

# Dispute Resolution Hotline

February 03, 2022

## SNOOPING: INDIAN COURT EXAMINES ADMISSIBILITY OF INTERCEPTED TELEPHONIC CONVERSATION FOR A CRIMINAL INVESTIGATION!

The Delhi High Court in *Jatinder Pal Singh v. Central Bureau of Investigation*<sup>1</sup>, has quashed criminal proceedings against the accused holding that illegally recorded telephonic conversations do not qualify as admissible evidence, and any criminal proceedings initiated based on such recordings is bad in law.

The following discussion entails a detailed analysis of the case and demystifies the current legal position vis-a-vis recording of telephonic conversations.

### BACKGROUND & CONTENTIONS

Charges had been framed against Mr. Jatinder Pal Singh (“**Accused**”) under the Prevention of Corruption Act<sup>2</sup> and the Indian Penal Code<sup>3</sup> for his alleged involvement in a criminal conspiracy. This conspiracy was allegedly pertaining to bribery being taken for allowing admissions in Gian Sagar Medical College and Hospital, Patiala in disregard of Medical Council of India’s Rules and Regulations.

The Accused had invoked the revisionary jurisdiction of the Delhi High Court under the Code of Criminal Procedure<sup>4</sup> and pleaded that the order of the lower Court framing charges against him be quashed, *inter alia*, on the ground that the charges were framed against him ‘without any legally admissible evidence’ being put on record. The charges against the Accused were primarily based on a recording of an intercepted telephonic conversation of the Accused with other co-accused, by the CBI Special Unit on information received by them about the complicities of the Accused. The Accused had contended that these recordings were illegal and inadmissible as evidence. He further contended that every material procured by the defense based on these recordings should also be disallowed in light of the principle *sub lato fundamento cadit opus* which provides that when the foundation is barred as illegal, everything procured incidental thereto, is also barred.

The High Court acknowledged its inherent revisionary power over an order of framing charges passed by a trial court. The High Court thereafter observed that the extent of such revision is limited to identifying (i) whether a *prima-facie* case has been made, and (ii) whether commission of the alleged offence is a possibility from the evidence placed on record. On these criteria, the High Court evaluated the allegedly illegal telephonic recordings and made the following observations.

### LEGAL FRAMEWORK PERTAINING TO RECORDING OF TELEPHONIC CONVERSATIONS

#### A) The Constitution of India

A nine-judge bench of the Hon’ble Supreme Court in *K.S. Puttaswamy v. UOI*<sup>5</sup> held in unequivocal terms that the right to privacy forms an intrinsic part of the right to life and personal liberty protected under Article 21 of the Indian Constitution. Since a person cannot be deprived of his life and personal liberty without following the procedure established under law, similarly, privacy of a person can ‘*only*’ be breached through the procedure established under law.

Commenting upon the ‘intimate and confidential’ nature of telephonic conversations, the Hon’ble Supreme Court in *PUCL v. UOI*<sup>6</sup> held that such conversations were protected under the right to privacy and can only be tapped in accordance with the procedure provided under the Telegraph Act and the Rules thereto.

This implies that interception of telephonic conversations, if done illegally i.e., not in accordance with the procedure laid in law, would result in a contravention of Article 21.

#### B) The Telegraph Act, 1885

Section 5(2) of the Telegraph Act stipulates the power of the Government to order for interception of messages. This provision contains two sets of conditions which must be satisfied before passing an order for interception. The first set of conditions include (i) occurrence of public emergency, or (ii) in the interest of public safety. It is pertinent to note that both these conditions imply a situation calling for ‘immediate’ attention and affecting ‘people at large’. The second set of conditions stipulate that Government can make an order for interception, if it is necessary or expedient to do so in the interests of (i) sovereignty and integrity of India, (ii) security of the State, (iii) friendly relations with foreign states, (iv) public order, or (iv) for preventing incitement to the commission of an offence. However, an order cannot be made solely on the basis of satisfaction of second set of conditions. Until and unless first set of the conditions are satisfied, the Government cannot evaluate the satisfaction of second set of conditions.<sup>7</sup> Thus, Section

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5(2) envisages a dual-protective layer in furtherance of individual's right to privacy.

In the present facts, the Delhi High Court after observing that the order passed by the Home Secretary did not satisfy the first set of conditions, held the recordings to be illegal and a violation of accused's right to privacy.

C) The Telegraph Rules, 1951

Rule 419A of the Telegraph Rules provide that when a competent authority orders for interception under the Telegraph Act, such authority is supposed to record its reasons in writing and forward the order so passed to a Review Committee within seven days. If the Review Committee perceives the reasons in the order to be inconsistent with the two sets of conditions laid under Section 5(2) of the Telegraph Act, it shall set aside the order and direct destruction of the recordings.

After observing that no material evidencing review of the Home Secretary's order was put on record, the High Court held such order to lack legal force and hence, the proceedings initiated by the trial Court based on illegally procured telephonic records as bad in law. The Court held that these telephonic recordings are 'insufficient' to showcase a *prima-facie* case being made against the accused.

D) The Evidence Act, 1872

Section 65-B (1) of the Evidence Act mandates that secondary electronic evidence shall be admissible in Court, only if it is accompanied by a certificate from an official, as provided under sub-section (4).<sup>8</sup>

Since in the present case, 'copy' of voice-recordings of telephonic conversation was put on record, making it a secondary document, a certificate under Section 65-B (4) was necessary. The Court observed that prosecution's failure to produce this certificate made these recordings inadmissible under the Evidence Act.

It is evident from a reading of the judgement that the prosecution needs to pass the tri-barrier of legality, admissibility, and genuineness of telephone conversation recordings, before making a case against an accused on the basis of such recordings.

Further, evidence must be produced by the prosecution to establish genuineness of the phone recordings, both for primary recordings and secondary copies. Genuineness of evidence is assessed by the Court only after the stage of admissibility. Reference can be made to the opinion of an expert witness under Section 45-A of Evidence Act for establishing genuineness.<sup>9</sup> When an accused denies the genuineness of voice recordings produced by the prosecution under Section 294 of Criminal Procedure Code, the burden is on the prosecution to prove, *inter alia*, (i) the recordings are relevant to the matter in issue, (ii) the recordings were not tampered with, and (iii) voice of the person recorded is accurate, as per testimony of the recorder or any other person known to the accused.<sup>10</sup>

In the present case, the High Court observed that no material in the form of forensic reports was put on record to prove the genuineness of the voice recordings. Consequently, the High Court noted that, *even if*, the matter would have gone to trial, it would have been materially impacted by the lack of such evidence.

In the present case, the intercepted telephonic recordings were (i) made illegally in violation of the Telegraph Act and Rules; (ii) inadmissible by virtue of no certificate being produced under the Evidence Act; and (iii) not supported with material to prove their genuineness, therefore, the High Court quashed the order of the lower Court relating to framing of charges and acquitted the accused.

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You can direct your queries or comments to the authors

<sup>1</sup> *Jatinder pal Singh v. Central Bureau of Investigation*, CRL. M.C. 3118/2012. (Order dated: January 17<sup>th</sup>, 2022)

<sup>2</sup> The Prevention of Corruption Act, 1988, Sections 7, 8, 11 and 13 (2) read with Section 13(1)(d).

<sup>3</sup> The Indian Penal Code, 1100%, Section 120-B.

<sup>4</sup> The Code of Criminal Procedure, 1973, Sections 397 and 401 read with Section 482.

<sup>5</sup> *K.S. Puttaswamy v. UOI*, (2017) 10 SCC 1.

<sup>6</sup> *People's Union for Civil Liberties v. Union of India*, (1997) 1 SCC 301, ¶18.

<sup>7</sup> *Id* at ¶28.

<sup>8</sup> *Ankur Chawla v. CBI*, CrI. M.C. No. 2455/2012, ¶¶ 16 & 18; *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal*, (2020) 7 SCC 1, ¶¶73.1 & 73.2.

<sup>9</sup> *Anvar P.V. v. P.K. Basheer*, (2014) 10 SCC 473, ¶1.

<sup>10</sup> *Nilesh Dinkar Paradkar v. State of Maharashtra*, (2011) 4 SCC 143, ¶¶ 31 & 32; *Shamsher Singh Verma v. State of Haryana*, (2016) 15 SCC 485, ¶¶10-16; *Sanjaysinh Ramrao Chavan v. Dattatray Gulabrao Phalke*, (2015) 3 SCC 123, ¶16.

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