Neutral Citation No. - 2023:AHC-LKO:56067

A.F.R.

Court No. - 16

Case :- CRIMINAL REVISION No. - 935 of 2023

Revisionist :- Mahant Prasad Ram Tripathi @ M.P.R. Tripathi
Opposite Party :- State Of U.P. Thru. C.B.I. / A.C.B., Lucknow And Another
Counsel for Revisionist :- Prateek Tewari
Counsel for Opposite Party :- Shiv P. Shukla

Hon'ble Subhash Vidyarthi J.

1. Heard Sri Prateek Tewari Advocate, the learned counsel for the revisionist and Sri Shiv P. Shukla, the learned counsel for the Central Bureau of Investigation and perused the records.

2. This revision under Section 397/401 Cr.P.C. has been filed by the revisionist challenging the validity of an order dated 25.05.2023, passed by the learned Special Judge, C.B.I. Court No.4, Lucknow, whereby the application under Section 227 Cr.P.C. praying for discharge of the applicant has been rejected.

3. Briefly stated, facts of the case are that one Haider Ali @ Mantu had filed a complaint against one Shashi Mohan, Member, Fatehgarh Cantonment Board, on the basis whereof Case No.RC0062015A0009 under Section 7 of Prevention of Corruption Act, 1988 was registered by the Central Bureau of Investigation on 09.05.2015. The complainant had alleged that Shashi Mohan had demanded Rs.1,56,000/- as bribe on behalf of the applicant Mahant Prasad Tripathi, who was the C.E.O. of Cantonment Board Fatehgarh, for payment of certain bills, at the rate of 6% of the bill amount.

4. The C.B.I. has recorded a telephonic communication between two accused persons on a digital voice recorder, wherein the co-accused told the applicant on phone that 'Haider had come and he has paid the amount of 6%', which was acknowledged by the applicant by

merely saying 'yes' and when the co-accused Shashi Mohan tried to carry the conversation forward, the applicant forbade him to talk on the issue and asked him to talk in the office.

5. The applicant had sought his discharge under Section 227 of Cr.P.C. on the ground that the telephonic conversation recorded on the digital voice recorder was not admissible in evidence, but the learned trial court has rejected the application.

6. Sri Prateek Tewari Advocate, the learned counsel for the revisionist has drawn attention of the Court towards the provisions contained in Section 5 of Indian Telegraph Act, which provide as follows: -

> *"5. Power for Government to take possession of licensed telegraphs and to order* ***interception of messages****.—*
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> *(1) On the occurrence of any public emergency, or in the interest of the public safety, the Central Government or a State Government, or any officer specially authorised in this behalf by the Central Government or a State Government, may, if satisfied that it is necessary or expedient so to do, take temporary possession (for so long as the public emergency exists or the interest of the public safety requires the taking of such action) of any telegraph established, maintained or worked by any person licensed under this Act.*
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> *(2) On the occurrence of any public emergency, or in the interest of the public safety, the Central Government or a State Government or any officer specially authorised in this behalf by the Central Government or a State Government may, if satisfied that it is necessary or expedient so to do in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign states or public order or for preventing incitement to the commission of an offence, for reasons to be recorded in writing, by order, direct that any message or class of messages to or from any person or class of persons, or relating to any particular subject, brought for transmission by or transmitted or received by any telegraph, shall not be transmitted, or shall be intercepted or detained, or shall be disclosed to the Government making the order or an officer thereof mentioned in the order:*
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> *Provided that the press messages intended to be published in India of correspondents accredited to the Central Government or a State Government shall not be intercepted or detained, unless their transmission has been prohibited under this sub-section."*

7. The learned counsel for the revisionist drawn attention of the Court towards Rule 419 of Indian Telegraph Rules, 1951, which provides as follows: -

> *"419. Interception or monitoring of telephone messages. - It shall be lawful for the Telegraph Authority to monitor or intercept a message transmitted through telephone, for the purpose of verification of any violation of these rules or for the maintenance of the equipment."*

8. The learned counsel for the applicant has submitted that Section 5 of the Telegraph Act permits interception of telegraph messages only in certain contingencies only, and that too under the orders of the Government. He has submitted that in the present case there was no such order and therefore interception of telephonic conversation between the accused persons was wholly illegal and the telephone conversation recorded in an illegal manner cannot be admitted in evidence in support of the prosecution case.

9. In support of his contention, learned counsel for the applicant has relied upon a judgment of Hon'ble the Apex Court in the case of **People's Union for Civil Liberties (PUCL) Vs. Union of India and another*:*** (1997) 1 SCC 301.

10. **PUCL** (Supra) was a public interest Writ Petition filed under Article 32 of the Constitution of India in the wake of a report on "Tapping of politicians' phones" by the Central Bureau of Investigation (CBI). It was mentioned in the C.B.I. report that the Director Intelligence Bureau, Director General Narcotics Control Bureau, Revenue Intelligence and Central Economic Intelligence Bureau and the Director Enforcement Directorate had been authorised by the Central Government to do interception for the purposes mentioned in Section 5 of the Telegraph Act. In addition, the State Governments generally give authorisation to the Police/Intelligence agencies to exercise the powers under the Act. The petitioner had challenged the constitutional validity of Section 5(2) of the Indian Telegraph Act, 1885 (the Act), in the alternative it was contended that the said provisions be suitably read down to include procedural safeguards to rule out arbitrariness and to prevent the indiscriminate telephone-

tapping. The Hon'ble Supreme Court took note of Section 7 (2) (b) of the Telegraph Act, which gives rule-making power to the Central Government is as under: -

> *"7. Power to make rules for the conduct of telegraphs.—(1) The Central Government may, from time to time, by notification in the Official Gazette, make rules consistent with this Act for the conduct of all or any telegraphs established, maintained or worked by the Government or by the persons licensed under this Act.*
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> *(2) Rules under this section may provide for all or any of the following among other matters, that is to say:*
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> *(a) * * **
>
> *(b) the precautions to be taken for preventing the improper interception or disclosure of messages."*

11. The Hon'ble Supreme Court noted that: -

> *"It is for the Central Government to make rules under Section 7 of the Act. Section 7(2)(b) specifically provides that the Central Government may make rules laying down the precautions to be taken for preventing the improper interception or disclosure of messages. The Act was enacted in the year 1885. The power to make rules under Section 7 of the Act has been there for over a century but the Central Government has not thought it proper to frame the necessary rules despite severe criticism of the manner in which the power under Section 5(2) has been exercised. It is entirely for the Central Government to make rules on the subject but till the time it is done the right to privacy of an individual has to be safeguarded. In order to rule out arbitrariness in the exercise of power under Section 5(2) of the Act and* ***till the time the Central Government lays down just, fair and reasonable procedure under Section 7(2)(b) of the Act, it is necessary to lay down procedural safeguards for the exercise of power under Section 5(2) of the Act so that the right to privacy of a person is protected****."*

12. In the aforesaid background, the Hon'ble Supreme Court issued the following directions: -

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

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

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

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

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

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

(a) the intercepted communications,

(b) the extent to which the material is disclosed,

(c) the number of persons and their identity to whom any of the material is disclosed.

(d) the extent to which the material is copied and

(e) the number of copies made of any of the material.

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

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

9.There shall be a Review Committee consisting of Cabinet Secretary, the Law Secretary and the Secretary, Telecommunication at the level of the Central Government. The Review Committee at the State level shall consist of Chief

Secretary, Law Secretary and another member, other than the Home Secretary, appointed by the State Government.

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

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

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

13. However, the question of admissibility of an intercepted telephonic conversation in evidence was not raised before the Hon'ble Supreme Court and this question was not decided in PUCL case. Therefore, PUCL case (Supra) is not an authority for adjudging the admissibility of a telephonic conversation allegedly intercepted without following the due process of law.

14. The learned Counsel for the applicant has placed reliance upon a judgment in the case of **Sanjay Pandey versus Directorate of Enforcement**, 2022 SCC OnLine Del 4299, wherein while deciding a bail application, an Hon'ble Single Judge of the Delhi High Court recorded his *prima facie* of the view that "*tapping phone lines or recording calls without consent is a breach of privacy. The right to privacy enshrined under Article 21 of the Constitution demands that phone calls not be recorded. Only with consent of the individuals concerned, can such activity be carried out otherwise it will amount to breach of the fundamental right to privacy"*.

15. The learned Counsel for the applicant has relied upon the following passage from the judgment in the case of **Rayala M. Bhuvaneswari Versus Nagaphanender Rayala**, AIR 2008 AP 98, wherein an

Hon'ble Single Judge of the Andhra Pradesh High Court expressed the following belief: -

> *"13. For all these reasons, I believe that the act of tapping itself by the husband of the conversation of his wife with others was illegal and it infringed the right of privacy of the wife. Therefore, these tapes, even if true, cannot be admissible in evidence. Hence, Ex.P-18 itself is not admissible in evidence and there is no question of forcing the wife to undergo a voice test and then ask the expert to compare the portions denied by her with her admitted voice."*

16. Per contra, Sri Shiv P. Shukla, the learned counsel for the respondent has opposed the revision and he has submitted that recording of conversation between two persons without interfering in the communication system will not amount to interception of the messages. He has further submitted that the recording of telephonic conversation between two accused persons is not the sole evidence relied upon by the prosecution against the applicant and there are some other evidences also including the statement of co-accused person and some independent persons.

17. The conversation in question was made between the accused persons through their mobile phone. The co-accused Shashi Mohan was directed by the Central Bureau of Investigation officials to make phone call to the applicant and make a conversation with him regarding the payment of bribe. The communication between the mobile phone devices of the two accused persons was received by putting the mobile phone of the co-accused on speaker mode and it was recorded in another device called 'digital voice recorder'.

18. It appears that the communication made by one accused person to the other reached him and it was thereafter that it was recorded by on another device called digital voice recorder. Can it be said in these circumstances that the communication between the two accused persons was 'intercepted'?

19. The word 'intercept' has been defined in Cambridge dictionary as '*to stop and catch something or someone* ***before that thing or person is able to reach a particular place****'*. Merriam-Webster dictionary

defines 'intercept' as *'to stop, seize or interrupt* ***in progress or before arrival****, receive (a communication or signal* ***directed elsewhere****) usually secretly'*. Collins dictionary defines 'intercept' as '*to stop, deflect or seize* ***on the way from one place to another, prevent from arriving*** *or proceeding*.

20. From the aforesaid facts, it appears the communication between the two accused persons reached its destination and it was not stopped while it was in the process of reaching the other person, before reaching the other person. Therefore, from the plane meaning of the word 'intercept' it appears that the communication was not 'intercepted'.

21. Therefore, I am of the view that the provisions of law regarding interception of telephonic communication would not apply to the facts of the present case.

22. However, as elaborate submissions have been made by the learned Counsel for the revisionist on the issue of admissibility of the recorded conversation, I proceed to examine the same.

23. In **State v. N.M.T. Joy Immaculate**, (2004) 5 SCC 729, the Hon'ble Court was deciding an appeal passed by the High Court of Madras holding that the order granting custody of the accused to police was illegal and the recovery made consequent to confession made during the illegal custody has no evidentiary value. A question arose whether the High Court was right in making the aforesaid observations, even if it is assumed that the order dated 6-11-2001 granting police custody was illegal. Answering the aforesaid question, the Hon'ble Supreme Court held that: -

> *"**The admissibility or otherwise of a piece of evidence has to be judged having regard to the provisions of the Evidence Act. The Evidence Act or the Code of Criminal Procedure or for that matter any other law in India does not exclude relevant evidence on the ground that it was obtained under an illegal search and seizure**.*
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> ***15.** The law of evidence in our country is modelled on the rules of evidence which prevailed in English law. In Kuruma v. R., 1955 AC 197, an accused was found in unlawful possession of some ammunition in a search conducted*

> *by two police officers who were not authorised under the law to carry out the search. The question was whether the evidence with regard to the unlawful possession of ammunition could be excluded on the ground that the evidence had been obtained on an unlawful search. The Privy Council stated the principle as under:*
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> *The test to be applied, both in civil and in criminal cases, in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how it was obtained.*
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> ***15.1.** This question has been examined threadbare by a Constitution Bench in Pooran Mal v. Director of Inspection (Investigation), (1974) 1 SCC 345, and the principle enunciated therein is as under:*
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> ***If the Evidence Act, 1872 permits relevancy as the only test of admissibility of evidence, and, secondly, that Act or any other similar law in force does not exclude relevant evidence on the ground that it was obtained under an illegal search or seizure, it will be wrong to invoke the supposed spirit of our Constitution for excluding such evidence**. Nor is it open to us to strain the language of the Constitution, because some American Judges of the American Supreme Court have spelt out certain constitutional protections from the provisions of the American Constitution. So, neither by invoking the spirit of our Constitution nor by a strained construction of any of the fundamental rights can we spell out the exclusion of evidence obtained on an illegal search.*
>
> ***So far as India is concerned its law of evidence is modelled on the rules of evidence which prevailed in English law, and courts in India and in England have consistently refused to exclude relevant evidence merely on the ground that it is obtained by illegal search or seizure. Where the test of admissibility of evidence lies in relevancy, unless there is an express or necessarily implied prohibition in the Constitution or other law evidence obtained as a result of illegal search or seizure is not liable to be shut out.***
>
> ***15.2.** This being the law, Direction (b) given by the High Court that the confession and alleged recovery has no evidentiary value is clearly illegal and has to be set aside. The effect of the confession and also the recovery of the incriminating article at the pointing out of the accused has to be examined strictly in accordance with the provisions of the Evidence Act."*

24. In **State (NCT of Delhi) v. Navjot Sandhu**, (2005) 11 SCC 600, a question arose regarding the legality and admissibility of intercepted telephone calls in the context of telephone conversation between accused Shaukat and his wife Afsan Guru and the conversation

between accused Gilani and his brother Shah Faizal. The Hon'ble Supreme Court dealt with the question in the following words: -

> *"**153.** ... On the relevant day, the interception of messages was governed by Section 5(2) of the Telegraph Act, 1885 read with Rule 419-A of the Telegraph Rules, 1951. The substantive power of interception by the Government or the authorised officer is conferred by Section 5. The modalities and procedure for interception is governed by the said Rules. It is contended by the learned Senior Counsel appearing for the two accused Shaukat and Gilani, that even Rule 419-A, has not been complied with in the instant case, and, therefore, the tape-recorded conversation obtained by such interception cannot be utilised by the prosecution to incriminate the said accused. It is the contention of the learned counsel for the State Mr Gopal Subramanium, that there was substantial compliance with Rule 419-A and, in any case, even if the interception did not take place in strict conformity with the Rule, that does not affect the admissibility of the communications so recorded. In other words, his submission is that the illegality or irregularity in the interception does not affect its admissibility in evidence there being no specific embargo against the admissibility in the Telegraph Act or in the Rules. Irrespective of the merit in the first contention of Mr Gopal Subramanium, we find force in the alternative contention advanced by him.*
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> ***154.** In regard to the first aspect, two infirmities are pointed out in the relevant orders authorising and confirming the interception in respect of specified telephone numbers. It is not shown by the prosecution that the Joint Director, Intelligence Bureau who authorised the interception, holds the rank of Joint Secretary to the Government of India. Secondly, the confirmation orders passed by the Home Secretary (contained in Vol. 7 of the lower court record, p. 447, etc.) would indicate that the confirmation was prospective. We are distressed to note that the confirmation orders should be passed by a senior officer of the Government of India in such a careless manner, that too, in an important case of this nature. **However, these deficiencies or inadequacies do not, in our view, preclude the admission of intercepted telephonic communication in evidence**. It is to be noted that unlike the proviso to Section 45 of POTA, **Section 5(2) of the Telegraph Act or Rule 419-A does not deal with any rule of evidence. The non-compliance or inadequate compliance with the provisions of the Telegraph Act does not per se affect the admissibility.** The legal position regarding the question of admissibility of the tape-recorded conversation illegally collected or obtained is no longer res integra in view of the decision of this Court in R. M. Malkani v. State of Maharashtra, (1973) 1 SCC 471. In that case, the Court clarified that a contemporaneous tape record of*

a relevant conversation is a relevant fact and is admissible as res gestae under Section 7 of the Evidence Act. Adverting to the argument that Section 25 of the Telegraph Act, 1885 was contravened the learned Judges held that there was no violation. At the same time, the question of admissibility of evidence illegally obtained was discussed. The law was laid down as follows: (SCC p. 477, para 24)

*"**There is warrant for the proposition that even if evidence is illegally obtained it is admissible**. Over a century ago it was said in an English case where a constable searched the appellant illegally and found a quantity of offending article in his pocket that it would be a dangerous obstacle to the administration of justice if it were held, because evidence was obtained by illegal means, it could not be used against a party charged with an offence. See Jones v. Owens [(1870) 34 JP 759] . The Judicial Committee in Kuruma v. R. [(1955) 1 All ER 236 : 1955 AC 197 : (1955) 2 WLR 223 (PC)] dealt with the conviction of an accused of being in unlawful possession of ammunition which had been discovered in consequence of a search of his person by a police officer below the rank of those who were permitted to make such searches. The Judicial Committee held that the evidence was rightly admitted. The reason given was that if evidence was admissible it matters not how it was obtained. There is of course always a word of caution. It is that the judge has a discretion to disallow evidence in a criminal case if the strict rules of admissibility would operate unfairly against the accused. That caution is the golden rule in criminal jurisprudence."*

***155.** We may also refer to the decision of a Constitution Bench of this Court in Pooran Mal v. Director of Inspection (Investigation), (1974) 1 SCC 345, in which the principle stated by the Privy Council in Kuruma case, (1955) 1 All ER 236, was approvingly referred to while testing the evidentiary status of illegally obtained evidence. Another decision in which the same approach was adopted is a recent judgment in State v. N.M.T. Joy Immaculate, (2004) 5 SCC 729. It may be mentioned that Pooran Mal case was distinguished by this Court in Ali Mustaffa Abdul Rahman Moosa v. State of Kerala, (1994) 6 SCC 569, which is a case arising under the NDPS Act on the ground that contraband material seized as a result of illegal search and seizure could by itself be treated as evidence of possession of the contraband which is the gist of the offence under the said Act. In the instant case, the tape-recorded conversation which has been duly proved and conforms to the requirements laid down by this Court in Ram Singh v. Col. Ram Singh, 1985 Supp SCC 611, can be pressed into service against the accused concerned in the joint trial for the offences under the Penal Code as well as POTA. Such evidence cannot be shut out by applying the embargo contained in Section 45 when on*

> *the date of interception, the procedure under Chapter V of POTA was not required to be complied with. On the relevant date POTA was not in the picture and the investigation did not specifically relate to the offences under POTA. The question of applying the proviso to Section 45 of POTA does not, therefore, arise as the proviso applies only in the event of the communications being legally required to be intercepted under the provisions of POTA. The proviso to Section 45 cannot be so read as to exclude such material in relation to the POTA offences if it is otherwise admissible under the general law of evidence.*

25. The law is clear that any evidence cannot be refused to be admitted by the Court on the ground that it had been obtained illegally. The judgment of Delhi High Court in the case of **Sanjay Pandey versus Directorate of Enforcement**, 2022 SCC OnLine Del 4299 and the judgment of Andhra Pradesh High Court in **Rayala M. Bhuvaneswari Versus Nagaphanender Rayala**, AIR 2008 AP 98 have not taken into consideration the above referred law laid down by the Hon'ble Supreme Court and, therefore, those are *per incuriam* judgments and those are not binding precedents.

26. Therefore, whether the telephonic conversation between the two accused persons was intercepted or not and whether it was done legally or not, would not affect the admissibility of the recorded conversation in evidence against the applicant.

27. Moreover, the telephonic conversation recorded in the digital voice recorder is not the solitary evidence relied upon by the prosecution and it appears that the prosecution proposes to produces other evidences as well during trial.

28. In **Gayatri Prasad Prajapati vs. Directorate of Enforcement** 2023 SCC OnLine All 376, this Court held that: -

> *"the law regarding the approach to be adopted by the court while considering an application for discharge of the accused persons under Section 227 and approach while framing charges under Section 228 of the Code, is that while considering an application for discharge of the accused under Section 227 of the Code, the Court has to form a definite opinion, upon consideration of the record of the case and the documents submitted therewith, that there is not sufficient ground for proceeding against the accused. However, while framing*

> *charges, the Court is not required to form a definite opinion that the accused is guilty of committing an offence. The truth of the matter will come out when evidence is led during the trial. Once the facts and ingredients of the Section exist, the court would presume that there is ground to proceed against the accused and frame the charge accordingly and the Court would not doubt the case of the prosecution."*

29. In the present case, no such material or ground is present from which the Court may form a definite opinion that there no sufficient ground for proceeding against the applicant. Therefore, I do not find any illegality in the order rejecting the discharge application filed by the revisionist.

30. The revision lacks merit and the same is, accordingly, **dismissed**.

(Subhash Vidyarthi, J.)

Order Date - 23.8.2023
Ram.