

(1991) 08 GUJ CK 0027
In the Gujarat High Court

State of Gujarat

APPELLANT

Vs

Sama Alana Abdulla and Another

RESPONDENT

Date of Decision : 06-08-1991

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 428

Official Secrets Act, 1923 — Section 10, 10, 11(2), 3(1)(a), 3(1)(a)

Citation : (1993) 2 GLR 1062

Hon'ble Judges : D.G. Karia, J;B.S. Kapadia, J

Bench : Division Bench

Judgement

B.S. Kapadia, J.—The accused were charged for the Offences u/s 3(1)(a), (b) and (c) read with Section 9 as well as for the offence u/s 10 of the Official Secrets Act, 1923 on the allegation that on 4th July, 1986 at about 5-00 p.m., one blue print map dated 11th June, 1967, prepared for the supply-line by the Garrison Engineer was obtained by the accused No. 1 with intention for being used for the purpose prejudicial to the external and internal safety and security of India, inasmuch as it was for the object of supplying the same to the institution like Intelligence of Pakistan through the accused No. 2.

2. The said charge was framed on 3rd April, 1989. Both the accused pleaded not guilty and thereafter the trial proceeded.

3. The facts of the case as revealed from the evidence of the witnesses can be briefly stated as under:

One Ghenukhan Jafurkhan, a Constable in B.S.F., was discharging his duty at Khavda in Kachchh District and his duty was to stop the persons crossing boundary of the country. On 2nd June, 1986, he along with others, was on patrolling duty. At that time, he saw three persons coming from Pakistan side when he was patrolling on the south-west side of Dharmashala. One of them was Hasan Osman, who was an Indian, while the other one was accused No. 2, Alimamad Hothi. They were arrested and they were brought before the Post Commandant S.I., Manjitsingh.

4. One Mr. Divansing Anandsing Negi was working as Intelligence Inspector in B.S.F. at Bhuj in the month of June, 1986. Two Pakistany persons were arrested from Dharmashala border and they were under interrogation. One of them was Mahmad Aladin and the other was Hothi, i.e., accused No. 2. Negi was also one of the persons in the team for interrogation. The photographs of Homi were taken. On interrogation, he found that accused No. 2 had come four to five times in India and he stayed at the residence of Alana, accused No. 1.

5. Lala Jagat Shaliram was working in L.I.B. on 4-7-1986 and the persons who were arrested from Pakistany Border by B.S.F. people were the two persons, one of whom was accused No. 2, and they were produced before Khavda Police Station and for the purpose of interrogation they were taken to L.I.B., Bhuj and they were interrogated. In the interrogation, it was found that before the present incident about four years back, they had come to India and were in touch with accused No. 1, Alana Abdulla and others and they were giving secret information to the informants of Pakistan Intelligence Subedar, Najir through their informants Kasam Sultan, Kadu Abdulla Fatan Saheb and Nurmahmad alias Nuri, etc. and in this manner they had come eight to ten times and supplied the secret information to Pakistan Agency. He had identified the accused No. 1. He had also identified the accused No. 2 as he was a Pakistan national and he had come before him for interrogation.

6. It is the case of the prosecution that the accused No. 1 is residing at Nana Dinara, Taluka Khavda, District Kachchh and according to the notification dated 28th October, 1923, the whole of the border area falling towards north or west; as the case may be, in the Great Rann of Kutch beyond the line formed by connecting Border Pillar No. 1175 with the farthest revenue pillars of villages mentioned therein and the Border Pillar No. 921 was declared as notified area under Sub-section (1) of Section 3 of the Criminal Law Amendment Act, 1961 by the Central Government. Dinara is mentioned tierein as one of the villages which comes between Border Pillar No. 1175 and Border Pillar No. 921.

6A. One Sajan Sura, Police Constable, Naliya, went along with Police Inspector Shri Dwivedi for the purpose of raid at village Nana Dinara, as they had received information that spying activity was going on there. Before raiding the house, they had already obtained the Search Warrant u/s 11(2) of the Official Secrets Act, 1923 from the Superintendent of Police authorising Shri B; B. Dwivedi, Police Inspector, Naliya to search the house of Sama Allana Abdulla, resident of Nana Dinara House No. 113 (Bhuj Taluka) under Khavda Police Station, as it was urgently necessary to search the house and premises of the said person. They had raided the house of accused No. 1 and the house of accused No. 1 was surrounded. He was one of the Constables who stood outside the house of accused No. 1.

7. One Jasubha Bhurubha was also another Constable who took part in the raid and who stood outside the house of the accused No. 1.

8. Vachia Kanji was also another Head Constable, who also accompanied the raiding party and. stood outside the house of the accused No. 1. According to him, Inspector Shri Dwivedi along with the Panchas, Gulabsinh and Prafulkumar and one Gohel Saheb went inside the house of the accused No. 1. According to them, when diey came out after raid, they brought one map which is Article No. 1. It is important to note that at the time of raid of the house of accused No. 1, the accused No. 1 was not personally present, but his father Abdulla Hala was present. According to Abdulla Hala, name of his son was Alana and he was residing with him in, the house. He was also occupying the house of his son. In his presence, before the raid was conducted he was shown the warrant and he was also explained the same by translating the same into Gujarati language and in token thereof his thumb impression was taken and further stated that his son was working as a Source "and that (His son) had also visited Pakistan once 01 twice. When he was questioned about the document that was found, according to him, he did not know anything about that document, but his son would be knowing about it. The said document was taken by the Police. The said document was attached by drawing a detailed Panchnama at Exh. 24.

9. In this case, the prosecution has examined one Prafulkumar, who was a Panch, but he has not supported the prosecution and has turned hostile and so tar as the second panch Gulabsinh was concerned, he had expired at the time when the prosecution led the evidence in the case. Therefore, the prosecution has to only rely on the evidence of the officers and/or members of the raiding party.

10. Nirmansinh Kalyansinh Gohil, who was one of the persons present in the house at the time of the raid, has also stated about showing of the warrant to the father of the accused No. 1 as well as about the search of the persons who were members of the raiding party.

11. Shri B.B. Dwivedi was C.P.I, and after arrest of the two Pakistanis in the month of June, 1986, watch was kept on the movements from 30th June, 1986 to 4th July, 1986. Accused No. 2 had come from Pakistan and he was having relations with Pakistani nationals and he was sent for getting secret information from India. Some persons from India including the accused No. 1 were working as Source for Najib, who was the Officer in F.I.U. (Foreign Intelligence Unit). Thereafter, he gathered information about the residential house of the accused No, 1 and from thevoters" list, he came to know that the accused No. 1 was occupying House No. 133. Thereafter he obtained the warrant from D.S.P. and on raid the blue-print map, which is Exh. 66, was searched and seized from his premises in the presence of Panchas, Prafulkumar and Gulabsinh and it was seized under the Panchnama Exh. 24. The entry thereof was also made in the Station Diary and in the Muddamal Register.

12. After gathering proper material, necessary sanction as required u/s 13(3) of the Official Secrets Act, 1923 was obtained by the order dated 13-6-1988, passed by the Under Secretary to the Government of India, vide Exh. 9, and thereafter the complaint at Exh. 36 was filed by Parshottamdas Hariipyasi, who

was Circle Inspector at Bhuj on 20-9-1988.

13. With a view to bring home the charge against the accused, the prosecution has also examined, in addition to the persons whose names are mentioned while stating the facts, one Kubil Katil Balan, who was working as In Charge of Army Area Supply, Khavda in water-supply area in the Garrison Department from 1984 to 1986. On perusal of the map at Exh. 66, Article 1, he has identified his signature thereon and according to him, the said map is the map showing how the pipe-line can be taken while passing through "Nala" and river. He has clarified that in that map it is not shows as to which place that pipe-line was to be taken. It only shows how it should be taken. There are four such maps and the present map only shows the technical dimension. If the maps Nos. 2 and 3 are also given along with the technical dimension map, one would know about the place where such line is to be taken. He has further stated that if the main drawing as well as side plan are given, then also one would know the place for which it is meant. This plan is given to the contractor at the time of giving him the work, but it is taken back after the completion of the work. He has also stated that it is true that map was for taking the pipe-line of water for Army and B.S.F. from Bhuj to Khavda.

14. Lala Jagat in his deposition has stated that some portion of the pipeline was open, while the other was hidden. It was open at Kotda, but it was hidden in the Rann area. He has also stated that the said map was for pipe-line. It was a map of pipe-line of B.S.F.

15. According to Mr. Negi, Intelligence Inspector in B.S.F. who has been examined by the prosecution as stated above, even if one part of document is received, from that the entire link can be established and if all the different parts are put together and if the knowledge of the pipeline is received, that would affect the entire safety and supply.

16. After considering the aforesaid prosecution case and the evidence led by the prosecution, the learned Sessions Judge recorded the further statements of the accused and thereafter delivered the aforesaid judgment acquitting both the accused.

17. Mr. K.V. Shelat, the learned Additional Public Prosecutor, appearing for the State, submits that the entire approach of the learned Sessions Judge to the case is misconceived. He further submits that inspite of the overwhelming evidence on the point of the proof about the guilt of the accused in the present case, the learned Judge has wrongly acquitted the accused. He further submits that in view of the evidence on the record, the order of acquittal is not tenable at all and no other conclusion except the guilt of the accused can be arrived at.

18. In support of his aforesaid submissions, he first of all points out from the points for determination raised by the learned Sessions Judge that the first part of the point for determination No. 1 is the result of misconception. There is no question of finding out whether the document at Exh. 66 was a secret document

or not. On the contrary, it was vehemently argued by Mr. P.B. Majmudar, learned Advocate appearing for the respondent No. 1 that it was not a secret document as contemplated by the Official Secrets Act and therefore no offence is committed by the accused No. 1, assuming that it was found out from his possession. With a view to appreciate the contention raised by the learned Additional Public Prosecutor before us, it would be first necessary to see the definition of "document" which is given in Section 2(3) of the Act. It says that "document" includes part of a document. Section 3 of the Act provides for penalties for spying. Section 3(1)(c) runs as under:

3. Penalties for spying: (1) If any person for any purpose prejudicial to the safety or interests of the State-

(a) xxx xxx xxx (b) xxx xxx xxx (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 the foreign States.

Apart from any interpretation of the section, the plain reading of the section clearly discloses that the word "secret" is connected with only the words following it, namely, "official code or password", because thereafter there is a comma and thereafter the words "any sketch, plan" are used which has connection with the words "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 the foreign States." Thus, this misreading of the section has impelled the learned Sessions Judge to frame point for determination on the point as to whether the document at Exh. 66 is a secret document or not. It may not be out of place to mention here that there is no definition of a "secret document" given in the Act and therefore one has to only read the word used in Clause (c) of Sub-section (1) of Section 3 of the Act. Even if Clause (c) of Sub-section (1) of Section 3 is properly read in the context in which the word "secret" is used, it qualifies only "official code or password" and nothing else. As stated above, this is clear from the comma and the word "or" which comes after the word "password". Therefore, in order to make a person liable u/s 3(1)(c) for obtaining or communicating a plan, it is not necessary to prove that the plan which obtained and communicated to any other person was a secret plan. It would suffice to show that the plan obtained and communicated to any other person was calculated to be or might be or was intended to be directly or indirectly useful to an enemy.

19. In view of the aforesaid legal position, if the evidence led by the prosecution is considered and appreciated, it can be said that there is sufficient evidence on the record to show that the plan at Exh. 66, which is a blue?print to show how

the water pipe-line can be carried through Nalas and river, would be useful to the enemy. On this point, the evidence of Lala Jagat P.W. 6, Kubil Katil Balan P.W. 9 and Negi P.W. 15 clearly discloses the nature of the document, and according to Mr. Negi, even if a part of the document is received by the Intelligence, they can make out the link of the whole document and if such piece of evidence is communicated to the enemy, certainly it would be useful to them to destroy the water-supply to the Army and that would affect the safety of the State.

20. In that view of the matter, it may be stated that with regard to the legal position and with regard to the evidence on the record, it was not seriously challenged before us on behalf of the respondent-accused that the document at Exh. 66 was a document which might be directly or indirectly useful to the enemy and accordingly we hold that if the prosecution establishes that the said document was obtained by the accused No. 1 for the purposes prejudicial to the safety and interest of the State, his case should fall u/s 3(1)(c) of the Act.

21. In that view of the matter, Mr K.V. Shelat, learned Additional Public Prosecutor, has pointed out to us the evidence as to how die said document was searched out, how raid was effected and how the Panchnama was made. He has read before us the evidence of Sajan Sura P.W. 1, Jashubha P.W. 2. Vachia P.W. 3, Abdulla P.W. 4 and the evidence of B.B. Dwivedi. The evidence of all the above prosecution witnesses clearly support the case of the prosecution on the point of finding out the document Exh. 66 from the possession of the accused No. 1, i.e., from the house of the accused No. 1 at Nana Dinara.

22. Realising this factual position, Mr. P.B. Majmudar, learned Advocate for the respondent-accused, attacked the very Panchnama at Exh. 24 by which the said document was seized. According to him, the two panchas who were selected, namely, Prafulkumar and Gulabsinh, were taken from Bhuj and they were not the panchas taken from the locality where the Panchnama was to be made. He. therefore, submitted that it is clear non-compliance with Sub-section (4) of Section 100 of the Code of Criminal Procedure, and when there is a clear non-compliance with Sub-section (4) of the Section 100 of the Code of Criminal Procedure, the whole search is illegal. This argument has found favour with the learned Sessions Judge and a very strong reliance was placed to substantiate this point on the judgment reported in State of Madhya Pradesh Vs. Ramprakash and Others, (Madhya Pradesh High Court), wherein in para 11 it is observed that duly of the officer making the search to call two or more independent and responsible inhabitants of the locality has to be deemed inexorable and failure to perform me duty must be deemed to vitiate the search made in violation thereof, unless explanation is furnished by the officer concerned to justify the violation In this case, the said question does not arise, in view of the fact that no reliance is placed on the evidence of the panch witnesses by the prosecution, inasmuch as one panch witness has turned hostile and the other panch witness is no more and therefore they have simply relied on the evidence of the other officers. It would be profitable to refer to the judgment in the case of State of U.P. Vs. Dr.

G.K. Ghosh, wherein Justice M.P. Thakkar, speaking for the Bench, has observed in para 11 as under:

... The Court may therefore, depending on the circumstances of a case, feel safe in accepting the prosecution version on the basis of the oral evidence of the complainant and the Police Officers even if the trap witnesses turn hostile or are found not to be independent....

These observations are made by the Supreme Court in a case under the Prevention of Corruption Act, but those observations can equally be made applicable in a more serious offence under the Official Secrets Act, 1923.

23. It is true that the aforesaid observations have been made in the above-stated decision of the Madhya Pradesh High Court. Still, however, it cannot be gainsaid that the object of Sub-Sections (4) to (8) of Section 100 of the Code of Criminal Procedure is to ensure a honest and genuine search and to prevent the trickery by planting the things to be found at searches. Further, on reading Sub-section (4) of Section 100 of the Code of Criminal Procedure, it is clear that importance is given to two or more independent and respectable inhabitants rather than to the locality because it is not possible to define precisely the locality. If the witnesses are respectable or reliable, it is immaterial if they belong to a different locality, as it is merely an irregularity because in substance the objects for introducing Sub-section (4) of Section 100 of the Code of Criminal Procedure would be achieved if respectable and independent persons are selected as Panchas. It is important to note that in the case of *State of Maharashtra Vs. P.K. Pathak*, , in the facts of that case, it was held that in the circumstances it would neither be practical nor reasonable to expect any person of the locality to witness the search. The fact that a witness was approached by the Police and the Customs authorities and accompanied them to witness the search, made at the instance of the accused persons, by itself would not show that he was in any way interested or unreliable. The fact that some of the search witnesses were Customs Officers their evidence could not be rejected outright because they were doubtless competent officers to prove the search and the recoveries. Thus, the aforesaid judgment makes it clear that even if the search is made in the presence of the independent and respectable witnesses, not of the same locality but of a different locality, at the most it would be an irregularity and their evidence has to be appreciated and considered.

24. It may be mentioned that in the aforesaid judgment of the Madhya Pradesh High Court, the view was taken after taking into consideration the holding of the Apex Court in *Radhakishan Vs. State of U.P.*, , *Bai Radha Vs. The State of Gujarat*, and *State of Maharashtra Vs. Natwarlal Damodardas Soni*, . In *Radhakishan Vs. State of U.P.*, in para (5), the Supreme Court has observed that it may be that where the provisions of Sections 103 and 165 of the Code of Criminal Procedure are contravened the search could be resisted by the person whose premises are sought to be searched. It may also be that because of the illegality of the search, the Court may be inclined to examine carefully the

evidence regarding the seizure. But beyond these two consequences, no further consequence ensues. Similarly, in another case referred to by the Madhya Pradesh High Court in the above decision, i.e., *Bai Radha Vs. The State of Gujarat*, it was a case under the Suppression of Immoral Traffic in Women and Girls Act and u/s 15 of the said Act power to search is conferred by the statute. The question arose as to when Section 15 is not strictly complied with, whether the trial is illegal. In para 5, it has been observed by the Supreme Court as under:

In that sense, it would be legitimate to say that a search which is to be conducted under the Act must comply with the provisions contained in Section 15, but it cannot be held that if a search is not carried out strictly in accordance with the provisions of that section the trial be rendered illegal. There is hardly any parallel between an officer conducting a search who has no authority under the law and a search having been made which does not strictly conform to the provisions of Section 15 of the Act. The principles which have been settled with regard to the effect of an irregular search made in exercise of the powers u/s 165 of the Code of Criminal Procedure would be fully applicable even to a case under the Act where the search has not been made in strict compliance with its provisions. It is significant that there is no provision in the Act according to which any search carried out in contravention of Section 15 would render the trial illegal. In the absence of such a provision we must apply the law which has been laid down with regard to searches made under the provisions of the Criminal Procedure Code.

Similarly, in the third case which is referred to in the aforesaid Madhya Pradesh High Court judgment, i.e., *State of Maharashtra Vs. Natwarlal Damodardas Soni*, it is observed in para 10 as under:

The Police had powers under Criminal Procedure Code to search and seize the gold if they had reason to believe that a cognizable offence had been committed in respect thereof. Assuming arguendo, that the search was illegal, then also, it will not affect the validity of the seizure and further investigation by the Customs Authorities, or the validity of the trial which followed on the complaint of the Assistant Collector of Customs.

25. Now, from the aforesaid authorities, it is clear that it would be irregular search if the Panchas are not chosen from the locality and if no explanation is given. Even the Madhya Pradesh High Court has also observed that it would vitiate search made in violation of Sub-section (4) of Section 100 unless explanation is furnished by the Officer concerned to justify the violation. Here, in the present case, nothing is pointed out from the evidence on record that any question was put in examination to Mr. Dwivedi who carried out the search or to any other officer who accompanied him at the time of search, on the point as to why the Panchas were not selected from the locality, namely, Nana Dinara, where the accused No. 1 was residing. It is true, as observed by the Madhya Pradesh High Court, that it is for the prosecution or the police to give the explanation and

therefore on; has not to wait till any such question is put in the cross-examination of the witnesses. However, the explanation is very explicit from the evidence of Chandrasing Gurkha, who has stated that in Nana Dinara, there is a total population of 300 to 400 persons and in that village there is only the population of Muslims. From that evidence, at least the Police Officer who has to carry out the search will have to apply his mind and common sense that when the accused No. 1 is a Muslim and there is only small population of 300 or 400 persons all belonging to the same community as that of the accused No. 1, whether he would be in a position to get respectable and independent witnesses from that village. The search warrant shows that there was urgency. Under the circumstances, we think that there is sufficient explanation in the record, itself to show that he could have taken the independent and respectable Panchas from Bhuj from where he was starting for search, In that view of the matter, even taking the test as applied even by the Madhya Pradesh High Court, the search carried out by Mr. Dwivedi cannot be said to be illegal or irregular in any manner whatsoever. In any event, assuming that the said evidence cannot be treated as an explanation, even so as per the aforesaid judgments of the Supreme Court as referred to in the said Madhya Pradesh High Court judgment, it cannot be said that the seizure was illegal.

26. In that view of the matter, it would be necessary to consider evidence of the prosecution which speaks as to how the search was carried out. It may be stated at the outset that Prafulkumar, who was one of the Panchas, was examined and he has not supported the prosecution. According to him, he had not gone to Nana Dinara and search had not taken place in his presence. He had simply put the signature on the Panchnama at Bhuj at the instance of Gulabsinh, who was the second Panch. Prafulkumar was treated as hostile and he was cross-examined. His evidence, in the light of the other evidence led by the prosecution does not inspire any confidence at all. On the point of carrying out of the raid as stated while stating the facts, number of witnesses who had accompanied Shri Dwivedi have been examined and they have supported the prosecution. It is also clear from the prosecution evidence that even when they reached Khavda Police Station from Bhuj, the search of the members of the raiding party was taken and nothing objectionable was found and thereafter also at the time of raiding the house of accused No. 1 when it was found that accused No. 1 was not present at his residence, his father Abdulla was asked as to whether he would like to search the person of the members of the raiding party and he answered in the negative. It is true that Abdulla himself has denied it, but the other witnesses of the prosecution have supported this version. Shri Dwivedi in his deposition has already stated that whatever is stated in the Panchnama is correct. In the Panchnama, it is clearly stated that Mr. Abdulla Hala was asked as to whether he would like to search the person of the members of the raiding party and he said No. This version is also found corroborated by the evidence of the members of the raiding party. Similarly, Mr. Gohil who also accompanied the raiding party, has stated that about the search and when he has so stated that members of the

raiding party were searched, it appears that he is referring to the search of the members of the raiding party which was taken at the Khavda Police Station. In the complaint also, there is a reference that the father of the accused No. 1 Mr. Abdulla had declined to take the search of the person of the members of the raiding party. Though Mr. Abdulla, father of the accused No. 1, has stated in his deposition that when members of the raiding party had come to search his house, he was shown the search warrant at Exh. 15. It was read over and explained to him in Gujarati language. When that is so, it is a fact that the raiding party had gone to search the premises of the accused No. 1 at Nana Dinara and many prosecution witnesses right from Sajan, Jashubha, Vachia, Gohil and Dwivedi have also stated about the search. Some were waiting outside and others were inside and they have given details of the search. Hence, the fact that the said house was searched and the document at Exh 66 was found from the house of the accused No. 1 cannot be doubted in any manner. When the persons taking search were the persons of the L.I.B., they had taken sufficient precaution to avoid the allegation of plantation and therefore they themselves have searched the persons of the members of the raiding party at Khavda Police Station before coming to Nana Dinara and thereafter also the members of the raiding party offered themselves for search which Mr. Abdulla, father of the accused No. 1, declined to take. In the circumstances, the possibility of plantation is totally ruled out. There is also no such cross-examination on the point either by the accused No. 1 or by the accused No. 2 of any of the witnesses. Under the circumstances, there is no reason to doubt the veracity of the aforesaid prosecution witnesses on the point of search. We are, therefore, inclined to accept their evidence and hold that the document at Exh. 66 was found from the accused No. 1, i.e., from his house No. 133 at Nana Dinara.

27. When that is so, the next question would be as to whether that document was obtained by him for the purposes as mentioned in Section 3 of the Act. It may be stated that Sub-section (2) of Section 3 of the Act clearly provides that it shall not be necessary for the prosecution to show that the accused person was guilty of any particular act tending to show a purpose prejudicial to the safety or interest 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 interest of the State. In this view of the matter, the prosecution has also led the evidence on this point and the important evidence on this point is of Chandra-sinh Gorkha, P.W. 17, Exh. 54. He has stated in his deposition that if this map, i.e., map at Exh. 66, is placed in the hand of any enemy country, it would cause damage to India from the security point of view. He has also stated that Alana Abdulla has relations with Pakistani nationals. He has further pointed out that there are cases registered against the accused No. 1, Alana Abdulla at Khavda Police Station. They are C.R. Nos. 7 of 1985, 36 of 1985, 36 of 1986, 37 of 1986, 39 and 43 of 1986. He has stated that he had also filed the cases under the Foreigners Act against the present accused and they are pending in the

Court. He has also stated that from 1964 to 1984 one Raiya and accused No. 1 have been often illegally going to Pakistan and they are also engaged in the activities of smuggling. He had also brought various FIRs with him and he has also identified the signatures of Shri Chuda-sama. Similarly, he has also produced the entries with regard to Alana Abdulla in the Register kept by the department, which is a confidential one. The various Firs are given at Exhs. 56, 57, 58 and 59 and there is also one entry in the Crime Note book at Khavda Police Station. It is at Exh. 60. It clearly shows that there are two history-sheeters-one is Alana Abdulla and second is Raiya Saheb-and it is further stated in the said entry that Alana Abdulla also belongs to the same family of the aforesaid two persons. They are having tendency towards Pakistan. They are harbouring Pakistani nationals. They are against police. They feel that they are the leaders and they try to dominate and make attempts to keep good relations with the officers. It may be mentioned that during the cross-examination, Mr. Khoja, who appeared for the accused, objected to this entry only on the ground that it was not relevant. However, the learned Public Prosecutor pointed out that it is relevant to show the conduct and accordingly it has been rightly proved and exhibited.

28. In addition to the aforesaid evidence, there is also the evidence of the father of accused No. 1 and he has clearly stated in his deposition that his son was working as a Source and once or twice he had gone to Pakistan. This clearly reflects the conduct and character of the person and also the circumstances which revealed the purpose for which he would have obtained and kept that document in his house.

28A. In addition to this, there is also the evidence of Mr. Negi P.W. 15, who in his evidence at Exh. 51 has stated that during the interrogation he came to know that Alana Abdulla, accused No. 1, who was residing in the border area, is an Indian and he has relations with the Pakistani people. He has clearly stated in the cross-examination that accused No. 2 had come four to five times in India and he stayed at the house of Alana, accused No. 1.

29. Thus, from the above evidence, the prosecution has established the circumstances and his conduct that his purpose for keeping the document at Exh. 66 was a purpose prejudicial to the safety or interest of the State. Thus, we have dealt with the entire relevant evidence on the point and we are of the view that the learned Sessions Judge, who has delivered the impugned judgment, has the misconception on the point of Exh. 66 as to whether it was a secret document or not and thus his entire approach was erroneous and illegal and contrary to the express provisions of the Official Secrets Act, 1923. Secondly, his decision is quite contrary to the evidence as discussed above. With this evidence, no other view is possible. Under the circumstances, we are of the opinion that the guilt of the accused is brought home by the prosecution beyond any reasonable doubt.

30. Before parting with the judgment, we would like to mention that Mr. D.M. Shah, a Senior Advocate of This Court, who appeared on behalf of accused No. 2,

pointed out to us from the further statement of accused No. 2 that accused No. 2 was arrested from Chhadbet area within Pakistan territory. However, the fact remains that he is a Pakistan citizen and he has not led any evidence to prove that he was arrested from Pakistani area. We fail to understand why our Indian Officers would enter the Pakistani territory and bring Pakistani nationals to India. It is further important to note that not even a single question is put to any of the prosecution witnesses on this point in the cross-examination. In the absence of probalising evidence, it merely becomes a mere statement with no proof whatsoever and his defence is not probalised at all. Under the circumstances, we do not find any substance in the submission made by Mr. D.M. Shah.

31. Mr. Kamlesh Sheth, Junior of Mr. P.B. Majmudar, also raised one point before us, and we have permitted him to raise it, that the accused No. 1 had not asked the learned Magistrate to commit his case to the Sessions Court and therefore the learned Sessions Judge who has rendered the judgment is without jurisdiction. Prima facie, this argument appears to be attractive, but when we properly peruse the provisions of Section 13 of the Act, it is clear that Section 13 is putting restriction on trial of offences and the restriction is with regard to the Courts inferior to that of the District or Presidency Magistrate and no Court other than that of a Magistrate of first class specially empowered in this behalf will have jurisdiction to try the offences. It is, therefore, clear that the said Sub-section (1) of Section 13 of the Act does not restrict the jurisdiction of the Sessions Judge. Sessions Court cannot be said to be inferior to that of the District or Presidency Magistrate.

32. If we refer to Sub-section (2) of Section 13 of the Act, it is clear that if any person under trial before a Magistrate for an offence under the Act at any time before a charge is framed claims to be tried by the Court of Session, the Magistrate shall, if he does not discharge the accused, commit the case for trial by that Court, notwithstanding that it is not a case exclusively triable by that Court. Sub-section (2) of Section 13 of the Act, thus clearly mentions that at the request of the accused before the framing of the charge, the case can be committed to the Sessions Court and the Sessions Court would have jurisdiction. Now, in the instant case, the case was already committed to the Sessions Court and the Sessions Court conducted the trial. Under the circumstances, looking to the language of Sections 13(1) & (2) of the Act, it cannot be said that the Sessions Court has no jurisdiction. Under the circumstances, we do not find any substance in this argument. It may be stated that no objection whatsoever was raised at any stage of the trial. Accordingly, we do not find any substance in this argument and therefore we find that both the accused are guilty. We convict the respondent-accused No. 1 for the offence punishable u/s 3(1)(c) and also for the offence punishable u/s 10 and also for the offence punishable u/s 3(1)(a) read with Section 9 of the Official Secrets Act, 1923. We also convict the respondent-accused No. 2 for the offence punishable u/s 3(1)(a) and also for the offence punishable u/s 3(1)(c) read with Section 9 and also for the offence u/s 10 read with Section 9 of the Official Secrets Act, 1923. When we hold them guilty and

convict them, we set aside the judgment of acquittal rendered by the learned Sessions Judge, Kachchh at Bhuj in Sessions Case No. 62 of 1988.

33. The accused were acquitted by the trial Court and therefore they had no opportunity to say anything on the point of sentence and therefore we direct the office to issue notice to the respondents-accused who are presently lodged in the Bhuj Jail regarding their conviction and also to inform the concerned Jail Authorities to produce the accused before This Court on 13-8-1991 at 11-00 a.m. so as to hear them on the point of sentence.

34. As the accused are required to be heard on the point of sentence u/s 235(2) of the Cr.P.C. notices were issued and accordingly the accused-respondents are brought before us today from Bhuj Jail where they are kept at present. We have heard both the accused on the point of sentence.

35. The accused No. 2 is a Pakistani national and he is unable, to follow either Gujarati or English or Hindi language and he knows only Sindhi and Kutchi languages. Accordingly, Mr. S.N. Bachani, Assistant Registrar of This Court was called and with his assistance the accused No. 2 is heard on the point of sentence.

36. So far as the accused No. 1 is concerned, he states that he was arrested on 28-12-1986 and till he was acquitted on 30-11-1989 he was in custody; that thereafter on the appeal against acquittal being admitted on 13-6-1990 in view of the non-bailable warrant issued by This Court he is in custody since 9-7-1990; that he has a wife and two children; that there is no other earning member in his family; that his parents are very old and his mother is suffering from T.B. and therefore, some lenient view should be taken in his case.

37. Mr. P.B. Majmudar, learned Advocate for the accused No. 1 submits that in view of the circumstances narrated by the accused No. 1 personally, reasonable sentence be awarded, if not lenient one. According to Mr. Majmudar, looking to the facts and circumstances of the case five years' R.I. would serve the ends of justice.

38. So far as the accused No. 1 is concerned, according to him he is a married person having two children and aged parents and two minor brothers. According to him he is the only earning member in his family and he has to maintain the family and he is very poor. He was arrested on 2-6-1986 and that even after his acquittal he was not released and therefore, he is continuously in Jail. Mr. D.M. Shah, learned Advocate for the accused No. 2 submits that in view of the circumstances narrated by the accused No. 2 personally, sentence of three years' R.I. would serve the ends of justice.

39. Mr. K.V. Shelat, learned Addl. P.P. submits that these are serious offences against the nation and because of the activity of the accused No. 1 safety and security of the nation would have been affected. He further submits that looking to the object of the Act the offences should not be viewed leniently and adequate

punishment should be given to the accused. He further submits that in the facts and circumstances of the case maximum sentence as provided u/s 3 of the Act should be imposed on both the accused and for the offence u/s 10 of the Act both the accused should be awarded two years" R.I. though the maximum provided under the Act is three years" R.I.

40. We have taken into consideration the aforesaid facts and circumstances of the case. Looking to the object of the Act as also the seriousness of the offences it is certain that no lenient view in such matter can be taken. It may be mentioned that there is no question of comparing these offences with the offence of murder. If one commits a murder in the heat of passion, he may subsequently improve his conduct and he only does damage to the family of the victim. However, in the present case if the accused are successful in carrying out their object and if the document (Ex. 66) which was seized from the house of the accused No. 1 was handed over to the Pakistani Intelligence, it would have caused lot of damage to the country and the safety and security of the State would have been affected. The said document (Ex. 66) relates to the B.S.F. i.e., Military and therefore, maximum sentence provided u/s 3 of the Act should be awarded to the accused.

41. Taking into consideration the pleas of the learned Advocates appearing for the parties we think the respondent No. 1-original accused No. 1 should be sentenced to R.I. for ten years for the offence u/s 3(1)(c) and also offence u/s 3(1)(a) read with Section 9 of the Official Secrets Act, 1923 and he should also be sentenced to two years" R.I. for the offence u/s 10 of the Act. It may be noted that so far as Section 9 of the Act is concerned, it also provides for the same sentence as that of the main offence of the Act.

42. Similarly, the respondent No. 2-original accused No. 2 should be sentenced to R.I. for ten years for the offence u/s 3(1)(a) as also for the offence u/s 3(1)(c) read with Section 9 of the Act. The accused No. 2-respondent No. 2 should also be sentenced to R.I. for two years for the offence u/s 10 read with Section 9 of the said Act.

43. In view of what is stated above, we set aside the order of acquittal passed by the learned Sessions Judge, Kutch at Bhuj in Sessions Case No. 62 of 1988 and we allow this Criminal Appeal No. 147 of 1990. The respondent No. 1-original accused No. 1 is convicted for the offence u/s 3(1)(c) as also offence u/s 3(1)(u) read with Section 9 of the Official Secrets Act, 1923, and is sentenced to R.I. for ten years. He is also convicted for the offence u/s 10 of the said Act and is sentenced to R.I. for two years. The respondent No. 2-original accused No. 2 is convicted for the offence u/s 3(1)(a) as also for the offence u/s 3(1)(c) read with Section 9 of the said Act and is sentenced to R.I. for ten years. He is also convicted for the offence u/s 10 read with Section 9 of the said Act and is sentenced to R.I. for two years.

Both the substantive sentences are ordered to run concurrently. The respondents-

accused will be entitled to benefit of set of, if admissible u/s 428 of the Criminal Procedure Code.