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RAJAT PRASAD

v.

C.B.I.

(Criminal Appeal No. 747 of 2010)

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APRIL 24, 2014

[P. SATHASIVAM, CJI, RANJAN GOGOI AND N.V. RAMANA, JJ.]

Prevention of Corruption Act, 1988 – s.12 – Penal Code, C *1860 – s.120B – Conspiracy to execute sting operation involving the giving of bribe to a Union Minister in return for certain favours so as to discredit him on the eve of State Assembly elections and thereby bring political advantage to a rival of the Union Minister – Criminal charges against* D *appellants – Quashing of – Refusal by High Court – Propriety – Held: Whether commission of offence u/s.12 of the PC Act r/w s.120B IPC had been occasioned by acts attributed to the appellants or not, ideally, is a matter that can be determined only after evidence in the case is recorded – Whether the* E *operation was really a journalistic exercise and giving of bribe to A-1 was a mere sham or pretence or whether giving of the bribe was with expectation of favours in connection with mining projects, are questions that can only be answered by the evidence of the parties which is yet to come – Such facts* F *cannot be a matter of an assumption – Why in the present case there was a long gap (nearly 12 days) between the sting operation and the circulation thereof to the public is another relevant facet of the case that would require examination – Inherent possibilities of abuse of the operation as* G *videographed, namely, retention and use thereof to ensure delivery of the favours assured by the receiver of the bribe has to be excluded before liability can be attributed or excluded – This can happen only after the evidence of witnesses is recorded – Also, merely because in the charge-*

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sheet it is stated that the accused had undertaken the operation to gain political mileage cannot undermine the importance of proof of the aforesaid facts to draw permissible conclusions on basis thereof as regards the criminal intent of the accused in the present case – Prima facie materials available for fuller probe into the precise role of appellants in the alleged conspiracy – Order of the High Court refusing to interfere with the charges framed against the accused-appellants therefore fully justified.

Criminal Law – Crime detection – Proof of criminal acts – Sting operation – If recognized as a legal method of law enforcement – Position in India and in certain foreign jurisdictions discussed.

The appellants (A-6 and A-4) were accused in a complaint case in the Court of the Special Judge, CBI, Delhi. The gravamen of the allegations against the accused-appellants was that one Amit Jogi (A-5) son of Ajit Jogi, who was then the Chief Minister of the State of Chhatisgarh, had hatched a conspiracy alongwith A-3 to A-6 to execute a sting operation showing receipt of bribe by the Union Minister of State for Environment and Forest (A-1) so as to discredit him on the eve of the elections to the State Assembly of Chhatisgarh and thereby bring political advantage to Ajit Jogi who was a rival of the Union Minister. Currency notes amounting to Rs. 9 lakhs were handed over by A-3 to A-1 who accepted the same and carried the same out of the hotel in a laundry bag offered by A-3. The video recording of the entire incident along with audio recording of the conversations exchanged was secretly done and the same was subsequently released to the media.

The prosecution alleged commission of the offence under Section 7 of the of the Prevention of Corruption Act, 1988 against A-1 and offences under Section 120-B IPC

A read with Section 7 of the Act against A-2. Insofar as the other accused including the accused-appellants are concerned, according to the prosecution, they had committed offences punishable under Section 12 of the Act read with Section 120-B of the IPC.

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The appellants assailed the order passed by the Trial Court framing charges against them under Section 120-B of the IPC read with Section 12 of the Prevention of Corruption Act, 1988 before the High Court. The High Court refused to interfere with the order of the Trial Judge.
C The refusal of the High Court to exercise its inherent jurisdiction under Section 482 Cr.P.C. to quash the criminal charges framed against the accused-appellants was challenged in the present appeals.

D In the instant appeals, the questions that arose for consideration was what would be the position of sting operations if conducted not by a State agency but by a private individual and the liability, not of the principal offender honey trapped into committing the crime, but
E that of the sting operator who had stained his own hands while entrapping what he considers to be the main crime and the main offender.

Some ancillary questions that arose for consideration were: 1) Should such an individual i.e. the
F sting operator be held to be criminally liable for commission of the offence that is inherent and inseparable from the process by which commission of another offence is sought to be established; 2) Should the commission of the first offence be understood to be
G obliterated and extinguished in the face of claims of larger public interest that the sting operator seeks to make, namely, to expose the main offender of a serious crime injurious to pubiic interest; and 3) Can the commission of the initial offence by the sting operator be understood

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to be without any criminal intent and only to facilitate the commission of the other offence by the "main culprit" and its exposure before the public. A

Dismissing the appeals, the Court

HELD:1.1. The expression 'sting operation' seems to have emerged from the title of a popular movie called "The Sting" which was screened sometime in the year 1973. The movie was based on a somewhat complicated plot hatched by two persons to trick a third person into committing a crime. Being essentially a deceptive operation, though designed to nab a criminal, a sting operation raises certain moral and ethical questions. The victim, who is otherwise innocent, is lured into committing a crime on the assurance of absolute secrecy and confidentiality of the circumstances raising the potential question as to how such a victim can be held responsible for the crime which he would not have committed but for the enticement. Another issue that arises from such an operation is the fact that the means deployed to establish the commission of the crime itself involves a culpable act. [Para 10] [650-C-F] B C D E

1.2. Unlike the U.S. and certain other countries where a sting operation is recognized as a legal method of law enforcement, though in a limited manner, the same is not the position in India which makes the issues arising in the present case somewhat unique. A sting operation carried out in public interest has had the approval of this Court in *R.K. Anand* case though it will be difficult to understand the ratio in the said case as an approval of such a method as an acceptable principle of law enforcement valid in all cases. Even in countries like the United States of America where sting operations are used by law enforcement agencies to apprehend suspected offenders involved in different offences like drug trafficking, political and judicial corruption, prostitution, F G H

A property theft, traffic violations etc., the criminal jurisprudence differentiates between "the trap for the unwary innocent and the trap for the unwary criminal" approving situations where government agents "merely afford opportunities or facilities for the commission of the
B offense" and censuring situations where the crime is the "product of the creative activity" of law-enforcement officials. In the latter type of cases the defence of entrapment is recognized as a valid defence in the USA. If properly founded such a defence could defeat the
C prosecution. [Para 11] [650-F-G; 651-A-C]

1.3. A somewhat similar jurisprudence recognizing the defence of entrapment in sting operations has developed in Canada where the defence available under specified conditions, if established, may result in "stay"
D of judicial proceedings against the accused the effect of which in the said jurisdiction is a termination of the prosecution. [Para 12] [651-D-E]

1.4. In United Kingdom the defence of entrapment is
E not a substantive defence. However, a shift in judicial reaction appears to be emerging. [Para 13] [653-A, C]

1.5. Thus, sting operations conducted by the law enforcement agencies themselves in the above jurisdictions have not been recognized as absolute
F principles of crime detection and proof of criminal acts. Such operations by the enforcement agencies are yet to be experimented and tested in India and legal acceptance thereof by our legal system is yet to be answered. [Para 14] [653-G]

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R.K. Anand vs. Registrar, Delhi High Court (2009) 8 SCC 106: 2009 (11) SCR 1026 – referred to.

Sherman vs. United States 356 US 359 (1958); *Sorrell*
H *vs. United States* 287 US 435 (1932); *R vs. Regan* [2002] 1

SCR 297; *R vs. Mack* [1988] 2 SCR 903; *R* vs. *Sang* [1980] AC 402 and *R v. Loosely* [2001] UKHL 53 – referred to. A

2. The answer to the ancillary questions posed for consideration in the present appeals would depend, as in any criminal case, on the facts and circumstances thereof. A crime does not stand obliterated or extinguished merely because its commission is claimed to be in public interest. Any such principle would be abhorrent to our criminal jurisprudence. At the same time the criminal intent behind the commission of the act which is alleged to have occasioned the crime will have to be established before the liability of the person charged with the commission of crime can be adjudged. The doctrine of *mens rea*, though a salient feature of the Indian criminal justice system, finds expression in different statutory provisions requiring proof of either intention or knowledge on the part of the accused. Such proof is to be gathered from the surrounding facts established by the evidence and materials before the Court and not by a process of probe of the mental state of the accused which the law does not contemplate. The offence of abetment defined by Section 107 of the IPC or the offence of criminal conspiracy under Section 120A of IPC would, thus, require criminal intent on the part of the offender like any other offence. Both the offences would require existence of a culpable mental state which is a matter of proof from the surrounding facts established by the materials on record. Therefore, whether the commission of offence under Section 12 of the PC Act read with Section 120B IPC had been occasioned by the acts attributed to the accused appellants or not, ideally, is a matter that can be determined only after the evidence in the case is recorded. What the accused appellants assert is that in view of the fact that the sting operation was a journalistic exercise, no criminal intent can be imputed to the participants therein. Whether the operation was really B C D E F G H

such an exercise and the giving of bribe to A-1 was a mere sham or pretence or whether the giving of the bribe was with expectation of favours in connection with mining projects, are questions that can only be answered by the evidence of the parties which is yet to come. Such facts cannot be a matter of an assumption. Why in the present case there was a long gap (nearly 12 days) between the operation and the circulation thereof to the public is another relevant facet of the case that would require examination. The inherent possibilities of abuse of the operation as videographed, namely, retention and use thereof to ensure delivery of the favours assured by the receiver of the bribe has to be excluded before liability can be attributed or excluded. This can happen only after the evidence of witnesses is recorded. Also, merely because in the charge-sheet it is stated that the accused had undertaken the operation to gain political mileage cannot undermine the importance of proof of the aforesaid facts to draw permissible conclusions on basis thereof as regards the criminal intent of the accused in the present case. [Para 15] [653-F-H; 654-A-H]

3. An issue has been raised on behalf of the appellants that any finding with regard to the culpability of the accused, even *prima-facie*, would be detrimental to the public interest inasmuch as any such opinion of the Court would act as an inhibition for enterprising and conscious journalists and citizens from carrying out sting operations to expose corruption and other illegal acts in high places. The matter can be viewed differently. A journalist or any other citizen who has no connection, even remotely, with the favour that is allegedly sought in exchange for the bribe offered, cannot be imputed with the necessary intent to commit the offence of abetment under Section 12 or that of conspiracy under Section 120B IPC. Non applicability of the aforesaid provisions of law in such situations, therefore, may be *ex-facie* apparent. The cause

of journalism and its role and responsibility in spreading information and awareness will stand subserved. It is only in cases where the question reasonably arises whether the sting operator had a stake in the favours that were allegedly sought in return for the bribe that the issue will require determination in the course of a full-fledged trial. The above is certainly not exhaustive of the situations where such further questions may arise requiring a deeper probe. As such situations are myriad, if not infinite, any attempt at illustration must be avoided. [Para 16] [656-A-E]

4. The contention of the appellants that the materials/ allegations against the accused appellants in the charge-sheet filed do not make out any criminal offence against them will not require a detailed probe and our conclusion thereon at the present stage of the proceeding. Suffice it will be to negative the said contention by holding that *prima facie* materials are available for a fuller probe into the precise role of A-4 and A-6 in the alleged conspiracy. The order of the High Court refusing to interfere with the charges framed against the accused-appellants is fully justified. [Paras 17, 18]

Case Law Reference :

2009 (11) SCR 1026	referred to	Para 11
356 US 359 (1958	referred to	Para 11
287 US 435 (1932	referred to	Para 11
[2002] 1 SCR 297	referred to	Para 12
[1988] 2 SCR 903	referred to	Para 12
[1980] AC 402	referred to	Para 13
[2001] UKHL 53	referred to	Para 13

A CRIMINAL APPELLATE JURISDICTION : CRIMINAL APPEAL NO. 747 OF 2010

From the Judgment and Order dated 30.05.2008 of the High Court of Delhi at New Delhi in Criminal Revision No. 472 of 2007.

B

WITH

Criminal Appeal No. 748 of 2010.

C P. P. Malhotra, ASG, U. U. Lalit, P. S. Narasimha, Haris Beeran, Mushtaq Salim, Radha Shyam Jena, Rohit Rao N., Ananga Bhattacharyya, Ritesh K. Chowdhary, S. Nagarajan, Dinesh Kothari, Yasir Rauf, B. Krishna Prasad for the appearing parties.

D The Judgment of the Court was delivered by

RANJAN GOGOI, J. 1. The refusal of the Delhi High Court to exercise its inherent jurisdiction under Section 482 Cr.P.C. to quash the criminal charges framed against the accused-
E appellants has been challenged in the present appeals. Specifically, the appellants, Rajat Prasad and Arvind Vijay Mohan who are the sixth and fourth accused respectively in CC Case No. 28 of 2005 (hereinafter referred to as A-6 and A-4) in the Court of the learned Special Judge, CBI, Delhi had
F assailed the order dated 24/25.04.2007 passed by the learned Trial Court framing charges against them under Section 120-B of the IPC read with Section 12 of the Prevention of Corruption Act, 1988 (hereinafter for short 'the Act') before the High Court. The High Court by its order dated 30.05.2008 refused to interfere with the said order of the learned Trial
G Judge. Hence, the present appeals by special leave.

2. The relevant facts which will require enumeration can be summed up as follows.

H On 16th of November, 2003 in the Delhi Edition of the

Indian Express a news item under the caption "Caught on Tape : Union Minister Taking Cash saying money is no less than God" had appeared showing visuals of one Dalip Singh Ju Dev, (deceased first accused) (A-1), the then Union Minister of State for Environment and Forest, receiving illegal gratification from one Rahul alias Bhupinder Singh Patel (third accused) (A-3) in the presence of the Additional Private Secretary to the Minister one Natwar Rateria (second accused) (A-2). Immediately on publication of the abovesaid news item a preliminary enquiry was registered by the ACU-II of the Central Bureau of Investigation, New Delhi and on conclusion of the said preliminary enquiry FIR dated 19.12.2013 was filed alleging commission of offences under Section 12 of the PC Act, 1988 read with Section 120-B IPC by the present appellants (A-4 and A-6).

3. The aforesaid FIR was challenged in a proceeding before the Delhi High Court registered and numbered as Crl. Misc. Case No. 59/2004. It appears that there was no interim restraint on the investigation pursuant to the FIR filed. While the investigation was in progress, Crl. Misc. Case No. 59/2004 came to be dismissed by the Delhi High Court by order dated 10.11.2004. As against the said order dated 10.11.2004, SLP (Crl.) No. 6336 of 2004 was instituted by the 4th Accused as well as other accused before this Court. However, as on completion of investigation chargesheet had been filed on 5.12.2005, the aforesaid SLP was closed by order dated 23.11.2007 as having become infructuous.

4. From the chargesheet dated 05.12.2005 filed by the CBI before the competent court, the gravamen of the allegations against the accused-appellants appear to be that one Amit Jogi (accused No.5) (A-5) son of Ajit Jogi, who was then the Chief Minister of the State of Chhatisgarh, had hatched a conspiracy alongwith A-3 to A-6 to execute a sting operation showing receipt of bribe by the Union Minister of State for Environment and Forest (A-1) so as to discredit him on the eve

of the elections to the State Assembly of Chhatisgarh and thereby bring political advantage to Shri Ajit Jogi who was a rival of the Union Minister. According to the prosecution, as per the conspiracy hatched, A-5 alongwith other co-conspirators had initially brought in one Manish Rachhoya (PW-23), a close friend of A-5, as a representative of a Calcutta based mining company which had pending work in the Ministry of Environment and Forest as one of the conspirators. A-5 had requested one Shekhar Singh (PW-22) to introduce the aforesaid Manish Rachhoya to A-1, which was agreed to. The said meeting was to be held in Hotel Taj Palace, New Delhi and to effectuate the said purpose A-6 had booked suite No. 151 in Hotel Taj Palace, New Delhi in the fictitious name of Manish Sarogi. According to the prosecution, Manish was introduced to Shekhar Singh. However, subsequently Manish developed cold feet and decided to disassociate himself from the plan hatched by A-5. However, on instructions of A-5, Manish had informed A-1 that as the deal had certain technical parameters, in future, his partner Rahul (A-3) would be discussing the matter with A-1.

5. The further case of the prosecution, as alleged in the chargesheet, is that at this stage Rahul alias Bhupinder Singh Patel (A-3) was roped into the conspiracy. He stayed in suite No. 151 in Hotel Taj Palace, New Delhi for a number of days and had meetings both with A-1 and A-2 on several occasions in the said hotel and had successfully be-friended them. According to the prosecution, on 5.11.2003, Rahul (A-3) had checked into Room No. 822 in Hotel Taj Mahal, Man Singh Road, New Delhi which was booked under the fictitious name of Raman Jadoja. It appears that on the same day i.e. 5.11.2003, A-3 requested A-1 and A-2 to visit him in the said hotel room. According to the prosecution, A-4 had arranged for installation of hidden video recording equipment in the sitting room of the said suite in Taj Mahal Hotel, Man Singh Road, New Delhi through one Manoj Hora, a dealer in the electronic products. In the late evening of 5.11.2003 A-1 and A-2 reached

the abovesaid hotel and went to Room No. 822. They were entertained. Wide ranging discussions between A-3 and other two accused (A-1 and A-2) were held in different matters including matters relating to certain mining projects in the States of Orissa and Chattisgarh which were pending in the Ministry. According to the prosecution, both A-1 and A-2 had assured A-3 that necessary assistance in getting the pending proposals cleared will be offered. Thereafter, currency notes amounting to Rs. 9 lakhs were handed over by A-3 to A-1 who accepted the same and carried the same out of the hotel in a laundry bag offered by A-3. The video recording of the entire incident along with audio recording of the conversations exchanged was secretly done and the same was subsequently released to the media. The video and audio cassette recording of the event was sent for analysis and report thereof was received from the FSL, Hyderabad. It is on these facts that the prosecution had alleged commission of the offence under Section 7 of the Act against A-1 and offences under Section 120-B IPC read with Section 7 of the Act against A-2. Insofar as the other accused including the present accused-appellants are concerned, according to the prosecution, they had committed offences punishable under Section 12 of the Act read with Section 120-B of the IPC. As already noticed, pursuant to the aforesaid chargesheet filed, the learned Trial Court had framed charges against the accused-appellants under Section 120-B IPC read with Section 12 of the PC Act.

6. We have heard Shri Uday U. Lalit and Shri P.S. Narsimha, learned senior counsels for the appellant in Criminal Appeal No. 747/2010 and 748/2010 respectively and Shri P.P. Malhotra, learned Addl. Solicitor General for the respondent.

7. Learned counsels for the appellants have placed before us the relevant part of the chargesheet mentioning the claim raised by A-3, during investigation, that the act of payment of illegal gratification to A-1 and the secret video recording of the same was prompted by a journalistic desire to expose

A corruption in public life. It is contended that the present case raises an issue of great public importance, namely, the legality of a sting operation prompted by overwhelming public interest. According to learned counsel, the said operation had been carried out to reveal the murky deeds in seats of governmental
B power. If an intention to commit any such criminal act is to be attributed to a citizen/journalist who had undertaken a sting operation, public interest would be severely jeopardized. It is also argued that in the chargesheet filed it is mentioned that investigations had revealed that the entire operation was
C carried out to disgrace the first appellant prior to the elections to the Chhatisgarh State Assembly and that the motive behind the operation was to derive political mileage in favour of the father of A-5 who was the then Chief Minister of State of Chhatisgarh. It is contended that if the above was the aim of
D the sting operation, surely, no offence under Section 12 of the Act or 120-B IPC is even remotely made out against the accused-appellants.

8. Learned counsels have elaborately laid before the Court the ingredients of the offence of criminal conspiracy defined in
E Section 120-A of the IPC to contend that there must be (1) commonality of object to be accomplished; (2) a plan or scheme embodying means to accomplish; and (3) an agreement or understanding between two or more persons whereby they become committed to cooperate for
F accomplishment of the object by the means embodied in the agreement. It is pointed out that going by the result of the investigation mentioned in the chargesheet, as elicited earlier, namely that the operation was aimed to disgrace A-1 and to derive political mileage in favour of the father of A-5, the
G conspiracy, if any, is to defame A-1 and not to commit any of the offences alleged in the chargesheet. It is also argued that a reading of the chargesheet goes to show that the conspiracy alleged against A-3 to A-6 is one against A-1 and A-2 whereas the charge framed is for the offence of conspiracy to abet A-1

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and A-2. The inherent contradiction behind the alleged intent of the accused to trap and expose A-1 and A-2 and the charge of abetment to facilitate the commission of the offence by A-1 is highlighted. According to the appellants, the intention on their part as alleged by the prosecution was not to aid, assist or facilitate A-1 and A-2 in committing the offence but to expose A-1 and A-2 yet, the charge of abetment has been levelled. It is also argued that there was no criminal intent behind the giving of bribe and the absence of *mens rea* to commit the offences alleged is *ex-facie* apparent. Learned counsels for the accused-appellants have, by referring to the specific allegations mentioned in the chargesheet, submitted that even if the said allegations are accepted to be correct no criminal offence is made out against either of the accused-appellants. In this regard it is pointed out by Shri Narasimha that except for the allegation of arranging the video equipment which was installed in the hotel room there is no other material against Accused A-4. The said fact, by itself, is not enough to even *prima facie* attract the offence of criminal conspiracy. Insofar as A-6 is concerned, Shri Lalit, learned senior counsel has urged that the role attributed to the said accused is only in respect of booking of the room in Hotel Taj Palace where Manish Rachhoya (PW-23) had stayed. However, as the aforesaid Manish Rachhoya had withdrawn from the plan and, thereafter, no specific role in the alleged conspiracy is attributed to A-6, the prosecution insofar as A-6 is concerned is wholly unsustainable.

9. In reply, Shri P.P. Malhotra, learned Addl. Solicitor General has submitted that the sting operation involved the giving of bribe to A-1 who was a Union Minister at the relevant point of time and in return certain favours were sought. While the motive behind the act of videographing the incident may have been to derive political mileage by discrediting A-1, the giving of bribe amounts to abetment within the meaning of Section 107 of the IPC. The said criminal act would not stand obliterated by what is claimed to be the pious desire of the accused to expose corruption in public life. Learned Addl.

A Solicitor General has further submitted that the evidence in the case is yet to be recorded. Whether the exchange of money for favours in mining projects in Orissa and Chhatisgarh was a pretence or otherwise i.e. real and what were the true intentions behind the operation carried out are matters which will be clear B only after evidence in the case is recorded. The aforesaid stage must be allowed to be reached and completed, the learned Addl. Solicitor General has urged. It is also urged that the power to quash a criminal charge ought to be exercised within well defined parameters none of which exists in the present case.

C 10. The expression 'sting operation' seems to have emerged from the title of a popular movie called "The Sting" which was screened sometime in the year 1973. The movie was based on a somewhat complicated plot hatched by two persons to trick a third person into committing a crime. Being D essentially a deceptive operation, though designed to nab a criminal, a sting operation raises certain moral and ethical questions. The victim, who is otherwise innocent, is lured into committing a crime on the assurance of absolute secrecy and confidentiality of the circumstances raising the potential question E as to how such a victim can be held responsible for the crime which he would not have committed but for the enticement. Another issue that arises from such an operation is the fact that the means deployed to establish the commission of the crime itself involves a culpable act.

F 11. Unlike the U.S. and certain other countries where a sting operation is recognized as a legal method of law enforcement, though in a limited manner as will be noticed hereinafter, the same is not the position in India which makes the issues arising in the present case somewhat unique. A sting G operation carried out in public interest has had the approval of this Court in *R.K. Anand vs. Registrar, Delhi High Court*[1] though it will be difficult to understand the ratio in the said case as an approval of such a method as an acceptable principle

H 1. (2009) 8 SCC 106.

of law enforcement valid in all cases. Even in countries like the United States of America where sting operations are used by law enforcement agencies to apprehend suspected offenders involved in different offences like drug trafficking, political and judicial corruption, prostitution, property theft, traffic violations etc., the criminal jurisprudence differentiates between *"the trap for the unwary innocent and the trap for the unwary criminal"* (per Chief Justice Warren in *Sherman vs. United States*[2]) approving situations where government agents "*merely afford opportunities or facilities for the commission of the offense"* and censuring situations where the crime is the "*product of the creative activity"* of law-enforcement officials (*Sorrell vs. United States*[3]). In the latter type of cases the defence of entrapment is recognized as a valid defence in the USA. If properly founded such a defence could defeat the prosecution.

12. A somewhat similar jurisprudence recognizing the defence of entrapment in sting operations has developed in Canada where the defence available under specified conditions, if established, may result in "stay" of judicial proceedings against the accused the effect of which in the said jurisdiction is a termination of the prosecution. [*R vs. Regan*[4] (para 2)].

In *R vs. Mack*[5], it has been explained by the Canadian Supreme Court that entrapment occurs when (a) the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a bona fide inquiry, and, (b) although having such a reasonable suspicion or acting in the course of a bona fide inquiry, they go beyond providing an opportunity and induce the commission of an offence. The following factors determine whether the police

2. [356 US 359 (1958].
3. [287 US 435 (1932)].
4. ([2002] 1 SCR 903).
5. ([1988] 2 SCR 903).

A have done more than provide an opportunity to commit a crime.

(1) The type of crime being investigated and the availability of other techniques for the police detection of its commission.

B (2) whether an average person, with both strengths and weaknesses, in the position of the accused would be induced into the commission of a crime;

(3) the persistence and number of attempts made by the
C police before the accused agreed to committing the offence;

(4) the type of inducement used by the police including: deceit, fraud, trickery or reward;

D (5) the timing of the police conduct, in particular whether the police have instigated the offence or became involved in ongoing criminal activity;

(6) whether the police conduct involves an exploitation of
E human characteristics such as the emotions of compassion, sympathy and friendship;

(7) whether the police appear to have exploited a particular vulnerability of a person such as a mental handicap or a substance addiction;

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(8) the proportionality between the police involvement, as compared to the accused, including an assessment of the degree of harm caused or risked by the police, as compared to the accused, and the commission of any
G illegal acts by the police themselves;

(9) the existence of any threats, implied or express, made to the accused by the police or their agents;

(10) whether the police conduct is directed at undermining
H other constitutional values.

13. In United Kingdom the defence of entrapment is not a substantive defence as observed in *R* vs. *Sang*[6] by the House of Lords:-

> "*The conduct of the police where it has involved the use of an agent provocateur may well be a matter to be taken into consideration in mitigation of sentence; but under the English system of criminal justice, it does not give rise to any discretion on the part of the judge himself to acquit the accused or to direct the jury to do so, notwithstanding that he is guilty of the offence.*"

However, a shift in judicial reaction appears to be emerging which is clearly discernable in *R v. Loosely*[7] wherein the House of Lords found that:-

> "*A prosecution founded on entrapment would be an abuse of the court's process. The court will not permit the prosecutorial arm of the state to behave in this way.*" (*para16*)

> "*Entrapment is not a matter going only to the blameworthiness or culpability of the defendant and, hence, to sentence as distinct from conviction. Entrapment goes to the propriety of there being a prosecution at all for the relevant offence, having regard to the state's involvement in the circumstance in which it was committed.*" *(para 17)*.

14. Thus, sting operations conducted by the law enforcement agencies themselves in the above jurisdictions have not been recognized as absolute principles of crime detection and proof of criminal acts. Such operations by the enforcement agencies are yet to be experimented and tested in India and legal acceptance thereof by our legal system is yet

6. [1980] AC 402.
7. ([2001] UKHL 53.

A to be answered. Nonetheless, the question that arises in the present case is what would be the position of such operations if conducted not by a State agency but by a private individual and the liability, not of the principal offender honey trapped into committing the crime, but that of the sting operator who had
B stained his own hands while entrapping what he considers to be the main crime and the main offender. Should such an individual i.e. the sting operator be held to be criminally liable for commission of the offence that is inherent and inseparable from the process by which commission of another offence is
C sought to be established? Should the commission of the first offence be understood to be obliterated and extinguished in the face of claims of larger public interest that the sting operator seeks to make, namely, to expose the main offender of a serious crime injurious to public interest? Can the commission
D of the initial offence by the sting operator be understood to be without any criminal intent and only to facilitate the commission of the other offence by the "main culprit" and its exposure before the public? These are some of the ancillary questions that arise for our answer in the present appeals and that too at the
E threshold of the prosecution i.e. before the commencement of the trial

15. The answer to the above, in our considered view would depend; as in any criminal case, on the facts and circumstances thereof. A crime does not stand obliterated or
F extinguished merely because its commission is claimed to be in public interest. Any such principle would be abhorrent to our criminal jurisprudence. At the same time the criminal intent behind the commission of the act which is alleged to have occasioned the crime will have to be established before the
G liability of the person charged with the commission of crime can be adjudged. The doctrine of *mens rea*, though a salient feature of the Indian criminal justice system, finds expression in different statutory provisions requiring proof of either intention or knowledge on the part of the accused. Such proof is to be

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gathered from the surrounding facts established by the evidence and materials before the Court and not by a process of probe of the mental state of the accused which the law does not contemplate. The offence of abetment defined by Section 107 of the IPC or the offence of criminal conspiracy under Section 120A of IPC would, thus, require criminal intent on the part of the offender like any other offence. Both the offences would require existence of a culpable mental state which is a matter of proof from the surrounding facts established by the materials on record. Therefore, whether the commission of offence under Section 12 of the PC Act read with Section 120B IPC had been occasioned by the acts attributed to the accused appellants or not, ideally, is a matter that can be determined only after the evidence in the case is recorded. What the accused appellants assert is that in view of the fact that the sting operation was a journalistic exercise, no criminal intent can be imputed to the participants therein. Whether the operation was really such an exercise and the giving of bribe to A-1 was a mere sham or pretence or whether the giving of the bribe was with expectation of favours in connection with mining projects, are questions that can only be answered by the evidence of the parties which is yet to come. Such facts cannot be a matter of an assumption. Why in the present case there was a long gap (nearly 12 days) between the operation and the circulation thereof to the public is another relevant facet of the case that would require examination. The inherent possibilities of abuse of the operation as videographed, namely, retention and use thereof to ensure delivery of the favours assured by the receiver of the bribe has to be excluded before liability can be attributed or excluded. This can happen only after the evidence of witnesses is recorded. Also, merely because in the charge-sheet it is stated that the accused had undertaken the operation to gain political mileage cannot undermine the importance of proof of the aforesaid facts to draw permissible conclusions on basis thereof as regards the criminal intent of the accused in the present case.

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A 16. AN ISSUE HAS BEEN RAISED ON BEHALF OF THE APPELLANTS THAT ANY FINDING WITH REGARD TO THE CULPABILITY OF THE ACCUSED, EVEN *prima-facie*, would be detrimental to the public interest inasmuch as any such opinion of the Court would act as an inhibition for enterprising B and conscious journalists and citizens from carrying out sting operations to expose corruption and other illegal acts in high places. The matter can be viewed differently. A journalist or any other citizen who has no connection, even remotely, with the favour that is allegedly sought in exchange for the bribe C offered, cannot be imputed with the necessary intent to commit the offence of abetment under Section 12 or that of conspiracy under Section 120B IPC. Non applicability of the aforesaid provisions of law in such situations, therefore, may be *ex-facie* apparent. The cause of journalism and its role and responsibility in spreading information and awareness will stand D subserved. It is only in cases where the question reasonably arises whether the sting operator had a stake in the favours that were allegedly sought in return for the bribe that the issue will require determination in the course of a full-fledged trial. The above is certainly not exhaustive of the situations where such E further questions may arise requiring a deeper probe. As such situations are myriad, if not infinite, any attempt at illustration must be avoided.

17. The contention of the appellants that the materials/ F allegations against the accused appellants in the charge-sheet filed do not make out any criminal offence against them will not require a detailed probe and our conclusion thereon at the present stage of the proceeding. Suffice it will be to negative the said contention by holding that *prima facie* materials are G available for a fuller probe into the precise role of A-4 and A-6 in the alleged conspiracy.

18. In view of the above discussion the order dated 30.05.2008 of the High Court refusing to interfere with the

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charges framed against the accused-appellants is fully justified. Accordingly, we dismiss the present appeals and affirm the order dated 30.05.2008 passed by the High Court. A

Bibhuti Bhushan Bose Appeals dismissed.