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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: July 21st, 2010

Date of Order: September 01 , 2010

+ Crl. Appeal No.785/2003

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Kender Singh

01.09.2010

...Appellant

Versus

CBI

...Respondent

Counsels:

Mr. Ravi Varma for appellant

Ms. Sonia Mathur & Mr. Sushil Kumar Dubey for respondent/CBI.

AND

+ Crl. Appeal No.44/2004

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State Through CBI

...Appellant

Versus

T.R. Sharma & Ors.

...Respondents

Counsels:

Ms. Sonia Mathur & Mr. Sushil Kumar Dubey for appellant/CBI

Mr. B.S. Rana for respondent.

AND

+ Crl. Appeal No.803/2003

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T.R. Sharma

...Appellant

Versus

The State (Through CBI)

...Respondent

Counsels:

Mr. B.S. Rana for appellant

Ms. Sonia Mathur & Mr. Sushil Kumar Dubey for respondent/CBI.

AND

+ Crl. Appeal No.27/2004

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B.K. Kapur

...Appellant

Versus

CBI

...Respondent

Counsels:

Mr. Anindya Malhotra for appellant

Ms. Sonia Mathur & Mr. Sushil Kumar Dubey for respondent/CBI.

JUSTICE SHIV NARAYAN DHINGRA

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| 1. | Whether reporters of local papers may be allowed to see the judgment? | Yes. |
| 2. | To be referred to the reporter or not? | Yes. |
| 3. | Whether judgment should be reported in Digest? | Yes. |

JUDGMENT

1. By this common order, I shall dispose of these four appeals against a common judgment. Criminal Appeal No.44 of 2004 has been preferred by the State assailing order on sentence passed by Special Judge whereas the other three appeals have been filed by the accused persons assailing the conviction.

2. Brief facts relevant for purpose of deciding these appeals are that telephone number 3018899, a service telephone working in Parliament House having ISD/STD was lying in disuse since 1988 as the minister to whom it was allotted had ceased to be the minister. It was detected that this telephone number was illegally functioning at 11/48, Commercial Centre, Malcha Marg, Chanakyapuri, New Delhi. On knowing that this telephone line was illegally functioning at some commercial centre, the conversation between the persons using the telephone line was taped. The said telephone was having ISD and STD facilities and it was found that the telephone was being used for making STD calls. The investigation team of MTNL then traced out as to where this line was

functioning and tracing of the telephone line led them to 11/48, Commercial Centre, Malcha Marg, Chanakyapuri, New Delhi to the premises of a private company namely 'Magnum International Trading Company'. Rajiv Chaudhary and Sudhir Chaudhary (accused no.4 and 5) were its directors. The taped telephonic conversation had revealed that the phone was being used by one B.K. Kapur (accused no.6). Further investigation revealed that it was accused no.1,2 and 3 who were responsible for illegally diverting the Parliament House telephone line to the business place of accused no.4 and 5. This telephone was found illegally operative from 23rd March, 1993, but could be detected on 23rd August 1993. In order to investigate as to where this telephone was functioning and who was using it, the telephone was allowed to remain operative till 26th August 1993. Thus, the period for which this telephone line remained illegally functioning at the premises of accused no.4 and 5 was from 23rd March, 1993 to 26th August 1993. (Accused numbers given herein are as per chargesheet).

3. Accused no.3 and 4 died during the trial. Accused no.5 was acquitted by the learned trial court. The trial court convicted accused no.1,2 and 6 i.e. three appellants under Sections 120B IPC read with section 13(1)(d) of Prevention of Corruption Act and the trial court convicted accused no.1 and 2 i.e. T.R. Sharma and Kender Singh additionally under Section 13(1)(d) read with section 13(2) of Prevention & Corruption Act. The trial court after convicting them, instead of sentencing them under Section 13(2) of Prevention of Corruption Act, gave benefit of probation to all the three accused persons. The State has filed appeal in view of provisions of Section 13(2) providing minimum sentence and in view of Section 18 of Probation of Offenders Act, submitting that benefit of probation could not be given. The appellant B.K. Kapur has appealed on the ground that the only evidence against him was that he had used the said telephone, and misuse of the said telephone would not make him liable for conspiracy. T.R. Sharma and Kender Singh have appealed on the ground that there was no evidence to

convict them for either of the offences.

4. As far as functioning of the said telephone illegally at the business place of Magnum International Trading Company, Malcha Marg is concerned, none of the appellants has challenged this fact. The fact that telephone number 3018899 of Parliament House was found illegally functioning at 11/48, Commercial Complex, Malcha Marg has been proved by cogent evidence and I need not discuss the evidence as this fact is not disputed by the appellants.

5. The only plea raised by the two appellants viz. Kender Singh and T.R. Sharma is their non-involvement in diverting this line from Parliament House to business place of Magnum International Trading Company at 48/11, Commercial Centre, Malcha Marg, Chanakyapuri, New Delhi.

6. This phone was in disuse from 1988. The room of the minister was lying locked and the telephone instrument and other fittings were not there. The telephone was in disuse since February 1988 and was lying in abandoned condition. This telephone being a telephone of a minister, had ISD and STD facilities. Despite the fact that this telephone was in disuse since 1988 and there were no fittings, a VIP fault docket qua this telephone was booked on 23rd March 1993. It is not known as to who lodged this false report as it seems that the investigating agency did not investigate this aspect. Once the fault report was generated, it was marked to Kender Singh (accused no.2) who was on duty on 23rd March 1993 in telephone exchange. The report of Lineman was that there was no instrument, no fittings. However, Kender Singh on the docket made an order and gave directions for change of pair of this phone from 2P/88 to 2P/86 (change of pair means change of telephone line allotted to a particular number). Thus the pair which was allotted to number 3018899 was directed to be changed to 2P/86. This direction was

given without clearance from AE(FRS) and this direction was given despite the fact that there was no fittings beyond Parliament House (MDF). Accused Satpal, since deceased, gave a wrong report in fault control register and looped line in Parliament House (MDF) and later on removed the looping between the line 2P/88 and 2P/86 and reversed the current at 2P/86 which was jumped to another vacant pair 18K/11, leading to that pair where business place of Magnum International was situated and this telephone line was illegally connected to the business place of Magnum International. The prosecution proved and relied upon Ex.PW16/B, a fault docket, showing that Kender Singh had ordered change of pair from 2P/88 to 2P/86. In the fault docket itself it is observed that there was no fittings and no instrument, as reported by Lineman, despite this giving of direction for change of pair by Kender Singh only shows his involvement in the conspiracy and in diversion of this telephone. The order for change of pair could have been given if there was fault in existing pair. Since order for change of pair was given without there being any fault in pair, it shows order was given to facilitate looping and diverting the line. It is argued by the counsel for the appellant Kender Singh that Kender Singh had merely performed his duty and Kender Singh had not given orders for change of line. The fault docket is normally prepared in the manner in which it was prepared by Kender Singh and for change of lines separate orders are required to be obtained from AE(FRS). He relied upon the testimony of PW-11 Mr. R.P. Singh who was AE (FRS).

7. There is no doubt that if the things are done in a legal way, permission of Mr. R.P. Singh AE(FRS) was necessary to change the line but the fact remains that in this case things were not done in a legal manner and were done in an illegal manner. This telephone was sought to be illegally diverted and that is why the fault docket was prepared by Kender Singh deliberately giving directions for change of line. It nails down his complicity in the entire conspiracy. Once it had come to notice of Kender Singh that there was no fittings, no instrument, he could not have given directions or even

suggested for change of line from 2P/88 to 2P/86. The fault docket is an order/ direction which is given as to what is to be done in the complaint. Once lineman has informed Kender Singh that there was no telephone and no fittings and nobody could have reported fault in line, still if Kender Singh had, in the fault docket, given directions for change of pair, it was for Kender Singh to explain his act in view of Section 106 of the Evidence Act as to what made him to give these directions. The arguments raised on behalf of Kender Singh that if a pair was faulty, the lineman was supposed to ask for a free pair in consultation with MDF and to forward the request to supervisor concerned who in this case was PW-16, is baseless. Lineman had not reported fault in line 28/88 and there was no necessity for Kender Singh to prepare fault docket giving directions of changing the pair. The very fact that Kender Singh gave directions for change of pair proves complicity of Kender Singh in the entire operation of diverting this Parliament House line to a business premises at Malcha Marg. The lineman in this case had appeared as PW-16. He had testified that he received complaint on 23rd March 1993 in respect of two telephone including telephone number 3018899. The docket pertaining to 301889 was given to him and the report on reverse of this docket was recorded by Kender Singh Operator. He identified the handwriting of Kender Singh. He conveyed the report to Vinod Kumar and handed over the docket to him. It is apparent that the report of fault in the telephone was created in order to divert this line illegally and thereafter the docket was prepared which was handed over to the lineman for compliance. The lineman it seems changed the pair from 2P/88 to 2P/86. This pair was then looped and diverted to an unused pair of Chanakyapuri Exchange namely 18K/11 and telephone was illegally installed at Malcha Marg, office of 'Magnum International'.

8. T.R. Sharma accused was working as SDO in the telephone exchange. The evidence against him is that he was conveyed by accused Satpal Sharma who was present in the office that there was no fittings and no instrument and the room of this

telephone number 3018899 was locked. Witness Vinod Kumar PW-10 had testified that he personally told T.R. Sharma to physically verify the non-existence of instrument and fittings on telephone number 3018899. T.R. Sharma at that time was Supervisor of both Malcha Marg and Parliament House area. The learned Special Judge found that T.R. Sharma (SDO) and Kender Singh operator both had colluded for diverting this line from Parliament House to Malcha Marg. T.R. Sharma SDO was immediate boss of Kender Singh and Kender Singh was the operator and illegal use of this telephone was the result of collusion between three accused namely T. R. Sharma, Kender Singh and the third accused who died during trial. T. R. Sharma since was informed by PW-10 about instrument not being there and the fittings not being there, he could not have become oblivious to the fact that the line had been diverted from 2P/88 to 2P/86 illegally and the telephone was put to misuse.

9. There is no doubt about misuse of this telephone line. The conspiracy to divert this telephone line has to be inferred from the circumstances and action of the persons. A conspiracy is never hatched openly in knowledge of everyone. The conspiracies are always hatched in secrecy. In order to establish conspiracy, direct evidence is hardly available and it is to be inferred from circumstantial evidence which come on record. The lack of direct evidence relating to conspiracy has no consequence. In the present case, there is no doubt that an agreement was reached between the director of Magnum International and the officials of MTNL i.e. accused no.1, 2 and 3, to divert this line illegally to the business premises of Magnum International. This telephone line was having ISD and STD facilities and evidence shows that from the date it was diverted till it was detected huge amount of STD calls were made on it from premises of Magnum International and it also paid a bill of more than Rs.1,80,000/- for illegal use of this telephone though under protest. In view of the fact that this telephone was in disuse and a fault complaint was generated and initiated by deceased accused and order for change

of pair was illegally made by accused Kender Singh within the knowledge of accused T.R. Sharma who was SDO at that time and to whom it was specifically told that he should verify about this telephone, I consider that the complicity of both the appellants stands proved. For proving common design, it is not necessary to prove that the parties came together and actually agreed in terms of this common design to do illegal act. It is sufficient if it is proved that the illegal act was committed and the parties had some role in completion of illegal act. What is to be seen is whether there was a common design and if there was a common design, did the accused performed a part in the common design or omitted to perform his duties so that common design was accomplished. In the present case, accused T.R. Sharma, SDO did not perform his duties of verifying about this telephone despite information and allowed illegal act to be performed by other persons thereby showing his complicity in the common design.

10. The plea taken by the counsel for T.R. Sharma is that he had no knowledge of the change of pair. It was obligatory on the part of personal staff of minister to get the telephone closed and since the telephone was not got closed, this incident of illegal diversion of telephone line happened. It is also submitted that T.R. Sharma took charge of SDO in 1990 while the telephone was in disuse since 1988.

11. I consider that this arguments has no force. No doubt the disuse of telephone line should have been brought to the notice of telephone department and the line should have been closed and no doubt that the lack of this act on the part of personal staff of minister was the reason that this telephone line was still having ISD and STD facilities with current flowing in the line, due to which this could be illegally put to use by the accused persons. But a person, who has not locked his house, cannot be blamed for the theft committed by thief. One cannot reason that had the person locked his house, thief would not have got tempted to steal therefore it was not the fault of the thief but it was

fault on the part of house owner who did not lock his house. Further T. R. Sharma being SDO of the area since 1990 was supposed to know which were the VIP phone numbers. Mostly the phone numbers of Parliament House and other important phone numbers are known to all SDOs working in telephone exchange and they personally take care of working of these telephones. Once it was informed to T.R. Sharma that there was a fault report of this telephone he was supposed to verify physically about the telephone as to why instrument and fittings were not there and how the pair has been changed and how a fault report has been generated when the telephone was not in use nor physically there and even fittings were not there showing that the said telephone was abandoned. I, therefore, consider that the learned trial court rightly came to conclusion that both the appellants entered into a criminal conspiracy with the director of Magnum International Trading Company, Malcha Marg to commit offence under Sections 13(1) (d) of Prevention of Corruption Act i.e. obtaining for any other person's advantage by committing criminal misconduct and the rightly convicted them also for criminal misconduct.

12. Appellant B.K. Kapur is the maternal uncle of Mr. Rajiv Chaudhary who was the person in charge of the office of Magnum International, as held by learned trial court. Mr. Kapoor was actually found using this telephone on an occasion during those three days when the telephone was kept on surveillance. This telephone was extensively used at the office of Magnum International. The record and the documents seized from PA to Mr. Rajiv Chaudhary would show that the telephone was being used for the purpose of company extensively. There is no evidence that Mr. B.K. Kapur was having any share in the company or was connected with the management of the company in any manner and he was going to draw an advantage if the company got benefits due to illegal use of STD facility. There is no doubt that Mr. B.K. Kapur became greedy and started using STD of this telephone. The explanation that he had come to office of company to know the fax

number also seems to be false since Mr. B.K. Kapur had a telephone at his own home and he could have known fax number by just giving a call. It only seems that Mr. B.K. Kapur was told that he could use the STD facility for free from the office of Magnum International and that greed of using the telephone facility free brought him to the office at Malcha Marg and he started using this telephone facility for making telephone calls to his daughter who was away to Bangalore. However, I consider that B.K. Kapur cannot be held liable for conspiracy for illegally installing this telephone at the office of Magnum International and he cannot be held to be a part of conspiracy because he used this telephone for making free telephone calls to his daughter. It is possible that many employees and other persons working in company also made free telephone calls from this telephone line to their relatives, after knowing that this telephone was illegally installed at the office of Magnum International in conspiracy with telephone exchange employees, such persons who used this telephone cannot be said to be conspirators in installation of this telephone illegally at the office of Magnum International. Only that person, who was responsible for business of Magnum International and who conspired to get this telephone installed in its office can be said to be a part of conspiracy. I, therefore, accept the appeal of Mr. B.K. Kapur and dismiss the appeals of Mr. T.R. Sharma and Mr. Kender Singh.

13. The State has filed appeal against grant of probation to the accused persons. I consider that the order of learned Special Judge granting probation was per se illegal in view of Section 13(2) of Prevention of Corruption Act. Section 13(2) reads as under:

“13. Criminal misconduct by a public servant

(1) A public servant is said to commit the offence of criminal misconduct,-

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(2) Any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall be not less

than one year but which may extend to seven years and shall also be liable to fine.”

14. The Supreme Court in *State through S.P. New Delhi v Ratan Lal Arora* 2004 Crl.L. J 2105 observed as under:

“12. That apart Section 7 as well as Section 13 of the Act provide for a minimum sentence of six months and one year respectively in addition to the maximum sentences as well as imposition of fine. Section 28 further stipulates that the provisions of the Act shall be in addition to and not in derogation of any other law for the time being in force. In the case of Superintendent Central Excise, Bangalore vs Bahubali, (AIR 1979 SC 1271), while dealing with Rule 126-P (2) (ii) of the Defence of India Rules which prescribed a minimum sentence and Section 43 of the Defence of India Act, 1962 almost similar to the purport enshrined in Section 28 of the Act in the context of a claim for granting relief under the Probation Act, this Court observed that in cases where a specific enactment, enacted after the Probation Act prescribes a minimum sentence of imprisonment, the provisions of Probation Act cannot be invoked if the special Act contains any provision to enforce the same without reference to any other Act containing a provision, in derogation of the special enactment, there is no scope for extending the benefit of the Probation Act to the accused. Unlike, the provisions contained in Section 5(2) proviso of the Old Act providing for imposition of a sentence lesser than the minimum sentence of one year therein for any "special reasons" to be recorded in writing, the Act did not carry any such power to enable the Court concerned to show any leniency below the minimum sentence stipulated. Consequently, the learned Single Judge in the High Court committed a grave error of law in extending the benefit of probation even under the Code. At the same time we may observe that though the reasons assigned by the High Court to extend the benefits of probation may not be relevant, proper or special reasons for going below the minimum sentence prescribed which in any event is wholly impermissible,

as held supra, we take them into account to confine the sentence of imprisonment to the minimum of six months under Section 7 and minimum of one year under Section 13(2) of the Act, both the sentences to run concurrently. So far as the levy of fine in addition made by the learned Trial Judge with a default clause on two separate courts are concerned, they shall remain unaffected and are hereby confirmed.”

15. In view of this judgment of Supreme Court followed by *The State v A. Parthiban* 2006 CrI.L. J. 4772, wherein the Supreme Court again observed that in a conviction under Section 13(2) of the Act, the provision of Probation of Offenders Act cannot be extended at all to the accused.

16. I, therefore, set aside the order of granting probation to the appellants by the learned Special Judge. The appeal preferred by State is hereby allowed and the appeals of T.R. Sharma and Kender Singh are hereby dismissed.

17. The appellants T.R. Sharma and Kender Singh are liable to be sentenced for the offence under Section 13(2) (d) read with Section 13(2) of Prevention of Corruption Act. Considering the facts and circumstances, I award them sentence of one year, which is the minimum sentence prescribed under Section 13(2) of the Act, to which the accused can be sentenced. Appellants T.R. Sharma and Kender Singh be taken into custody to serve the sentence.

18. All the four appeals stand disposed of in view of above order.

September 01, 2010
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SHIV NARAYAN DHINGRA, J