
XII K.K. LUTHRA MEMORIAL MOOT COURT, 2016

Before

THE SUPREME COURT OF ARKHAM

JAMES MORRISONPETITIONER 1
ARISTOTLEPETITIONER 2
NAJEEDA SHAH.....PETITIONER 3
RUFUS GREYPETITIONER 4

v.

STATE OF ARKHAM..... RESPONDENT

[MEMORIAL ON BEHALF OF THE RESPONDENT]

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STATEMENT OF FACTS

BACKGROUND

Arkham, a former Dutch colony, is one of the most resource rich countries today. A member of the BRICS, Arkham's primary natural resources include coal and crude oil. Recently, foreign industries have started entering into transactions with the government and investing large amounts of money in the Arkham single stock exchange. Such transactions and investments are based on information gained from consulting companies, which typically gain such information by bribing low grade officials to steal information from government offices. Prime Minister Hozier directed an investigation into the extraordinary profits made by these foreign companies.

THE TRAP

Following a preliminary enquiry, the Faltusa police registered an information report under various provisions of the Arkhma Penal (Provisions and Punishment) Act, 1963, the Arkham Government Secrets Act, 1892, and the Prevention and Punishment of Corruption Act, 1998. After registering the report, the police laid a trap on 20 March, 2015 at the offices of the Ministry of Natural Resources. This trap was laid based on secret information received by the Lead Investigating Officer that two persons named Eddie and Elvis would try to steal documents with fake ID cards and duplicate keys. The trap was carried out successfully, and Eddie and Elvis were apprehended as they were trying to leave the premises with several documents.

THE INTERROGATION

Eddie and Elvis, when confronted with incriminating call records, confessed to stealing documents at the behest of various individuals and consulting companies. They said that they were lured into stealing documents by Mr. James Morrison, who owned the consulting company M/s LDC Pvt. Ltd. Similarly, they also admitted that Mr. Aristotle of M/s Rustum Energy Ltd., Mrs. Najeeda Shah of M/s Mojo Energy Consultants Ltd. and Mr. Rufus Grey of M/s Grey.

A search of their offices led to recovery of several classified documents, including a copy of the document titled 'Draft Arkham Budget for Financial Year 2015-2016'. Bank statements revealed that they made monthly payments to Eddie and Elvis.

THE PROCEEDINGS

The Faltusa Police submitted an indictment report before the Special Court constituted under the Prevention and Punishment of Corruption Act, 1998. The court, after hearing the arguments, decided that sufficient grounds existed for the court to proceed against all of the accused. The accused, except Eddie and Elvis, have preferred a writ petition before the Supreme Court for striking down the Arkham Government Secrets Act, 1892 and quashing the proceedings in the Special court. Hence, the present matter.

ISSUES RAISED

I.

IS THE PREVENTION OF ARKHAM GOVERNMENT SECRETS ACT, 1892 LIABLE TO BE STRUCK
DOWN?

II.

IS THE ENTIRE PROSECUTION AGAINST THE ACCUSED PERSONS LIABLE TO BE QUASHED?

III.

IS THE FORMAL NOTICE OF INDICTMENT LIABLE TO QUASHED?

IV.

SHOULD THE PROCEEDINGS BE STAYED DURING THE PENDENCY OF THIS WRIT PETITION?

SUMMARY OF ARGUMENTS

[1]. THE POAGSA CANNOT BE STRUCK DOWN AS BEING REDUNDANT AND OTIOSE

A law cannot be struck down as redundant, as a court of law does not have the power to strike down a law for its perception that the law is unwarranted. In any case, the Prevention of Arkham Government Secrets Act is not redundant and otiose, because it provides for provisions *vis-à-vis* classification of information and sanctions for offences committed. These two aspects are absent in the Freedom of Information Act. Further, the Prevention of Arkham Government Secrets Act is not against the letter and spirit of Freedom of Information Act. With respect to letter, it is because the presence of *non-obstante* clause in Freedom of Information Act gives it overriding effect over Prevention of Arkham Government Secrets Act. This removes any possibility of inconsistency between the two statutes. The Prevention of Arkham Government Secrets Act does not contravene the spirit of Freedom of Information Act as the restrictions imposed by it are reasonable in nature.

[2]. THE PROSECUTION AGAINST THE ACCUSED PERSONS SHOULD NOT BE QUASHED

It is well established that a Special Court can try an accused person if he is a public servant or if the offences committed by that person fall within the same transaction as that of a public servant. In the instant case, it is submitted that the court should not quash the entire prosecution as the Special Court has the jurisdiction to try the accused persons because, *first*, Eddie and Elvis are public servants under the Prevention and Punishment of Corruption Act. *Secondly*, the accused persons can be tried under the Prevention and Punishment of Corruption Act as their acts form the part of the same transaction. Eddie and Elvis are public servants as they are in the service and pay of the government, and are also entrusted with certain public duties. Further, the actions of Eddie and Elvis, and the petitioners form a continuous whole as there is both continuity of action and community of purpose. Thus, they can be tried together and the Special Court has the jurisdiction to try the petitioners.

[3]. THE INDICTMENTS MUST NOT BE QUASHED

It is well settled that, usually, proceedings cannot be quashed unless a *prima facie* case cannot be made out from the record. It is submitted that the recovery of documents from the petitioners, coupled with the confessions of the co-accused and the circumstances surrounding the case, provide 'sufficient ground' to proceed against the accused. Thus, *prima*

facie case exists with regard to *first*, the provisions of Arkham Penal (Provisions and Punishment) Act and *secondly*, the provisions of the Prevention of Arkham Government Secrets Act.

[4]. THE PROCEEDINGS SHOULD NOT BE STAYED DURING THE PENDENCY OF PRESENT WRIT PETITION

Stay cannot be granted on any ground other than defective or illegal sanction. The requirement of sanction *vis-à-vis* a public servant entails, *first*, the act should be in discharge of an official duty and *secondly*, the act so discharged should have close nexus or link with such discharge of duty. It is submitted, that in the instant case, sanction is not required, as the acts of Eddie and Elvis do not come within the scope of their official duty. The *modus operandi* pursued by Eddie and Elvis indicates that the act committed by them was not intrinsically linked with the discharge of their official duty. Hence, it is submitted that the proceedings should not be stayed in the instant case.

WRITTEN PLEADINGS**[1]. THE PREVENTION OF ARKHAM GOVERNMENT SECRETS ACT, 1892 SHOULD NOT BE STRUCK DOWN**

1. The Prevention of Arkham Government Secrets Act [“POAGSA”] is the legislation encapsulating the policy framework to counter the instances of spying in fields of defence and leakages in economic policy. It is submitted that *first*, the POAGSA is not redundant and otiose [1.1] and *secondly*, the POAGSA is not against the letter and spirit of Freedom of Information Act, 2002 [1.2].

[1.1] THE POAGSA CANNOT BE STRUCK DOWN AS BEING REDUNDANT AND OTIOSE

2. Redundancy means the fault of introducing superfluous matter into a legal instrument.¹ *Ut res magis valeat quam periat* is a well settled principle of interpretation.² It implies that the courts should strongly lean against any construction which tends to reduce a statute to a futility. Hence, the construction given by the court should further the object of incorporation of that provision, should be read harmoniously and should not render another provision redundant.³ Courts should not impute redundancy or tautology to the Parliament.⁴ Construction that leaves without effect any part of the language of the statute will normally be rejected.⁵ Besides this settled legal position *vis-à-vis* redundancy, it is submitted that the power of the legislature to make laws is plenary.⁶ In light of this, it is submitted that *first*, the court does not have the power to strike down a law as redundant [1.1.1] and *secondly*, in any case, the POAGSA is not redundant or otiose [1.1.2].

[1.1.1] THE COURT DOES NOT HAVE THE POWER TO STRIKE DOWN A LAW AS REDUNDANT

3. Article 47(1) of the Constitution of Arkham is analogous to Article 32(1) of the Constitution of India. In light of this, the validity of a statute cannot be challenged on the grounds other than the contravention of fundamental rights [the rights which are conferred by the Constitution] via invocation of this writ jurisdiction for the enforcement of rights,⁷

¹ Henry Campbell Black, BLACK’S LAW DICTIONARY 1009 (Bryan A. Garner ed., 9th edn., 2009).

² Tinsukhia Electricity Supply Co. Ltd. v. State of Assam, (1989) 3 SCC 709.

³ T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481, ¶ 148; Indian Medical Association v. Union of India, (2011) 7 SCC 179, ¶¶ 232-233.

⁴ Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552, ¶¶ 80-81.

⁵ L.I.C. v. D.J. Bahadur, (1981) 1 SCC 315.

⁶ A.B. Kafaltiya, INTERPRETATION OF STATUTES 214 (2008).

⁷ Kheybari Tea Co. Ltd. v. State of Assam, AIR 1964 SC 925, ¶ 941.

absence of legislative competence and reasonableness of the law.⁸ A legislation cannot be struck down for the reason of its enactment becoming redundant.⁹ The court cannot strike down an enactment due to its perception that the legislation is unnecessary or unwarranted.¹⁰

[1.1.2] IN ANY CASE, POAGSA IS NOT REDUNDANT OR OTIOSE

4. The preamble of the POAGSA categorically states that this legislation was enacted for introduction of sanction and protection of Government secrets *vis-à-vis* the fields of defence and economic policy of Arkham.¹¹ It is submitted that the provisions concerning the classification by an appropriate authority [1.1.2.1] and penalty for contravention of POAGSA [1.1.2.2] indicate that the POAGSA is not redundant or otiose.

[1.1.2.1] *Classification by an Appropriate Authority*

5. It is to be highlighted that Section 2 of POAGSA envisages an “*appropriate authority*”. This implies that a mechanism is put to operation by the POAGSA for classification of information into the exempted categories i.e., secret, confidential or classified.¹² The appropriate authority possesses the requisite expertise to deal with the matters entrusted to it. In the instant case, it would include, scrutinizing the information and classifying it.

6. It may be argued that the information which can be exempted under the POAGSA can be satisfactorily exempted from disclosure under Section 41 of the Freedom of Information Act, 2002 [“FOIA”]. However, Section 41 does not envisage any “*appropriate authority*” to deal with the matter of classification. This can result in subjecting the matters of national security at peril. The officials in-charge for dissemination of information under the FOIA lack the requisite expertise and would not be barred from perusing the information which should necessarily be exempted.

7. A comparative analysis of this provision with Section 103 of the Evidence Act indicates the need for appropriate authority. Section 103 of the Evidence Act, which is analogous to Section 123 of the Indian Evidence Act, captures the notion of government privilege. It is premised on the common law notion of the Crown's privilege to withhold disclosure of documents. This is done by giving power to the government (head of the

⁸ Namit Sharma v. Union of India, (2013) 1 SCC 745, ¶ 10.

⁹ State of Haryana v. State of Punjab, (2004) 12 SCC 673, ¶ 82.

¹⁰ State of Andhra Pradesh v. McDowell and Co., (1996) 3 SCC 709, ¶ 43.

¹¹ Clarification No. 2, QUERIES AND CLARIFICATIONS, The K.K. Luthra Memorial Moot Court, 2016.

¹² ¶ 3, Page 4, STATEMENT OF FACTS, The K.K. Luthra Memorial Moot Court, 2016.

department) to withhold disclosure of documents, which pertains to affairs of State if in its opinion such disclosure would jeopardize the public interest.¹³ The Court has to balance the public interest in the fair administration of justice against the public interest in the confidentiality of certain documents.¹⁴

8. Such a provision in Arkham's evidentiary law indicates that the policy of the law acknowledges that certain information is to be kept out of the public gaze. Such information can be perused only post the authorisation of head of the department who possess the requisite expertise. This bar does not apply to courts, unless a document belongs to a class (affairs of State) by the nature of which it deserves immunity from disclosure. It should be examined by the court in camera to decide the validity of the claim to withhold it.¹⁵

9. This provision highlights the need of authorisation of disclosure of information by an appropriate authority. This shows that sensitive information should be handled by appropriate authority that possesses the requisite acumen to deal with the matter. Similarly, in the present case, an appropriate authority is entrusted with the task of classification of information which shows the utility of the provision.

[1.1.2.2] Penalty for Contravention of POAGSA

10. The integral purpose of the enactment of POAGSA was prevention of regular instances of spying and leakage in matters of economic policy via conferring the power in the government to punish such illegal acts.¹⁶ In Section 7(1)(c) of the POAGSA, each one of the several acts individually constitutes an offending act to attract the sanction provided in the provision. It is not necessary to prove committal of multiple acts conjointly.¹⁷ Therefore, this provision encapsulates multiplicity of offences within itself to achieve the object and purpose of the enactment.

11. Similarly, Section 8 penalises wrongful communication and dissemination of information. This provision is wider than the provision for spying. It also penalises unauthorised retention and failure to take care of such official secret.¹⁸ This provision has

¹³ *Duncan v. Cammell, Laird and Co. Ltd.*, [1942] AC 624.

¹⁴ *S.P. Gupta v. Union of India*, AIR 1982 SC 149, ¶ 63.

¹⁵ *State of Uttar Pradesh v. Raj Narain*, AIR 1975 SC 865.

¹⁶ Clarification No. 2, *QUERIES AND CLARIFICATIONS*, The K.K. Luthra Memorial Moot Court, 2016.

¹⁷ *Govt. of NCT of Delhi v. Jaspal Singh*, (2003) 10 SCC 586, ¶ 8.

¹⁸ 43rd Report of the Law Commission of India, *OFFENCES AGAINST THE NATIONAL SECURITY*, 7.59 (1971).

been observed to be comprehensive in nature.¹⁹ This provision contains no defence such as, lack of *mens rea*, prior disclosure of the information, or disclosure in public interest.²⁰ This is however attributed to the difficulty in securing direct evidence and the gravity of the offence.²¹ The striking down of these provisions will create a vacuum in the law due to the absence of sanction. This will be contrary to the objective and policy underlying the POAGSA.

12. It might be argued that the above-mentioned provisions are overbroad in nature. However, it is submitted that the provisions in consideration were enacted to curb the menace of spying in defence related activities and leakages in economic policy. Hence, the policy underlying the said provision demands it to contemplate several eventualities that might occur. This is the rationale behind the employment of overarching language which is nevertheless *comprehensive*²² in nature. This is furthered by the fact that the information other than those exempted by Section 7 and 8 of POAGSA can be exempted by virtue of Section 2, if disclosure of the same could be prejudicial to National Security and Sovereignty. In the landmark case of *The Sunday Times v. The United Kingdom*,²³ the European Court of Human Rights has categorically stated that the mere over-breadth of the provision does not merit striking down the same when the enactment was directed to contemplate several eventualities to safeguard the national interest.

13. The possibility of abuse of a provision does not *per se* render the statute invalid. There is a presumption that the administration and application of a law is done “*not with an evil eye and unequal hand*” unless the contrary is proved. This possibility with an otherwise *intra vires*, constitutional and valid statute will not make it *ultra vires* and unconstitutional. This depicts the vulnerability of the action and not the provision.²⁴ Even if the misuse of the provision were to be considered as a criterion, statistics indicate that the number of prosecution in United Kingdom *vis-à-vis* Section 1 (analogous to Section 7 of POAGSA) and

¹⁹ R.K. Karanjia v. Emperor, AIR 1946 Bom 322, ¶ 5; M.P. Jain & S.N. Jain, PRINCIPLES OF ADMINISTRATIVE LAW 97 (6th edn., 2013).

²⁰ S.P. Sathe, RIGHT TO INFORMATION 73 (1st edn., 2006).

²¹ 43rd Report of the Law Commission of India, OFFENCES AGAINST THE NATIONAL SECURITY, 7.48 (1971).

²² R.K. Karanjia v. Emperor, AIR 1946 Bom 322, ¶ 5.

²³ The Sunday Times v. The United Kingdom, (1979-80) 2 E.H.R.R. 245.

²⁴ Sushil Kumar Sharma v. Union of India, (2005) 6 SCC 281, ¶¶ 12, 14; A. Thangal Kunju Musaliar v. M. Venkatchalam Potti, AIR 1956 SC 246.

Section 2 (analogous to Section 7 of POAGSA) of the Official Secrets Act, 1911 are merely 40 and 79 respectively.²⁵ Hence, the provisions of the act are invoked sparingly.

[1.2] THE POAGSA IS NOT AGAINST THE LETTER AND SPIRIT OF THE FREEDOM OF INFORMATION ACT

[1.2.1] THE POAGSA IS NOT AGAINST THE LETTER OF FOI

14. Article 6 of the Constitution of Arkham is analogous to Article 19(1)(a) of the Constitution of India. The right to information has been held to be integral part of right to freedom of speech and expression.²⁶ The POAGSA can only be against the letter of FOIA, if there exists any inconsistency between the two enactments such that it hampers the implementation of laws. Section 50 of the FOIA via a non-obstante clause clearly provides an overriding effect to the FOIA over the POAGSA. Hence, any inconsistency between the application of two laws cannot be contemplated. In *Namit Sharma v. Union of India*,²⁷ the Indian apex court categorically stated that the question of repugnancy would not arise where the provisions of other law can be applied harmoniously. This proposition was laid down while dealing with application of a *verbatim* non-obstante clause as that of Section 50 of FOIA *vis-à-vis* the Right to Information Act, 2005.

[1.2.2] THE POAGSA IS NOT AGAINST THE SPIRIT OF FOIA

15. The letter of the law prevails over the spirit of the law.²⁸ The spirit of the law may be an elusive and unsafe guide.²⁹ Nevertheless, it is submitted that POAGSA does not go against the spirit of the law. It is settled that the right to information guaranteed by the FOIA is derived from the right to freedom of speech and expression enshrined in the Constitution.³⁰ However, this right is not absolute in nature and is subject to certain reasonable restrictions.³¹

²⁵ Patrick Birkinshaw, FREEDOM OF INFORMATION: THE LAW, THE PRACTICE AND THE IDEAL, 85-86 (4th edn., 2010).

²⁶ *State of Uttar Pradesh v. Raj Narain*, AIR 1975 SC 865; *Union of India v. Motion Picture Association*, 1999 (6) SCC 150; *Dinesh Trivedi v. Union of India*, 1997 (4) SCC 306; *Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd.*, 1995 (5) SCC 139; *Secretary, Ministry of Information & Broadcasting v. Cricket Association of Bengal*, 1995 (2) SCC 161; *Life Insurance Corporation of India v. Prof. Manubhai D. Shah*, 1992 (3) SCC 637; *Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers*, 1988 (4) SCC 592; *Sheela Barse v. State of Maharashtra*, 1987 (4) SCC 373; *S.P. Gupta v. Union of India*, AIR 1982 SC 149.

²⁷ *Namit Sharma v. Union of India*, (2013) 1 SCC 745, ¶ 79.

²⁸ *C.I.T. v. Motors and General Stores Pvt. Ltd.*, AIR 1968 SC 200.

²⁹ *Dibyasingh Malana v. State of Orissa*, AIR 1989 SC 1737.

³⁰ *Indian Soap and Toiletries Makers Association v. Ozair Hussain*, (2013) 3 SCC 641, ¶¶ 28-29.

³¹ Clarification No. 11, QUERIES AND CLARIFICATIONS, The K.K. Luthra Memorial Moot Court, 2016.

16. A restriction to be valid must have a rational relation with the grounds for which the legislature is entitled to impose restrictions.³² Too remote a connection between a restriction and the constitutionally authorized ground for restriction will render the law invalid.³³ The underlying rationale for the enactment of POAGSA was prevention of instances of spying and leakage in matters of economic policy.³⁴ ‘National Security’ and ‘information of economic nature’ being well recognised reasonable restrictions to the right to information.³⁵ Hence, the restrictions imposed by POAGSA are reasonable.

17. In light of the above-mentioned arguments the provisions for classification of information and penalty for contravention of POAGSA show that the POAGSA is neither redundant nor otiose. The *non-obstante* clause in Section 50 of FOIA ensures that the letter of FOIA is not violated by the provisions of POAGSA. Further, the reasonableness of restrictions imposed by POAGSA makes it on consonance with the spirit of FOIA. Hence, POAGSA should not be struck down.

[2]. THE PROSECUTION AGAINST THE ACCUSED PERSONS SHOULD NOT BE QUASHED

18. Inherent powers of the court can be exercised in relation to a matter that is pending before a court.³⁶ However, it can be used only if the prosecution amounts to an abuse of the process of the court, and is oppressive and vexatious.³⁷ It is well established that a Special Court can try an accused person if he is a public servant or if the offences committed by that person fall within the same transaction as that of a public servant.³⁸ In the instant case, it is submitted that the court should not use its inherent powers to quash the entire prosecution as the Special Court has the jurisdiction to try the accused persons because, *first*, Eddie and Elvis are public servants under the Prevention and Punishment of Corruption Act, 1998 [“PAPCA”] [2.1] and *secondly*, the accused persons can be tried under PAPCA as their acts form the part of the same transaction [2.2].

³² M.P Jain, INDIAN CONSTITUTIONAL LAW 1017 (7th edn., 2013).

³³ Superintendent, District Jail v. Lohia, AIR 1960 SC 633.

³⁴ Clarification No. 2, QUERIES AND CLARIFICATIONS, The K.K. Luthra Memorial Moot Court, 2016.

³⁵ People’s Union for Civil Liberties v. Union of India, (2004) 2 SCC 476, ¶ 58.

³⁶ State of West Bengal v. Sujit Kumar Rana, AIR 2004 SC 1851; Divisional Forest Officer v. G.V. Sudhakar Rao, (1985) 4 SCC 573; State of West Bengal v. Gopal Sarkar, (2002) 1 SCC 495.

³⁷ C.B.I. v. A Ravishankar Prasad, (2009) 6 SCC 351, ¶ 17; Director of Public Prosecutions v. Humphrys, [1977] AC 1; Connelly v. Director of Public Prosecutions, 1964 AC 1254; State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335.

³⁸ Vivek Gupta v. Central Bureau of Investigation, 2004 SCC (Cri) 51, ¶ 14; P Nallamal v. State, 1999 Cri LJ 1591; Ramesh Chand Jain v. State of Madhya Pradesh, ILR [1992] MP 812.

[2.1] EDDIE AND ELVIS ARE PUBLIC SERVANTS UNDER THE PREVENTION AND PUNISHMENT OF CORRUPTION ACT, 1998

19. The term ‘public servant’ is not defined in the PAPCA. However, the Prevention of Corruption Act, 1988 [“PCA”] which has provisions analogous to PAPCA provides a wide and illustrative definition of the term public servant.³⁹

20. In *G.A. Monterio v. The State of Ajmer*,⁴⁰ the question before the court was whether a metal examiner was a public servant under the PCA.⁴¹ The two main tests established in this case to determine whether a person is a public servant are, *first*, whether the person is in the service or pay of the government and *secondly*, whether he is entrusted with the performance of a public duty.

21. In the instant case, both the abovementioned tests are satisfied. *First*, Eddie and Elvis are in the service and pay of the government as they were appointed as *ad hoc* employees in the ministry of Natural resources.⁴² *Secondly*, they were entrusted with a public duty. Public duty has been defined under Section 2(2) of PAPCA as the duty in the discharge of which the state, the public or the community at large has an interest.⁴³ They were appointed as employees in the Ministry of Natural Resources, therefore, it is clear that the public, state or community at large has an interest in the discharge of their duties. Further, it is well established that public officers include those who perform *ad hoc* duties.⁴⁴ Thus, it is submitted that Eddie and Elvis are public servants.

[2.2] THE ACCUSED PERSONS CAN BE TRIED WITH EDDIE AND ELVIS BY THE SPECIAL COURT AS THEIR ACTS FORM PART OF THE SAME TRANSACTION

22. It is submitted that the Special Court can try the accused persons with Eddie and Elvis as their acts form part of the same transaction. Under Section 2(1) of PAPCA, “*court*” has been defined to mean the court duly notified under this Act to try offences committed by public servants.⁴⁵

23. The PCA which has provisions analogous to PAPCA via Section 3 states that the Special Court has the jurisdiction to try any offences punishable under that Act and any

³⁹ Section 2(c), The Prevention of Corruption Act, 1988.

⁴⁰ *G.A. Monterio v. State of Ajmer*, AIR 1957 SC 13.

⁴¹ The Prevention of Corruption Act, 1947.

⁴² ¶ 2, Page 3, STATEMENT OF FACTS, The K.K. Luthra Memorial Moot Court, 2016.

⁴³ Section 2(2), The Prevention and Punishment of Corruption Act, 1998.

⁴⁴ *R v. Pitt and Mead*, (1762) 3 Burr 1335; *Worrall*, (1890) 16 Cox C.C. 550.

⁴⁵ Section 2(2), The Prevention and Punishment of Corruption Act, 1998.

conspiracy to commit or any attempt to or any abetment of any of the offences triable under the Act.⁴⁶ Section 4(3) of the PCA clearly states that a Special Court may also try an offence, other than those specified in Section 3, with which the accused may, under the Code of Criminal Procedure, 1973 [“CrPC”], be charged at the same trial.⁴⁷

24. Section 4(3) deals with the jurisdiction of the Special Court to try offences other than those specified under Section 3. However, in *Vivek Gupta v. Central Bureau of Investigation*,⁴⁸ it was observed that it would be incongruous, if out of the people charged with the same offence, some would be tried by the Special Court and others by an ordinary Court. Hence, it was held that any person other than a public servant who is charged with same offences can also be tried by the Special Court, provided the offences fall under the same transaction. The Section relating to joinder of persons applies in such cases. In the instant case, Section 114 of Criminal Code of Procedure and Rules [“CCPR”], which relates to joinder of persons states that the persons accused of the same offence committed within the same transaction can be tried together.⁴⁹

25. The term ‘transaction’ has been used in both the CrPC and the CCPR.⁵⁰ However, its definition is neither given in the CrPC nor is it annexed to the Statement of Facts.⁵¹ The facts of the case determine whether the actions of the accused constitute one transaction or several transactions.⁵² The words “*the same transaction*” occurring in this section comprise all the acts of all the persons concerned, done in the course of carrying through the affair in question. The *prima facie* test, as the words “*in the course of*” indicate, is *community* of purpose and *continuity* of action.⁵³ To ascertain whether a series of acts is a part of the same transaction, it is essential to see whether they are linked together to present a continuous whole.⁵⁴

⁴⁶ Section 3, The Prevention of Corruption Act, 1988.

⁴⁷ Section 4(3), The Prevention of Corruption Act, 1988.

⁴⁸ *Vivek Gupta v. Central Bureau of Investigation*, 2004 SCC (Cri) 51, ¶ 14; *P Nallamal v. State*, 1999 Cri LJ 1591; *Ramesh Chand Jain v. State of Madhya Pradesh*, ILR [1992] MP 812.

⁴⁹ Section 114, Criminal Code of Procedure and Rules, 1920.

⁵⁰ Section 223, The Code of Criminal Procedure, 1973.

⁵¹ S.C. Sarkar, THE CODE OF CRIMINALPROCEDURE, 1173, Vol. 2, (10th edn., 2012).

⁵² *Choragudi Venkatadri v. Emperor*, (1910) 20 MLJ 220; *Shapurji Sorabji v. Emperor*, 162 Ind Cas 399; *Virupana Gowd v. Emperor*, (1915) 28 MLJ 397; *State of Rajasthan v. Mangtu Ram*, AIR 1962 Raj 155; *State of Andhra Pradesh v. Cheemalapati Ganeswara Rao*, AIR 1960 SC 1850; *Ramaraja Tevan v. Emperor*, 32 Cri LJ 30; *Emperor v. Keshavlal Tribhuvandas*, (1944) 46 BOMLR 555; *Lockley v. Unknown*, (1920) 38 MLJ 209.

⁵³ *Shamsher Bahadur Saxena v. State of Bihar*, AIR 1956 Pat 404; *Nabijan v. Emperor*, AIR 1947 Pat 212.

⁵⁴ *Emperor v. Keshavlal Tribhuvandas*, (1944) 46 BOMLR 555.

26. It is submitted that, in the instant case, the acts of the accused persons and those of Eddie and Elvis form part of the same transaction as there is, *first*, community of purpose [2.2.1] and *secondly*, continuity of action [2.2.2].

[2.2.1] COMMUNITY OF PURPOSE

27. It is contended that the purpose of the accused persons was to steal information from the Ministry of Natural Resources. The Statement of Facts clearly indicates that the *modus operandi* adopted by these companies was to pay public officials like Eddie and Elvis to steal the information.⁵⁵ Thus, it is clear that the petitioners, and Eddie and Elvis had the same purpose *i.e.*, to steal information from the Ministry of Natural Resources. They were lured by the petitioners, especially Mr. Morrison, to steal confidential documents.⁵⁶

[2.2.2] CONTINUITY OF ACTION

28. Further, the actions of the petitioners, and Eddie and Elvis form a continuous whole. ‘Continuity of action’ refers to following up of some initial act through all its consequences until the series of acts comes to an end, either by attainment of object or by putting an end to the acts.⁵⁷ The actions of Eddie and Elvis, in stealing the information were performed in continuation of the actions of the petitioners, who lured them to steal the documents.⁵⁸

29. Hence, it is submitted that the actions of the petitioners, and Eddie and Elvis are so closely linked that they form part of the same transaction. Therefore, they can be tried together and the Special Court has the jurisdiction to try the petitioners.

[3]. THE INDICTMENTS MUST NOT BE QUASHED

30. A court can serve a notice of indictment if it finds ‘sufficient ground’ after hearing the accused and prosecution to proceed against the accused.⁵⁹ It is not necessary to prove the charges beyond reasonable doubt at the stage of the indictment. Ordinarily, courts would be reluctant to interfere with proceedings at an interlocutory stage.⁶⁰ Usually, proceedings cannot be quashed unless a *prima facie* case cannot be made out from the record. It is submitted that the recovery of documents from the petitioners, coupled with the confessions

⁵⁵ ¶ 2, Page 1, STATEMENT OF FACTS, The K.K. Luthra Memorial Moot Court, 2016.

⁵⁶ ¶ 1, Page 4, STATEMENT OF FACTS, The K.K. Luthra Memorial Moot Court, 2016.

⁵⁷ S.C. Sarkar, THE CODE OF CRIMINAL PROCEDURE 1174, Vol. 2, (10th edn., 2012); Shapurji Sorabji v. Emperor, 162 Ind Cas 399.

⁵⁸ ¶ 3, Page 4, STATEMENT OF FACTS, The K.K. Luthra Memorial Moot Court, 2016.

⁵⁹ Section 134, Criminal Code of Procedure and Rules, 1920.

⁶⁰ R.P. Kapur v State of Punjab, AIR 1960 SC 862.

of the co-accused and the circumstances surrounding the case, provide ‘sufficient ground’ to proceed against the accused. Thus, a *prima facie* case exists to proceed against the petitioners with regard to *first*, the provisions of Arkham Penal (Provisions and Punishment) Act [3.1] and *secondly*, the provisions of the POAGSA [3.2].

[3.1] PRIMA FACIE CASE EXISTS WITH REGARD TO PROVISIONS OF THE ARKHAM PENAL CODE

31. The petitioners, along with the co-accused, have been charged with multiple offences under the Arkham Penal (Provisions and Punishments) Act, 1963 [“APA”].⁶¹ Some of these offences clearly pertain to Eddie and Elvis only. Offences like Criminal Trespass and Breach of Trust by Public Servant do not pertain to the petitioners. They have been included only because all six persons are being tried jointly. However, a *prima facie* case can be clearly made out in respect of the following offences *viz.*, theft in a dwelling house [3.1.1] and dishonestly receiving stolen property [3.1.2].

[3.1.1] THEFT IN A DWELLING HOUSE

32. The definition of ‘theft’ in the APA is in *pari materia* with the definition given in the Theft Act, 1968 of the United Kingdom. It is well settled that any assumption of any rights of an owner constitutes ‘appropriation’.⁶² Unlike the equivalent provision in the Indian Penal Code [“IPC”], there is no requirement of moving the object in APA.⁶³ Also, ‘keeping’ and ‘dealing’ also constitute appropriation.⁶⁴ Further, the Theft Act also defines property as including intangible property.⁶⁵ It is immaterial whether the appropriation is made with a view to gain.⁶⁶

33. It is submitted that the documents recovered from the petitioners come within the definition of property. The bank statements obtained by the police indicate that the petitioners had paid Eddie and Elvis in order to appropriate the documents in question.⁶⁷ Eddie and Elvis have already confessed that they were lured into stealing these documents by Mr. Morrison.⁶⁸

⁶¹ ¶ 2, Page 2, STATEMENT OF FACTS, The K.K. Luthra Memorial Moot Court, 2016; Clarification No. 70, QUERIES AND CLARIFICATIONS, The K.K. Luthra Memorial Moot Court, 2016.

⁶² Section 3(1), Theft Act, 1968; DPP v. Gomez, 1993 AC 442.

⁶³ Section 378, The Indian Penal Code, 1860; Ratanlal and Dhirajlal, THE INDIAN PENAL CODE 932 (Justice K.T. Thomas *et al* eds., 34th edn., 2014).

⁶⁴ R v. Gresham, 2003 EWCA Crim 2070.

⁶⁵ Section 4, Theft Act, 1968; *Smith and Hogan’s Criminal Law* 779 (David Ormerod ed., 13th edn., 2011).

⁶⁶ Section 259, Arkham Penal (Provisions and Punishment) Act, 1963.

⁶⁷ ¶ 3, Page 4, STATEMENT OF FACTS, The K.K. Luthra Memorial Moot Court, 2016.

⁶⁸ ¶ 1, Page 4, STATEMENT OF FACTS, The K.K. Luthra Memorial Moot Court, 2016.

Thus, the mode of obtaining the documents through Eddie and Elvis constitutes ‘appropriation’.⁶⁹

34. Admittedly, it is necessary to establish that the act was done dishonestly.⁷⁰ The Theft Act labels any act not falling within the following cases as being done dishonestly.⁷¹ *First*, if a person believes he or she has a right to do so in law, or *secondly*, if a person believes that the owner would consent if they knew of the circumstances, or *thirdly*, if a person believes that the true owner cannot be identified. The IPC provides a slightly wider definition by describing any act that results in “...*wrongful gain or...wrongful loss...*”⁷² as being dishonest. It is submitted that the petitioners acted dishonestly. It is common knowledge that the *modus operandi* adopted by consulting companies is to bribe low grade officials.⁷³ More importantly, Eddie and Elvis have already confessed that Mr. Morrison had lured them into stealing these documents for money.⁷⁴

35. Theft in a dwelling house is an aggravated form of theft and has an identical provision in the IPC.⁷⁵ The offence is definitely made out if theft is committed in a building used for custody of property.⁷⁶ In the instant case, the evidence on record indicates that the petitioners have dishonestly appropriated property from government offices.⁷⁷ Hence, it is submitted that a *prima facie* case exists against the petitioners with regard to the offence of theft in a dwelling house.

[3.1.2] DISHONESTLY RECEIVING STOLEN PROPERTY

36. A threefold test needs to be satisfied to prove that the offence of dishonestly receiving stolen property was committed.⁷⁸ *First*, that the stolen property was in the possession of the accused. *Secondly*, that some person other than the accused had possession of the property before the accused got possession of it. *Thirdly*, that the accused had knowledge that the property was stolen property.

⁶⁹ Section 259, Arkham Penal (Provisions and Punishment) Act, 1963.

⁷⁰ Section 259, Arkham Penal (Provisions and Punishment) Act, 1963.

⁷¹ Section 2, Theft Act, 1968.

⁷² Section 24, The Indian Penal Code, 1860; *Halsbury's Laws of India*, Criminal Law-II, 296 Vol. 5(2) (2006).

⁷³ ¶ 3, Page 1, STATEMENT OF FACTS, The K.K. Luthra Memorial Moot Court, 2016.

⁷⁴ ¶ 1, Page 4, STATEMENT OF FACTS, The K.K. Luthra Memorial Moot Court, 2016.

⁷⁵ Section 380, The Indian Penal Code, 1860.

⁷⁶ Section 260, Arkham Penal (Provisions and Punishment) Act, 1963.

⁷⁷ ¶ 3, Page 2, STATEMENT OF FACTS, The K.K. Luthra Memorial Moot Court, 2016.

⁷⁸ *Trimbak v. State of Madhya Pradesh*, AIR 1954 SC 39.

37. It is submitted that all the three prongs of the test are met in this case, at least to the extent of establishing a *prima facie* case. It cannot be disputed that government documents were obtained from the possession of the petitioners.⁷⁹ The petitioners have also admitted that they obtained these documents from Eddie and Elvis.⁸⁰ The only point of contention would be with regard to the third part of the test.

38. It is submitted that the petitioners were clearly aware of the fact that the documents they received were stolen. Stealing documents by paying low grade officials is the general *modus operandi* used by consulting companies.⁸¹ Moreover, the position in common law is that recent possession of stolen property raises a presumption of knowledge.⁸² Such a presumption can also be found in Indian laws.⁸³ The presumption operates such that the person from whom property is recovered is presumed to have either stolen it or received it knowing it was stolen. Admittedly, such a presumption can be rebutted at trial but not at an interlocutory stage.⁸⁴ However, it certainly shows that a *prima facie* case exists to proceed against the accused.

[3.2] PRIMA FACIE CASE EXISTS WITH REGARD TO OFFENCES UNDER PREVENTION OF ARKHAM GOVERNMENT SECRETS ACT, 1892

39. The POAGSA under Section 7(1) makes it an offence to obtain, collect, record or publish certain documents or information.⁸⁵ It is not necessary to prove that such an act was done for a purpose prejudicial to the safety or interest of the state. In order to raise such a presumption, it is sufficient to show that such an act was done with regard to any material relating to or used in a prohibited place.⁸⁶ Such a presumption can be rebutted at trial but is sufficient to prove a *prima facie* case.⁸⁷ Prohibited place includes offices belonging to the government.⁸⁸

40. It is submitted that the petitioners are liable under this section. Documents recovered from the petitioners were clearly official documents. It is not necessary that these documents be confidential as it has been held that the adjective ‘secret’ used in the act qualifies only the

⁷⁹ ¶ 2, Page 4, STATEMENT OF FACTS, The K.K. Luthra Memorial Moot Court, 2016.

⁸⁰ ¶ 4, Page 4, STATEMENT OF FACTS, The K.K. Luthra Memorial Moot Court, 2016.

⁸¹ ¶ 3, Page 1, STATEMENT OF FACTS, The K.K. Luthra Memorial Moot Court, 2016.

⁸² Phillip Bruce v. The Queen, (1987) 74 ALR 219.

⁸³ Section 114, The Indian Evidence Act, 1872.

⁸⁴ Mohan Energy Corporation Limited v. State, 2015 Indlaw DEL 4496.

⁸⁵ Section 7(2), Arkham Government Secrets Act, 1892.

⁸⁶ Section 7(2), Arkham Government Secrets Act, 1892.

⁸⁷ Mohan Energy Corporation Limited v. State, 2015 Indlaw DEL 4496.

⁸⁸ Section 9, Arkham Government Secrets Act, 1892.

terms “*official code word and pass word*”.⁸⁹ Therefore, it is not necessary that the documents obtained from the accused be confidential in nature. It has also been held that the offence is duly made out if, *first*, material prejudicial to national interest is found in the possession of accused and *secondly*, testimony of witnesses is available.⁹⁰ Clearly, in light of the recovery of official documents from the accused and the confessions of Eddie and Elvis, the offence is duly made out. At any rate, it is submitted that sufficient ground exists to proceed against the accused.

41. It is also an offence under that act to receive or retain such material. The offence is completed the moment such document is received.⁹¹ In particular, it has been held that budget papers are ‘official secrets’ and obtaining them before they are tabled in the parliament constitutes an offence under this provision.⁹² Hence, criminal liability accrues for wrongful communication and dissemination of information under POAGSA.

42. Hence, a *prima facie* case is undoubtedly made out against the petitioners for the offences of theft in a dwelling house, dishonestly receiving stolen property, spying and wrongful communication and dissemination of information. Therefore, it is submitted that the proceedings must not be quashed at this stage.

[4]. THE PROCEEDINGS SHOULD NOT BE STAYED DURING THE PENDENCY OF PRESENT WRIT PETITION

43. Section 14 of the PAPCA states that no court shall stay the proceedings under this Act on any ground other than defective or illegal sanction.⁹³ In the instant case, it is submitted that the court should not stay the proceedings because, *first*, stay cannot be granted but for defective or illegal sanction [4.1] and *secondly*, the acts of Eddie and Elvis do not come within the scope of official duty [4.2].

[4.1] STAY CANNOT BE GRANTED BUT FOR DEFECTIVE OR ILLEGAL SANCTION

44. It might be argued that Section 14 of the PAPCA does not apply to this court while it is exercising its powers of inherent jurisdiction. However, the Indian Supreme Court has categorically stated in *Satya Narayan Sharma v. State of Rajasthan*⁹⁴ that the phrase ‘no court

⁸⁹ Sama Alana Abdulla v. State of Gujarat, AIR 1996 SC 569.

⁹⁰ Abdul Gaffur Sumra v. State of Gujarat, 1994 Cr LJ 966; C.B.I. v. Abhishek Verman, AIR 2009 SC 2399.

⁹¹ Narendra Kapadia v. C.B.I., 1982 1 Bom CR 148.

⁹² Emperor v. R.K. Karanjia, ILR 1960 Ker 1085.

⁹³ Section 14, The Prevention and Punishment of Corruption Act, 1998.

⁹⁴ Satya Narayan Sharma v. State of Rajasthan, 2001 (4) Crimes 34 (SC).

shall stay the proceedings' applies even while a Court is exercising its inherent jurisdiction. Further, it is well established that the court cannot use its inherent powers in contravention of the provisions of any enactment.⁹⁵ Therefore, a court cannot grant a stay the proceedings but for defective or illegal sanction.

[4.2] SANCTION IS NOT REQUIRED AS IMPUGNED ACTS DO NOT COME WITHIN THE AMBIT OF OFFICIAL DUTY

45. The requirement of sanction *vis-à-vis* a public servant entails, *first*, the act should be in discharge of an official duty and *secondly*, the act so discharged should have close nexus or link with such discharge of duty.⁹⁶ It must be established that the act committed and official duty discharged were so inter-related that one can reasonably postulate that the act was committed by the accused in the performance of official duty, though manifestly in excess of the requirement of the scenario.⁹⁷

46. The Indian Supreme Court in *Inspector of Police v. Battenapatla Venkata Ratnam*,⁹⁸ has stated that the question to be asked is whether the alleged offences have been committed by public servants “*while acting or purporting to act in discharge of their official duty*”. This proposition has been endorsed in further cases as well.⁹⁹ The underlying rationale behind obtaining sanction is to protect honest public servants from malicious and vexatious prosecution.

47. However, a criminal act which is committed in the colour of authority but which in reality is for the public servant's own pleasure or benefit, does not merit protection in the garb of doctrine of state immunity.¹⁰⁰ The courts have gone to the extent of saying that even in the eventuality of criminal act being committed in the discharge of official duty; the act shall be construed as being committed outside the ambit of official duty, hence, meriting no sanction for prosecution.¹⁰¹

48. The *modus operandi* pursued by Eddie and Elvis indicates that the act committed by them was not intrinsically linked with the discharge of their official duty. Facts indicate that

⁹⁵ Madhu Limaye v. State of Maharashtra, (1977) 4 SCC 551; Janata Dal v. H.S. Chowdhary, (1992) 4 SCC 305.

⁹⁶ M.R. Reddi, ANTI-CORRUPTION LAWS AND DEPARTMENTAL ENQUIRIES 706 (5th edn., 2014); P.V. Ramakrishna, A TREATISE ON ANTI-CORRUPTION LAWS IN INDIA, Vol. 2, 1399 (13th edn., 2011).

⁹⁷ Matajog Dubey v. H.C.Bhari, AIR 1956 SC 44.

⁹⁸ Inspector of Police v. Battenapatla Venkata Ratnam, 2015 SCC OnLine SC 339.

⁹⁹ Shambhoo Nath Misra v. State of Uttar Pradesh, (1997) 5 SCC 326, ¶ 5.

¹⁰⁰ Parkash Singh Badal v. State of Punjab, (2007) 1 SCC 1, ¶ 20.

¹⁰¹ Rajib Ranjan v. R. Vijaykumar, (2015) 1 SCC 513, ¶ 18.

they had to use fake ID cards to access the information that they were trying to steal.¹⁰² It is fair to assume that access to such information would not be restricted to them had it been pertinent to their official duty. Thus, the stolen information had no nexus with their official duty. Consequently, the absence of sanction in the present case does not vitiate the proceedings. Hence, it is submitted that no grounds exist for the petitioners to seek a stay on the proceedings.

PRAYER

Wherefore in the light of the issues raised, arguments advanced and authorities cited, it is humbly prayed that this Hon'ble Court may be pleased to adjudge and declare that:

1. The Prevention of Arkham Government Secrets Act, 1892 is not redundant and otiose, and is also not against the letter and spirit of Freedom of Information Act, 2000.
2. The prosecution against the petitioners is valid as the Special Court has jurisdiction to try the accused persons.
3. The formal notice of indictment is valid as the offences are made out against the accused persons.
4. The proceedings should not be stayed during the pendency of the present writ petition.

And pass any other order, direction, or relief that this Hon'ble Court may deem fit in the interests of justice, equity and good conscience.

All of which is humbly prayed,
URN – 1265,
Counsels for the Respondent.

¹⁰² ¶ 3, Page 2, STATEMENT OF FACTS, The K.K. Luthra Memorial Moot Court, 2016.