspectus of the materials available on record, this Court is of the view that the Petitioner has made out a case for grant of bail, subject to conditions which would be stringent.

45. The Court accordingly directs that Petitioner be released on bail, subject to the following conditions: (1) The Petitioner will furnish a personal bond in the sum of Rs.1 lakh with two sureties in the like amount one surety of New Delhi and the other a surety of the petitioner's permanent address in Pune - to the satisfaction of the trial court; (2) The Petitioner will not leave India without the prior permission of the trial court; (3) If not already done, the Petitioner will surrender his passport forthwith to the CBI and appropriate measures will be taken by the CBI to ensure that the Petitioner does not travel during the pendency of the criminal case; (4) The Petitioner will appear on the every date the case is fixed before the trial court and furnish his present address; (5) The Petitioner will not attempt to influence any witness or tamper the evidence or

seek unnecessary adjournments before the trial court. He will not in any manner impede the fair progress of the case.

46. If any of the above conditions is violated, it would be open to the CBI to apply for cancellation of bail. It is made clear that the observations in this order are limited to considering the case of the Petitioner for grant of bail and are not intended to influence the case of any of the co-accused for release on bail or influence the opinion to be formed by the trial court on an independent assessment of the materials at any of the subsequent stages of the case.

47. The bail application is disposed of. Dasti to the Counsel for parties.