

and public interest. To the people who watch TV and read newspapers it was yet another case that was destined to end up in a fiasco. It was in this background that a well known English language news channel called New Delhi Television (NDTV) telecast a programme on May 30, 2007 in which one Sunil Kulkarni was shown meeting with IU Khan, the Special Public Prosecutor and RK Anand, the Senior Defence Counsel (and two others) and negotiating for his sell out in favour of the defence for a very high price. Kulkarni was at one time considered the most valuable witness for the prosecution but afterwards, at an early stage in the trial, he was dropped by the prosecution as one of its witnesses. Nearly eight years later, the trial court had summoned him to appear and give his testimony as a court witness. The telecast came a few weeks after the court order and even as his evidence in the trial was going on. According to NDTV, the programme was based on a clandestine operation carried out by means of a concealed camera with Kulkarni acting as the mole. What appeared in the telecast was outrageous and tended to confirm the cynical but widely held belief that in this country the rich and the mighty enjoyed some kind of corrupt and extra-constitutional immunity that put them beyond the reach of the criminal justice system. Shocked by the programme the Delhi High Court *suo moto* initiated a proceeding (Writ Petition (Criminal) No.796 of 2007). It called for from the news channel all the materials on which the telecast was based and after examining those materials issued show cause notices to RK Anand, IU Khan and Bhagwan Sharma, an associate advocate with RK Anand why they should not be convicted and punished for committing criminal contempt of court as defined under section 2 (c) of the Contempt of Courts Act. (In the sting operations there was another person called Lovely who was apparently sent to meet Kulkarni as an emissary of RK Anand. But he died in a freak accident even before the stage of issuance of notice in the proceeding before the High Court). On considering their show cause and after hearing the parties the High Court expressed its displeasure over the role of Bhagwan Sharma but acquitted him of the charge of contempt of court. As regards RK Anand and IU Khan, however, the High Court found and held that their acts squarely fell within the definition of contempt under clauses (ii) & (iii) of section 2(c) of the Contempt of Courts Act. It, accordingly, held them guilty of committing contempt of Court vide judgment and order dated August 21, 2008 and in exercise of

power under Article 215 of the Constitution of India prohibited them, by way of punishment, from appearing in the Delhi High Court and the courts subordinate to it for a period of four months from the date of the judgment. It, however, left them free to carry on their other professional work, e. g., 'consultations, advises, conferences, opinion etc'. It also held that RK Anand and IU Khan had forfeited their right to be designated as Senior Advocates and recommended to the Full Court to divest them of the honour. In addition to this the High Court also sentenced them to fine of rupees two thousand each.

2. These two appeals by RK Anand and IU Khan respectively are filed under section 19 (1) of the Contempt of Courts Act against the judgment and order passed by the Delhi High Court.

THE CONTEXT:

3. Before proceeding to examine the different issues arising in the case it is necessary to first know the context in which the whole sordid episode took place. It will be, therefore, useful to put together the basic facts and circumstances of the case at one place. The occurrence in which six people lost their lives was reconstructed by the prosecution on the basis of police investigation as follows:

The crime, the Police investigation & proceedings before the Trial court:

4. On January 10, 1999 at about half past four in the morning a speeding vehicle crashed through a police check-post on one of the Delhi roads and drove away leaving behind six people dead or dying. As the speeding car hit the group of persons standing on the road some were thrown away but two or three persons landed on the car's bonnet and rolled down to the ground under it. The car, however, did not stop. It moved on dragging along the persons who were caught in its underside. It halted only after the driver lost control and going down a distance of 200-300 feet hit the road divider. At this point the occupants came down from the car to inspect the scene. They looked at the front and the rear of the car and would not have failed to notice the persons caught under the car who were still crying for help and who perhaps might have been saved if they were

taken out even at that stage. But the anxiety of the car's occupants to leave the accident site without delay seemed to override all other considerations. They got back into the car, reversed it and drove on. The car went on dragging the unfortunate victims trapped under it to certain and ghastly death and left behind at the accident site dismembered limbs and dead bodies of men.

5. The police investigation brought to light that the accident was caused by a black BMW car which was being driven by Sanjeev Nanda. He was returning from a late night party, under the influence of liquor, along with some friend(s).

6. Five days after the accident, on January 15, 1999 one Sunil Kulkarni contacted the Joint Commissioner of Police, Delhi, and claimed to be an eye witness to the occurrence. According to his story, at the time of the accident he was passing through the spot, on foot, on his way to the Nizamuddin Railway Station for catching a train for Bhopal. He described the accident in considerable detail and stated that at the sight of so many people being mowed down by the car he got completely unnerved. He proceeded for the railway station and on reaching there tried to ring up the police or the emergency number 100 but was unable to get through. He finally went to Bhopal and on coming back to Delhi, being bitten by conscience, he contacted the police. What was of significance in Kulkarni's statement is that the accident was caused by a **car** and when it stopped after hitting the people a man alighted from the driving seat and examined the front and rear of the car. Then, another person got down from the passenger seat called the other, "Sanjeev", and urged that they should go. On the same day his statement was recorded by the police under section 161 of the Code of Criminal Procedure (CrPC). The following day he was shown Nanda's BMW car at Lodhi Colony Police Station and he identified it as the one that had caused the accident. On January 21, 1999 Kulkarni's statement was recorded before a magistrate under section 164 of CrPC. Before the magistrate, in regard to the accident, he substantially reiterated the statement made before the police, lacing it up with details about his stay in Delhi from January 7 and his movements on the evening before the accident. In the statement before the magistrate the manner of identification of Sanjeev Nanda was also the same with the addition that after the accident when the car moved again the person on the driving seat was trying to look for the way by craning out his head out of the

broken glass window and thus he was able to see him from a distance of no more than three and a half feet when the car passed by his side. The police wanted to settle the question of the driver's identification by having Kulkarni identify Sanjeev Nanda in a test identification parade but Sanjeev Nanda refused to take part in any identification parade. Then, on March 31, 1999 when Sanjeev Nanda was produced in court Kulkarni also happened to be there. He identified him to the investigating officer as the driver of the car causing accident.

7. Kulkarni's arrival on the scene as an eye witness of the tragic accident got wide publicity and he was generally acclaimed as a champion of the public cause. He must have appeared to the police too as godsend but soon there were reasons for the police to look at him completely differently. He had given as his address a place in Mumbai. A summons issued by the trial court on the Mumbai address given by him returned unserved. The report dated August 30, 1999 on the summons disclosed that he had given a wrong address and his actual address was not known to anyone. It also stated that he was a petty fraudster who had defrauded several people in different ways. The report concluded by saying that he seemed to be a person of shady character.

8. At the same time Kulkarni also turned around. On August 31, 1999 a *Habeas Corpus* petition (Writ Petition (Crl) No.846/99) was filed in the Delhi High Court making the allegation that he was being held by the Delhi Police in wrongful confinement. On the following day (September 1, 1999) when the writ petition was taken up the allegations were denied on behalf of the police. Moreover, Kulkarni was personally present in Court. The Court, therefore, dismissed the writ petition without any directions. Next, Kulkarni filed a petition (through a lawyer) before the trial court on September 13, 1999. In this petition, he stated that on the date of occurrence, that is, January 10, 1999 itself he had told the police that the accident was caused by a truck. But the police was adamant not to change the version of the FIR that was already registered and on the basis of which five persons were arrested. The police forced him to support its story, and his earlier statements were made under police coercion.

9. On September 23, 1999 a clash took place between some policemen and some members of the bar in the Patiala House court premises for the 'custody' of Kulkarni. A complaint about the

alleged high handed actions of the police was formally lodged before the court and a notice was issued to the Jt. Commissioner. In response to the notice the Jt. Commissioner submitted a long and detailed report to the court on September 27, 1999. In the report, apart from defending the action of the policemen the Jt. Commissioner had a lot of things to say about Kulkarni's conduct since he became a witness for the prosecution in the BMW case. He noted that he would never give his address or any contact number to any police official. His life style had completely changed. He lived in expensive hotels and moved around in big cars. The Jt. Commissioner enclosed with his report a copy of the print-out of the cell phone of Kulkarni (the number of which he had given to one of the police officers) that showed that as early as on July 17, 1999 he was in touch with the counsel for the defence RK Anand (one of the appellants) and his junior Mr. Jai Bhagwan, Advocate and even with Suresh Nanda, father of Sanjeev Nanda. He cited several other instances to show Kulkarni's duplicity. The long and short of the report was that Kulkarni was bought off by the defence. He was in collusion with the defence and was receiving fat sums of money from the family of the accused. He was trying to play the two ends against the middle and he was completely unreliable.

10. On September 30, the date fixed for his examination, Kulkarni was duly present in court. He was, however, represented by his own lawyer and not by the prosecuting counsel. He was quite eager to depose. But the prosecution no longer wanted to examine him. IU Khan, the Special Prosecutor filed a petition stating that on the instructions of the State he gave up Kulkarni as one of the prosecution witness on the ground that he was won over by the accused. He also submitted before the court the report of the Joint Commissioner dated September 27. The allegation that he was won over was of course, denied both by Kulkarni and the accused. The court, however, discharged him leaving the question open as to what inference would it draw as a result of his non-examination by the prosecution.

11. Earlier to Kulkarni's exit from the case, the prosecution had lost two other key witnesses. To begin with there were three crucial witnesses for the prosecution. One was Hari Shankar Yadav, an attendant on a petrol pump near the site of the tragedy; the other was one Manoj Malik who was the lone survivor among the victims of the accident and the third of course was Kulkarni. Hari

Shankar Yadav was examined before the court on August 18, 1999 and he resiled from his earlier statement made before the police. Manoj Malik was scheduled to be examined on August 30, 1999 but he seemed to have disappeared and the police was unable to trace him out either in Delhi or at his home address in Orissa. On the date fixed in the case, however, he appeared in court, not with the prosecution team but with two other lawyers. He was examined as a witness notwithstanding the strong protest by the prosecution who asked for an adjournment. Not surprisingly, he too turned hostile. Lastly, Kulkarni too had to be dropped as one of the prosecution witness in the circumstances as noted above.

12. The trial proceeded in this manner and over a period of the next four years the prosecution examined around sixty witnesses on the forensic and other circumstantial aspects of the case. The prosecution finally closed its evidence on August 22, 2003. Thereafter, the accused were examined under section 313 of CrPC and a list of defence witnesses was furnished on their behalf. While the case was fixed for defence evidence two applications came to be filed before the trial court, one was at the instance of the prosecution seeking a direction to the accused Sanjeev Nanda to give his blood sample for analysis and comparison with the blood stains found in the car and on his clothes, and the other by the defence under section 311 of CrPC for recalling nine prosecution witnesses for their further cross-examination. By order dated March 19, 2007 the trial court rejected both the applications. It severely criticised the police for trying to seek its direction for something for which the law gave it ample power and authority. It also rejected the petition by the defence for recall of witnesses observing that the power under section 311 of CrPC was available to the court and not to the accused. At the end of the order the court observed that the only witness in the case whose statement was recorded under section 164 of CrPC was Kulkarni and even though he was given up by the prosecution, the court felt his examination essential for the case. It, accordingly, summoned Kulkarni to appear before the court on May 14, 2007. Kulkarni thus bounced back on the stage with greater vigour than before.

MEDIA INTERVENTION:

13. In the trial court the matter was in this state when another chapter was opened up by a TV channel with which we are primarily concerned in this case. On April 19, 2007 one Vikas Arora, Advocate, an assistant of IU Khan sent a complaint in writing to the Chief Editor, NDTV with copies to the Commissioner of Police and some other authorities. In the complaint it was alleged that one Ms Poonam Agarwal, a reporter of the TV Channel was demanding copies of statements of witnesses and the Police Case-diary of the BMW case and was also seeking an interview with IU Khan or the complainant, his junior. On their refusal to meet the demands she had threatened to expose them through some unknown person and to let the people know that the police and the public prosecutor had been influenced and bribed by the accused party. He requested the authorities to take appropriate action against Poonam Agarwal.

14. On April 20, 2007 NDTV telecast a half hour special programme on how the BMW case was floundering endlessly even after more than seven years of the occurrence. Apparently, the telecast on April 20, 2007 brought Poonam Agarwal and Kulkarni together. According to Poonam Agarwal, on April 22, 2007 she received a phone call from Kulkarni who said that he was deeply impressed by the programme telecast by her channel and requested for a meeting with her. (The version of Kulkarni is of course quite different). She met him on April 22 and 23. He told her that in the BMW case the prosecution was hand in glove with the defence; he wanted to expose the nexus between the prosecution and the defence and needed her help in that regard. Poonam Agarwal obtained the approval of her superiors and the idea to carry out the sting operation using Kulkarni as the decoy was thus conceived.

15. Even while the planning for the sting operation was going on, NDTV on April 26 gave reply to the notice by Vikas Arora. In their reply it was admitted that Poonam Agarwal had sought an interview with Arora's senior which was denied for reasons best known to him. All other allegations in Arora's notice were totally denied and it was loftily added that the people at NDTV were conscious of their responsibilities and obligations and would make continuous efforts to unravel the truth as a responsible news channel.

16. On April 28, 2007 Kulkarni along with one Deepak Verma of NDTV went to meet IU

Khan in the Patiala House court premises. For the mission Poonam Agarwal 'wired' Kulkarni, that is to say, she equipped him with a concealed camera and a small electronic device that comprised of a tiny black button-shaped lens attached to his shirt front connected through a wire to a small recorder with a microchip hidden at his backside. Before sending off Kulkarni she switched on the camera and waited outside the court premises in a vehicle. Deepak Verma from the TV channel was sent along to ensure that everything went according to plan. He was carrying another concealed camera and the recording device in his handbag. Kulkarni and Deepak Verma were able to meet IU Khan while he was sitting in the chamber of another lawyer. Kulkarni entered into a conversation with IU Khan inside the crowded chamber (the details of the conversation we will examine later on at its proper place in the judgment). The conversation between the two that took place inside the chamber was recorded on the microchips of both the devices, one worn by Kulkarni and the other carried by Deepak Verma in his bag. After a while, on Kulkarni's request, both IU Khan and Kulkarni came out of the chamber and some conversation between the two took place outside the chamber. The recording on the microchip of Kulkarni's camera was copied onto magnetic tapes and from there to compact discs (CDs). The microchip in Kulkarni's camera used on April 28, 2007 was later reformatted for other uses. Thus, admittedly that part of the conversation between Kulkarni and IU Khan that took place on April 28, 2007 outside the chamber is available only on CD and the microchip on which the original recording was made is no longer available. The second operation was carried out on May 6, 2007 when Kulkarni met RK Anand in the VIP lounge at the domestic terminal of IGI Airport. The recording of the meeting was made on the microchip of the concealed camera carried by Kulkarni.

17. On May 8, 2007 the third sting operation was carried out when Kulkarni got into the back seat of RK Anand's car that was standing outside the Delhi High Court premises. RK Anand was sitting on the back seat of the car from before. The recording shows Kulkarni and RK Anand in conversation as they travelled together in the car from Delhi High Court to South Extension.

18. In the evening of the same day the fourth and final sting operation was carried out in South Extension Part II market where Kulkarni met one Bhagwan Sharma, Advocate and another

person called Lovely. Bhagwan Sharma is one of the juniors working with RK Anand and Lovely appears to be his handyman who was sent to negotiate with Kulkarni on behalf of RK Anand.

19. According to Poonam Agarwal, in all these operation she was only at a little distance from the scene and was keeping Kulkarni, as far as possible, within her sight.

20. According to NDTV, in all these operations a total of five microchips were used. Four out of those five chips are available with them in completely untouched and unaltered condition. One microchip that was used in the camera of Kulkarni on April 28, 2007, as noted above, was reformatted after its contents were transferred onto a CD.

21. On May 13, 2007 NDTV recorded an interview by Kulkarni in its studio in which Kulkarni is shown saying that after watching the NDTV programme (on the BMW case) he got in touch with the people from the channel and told them that the prosecution and the defence in the case were in league and he knew how witnesses in the case were bought over by the accused and their lawyers. He also told NDTV that he could expose them through a sting operation. He further said that he carried out the sting operation with the help of NDTV. He first met IU Khan who *referred* him to RK Anand. He then met some people sent by RK Anand, including someone whose name was 'Lovely or something like that'. As to his objective he said quite righteously that he did the sting operation 'in the interest of the judiciary'. In answer to one of the questions by the interviewer he replied rather grandly that he would ask the court to provide him security by the NSG and he would try to go and depose as soon as security was provided to him. In the second part of the interview the interviewer asked him about the accident and in that regard he said briefly and in substance what he had earlier stated before the police and the magistrate.

Back to the Court:

22. It is noted above that by order dated March 19, 2007 the trial court had summoned Kulkarni to appear before it as a court witness on May 14, 2007. The defence took the matter to the Delhi High Court (in CrI. M. C. No.1035/2007 with CrI. M. 3562/2007) assailing the trial court order rejecting their prayer to recall some prosecution witnesses for further cross-examination and *suo moto* summoning Kulkarni under section 311 of CrPC, to be examined as a court witness. The

matter was heard in the High Court on several dates. In the meanwhile Kulkarni was to appear before the trial court on May 14, 2007. Hence, the High Court gave interim directions allowing Kulkarni to be examined by the court but not to put him to any cross-examinations till the disposal of the petition being argued before it. The petition was finally disposed of by a detailed order dated May 29, 2007. The High Court set aside the trial court order rejecting the defence petition for recall of certain prosecution witnesses and asked the trial court to reconsider the matter. It also held that the trial court's criticism of the police was unwarranted and accordingly, expunged those passages from its order. However, insofar as summoning of Kulkarni was concerned the High Court held that there was no infirmity in the trial court order and left it undisturbed.

23. On May 14, 2007 Kulkarni appeared before the trial court but on that date, despite much persuasion, the court was not able to get any statement from him. From the beginning he asked for an adjournment on the plea that he was not well. In the end the court adjourned the proceedings to May 17 with the direction to provide him police protection. On May 17, the examination of Kulkarni commenced and he described the accident more or less in the same way as in his statements before the police and the magistrate. He said that the accident was caused by a black car (and not by a truck) but added that the car was coming from his front and its light was so strong that he could not see much. He said about his identification of the car at the Lodhi Colony police station. But on the question of identification of the driver there was a significant shift from his earlier statements. He told the court that what he had heard was one of the occupants urging the other to go calling him "Sanch or Sanz". He had also heard another name 'Sidh' being mentioned among the car's occupants. In reply to the court's question he said that in his statement before the magistrate under section 164 of CrPC he had stated the name 'Sanjeev', and not the nick names that he actually heard, under pressure from some police officials. He said that he was also put under pressure not to take the name of Sidharth Gupta and some police official told him that he was not in the car at the time of the accident. He said that apart from the name that he heard being uttered by the occupant(s) of the car and the number of persons he saw getting down from the car the rest of his statement under section 164 was correct. He said that actually three, and not two, persons had got down from

the car. The court then asked him to identify the persons who came out of the offending car. Kulkarni identified Sanjeev Nanda who was present in court. He further said that the third occupant of the car was a hefty boy whom he did not see in the court. At this point IU Khan explained that he might be referring to Sidharth Gupta who was discharged by the order of the High Court. Kulkarni added that he was unable to identify the second occupant of the car and went on to declare, even without being asked, he could not say who came out of the driver's side. He was shown Manik Kapoor, another accused in the case, as one the occupants of the car but he said that after lapse of nine years he was not in a position to identify him.

24. On May 29 Kulkarni was cross examined on behalf of the Prosecution by IU Khan. The prosecutor confronted him with his earlier statements recorded under sections 161 and 164 of CrPC and he took it as opportunity to move more and more away from the prosecution case. He admitted that Sanjeev Nanda was one of the occupants of the car but positively denied that he came out from the driving seat of the offending car. He elaborated that the one to come out from the driving seat of the car was a fat, hefty boy who was not present on that date. (It does not take much imagination to see that he was trying to put Sidharth Gupta on the driving seat of the car who had been discharged from the case by the order of the Delhi High Court and was thus in no imminent danger from his deposition!). He denied that he disowned or changed some portions from his earlier statements under the influence of the accused persons. On May 29 Kulkarni's cross-examination by IU Khan was incomplete and it was deferred to May 31. But before that NDTV telecast the sting programme that badly jolted not only everyone connected with the BMW trial but the judicial system as well.

THE TELECAST:

25. Based on the sting operations NDTV telecast a programme called India 60 Minutes (BMW Special) on May 30, 2007 at 8.00 p.m. It was followed at 9.00 pm, normally reserved for news, as 'BMW Special'. From a purely journalistic point of view it was a brilliant programme designed to have the greatest impact on the viewers. The programmes commenced with the anchors (Ms. Sonia Singh in the first and Ms. Barkha Dutt in the second telecast) making some crisp and hard hitting introductory remarks on the way the BMW case was proceeding which, according to the

two anchors, was typical of the country's legal system. The introductory remarks were followed by some clips from the sting recordings and comments by the anchors, interspersed with comments on what was shown in the programme by a host of well known legal experts.

26. It is highly significant for our purpose that both the telecasts also showed live interviews with RK Anand. According to the channel's reporter, who was posted at RK Anand's residence with a mobile unit, he initially declined to come on the camera or to make any comments on the programme saying that he would speak only the following day in the court at the hearing of the case. According to the reporter, in course of the telecast Sanjeev Nanda also arrived at the residence of RK Anand and joined him in his office. He too refused to make any comments on the on-going telecast. But later on RK Anand came twice on the TV and spoke with the two anchors giving his comments on what was being shown in the telecasts. We shall presently examine whether the programmes aired to the viewers were truly and faithfully based on the sting operations or whether in the process of editing for preparing the programmes any slant was given, prejudicial to the two appellants. This is of course subject to the premise that the Court has no reason to suspect the original materials on which the programme was based and it is fully satisfied in regard to the integrity and authenticity of the recordings made in the sting operations. That is to say, the recordings of the sting operations were true and pure and those were not fake, fabricated, doctored or morphed.

27. In regard to the telecast it needs to be noted that though the sting operations were complete on May 8, 2007 and all the materials on which the telecast would be based were available with the TV channel, the programme came on air much later on May 30. The reason for withholding the telecast was touched upon by the anchors who said in their introductory remarks that after the sting operations were complete and just before his testimony began in court Kulkarni withdrew his consent for telecasting the programmes. Nevertheless, after taking legal opinion on the matter NDTV was going ahead with the airing of programme in larger public interest. Towards the end of the nine o'clock programme the anchor had a live discussion with Poonam Agarwal in which she elaborated upon the reason for withholding the telecast for about three weeks. Concerning Kulkarni,

Poonam Agarwal said that he was the main person behind the stings and the sting operation was planned at his initiative. He had approached her and said to her that he wished to bring out into the open the nexus between the prosecution and the defence in the BMW case. He had also said to her that in connection with the case he was under tremendous pressure from both sides. But after the stings were complete he changed his stand and would not agree to the telecast of the programme based on the stings. In the discussion between the anchor and Poonam Agarwal it also came to light that initially NDTV had seen Kulkarni as one of the victims of the system but later on he appeared in highly dubious light. The anchor said that they had no means to know if he had received any money from any side. Poonam Agarwal who had the occasion to closely see him in course of the sting operations gave instances to say that he appeared to her duplicitous, shifty and completely unreliable.

28. NDTV took the interview of RK Anand even as the first telecasts were on and thus what he had to say on what was being shown on the TV was fully integrated in the eight o'clock and nine o'clock programmes on May 30. IU Khan was interviewed on the following morning when a reporter from the TV channel met him at his residence with a mobile transmission unit. The interview was live telecast from around eight to twenty three past eight on the morning of May 31. But that was the only time his interview was telecast in full. In the programmes telecast later on, one or two sentences from his interview were used by the anchor to make her comments.

29. In his interview IU Khan basically maintained that from the clandestine recording of his conversation with Kulkarni, pieces, were used out of context and selectively for making the programme and what he spoke to Kulkarni was deliberately misinterpreted to derive completely wrong inferences. He further maintained that in his meeting with Kulkarni he had said nothing wrong much less anything to interfere with the court's proceeding in the pending BMW case.

Impact of the telecast:

30. On the same day IU Khan withdrew from the BMW case as Special Public Prosecutor. Before his withdrawal, however, he produced before the trial court a letter that finds mention in the trial court order passed on that date, written in the hand of Kulkarni stating that he collected the

summons issued to him by the court from SHO, Lodhi Colony Police Station on the advice of IU Khan.

31. The trial court viewed the telecast by NDTV very seriously and issued notice to its Managing Director directing to produce 'the entire unedited original record of the sting operation as well as the names of the employees/reporters of NDTV who were part of the said sting operation' by the following day.

32. The further cross-examination of Kulkarni was deferred to another date on the request of the counsel replacing IU Khan as Special Public Prosecutor.

33. On June 1, 2007, RK Anand had a legal notice sent to NDTV, its Chairman, Directors and a host of other staff asking them to stop any further telecasts of their BMW programme and to tender an unconditional apology to him failing which he would take legal action against them *inter alia* for damages amounting to rupees fifty crores. NDTV gave its reply to the legal notice on July 20, 2007. No further action was taken by RK Anand in pursuance of the notice.

HIGH COURT TAKES NOTICE:

34. On the same day (May 31, 2007) a Bench of the Delhi High Court presided over by the Chief Justice took cognisance of the programme telecast by NDTV the previous evening and felt compelled to examine all the facts. The Court, accordingly, directed the Registrar General 'to collect all materials that may be available in respect of the telecast including copies of CDs/Video and transcript and submit the same for consideration within 10 days'. The court further **directed NDTV 'to preserve the original material** including the CDs/Video pertaining to the aforesaid sting operation.'

35. In response to the notice issued by the trial court, NDTV produced before it on June 1, 2007 **two** microchips and a recorder with the **third** chip inside it. The chips were said to contain the original recordings. In addition to the chips and the recorder NDTV also produced 5 CDs that were copies of the original, unedited recordings on the **three** chips. It was brought to the notice of the trial court that the High Court had also issued notice to NDTV in the same matter. The trial court, accordingly, stopped its inquiry and returned everything back to NDTV for production before the

High Court.

36. On June 2, 2007, Ms. Poonam Agarwal of NDTV submitted before the High Court six CDs; one of the CDs (marked '1') was stated to be edited and the remaining five (marked '2'-'6') unedited. In a written statement given on the same day she declared that **NDTV News Channel did not have any other material in connection with the sting operation**. She also stated that in accordance with the direction of the Court, NDTV was preserving the original CDs/ Videos relating to the sting operation. On June 6, 2007, Poonam Agarwal submitted true transcripts of the CDs duly signed by her on each page. She also gave a written statement on that date stating that the CDs submitted by her earlier were duplicated from a tape-recording prepared from **four** spy camera chips which were recorded on different occasions. (As we shall see later on, the total number of microchips used in all the four stings was actually five and not four). She also gave the undertaking, on behalf of NDTV that those original chips would be duly preserved.

37. On June 11 (during summer vacation) the Court recorded the statement of the counsel appearing for NDTV that its order dated May 31 had been fully complied with. On July 9 after hearing counsel for NDTV and on going through the earlier orders passed in the matter the Court felt the need for a further affidavit regarding the telecast based on the sting operation. It, accordingly, directed NDTV to file an affidavit 'concerning the sting operation from the stage it was conceived and the attendant circumstances, details of the recording done, i.e., the time and place etc. and other relevant circumstances'. In compliance with the Court's direction, Poonam Agarwal filed an affidavit on July 23, 2007.

Poonam Agarwal's Affidavit:

38. In her affidavit Poonam Agarwal stated that she was a reporter working with NDTV. She had joined the TV channel two years ago. She stated that NDTV was covering the BMW trial and had telecast a special programme on the case on April 20, 2007. Two days later Kulkarni contacted her on telephone and requested for a meeting saying that he had something important to tell her about the case. She met him on April 22 and 23. In the second meeting he was accompanied by his wife. He told her that there was a strong nexus between the prosecution and the defence in that case

and that he had suffered a lot due to his involvement in the case. He was determined to expose the nexus. He said that he needed the help of NDTV to do a sting operation in order to bring out the complicity between the prosecution and the defence into open. She discussed the plan mooted by Kulkarni with her superiors in the organisation and got their permission to carry out the sting operation. In this regard she stated in the affidavit that the people at NDTV were greatly concerned over the manner in which a number of trials had ended up in acquittal on account of witnesses turning hostile, especially in cases in which accused were influential people. NDTV, as a news channel, was trying to uncover the causes behind this malaise and it was in this spirit that the channel decided to help Kulkarni. She duly told Kulkarni that NDTV was willing to help him in doing the sting operation. Kulkarni informed her that he was going to meet IU Khan in his chamber to seek his direction in connection with the court summons issued to him and that would be good a opportunity for doing the sting. Accordingly, she along with one Deepak Verma (a camera person from the TV channel) met Kulkarni outside the Patiala House court premises. She fitted Kulkarni with a button camera and a recording device and also gave her a cell phone to communicate with her in any emergency. Then Kulkarni and Deepak Verma went to meet IU Khan. Deepak Verma carried another concealed camera and a recording device in his bag. Deepak Verma was sent along with Kulkarni to ensure that he did not in any manner tamper with the hidden camera. Before sending them off she switched on Kulkarni's camera. After meeting with IU Khan both came back and she then switched off Kulkarni's camera. She stated in the affidavit that after copying its contents onto a compact disc the microchip used in Kulkarni's camera was formatted for other projects but the microchip in the camera in Deepak Verma's bag was available undisturbed. Kulkarni next called to tell her that he was meeting RK Anand at the IGI Airport (Domestic Terminal) and suggested to do a sting there. She, accordingly, took her to the airport on May 6, 2007. There she fitted him with the hidden camera and the recording device, switched the camera on and send him off to meet RK Anand. She herself waited for him in her car. After meeting with RK Anand, Kulkarni came out of the airport building and contacted her on the cell phone to find out where her car was parked. He then came back to the car. She switched off the camera and brought her back to her office. Kulkarni

again contacted her to say that he was meeting RK Anand on May 8. This time she met him near the Delhi High Court and in her vehicle equipped him with the hidden camera and switched it on. She waited in her vehicle while Kulkarni got into the back seat of a black car outside the Delhi High Court in which RK Anand was sitting from before. The car with Kulkarni and RK Anand drove off and she followed them in her vehicle. They went to South Extension, New Delhi where Kulkarni was dropped. He came back to her vehicle and joined her. She then switched off the camera. She stated in the affidavit that all along the way from outside the Delhi High Court to South Extension the car in which Kulkarni and RK Anand were travelling did not stop anywhere except at the red lights on the crossings. She also averred that all along the way she followed the car in her own vehicle and it always remained in her sight. On the same day Kulkarni told her that he was scheduled to meet RK Anand in his office at South Extension Part II. They together went to South Extension and from there Kulkarni telephoned RK Anand. He told her that he was asked to wait there at a particular spot where someone would come to meet him. After a short while Bhagwan Sharma arrived there whom she knew from before as an advocate associated with RK Anand. At that time they were in her vehicle. She 'wired' Kulkarni, like the earlier occasions, and he went to meet Bhagwan Sharma at the fixed spot. For a little while she lost them from her sight. She then contacted Kulkarni on his cell phone and he, feigning to be talking to his wife, indicated to her the exact spot where he was at that moment. She approached that spot and found that Bhagwan Sharma had gone away and Kulkarni was talking with a Sikh person whom he later identified as 'Lovely'. They moved around and talked for a pretty long time. In the end Lovely got into his car and drove away. Kulkarni then called her on the cell phone to find out where her vehicle was parked. He came back to her. She switched off the camera. He narrated to her what transpired in the meetings with Bhagwan Sharma and Lovely. She stated in the affidavit that the entire episode lasted for over an hour and a half. All through she had Kulkarni in her sight except for the short period as indicated above. She also stated that as the episode went on for a long time the batteries of the hidden camera got exhausted and, therefore, the recording of the meeting ended abruptly. Once all the material collected in course of the sting operations came in possession of NDTV it was carefully examined

and evaluated and the editorial team at NDTV came to the view that in the larger public interest it was their duty to put the whole matter in the public domain. The decision was thus taken to telecast a special programme under the caption 'BMW expose'. The recordings made in the sting operations were then very carefully edited for making a programme that could be telecast. The process of editing took three days. The chips were copied onto CDs in her presence and under her supervision. She, at all time, retained the custody of the original chips. At all successive stages she was personally present to ensure the factual accuracy of the edited version incorporated in the programme. But once the programme was made Kulkarni completely changed his position and strongly opposed the telecast of the programme. He asked her not to telecast the programme saying that he and his wife were facing threat to their lives. He would not clearly spell out the nature of the threat or its source but simply oppose the telecast. In view of his plea that he and his wife faced threat to their lives it was decided to defer the telecast till his examination-in-chief in the court was over. She then stated about Kulkarni's interview (without stating the date on which it was recorded) on camera in the NDTV studio in which he spoke about why and how he carried out the stings. Coming back to the telecast she said that she met Kulkarni on the dates of his appearance in the trial court on May 14, 17 and 29 but was not able to persuade him to agree to the telecast. He was not willing to give his consent even on May 29 but then the people at NDTV felt that his stand was quite contradictory to the objective avowed by him for carrying out the stings with the help of NDTV; by that date his examination-in-chief was over and he was also provided with police protection. Taking all those facts and circumstances into account it was decided to go ahead with the telecast regardless of Kulkarni's objections. The programme was, accordingly, telecast on May 30, 2007. In course of the telecast the anchor of the show engaged with RK Anand and presented his version too before the viewers. IU Khan was similarly tried to be contacted but he was indisposed. In the end the affidavit gave a list of all the materials submitted in the court along with it.

39. In Poonam Agarwal's affidavit NDTV took the stand that the stings were conceived and executed by Kulkarni. Its own role was only that of the facilitator. Kulkarni would choose the date and time and venue of the meetings where he would like to do the sting. He would fix up the

meetings not in consultation with Poonam Agarwal but on his own. He would simply tell her about the meetings and she would provide him with the wherewithal to do the sting. She would not ask him when and how and for what purpose the meeting was fixed even though it may take place at such strange places as the VIP lounge of the airport or a car travelling from outside the Delhi High Court to South Extension. She would not ask him even about any future meetings or his further plans.

Proceeding resumes:

40. On July 25, 2007 when the matter next came up before the Court the affidavit of Poonam Agarwal was already submitted before it. On that date the counsel for NDTV took the Court through the transcripts of the sting recordings and submitted that the three advocates and the other person Lovely, the subjects of the sting, had prima facie interfered with the due administration of criminal justice. The Court, however, deferred any further action in the matter till it viewed for itself the original sting recordings. On that date it appointed Mr. Arvind K. Nigam, Advocate as *amicus curiae* to assist the court in the matter.

41. On July 31, 2007, one Mr. Vinay Bhasin, Senior Advocate, tried to intervene stating that the action of NDTV in telecasting a programme based on sting operations in connection with a pending criminal trial itself amounted to interference with the administration of criminal justice. On the same day both RK Anand and IU Khan also tried to intervene in the Court proceedings and sought to put forward their point of view. The Court, however, declined to hear them, pointing out that there was no occasion for it at that stage since no notice was issued to them.

42. On August 7, 2007, the Court on a consideration of all the materials coming before it came to the view that prima facie the actions of RK Anand, IU Khan, Bhagwan Sharma and Lovely (who was dead by then) were aimed at influencing the testimony of a witness in a manner so as to interfere with the due legal process. Their actions thus clearly amounted to criminal contempt of court as defined under clause (ii) & (iii) of section 2(c) of the Contempt of Courts Act. The Court accordingly passed the following order:

“From your aforesaid acts and conduct as discerned from the CDs and their transcripts, the

affidavit 23rd July, 2007 of Ms. Poonam Agarwal along with its annexures, we are, *prima facie*, satisfied that you Mr. R.K. Anand, Senior Advocate, Mr. I. U. Khan, Senior Advocate, Mr. Sri Bhagwan, Advocate and Mr. Lovely have wilfully and deliberately tried to interfere with the due course of judicial proceedings and administration of justice by the courts. *Prima facie* your acts and conduct as aforesaid was intended to subvert the administration of justice in the pending trial and in particular influence the outcome of the pending judicial proceedings.

“Accordingly, in exercise of the powers under Article 215 of the Constitution of India, we do hereby direct initiation of proceedings for contempt and issuance of notice to you, Mr. RK Anand, Senior Advocate, Mr. IU Khan, Senior Advocate, Mr. Shri Bhagwan, Advocate and Mr. Lovely to show cause as to why you should not be proceeded and punished for contempt of court as defined under Section 2(c) of the Contempt of Courts Act and under Article 215 of the Constitution of India.

“You are, therefore, required to file your reply showing cause, if any, against the action as proposed within four weeks.

“Noticees and contemnors shall be present in Court on the next date of hearing i.e. 24th September, 2007.

“Registry is directed to supply under mentioned material to the noticees:-

“(i) Copy of the order dated 7th August, 2007;

“(ii) Affidavit of Ms. Poonam Agarwal dated 23rd July, 2007 together with annexures including the four copies of CDs filed along with the affidavit;

“(iii) Copies of the corrected transcripts filed on 6th August, 2007 in terms of the order dated 31st July, 2007;

“(iv) Copies of 6 CDs, including one edited and five unedited containing the original footage which were produced on 6th June, 2007.

“NDTV shall make available to the Registry sufficient number of copies of the CDs. and transcripts, which the Registry has to supply to the noticees as above.”

43. In response to the notice RK Anand, instead of filing a show cause, first filed a petition (on September 5, 2007) asking one of the judges on the Bench, namely, Manmohan Sarin J. to recuse himself from the hearing of the matter. The recusal petition and the review petition arising from it were rejected by the High Court by orders dated October 4 and November 29, 2007. We will be required to consider the unpleasant business of the recusal petition in greater detail at its proper place later in the judgment.

44. While the matter of recusal was still pending a grievance was made before the Court (on September 24) that along with the notice the proceedees were given only five CDs, though the

number of CDs submitted by NDTV before the Court was six. Counsel for NDTV explained that the contents of two of the CDs were copied onto a single CD and hence, the number of CDs furnished to the noticees had come down to five. Counsel for the TV channel, however, undertook to provide fresh sets of six CDs to each of the noticees.

45. On September 28, 2007 counsel for IU Khan was granted permission for viewing the six CDs submitted by NDTV on the courts record.

46. On October 1, IU Khan filed his affidavit in reply to the notice issued by the High Court and RK Anand and Bhagwan Sharma filed their affidavits on October 3, 2007.

YET ANOTHER TELECAST:

47. In the evening of December 3, 2007 NDTV telecast yet another programme from which it appeared that RK Anand and Kulkarni were by no means strangers to each other and the association between the two went back several years in the past. Kulkarni, under the assumed name of Nishikant, had stayed in RK Anand's villa in Shimla for some time. There he also had a brush with the law and was arrested by the police in Una (HP). He had spent about forty five days in jail. From the HP police record it appeared that after coming on the scene in the BMW case he spent some time in hotels in Rajasthan and Gurgaon with the Nanda's paying the bills.

48. This time RK Anand did not give any legal notice to NDTV seeking apology or claiming damages etc. but on the following day (December 4) he made a complaint about the telecast before the Court. The Court directed NDTV to produce all the original materials concerning the telecast and its transcript. The Court further directed NDTV to file an affidavit giving details in regard to the collection of the materials and the making of the programme.

49. In response to the High Court's direction one Deepak Bajpai, Principal Correspondent with NDTV filed an affidavit on its behalf on December 11, 2007. In the affidavit it was stated that following a reference to HP in the conversation between RK Anand and Kulkarni in the second sting that took place in the car he went to Shimla and other places in Himachal Pradesh and made extensive investigations there. Kulkarni was easily identified by the people there through his photograph. On making enquiries he came to learn that in the year 2000 Kulkarni lived in RK

Anand's villa called 'Schilthorn' in Shimla for about a year under the assumed name of Nishikant. While staying there he corresponded with an insurance company on behalf of RK Anand, using his letter-head, in connection with some insurance claim. Interestingly, there he also obtained a driving licence describing himself as Nishikant Anand son of RK Anand. In Shimla and in other places in Himachal he also duped a number of traders and businessmen. In Una he was arrested by Police on suspicion and he had to spend about 45 days in jail.

50. In reply to the affidavit filed by Deepak Bajpai, RK Anand filed an affidavit on January 10, 2008 in which he mostly tried to point out the discrepancies in the sting recordings and contended that those were inadmissible in evidence.

PROCEEDINGS BEFORE THE HIGH COURT:

51. After putting the recusal petition and the review application out of its way, the Court took up the hearing of the main matter that was held on many dates spread over a period of four months from December 4, 2007 to May 2, 2008. RK Anand appeared in person while IU Khan was represented through lawyers. Neither RK Anand nor IU Khan (nor for that matter Bhagwan Sharma) tendered apology or expressed regret or contrition for their acts. IU Khan simply denied the charge of trying to interfere with the due course of judicial proceedings and administration of justice by the Courts. He took the stand that the expressions and words he is shown to have uttered in his meeting with Kulkarni were misinterpreted and a completely different meaning was given to them to suit the story fabricated by the TV channel for its programme.

52. RK Anand on his part took a posture of defiant denial and tried to present himself as one who was more sinned against than a sinner. Before coming to his own defence he raised a number of issues concerning the role of the mass media in general and, in particular, in reporting about the BMW case. He contended that it was NDTV that was guilty of committing contempt of Court as the programmes telecast by it on May 30, 2007 (and on subsequent dates) clearly violated the *sub-judice* rule. On this issue, however, he was strangely ambivalent; he would not file an application before the Court for initiating contempt proceedings against the TV channel but 'invite' the Court to *suo moto* take appropriate action against it. He next submitted that the Court should rein in and control

the mass media in reporting court matters, especially live cases pending adjudication before the court, arguing that media reports mould public opinion and thereby tend to goad the court to take a certain view of the matter that may not necessarily be the correct view. He also urged the Court to lay down the law and guidelines in respect of stings or undercover operations by media. After an elaborate discussion the High Court rejected all the contentions of the contemnors based on these issues. Before us these issues were not raised on behalf of the appellants. But we must observe we fail to see how those issues could be raised before the High Court as pleas in defence of a charge of criminal contempt for suborning a witness in a criminal trial. In the overall facts and circumstances of the case it was perfectly open to the High Court to deal with those issues as well. But it certainly did not lie with anyone facing the charge of criminal contempt to plead any alleged wrong doing by the TV channel as defence against the charge. If the telecast of the programme concerning a pending trial could be viewed as contempt of Court; or if the stings preceding it, in any way, violated the rights of the subjects of the stings those would be separate issues to be dealt with separately. In case of the former the matter was between the Court and the TV channel and in the latter case it was open to the aggrieved person(s) to seek his remedies under the civil and/or criminal law. As a matter of fact RK Anand had given a legal notice to NDTV that he did not pursue. But neither the stings nor the telecast would absolve the contemnors of the grave charge of suborning a witness in a criminal trial. We have, therefore, not the slightest doubt that the High Court was quite right in rejecting the contemnors' contentions based on those so called preliminary issues.

53. The contemnors then raised the issues of the nature of contempt jurisdiction and the onus and the standard of proof in a proceeding for criminal contempt. They further questioned the admissibility of the sting recordings and contended that those recordings were even otherwise unreliable. In course of hearing RK Anand tried to assail the integrity of the CDs furnished to him that were the reproductions from the original of the sting recordings. According to him, there were several anomalies and discrepancies in those recordings and (on January 29, 2008) he submitted before the Court that from the CDs furnished to him he had got another CD of eight minutes duration prepared in order to highlight the tampering in the original recording. He sought the

Court's permission to play his eight minute CD before it. On RK Anand's request the Court viewed the eight minute CD submitted by him on February 5, 2008. On February 27, 2008 the Court directed NDTV to file an affidavit giving its response to the CD prepared by RK Anand. As directed, NDTV filed the affidavit, sworn by one Dinesh Singh, on March 7, 2008. The affidavit explained all the objections raised by RK Anand in his eight minute CD. RK Anand then filed a petition (Crl. M. 4012/2008) on March 31, 2008 for sending the original CDs for examination by the Central Forensic Science Laboratory.

54. Besides this, RK Anand filed a number of interlocutory applications in course of the proceedings. Only three of those are relevant for us having regard to the points raised in the hearing of the appeal. Those were: (I) Crl.M. No. 13782 of 2007 filed on December 3, 2007 for summoning Poonam Agarwal for cross-examination, (II) Crl.M. No. 4010 of 2008 filed on March 31, 2008 for initiating proceeding of perjury against NDTV and Poonam Agarwal for deliberately making false statements on affidavits and fabricating evidence and (III) Crl.M. No. 4150 of 2008 filed on April 2, 2008 asking the Court to direct NDTV to place all the original microchips before it and to furnish him copies directly reproduced from those chips. Apart from the above, RK Anand also filed before the High Court on March 31, 2008 an application in the nature of written arguments.

55. On conclusion of oral submissions, on April 5, 2008 the Court, in presence of the three contemnors and their counsel, viewed all the original materials of the sting operations submitted before it by NDTV. In the order passed on that date it recorded the proceeding of the day as under:

“The under mentioned recordings were played in court today in the presence of noticees, their counsel and the *amicus curiae*:

- (i) Bag camera chip of conversation with Shri I. U. Khan on 28.4.2007;
- (ii) Button camera DVD of conversation with Shri I. U. Khan on 28.4.2007;
- (iii) Button camera chip of conversation with Shri R. K. Anand on 6.5.2007;
- (iv) Button camera chip of conversation with Shri R. K. Anand on 8.5.2007;
- (v) Button Camera Chip of conversation with Sri Bhagwan Sharma; Shri Lovely;
- (vi) Telecast of second expose of 3.12.2007 at H.P. stay of Sunil Kulkarni

Mr. Huzefa Ahmedi for noticee Mr. I. U. Khan and Mr. R. K. Anand for himself and Sri Bhagwan offered their comments on the inferences to be drawn from the video recordings and the conversations therein.

Re-notify on 10th April, 2008 at 2.30 p.m. for conclusion of submissions on behalf of noticees.”

56. On the next date April 10, 2008 RK Anand concluded his submission and the counsel for IU Khan filed reply to the written submission of *amicus curiae*. The matter came up once more before the Court on May 2, 2008 when the Court after giving some direction to NDTV and *amicus curiae*, reserved judgment in the case which was finally pronounced on August 21, 2008. The Court held that the contempt jurisdiction of a Court is *sui generis*. The provisions of CrPC and the Evidence Act are not applicable to a proceeding of contempt. In dealing with contempt, the Court was entitled to devise its own procedure but it must firmly adhere to the principles of natural justice. The Court also found and held that the recordings of the stings on the microchips and their reproduction on the CDs were completely genuine and unimpeachable and hence, those materials could not only be taken in evidence but fully relied on in support of the charge.

57. The High Court rejected all the interlocutory applications filed by RK Anand. As to the request to call Poonam Agarwal for cross-examination the Court observed that what transpired between RK Anand and Kulkarni in the sting meetings was there on the microchips and the CDs, copied from those chips, for anyone to see and no statement by Poonam Agarwal in her cross-examination would alter that even slightly. The Court further recorded its finding that the microchips were not subjected to any tampering etc. and hence, rejected the petition for proceeding against NDTV for perjury. In regard to the other petitions the Court observed that those were moved in desperation and for exerting pressure on NDTV and Poonam Agarwal. The Court further observed that the original chips were in the safe custody of NDTV and there was no need for those chips to be deposited in Court. The contents of the microchips were viewed by the proceedees and the CDs onto which the microchips were copied were handed over to them. The proceedees, therefore, had no cause for grievance and the submission to send the microchips for forensic examination or for directing NDTV to submit the original microchips before the High Court had no

substance or merit.

58. In the end the Court held that the circumstances and the manner in which the meetings took place between the proceedees and Kulkarni and the exchanges that took place in those meetings as evidenced from the sting recordings fully established that both IU Khan and RK Anand were guilty of the charges framed against them. It accordingly convicted them for criminal contempt of Court and sentenced them as noticed above.

SOME OF THE ISSUES ARISING IN THE CASE:

59. These are broadly all the facts of the case. We have set out the relevant facts in considerable detail since we do not see this case as simply a matter of culpability, or otherwise, of two individuals. Inherent in the facts of the case are a number of issues, some of which go to the very root of the administration of justice in the country and need to be addressed by this Court.

The two appeals give rise to the following questions:

1. Whether the conviction of the two appellants for committing criminal contempt of court is justified and sustainable?
2. Whether the procedure adopted by the High Court in the contempt proceedings was fair and reasonable, causing no prejudice to the two appellants?
3. Whether it was open to the High Court to prohibit the appellants from appearing before the High Court and the courts sub-ordinate to it for a specified period as one of the punishments for criminal contempt of court?
4. Whether in the facts and circumstances of the case the punishments awarded to the appellants can be said to be adequate and commensurate to their misdeeds?

Apart from the above, some other important issues arise from the facts of the case that need to be addressed by us. These are:

5. The role of NDTV in carrying out sting operations and telecasting the programme based on the sting materials in regard to a criminal trial that was going on before the court.
6. The declining professional standards among lawyers, and

7. The root-cause behind the whole affair; the way the BMW trial was allowed to go directionless

60. On these issues we were addressed at length by Mr. Altaf Ahmed, learned Senior Advocate appearing for RK Anand and Mr. P. P. Rao, learned Senior Advocate appearing on behalf of IU Khan. We also heard Mr. Harish Salve, learned Senior Advocate representing NDTV, which though not a party in the appeals was, nevertheless issued notice by us. We also received valuable assistance from Mr. Gopal Subramaniam, Senior Advocate and Mr. Nageshwar Rao, Senior advocate, the *amici* appointed by us having regard to the important issues involved in the case. We spent a full day viewing all the sting recordings, the recording of the programmes telecast by NDTV on May 30, 2007 and the eight minute CD prepared by RK Anand. Present at the viewing were all the counsel and one of the appellants, namely RK Anand.

RK ANAND'S APPEAL

61. Before advertng to anything else we must deal with the appeals proper. In order to judge the charge of criminal contempt against the appellants it needs to be seen what actually transpired between Kulkarni and the two appellants in the stings to which they were subjected. And for that we shall have to examine the raw sting recordings.

62. Taking the case of RK Anand first we go to the sting done on him on May 6, 2007 when Kulkarni met him in the VIP lounge at the domestic terminal of IGI Airport, Delhi. Here, it needs to be recalled that as Kulkarni was behind the camera (which was fixed to his shirt front) he is not seen in the picture. What one sees and hears are the pictures of whomsoever he is engaged with and their voices. The video begins with Kulkarni approaching the guard at the entrance of the airport building and asking him about the public address system from where he could contact RK Anand who was inside the airport building in the VIP lounge. The following are the extracts from the transcript of the sting recording of the meeting that would give an idea how the meeting between the two took place and what was said in the meeting.

Anand: *Haan ab....ab mujhe batao...*

Anand: *Ab batao mereko.....*

Kulkarni: ***Mujhe bola dhai crore doonga...aap batao mereko.***

Anand: *Hain?*

Kulkarni: *Dhai crore.....*

Anand: ***Tu paanch crore maang le.....***

Kulkarni: *Main paanch crore maang leta hoo...*

Anand: *Tere ko cross examine maine zaroor karna hai!*

Kulkarni: *Aur doosri baat....cross examine aap karoge mereko? (Anand laughs)*

xx

Kulkarni: *Jab bhi mereko zaroorat padegi main ghar pe aa jaunga, mujhe pata hai.*

Anand: ***Chalo let me come back tomorrow evening, you come and meet me in the night...in the farm....don't meet me outside.***

xx

Kulkarni: *Nahi aaj jaroori tha isliye main mila...nahi to main..I avoid it..*

Anand: *Nahi farm pe milna.*

Kulkarni: *Aur doosri baat...yeh inhe bhi jante ho...yeh dekho its Commando...ok*

Anand: ***Ya, Tomorrow evening, bye!***

The second sting took place on May 8, 2007 in the car. Extracts from the transcript of that meeting are as follows.

Kulkarni: *kyon office mein bhi aur ghar pe bhi mat millo...yeh sare log mere peeche...*

Anand: *yahan kyon milte ho phir?*

Kulkarni: *Yahan koi nahi dekhta...acha abhi kya karna hai batao.*

xx

Anand: ***Ab dekho tum xxxx tum xx ,paise xxxxx***

Kulkarni: *Main....yeh sab main kaise boloonga...ab yeh sab drama yeh kar rahe hai na...drama kar rehe hai poora hi...ab dekho jo hua so hua....*

Anand: *Baat to tumhare samne karonga, peeche to karongaa nahi....*

Kulkarni: *Vo to mainbhi janta hoo*

Anand: *Samne baat hogi tumhare*

Kulkarni: *Kal kya mere ko nikaal rahe ho kya...311 se?*

Anand: *Nikal doo?*

Kulkarni: *Nahi..nahi mat nikalna xxx*

Anand: *Nahi Nikalta*

Kulkarni: *Nahi Nahi mat nikalna..withdraw karva lo na aap...jab main aapke saath hoo, jo marzi karne ke liye tyaar hoo. to yeh kaye ke liye High Court main laga diya aapne..aur mere upar aapko itna bhi bharosa nahi hai kyatheek hai gussa ho jata hoo main xxxxx..*

Anand: *Nahi Nahi*

Kulkarni: *Lekin aana hai.....depose karna hai.*

Anand: *Ab usse kya baat karni hai...batao, Reasonable baat karo.*

Kulkarni: *Aap decide karo.*

Anand: *Tum decide karo.*

Anand: *Woh to you decide.”*

Kulkarni: *30,000 crores...CBI ne 2300 crores..big investment...84 crores*

Anand: *Vo choddo*

Kulkarni: *Kyon..kyon Chodo..kyon chodo?.. Aap..main aapka beta hoo. bolo.*

Anand: *Tumhara bheja kharaab ho gaya hai...(Laughs)*

Kulkarni: *Kharaab ho gaya hai na abhi....*

Anand: *Haa bheja kharaab ho raha hai.*

xx

Anand: *So you have not taken the summon?*

Kulkarni: *Na...not al all. Jab tak aap nahin bataoge, Khan sahib nahi bataenge tab main summon kaise lu.*

Anand: *How did Ramesh Gupta inform him that you have taken the summons?*

xx

Kulkarni: *Ab maine kya karna hai..maine summon liya nahi hai..aap mere upar to bharosa kar sakte ho na?*

Anand: *Poora, mujhe to poora...*

Kulkarni: *Poora vishwas hai na? To maine summon nahi liya ha...*

xx

Anand: *I'm out of touch...I'm not in trial, I'm in High Court so I don't know...anyhow..what statement you are supposed to make..we will decide about it...First of all, meet the bugger and talk to him. And be reasonable. Don't be unreasonable like what you told me that day. Don't be silly!*

Kulkarni: *Kitna Mango?*

Anand: *Chodo na...bat samjha kar yaar...aadmi ko zindagi main aur bhi bade kaam aate hai...aise nahi karte..that fellow is sick you know..that man..jo kya naam hai uska xxx*

Kulkarni: *Hmm.*

xx

Anand: *Talk to me around seven forty five.*

Kulkarni: *Ok*

Anand: *Ok*

Kulkarni: *Sir..*

Anand: *Then we'll decide about it.*

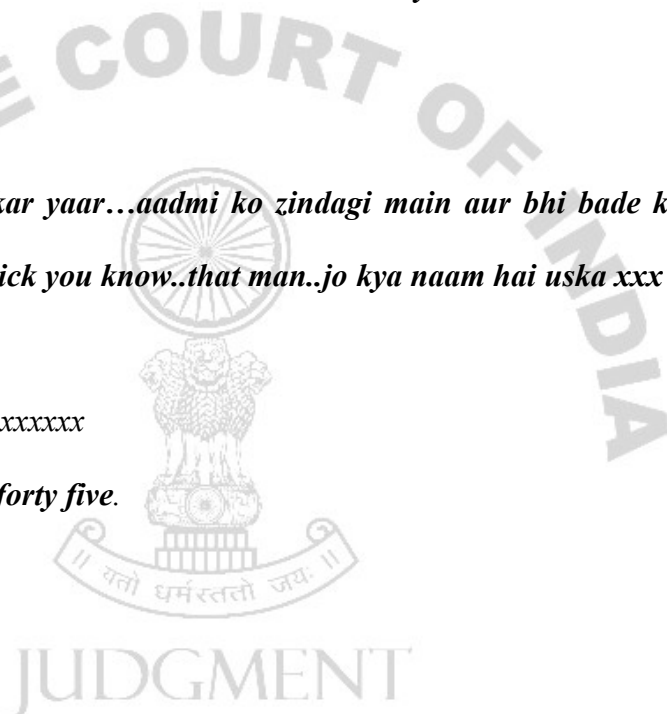
xx

Kulkarni: *Hmm. Paune aath (8) baje I'll get back to you..agar paune aath (8) baje aap bulate ho to main aaju-baaju ke area main hi rehta hoo..Kanth ko bula lena bas..meri ek dil ki bhadaas niklane do bas...do minute.*

Anand: *Aaju baju mein hi rehna, main tumhe bula lunga.*

Kulkarni: *Isme bachana hai na usko Sanjeev ko?*

Anand: *xx Kabhi kisika bura mat kiya karo. Panga lene ka kaya faydaa.!*



Kulkarni: *Theek hai.*

Kulkarni: *Nahi..lekin kaise kya karna hai vo aapne aur khan sahab ne decided karna hai..after all it was merely an accidentxxx.*

Anand: *And he remained in jail for 8-9 months...yaar.*

Kulkarni: *To main..to mere ko bhool jayoge aap..pentalis (45) din.*

Anand: *Kaise.*

xx

Anand: *You were enjoying..*

Kulkarni: *Kya, ...*

Anand: *You were enjoying. Not that you were in a problem..uski to dikkat hai bechare kixxxx*

Kulkarni: *Nahi Nahi..I'm also not interested. Aisi baat nahi hai..*

Anand: *Kabhi kisi ka bura nahi kara karo..aise bhala karne se hi aadmi to acha rehta hai..kisi ko jhoota nahi phasana chahiye..nikal dena chahiye...*

Kulkarni: *Chalo theek hai. Aap ke kehne par main kuch bhi karne ke liye tayaar hoo..aur inki saari galat information hai.*

Anand: *Aage jake bhi bhagwan ko jawaab dena hota hai yaar..aage bhi jawaab.... kya fayda karne..xxx*

Anand: *Chhuraane se phir bhi ache rehta hai..phasane seto (abuses) bura hi kaam hota hai... main to kisi main interested hi nahi hoo..kisiko phasane main...*

Kulkarni: *nahi vo to mujhe bhi pata hai...*

Anand: *In logo ne Narsimha Rao ko phasaya..acha thodi hua tah vo..vaapis chhuraya tha humne..kya fayda hua..*

Kulkarni: *Main aajo baajo main paune aath baje..aap mere ko bula lena*

Anand: *Give me a call at seven forty five..*

Kulkarni: *Ji..*

Anand: *On my office number.*

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

Kulkarni: *Phir mere khayaal se 311 udega nahi na, blood sample ka udega?*

Anand: *Hain?*

Anand: *Kyon udaye..jab tumhare pass paise bante hai to main kyon udayo?*

Kulkarni: *Jab main aapke saath hoo..*

Anand: *Ha..to phir kya hai..*

xx

Kulkarni: *Koi neta log tha..acha..seven forty five..*

Anand: *Pakki gal..*

63. It is quite possible that Kulkarni had somehow found out RK Anand's programme and RK Anand did not know that he was coming to meet him at the airport but there can be no doubt that he allowed him to come to him and the meeting took place with his consent. From his opening remark and the general tenor of the conversation it is evident that they were quite free and familiar with each other. (We may recall here their seven years old Shimla connection!). Now, when Kulkarni asks him what strategy was to be made it could mean only one thing. He did not give any direct reply to that question but he did not ask Kulkarni to shut up either. When Kulkarni said that he was offered two and half crores he indeed mockingly suggested that he should ask for five crores but here also what was sought to be ridiculed was the sum quoted and not the prospects for negotiation. As a matter of fact for further negotiation door was kept wide open with the express invitation for further meeting albeit at a discreet place and time.

64. The meeting at the airport might or might not have been scheduled but there can be no doubt that the meeting in the car was fixed from before. Otherwise, it was impossible for Kulkarni to enter the car having equipped himself with a hidden camera and the recording device from before in anticipation that he would get the chance to get into the car outside Delhi High Court. The purpose of the meeting is manifest by the conversation between the two. It is also evident that before parting another meeting was fixed in the evening for which Kulkarni was to call up RK Anand at his office. As arranged, Kulkarni did telephone at RK Anand's office but the meeting did not take place there or with RK Anand. The meeting took place at the South Extension Market

where first Bhagwan Sharma and then Lovely came to meet Kulkarni. Both claimed that they were sent to meet him by RK Anand. There is a very long transcript of the sting on the third meeting, first between Kulkarni and Bhagwan Sharma (who stayed with Kulkarni till Lovely came there) and then between Kulkarni and Lovely. The recording of the third sting further makes it evident that Kulkarni was trying (at least for the purpose of the sting) to sell himself off in favour of the accused Sanjeev Nanda for a price that he left to be fixed by RK Anand. However we see no reason to advert to the third sting, first because RK Anand was not personally present in the meeting and secondly and more importantly because the charge is fully established against him on the basis of the two stings done on him personally. This is of course, provided the recordings of the two stings truly and faithfully represent what actually transpired in those two meetings.

Submissions on behalf of RK Anand:

65. Mr. Altaf Ahmed, learned senior counsel appearing for RK Anand, submitted that the High Court founded the appellant's conviction under the Contempt of Courts Act on facts that were electronically recorded, even without having the authenticity of the recording properly proved. The High Court simply assumed the sting recordings to be correct and proceeded to pronounce the appellant guilty of criminal contempt on that basis. Hence, the genuineness and accuracy of what appeared in the sting recordings always remained questionable. Mr. Ahmed submitted that the judgment and order coming under appeal was quite untenable for the simple reason that the integrity of its factual foundation was never free from doubt. Learned counsel further submitted that the procedure followed by the High Court was not fair and the appellant was denied a fair trial. He also submitted that the High Court arrived at its conclusions without taking into consideration the appellant's defence and that was yet another reason for setting aside the impugned judgment and order.

Nature of Contempt Proceeding:

66. Mr. Ahmed submitted that under the Contempt of Courts Act the High Court exercised extra-ordinary jurisdiction. A proceeding under the Act was quasi criminal in nature and it demanded the same standard of proof as required in a criminal trial to hold a person guilty of

criminal contempt. In support of the proposition he cited two decisions of this Court, one in *Mritunjoy Das Vs. Sayed Hasibur Rahman*, (2001) 3 SCC 739 and the other in *Chotu Ram Vs. Urvashi Gulati and ors.*, (2001) 7 SCC 530. In both the decisions the Court observed that the common English phrase, “he who asserts must prove” was equally applicable to contempt proceedings. In both the decisions the Court cited a passage from a decision by Lord Denning in *Re Bramblevale Ltd.*, (ALL ER pp. 1063H and 1064B) on the nature and standard of evidence required in a proceeding of contempt.

“A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond reasonable doubt. It is not proved by showing that, when the man was asked about it, he told lies. There must be some further evidence to incriminate him. Once some evidence is given, then his lies can be thrown into the scale against him. But there must be some other evidence. Where there are two equally consistent possibilities open to the court, it is not right to hold that the offence is proved beyond reasonable doubt.”

67. Seeking to buttress the point learned Counsel also referred to some more decisions of this Court in: (i) *Anil Rattan Sarkar vs. Hiral Ghosh*, (2002) 4 SCC 21 (ii) *Bijay Kumar Mahanty vs. Jadu @ Ram Chandra Sahoo*, (2003) 1 SCC 644 (iii) *J. R. Parashar, Advocate vs. Prashant Bhushan, Advocate* (2001) 6 SCC 735 and (iv) *S. Abdul Karim vs. NK Prakash and others* (1976) 1 SCC 975

68. There cannot be any disagreement with the proposition advanced by Mr. Ahmed but as noted above **if** the sting recordings are true and correct no more evidence is required to see that RK Anand was trying to suborn a witness, that is, a particularly vile way of interfering with due course of a judicial proceeding especially if indulged in by a lawyer of long standing.

Admissibility of electronically recorded & stored materials in evidence:

69. This leads us to consider the main thrust of Mr. Ahmed’s submissions in regard to the integrity, authenticity, and reliability of the electronic materials on the basis of which the appellants were held guilty of committing contempt of Court. Learned counsel submitted that the way the High Court proceeded in the matter it was impossible to say with any certainty that the microchips that finally came before it for viewing were the same microchips that were used in the spy cameras for the stings or those were not in any way manipulated or interfered with before production in court.

He further submitted that the admissibility in evidence of electronic recordings or Electronically Stored Information (ESI) was subject to stringent conditions but the High Court completely disregarded those conditions and freely used the sting recordings as the basis for the appellants' conviction.

70. In support of the submissions Mr. Ahmed submitted a voluminous compilation of decisions (of this Court and of some foreign courts) and some technical literature and articles on ESI. We propose to take note of only those decisions/articles that Mr. Ahmed specifically referred to us and that have some relevance to the case in hand.

71. Two of the decisions of this Court referred by Mr. Ahmed, one in *S A Khan vs. Bhajan Lal*, (1993) 3 SCC 151 and the other in *Quamarul Islam vs. S. K. Kanta*, (1973) 1 SCC 471 relate to newspaper reports. In these two decisions it was held that news paper report is hearsay secondary evidence which cannot be relied on unless proved by evidence *aliunde*. Even absence of denial of statement appearing in newspaper by its maker would not absolve the obligation of the applicant of proving the statement. These two decisions have evidently no relevance to the case before us.

72. In regard to the admissibility in evidence of tape recorded statements Mr. Ahmed cited a number of decisions of this Court in (i) *N. Shri Rama Reddy vs. V. Giri* (1970) 2 SCC 340 (ii) *R. M. Malkani vs. State of Maharashtra* (1973) 1 SCC 471 (iii) *Mahabir Prasad Verma vs. Dr. Surinder Kaur* (1982) 2 SCC 258 and (iv) *Ram Singh vs. Col. Ram Singh* (1985) Suppl SCC 611. He also referred to two foreign decisions on the point, one in (i) *R vs. Stevenson*, 1971 (1) All ER 678, and the other of the Supreme Court, Appellate Division of the State of New York in *The People of State of New York vs. Francis Bell* (taken down from the internet). We need here refer to the last among the decisions of this Court and the English decisions in *R vs. Stevenson*. In *Ram Singh*, a case arising from an election trial the Court examined the question of admissibility of tape recorded conversations under the relevant provisions of the Indian Evidence Act. The Court lay down that a tape recorded statement would be admissible in evidence subject to the following conditions

“Thus, so far as this Court is concerned the conditions for admissibility of a tape-recorded statement may be stated as follows:

(1) The voice of the speaker must be duly identified by the maker of the record or

by other who recognise his voice. In other words, it manifestly follows as a logical corollary that in the first condition for the admissibility of such a statement is to identify the voice of the speaker. Where the voice has been denied by the maker it will require very strict proof to determine whether or not it was really the voice of the speaker.

- (2) The accuracy of the tape-recorded statement has to be proved by the maker of the record by satisfactory evidence-direct or circumstantial.
- (3) Every possibility of tampering with or erasure of a part of a tape-recorded statement must be ruled out otherwise it may render the said statement out of context and, therefore, inadmissible.
- (4) The statement must be relevant according to the rules of Evidence Act.
- (5) The recorded cassette must be carefully sealed and kept in a safe or official custody.
- (6) The voice of the speaker should be clearly audible and not lost or distorted by other sounds or disturbances.”

73. In *R vs. Stevenson* too the Court was dealing with a tape recorded conversation in a criminal case. In regard to the admissibility of the tape recorded conversation the court observed as follows:

“Just as in the case of photographs in a criminal trial the original un-retouched negatives have to be retained in strict custody so in my views should original tape recordings. However one looks at it, whether, as counsel for the Crown argues, all the prosecution have to do on this issue is to establish a prima facie case, or whether, as counsel for the defendant Stevenson in particular, and counsel for the defendant Hulse joining with him, argues for the defence, the burden of establishing an original document is a criminal burden of proof beyond reasonable doubt, in the circumstances of this case it seems to me that the prosecution have failed to establish this particular type of evidence. *Once the original is impugned and sufficient details as to certain peculiarities in the proffered evidence have been examined in court, and once the situation is reached that it is likely that the proffered evidence is not the original-is not the primary and the best evidence -that seems to me to create a situation in which, whether on reasonable doubt or whether on a prima facie basis, the judge is left with no alternative but to reject the evidence.* In this case on the facts as I have heard them such doubt does arise. That means that no one can hear this evidence and it is inadmissible.”

(emphasis added)

74. Mr. Ahmed also referred to another decision by a US Court on the admissibility of video tapes. This is by the Court of Appeal of the State of North Carolina in *State of North Carolina vs. Michael Odell Sibley* (downloaded from the internet). In this decision there is a reference to an earlier decision of the same court in *State vs. Cannon*. 92 N C App. 246 etc. in which the conditions for admissibility of video tape in evidence were laid down as under:

“The prerequisite that the offer or lay a proper foundation for the videotape can be met by: (1) testimony that the motion picture or videotape fairly and accurately illustrates the events filmed (illustrative purpose); (2) “proper testimony concerning the checking and operation of the video camera and the chain of evidence concerning the videotape...”; (3) testimony

that “the photographs introduced at trial were the same as those [the witness] had inspected immediately after processing,” (substantive purposes); or (4) “testimony that the videotape had not been edited, and that the picture fairly and accurately recorded the actual appearance of the area ‘photographed.’”

75. On the different issues germane to the admissibility of ESI Mr. Ahmed also referred to a decision of the District Court of Maryland, United State in Civil Action No. PWG-06-1893, *Jack R. Lorraine and Beverly Mack vs. Markel American Insurance Company* (downloaded from the internet). Mr. Ahmed also cited before us an article captioned ‘*The Sedona Conference ® Commentary on ESI Evidence & Admissibility*’: A Project of The Sedona Conference Working Group on Electronic Document Retention & Production (WGI)®, published in Sedona Conference Journal, Fall 2008. The article deals extensively with the different questions relating to admissibility in evidence of ESI and one of its basic premises is that the mere fact that the information was created and stored within a computer system would not make that information reliable and authentic.

76. He also invited our attention to an article appearing in The Indian Police Journal, July-September 2004 issue under the caption “*Detection Technique of Video Tape Alteration on the Basis of Sound Track Analysis*”. From this article Mr. Ahmed read out the following passages:

“The acceptance of recorded evidence in the court of law depends solely on the establishment of its integrity. In other words, the recorded evidence should be free from intentional alteration. Generally, examination of recorded evidence for establishing the integrity/authenticity is performed to find out whether it is a one-time recording or an edited version or copy of the original.”

And further:

“Alteration on an audio recording can be of Addition, Deletion, Obscuration, Transformation and Synthesis. In video recordings the alteration may be with the intention to change either on the audio track or on the video track. In both the ways there is always disturbance on both the track. Alterations in a video track are usually made by adding or removing some frames, by rearranging few frames, by distorting certain frames and lastly by introducing artificially generated frames. Alteration on a video recording”

77. In light of the decisions and articles cited above Mr Ahmed contended that the High Court freely used the copies of the sting recordings and the transcripts of those recordings made and supplied by NDTV without caring to first establish the authenticity of the sting recordings. Learned counsel submitted that the use of the CDs of the sting recordings and their transcripts by the High Court was in complete violation of the conditions laid down by this Court in *Ram Singh*.

78. Learned counsel pointed out that at the threshold of the proceeding, started *suo moto*, the High Court, instead of taking the microchips used for the sting operations in its custody directed NDTV 'to preserve the original material including the CDs/Video' pertaining to the sting operations and to submit to the Court copies and transcripts made from those chips. Thus the microchips remained all along with NDTV, allowing it all the time and opportunity to make any alterations and changes in the sting recordings (even assuming there were such recording in the first place!) to suit its purpose. The petition filed by RK Anand for directing NDTV to submit the original microchips before the Court and to give him copies made in Court directly from those chips remained lying on the record unattended till it was rejected by the final judgment and order passed in the case. Another petition requesting to send the microchips for forensic examination also met with the same fate.

79. Mr. Ahmed further submitted that the procedure followed by the High Court was so flawed that even the number of chips used for the different sting operations remained indeterminate. The trial court order dated June 1, 2007 referred to three chips produced on behalf of NDTV. The written statement of Poonam Agarwal made before the High Court on June 6, 2007 mentioned four chips and finally their number became five in her affidavit dated October 1, 2007.

80. He further submitted that the audio and the video recording on the basis of which the NDTV telecast was based and that was produced before the High Court was done by Kulkarni and it was he who was the maker of those materials. The Court never got Kulkarni brought before it either for the formal proof of the electronic materials or for cross-examination by the contemnors. The finding of the High Court was thus based on materials of which neither the authenticity was proved nor the veracity of which was tested by cross-examination. He further submitted that the affidavit of the NDTV reporter (Poonam Agarwal) doesn't cure this basic flaw in the proceedings. The recordings were not done by the TV channel's reporter: her participation in the process was only to the extent that she 'wired' Kulkarni and received from him the recorded materials. What she received from Kulkarni was also not identified, much less formally proved before the High Court. According to Mr. Ahmed, therefore, the finding of the High Court was wholly untenable and fit to be set aside.

SUBMISSIONS CONSIDERED:

81. The legal principles advanced by Mr. Ahmed are unexceptionable but the way he tried to apply those principles to the present case appear to us to be completely misplaced.

82. Here, we must make it clear that we are dealing with a proceeding under the Contempt of Courts Act. Now, it is one thing to say that the **standard** of proof in a contempt proceeding is no less rigorous than a criminal trial but it is something entirely different to insist that the **manner** of proof for the two proceedings must also be the same. It is now well settled and so also the High Court has held that the proceeding of contempt of court is *sui generis*. In other words, it is not strictly controlled by the provisions of the CrPC and the Indian Evidence Act. What, however, applies to a proceeding of contempt of court are the principles of natural justice and those principles apply to the contempt proceeding with greater rigour than any other proceeding. This means that the Court must follow a procedure that is fair and objective; that should cause no prejudice to the person facing the charge of contempt of court and that should allow him/her the fullest opportunity to defend himself/herself. (See *In Re Vinay Mishra* (1995) 2 SCC 584, *Daroga Singh and Ors. vs. B.K. Pandey* (2004) 5 SCC 26)

CORRECTNESS OF STING RECORDINGS NEVER DISPUTED OR DOUBTED:

83. Keeping this in mind when we turn to the facts of this case we find that the correctness of the sting recordings was never in doubt or dispute. RK Anand never said that on the given dates and time he never met Kulkarni at the airport lounge or in the car and what was shown in the sting recordings was fabricated and false. He did not say that though he met Kulkarni on the two occasions, they were talking about the weather or the stock market or the latest film hits and the utterances put in their mouth were fabricated and doctored. Where then is the question of proof of authenticity and integrity of the recordings? It may be recalled that both in the eight o'clock and nine o'clock programmes, RK Anand was interviewed by the programme anchors and the live exchange was integrated into the programmes. Let us see what his first response to the telecast was when the anchor of the eight o'clock programme brought him on the show.

[Following are the extracts from the exchange between the anchor and RK Anand]

LIVE EXCHANGE BETWEEN TV ANCHOR & RK ANAND:

“India 60 Minutes (BMW Special) 8 PM”

Segment 2

Sonia: *We have RK Anand, on line with us. Mr. RK Anand, you have watched that report, what's your defence?*

RK Anand: *My defence, what can be the defence you tell me. See, he just came to me and he was making a joke that should I make a demand for Rs. 2.5 crores and I said what the hell are you talking, you would want any amount you want ten, I meant this jokingly I'd not serious manner. I thought what the hell you want and I never invited him I was going out he must have come there to meet me and I don't know what kind of story if being made my NDTV on this channel.*

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Sonia: *But Mr. Anand if you have a witness who has come up, you have a witness of the prosecution who has come up to you he has claimed that he wants this much money and you may've laughed it off but you then met him again, you've again discussed details of the case, surely that is not appropriate behaviour for a defence lawyer with a prosecution witness.*

RK Anand: *See, did I ask him to sit in the car? Did I ask him to come to my office? Did I ever give him a call to come to me? We never called. I think it's a trap being laid by the NDTV people and sending the Kulkarni to me. It's nothing that we have done anything.*

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Sonia: *But Mr Anand, let me come back to the central point once again why should a defence lawyer and a prosecution witness be meeting and discussing the case even if it's at the behest of the witness, surely as a senior defence lawyer you should've thrown him out and not entertained this conversation?*

RK Anand: ***Just listen to me now; somebody comes up and talks to you, what do you do, you throw him out?***

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Sonia: *But you met him again in your car?*

RK Anand: ***HE was saying 2.5 and I said make a demand for 5. I was making a joke of him. Could you not understand the language in which I said it? I was laughing at that time. Listen to me, he is a blackmailer, he is trying to blackmail at your instance.***

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Sonia: *Mr Anand, if you were joking the questions that we are raising as we've said many times, we have no evidence that money changed hands or didn't change hands, what we are showing you is what was caught on camera. Money being discussed whether it was jokingly or not jokingly has to be investigated and two meetings between you and the key prosecution witness, that seems to be what is currently on camera, what actually happened has to be investigated. But how do you justify these two meetings?*

RK Anand: ***You are trying again to ask questions after questions. I am saying that you know when he said about 2.5 crores, I laughed at him and said bloody you are joking. I was smiling at him; he was making a fool of himself.***

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Next is his response in course of the second telecast immediately following the first one:

[Following are the extracts from the exchange between the anchor and RK Anand]

30th May – 9 PM BMW Special

Barkha Dutt: *Mr RK Anand if you can hear me, by now you have watched over two times on NDTV. The camera doesn't lie sir, u were meeting the prosecution's witness not once but twice, sir, how was this appropriate, how can you defend this sir?*

Anand: *Barkha, we should talk in the right perspective. One must understand that this witness is a blackmailer, we have been fighting in the High Court even today that this witness should not be examined because he has been blackmailing us for the last so many years **and when I was going out of Delhi, he appeared suddenly at the airport, and starts talking to me and say should I make it 2.5 crores. I laughed at him and what the hell are you talking, u demand 5 crores, I'll cross-examine you. This is my first reaction to that one.***

Barkha: *But Mr Anand if he's a blackmailer, why did you meet him a second time in your own car a second time outside the Delhi High Court, if he's a blackmailer?*

Anand: ***I have not met him in my car I'm telling you, this is not correct.***

Barkha: *Did u meet him a second time?*

Anand: ***No I did not meet him***

Barkha: *Sir our investigation reveals that you met him at the Delhi airport and then again a second time conversation between you and him takes place inside a car, it may not have been your car. There are two separate meetings for sure sir.*

Anand: ***There is no second meeting, I've never met him. I only met him once and that he came. I was going out of Delhi, and somebody comes and talks to me and asks for 2.5 crores and I laughed at him that what the hell are u talking. U want 2.5 crores and just see what I've said. I'll cross-examine you. He said will you cross-examine me, I said yes I'll cross-examine you. And then we go to the HC and tell HC that he is a blackmailer and we will not examine him.***

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Barkha: *Anand, when Sunil Kulkarni met u at the airport, how correct is it for the defence lawyer to be toughing (sic. laughing) when Sunil Kulkarni raises the question of Rs 2.5 crores. In response u laugh and say for that money I will cross-examine you. Even as a joke is it appropriate?*

Anand: ***It is not a joke I'm saying.If somebody comes before your vision suddenly when u are going out of Delhi, and say I will demand 2.5 crores, I say what 2.5 crores, make a demand of 5 crores I will cross examine you in the court of law***

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Barkha: *U we (sic. have) flatly denied meeting Sunil Kulkarni, is that correct?*

Anand: ***I've not met him a second time.***

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Barkha: *u think its appropriate for you to asking the prosecution witness to come and met you at your house sir?*

Anand: ***why what is the difficulty in meeting anyone, I don't understand?***

Barkha: *So according to u RK Anand.....*

Anand:.....*so long u do not influence them...*

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84. As may be seen from the above, the first response of RK Anand is to try to explain away (quite unconvincingly to anyone who might have viewed the recorded programme!) what he said when Kulkarni mentioned the amount of rupees 2.5 crores. He admitted that Kulkarni met him at the airport lounge. He didn't deny any part of the conversation between them as shown in the programme based on the sting recordings. To the anchor of the first programme, he impliedly admitted meeting Kulkarni for the second time in the car simply stating that he didn't ask Kulkarni to sit in the car and he did not ask him to come to the office. But about half an hour later, to the anchor of the second programme, though admitting meeting Kulkarni at the airport lounge, RK Anand completely denied meeting him in the car or anywhere else for the second time. However, as we shall see presently the denial was quite false.

85. We have gone through the transcripts of the exchange between the two anchors and RK Anand a number of times and we have also viewed the programme recorded on CDs. To us, RK Anand, in his interactions with the programme anchors, appeared to be quite stunned at being caught on the camera in the wrong act, rather than outraged at any false accusations.

86. It is noted above that immediately after the telecast RK Anand sent a legal notice to NDTV threatening legal actions against them and demanding a huge sum as compensation. NDTV gave its replay to the legal notice and thereafter RK Anand didn't pursue the matter any further.

Meeting with Kulkarni in car admitted:

87. RK Anand filed his reply affidavit in response to the notice issued by the Court on October 3, 2007. In paragraph B of the affidavit he denied, "each and every part of alleged tape conversation and CDs produced before the Court in response to order passed by this Court in relation to telecast of BMW exposing thereby denying each part of the conversation". He further stated that the whole tape was fabricated, distorted, edited in such a manner to tarnish his image and

to suit and project the TV channel's story in particular manner.

In paragraph 'O' of the affidavit, however, he stated as follows:

“O. That the Deponent was awfully busy in Court on 8.5.2007. He finished his arguments in a bride burning case at 5.45 p.m. While he was sitting in his car, Sunil Kulkarni made entry in the car. The Deponent was unwilling to talk and to allow him to sit in the car. The opening lines would make it clear that the Deponent never wanted to talk to Sunil Kulkarni.

“Kulkarni: Kyon office mein, ghar pe bhi mat milo....
Anand: Yahan Kyon milto ho phir.”

“After reaching office, the deponent had meeting with clients i.e. Sanjeev Nanda and his father. Lovely had come to meet Mr. Suresh Nanda. All the colleagues of the deponent and Nanda's were apprised of development in the car about Sunil Kulkarni. After some time, the deponent left the office. The deponent was informed that Lovely offered to record the conversation of Kulkarni so as to trap him. The deponent was informed later that not only Lovely was successful in recording the demand of Sunil Kulkarni but Shri Bhagwan also recorded another conversation subsequent to that of Lovely. The said conversation is reproduced below.”

88. This is followed by a transcript of some alleged conversation between Shri Bhagwan and Kulkarni.

89. In the above quoted paragraph there is plain and clear admission in regard to the second meeting taking place in the car between RK Anand and Kulkarni on the evening of May 8, 2007. The statement made on oath before the High Court thus completely falsifies his denial in the live interview with the anchor of the TV programme about the second meeting with Kulkarni in the car. As to the later part of the paragraph regarding the alleged sting on Sunil Kulkarni by Shri Bhagwan, we don't have the slightest doubt that it was an afterthought and concoction. Had there been such a sting recording RK Anand was duty bound to inform the High Court about it when the Criminal Revision against the trial court order summoning Kulkarni as court witness was heard on several dates in May 2007 before the telecast of the programme by NDTV. He was equally duty bound to inform the trial court about Kulkarni's approaches and the sting done on him by Shri Bhagwan when Kulkarni was examined before it on May 14, 17 & 29.

Referring to sting recordings to show innocence:

90. Further, interestingly, though calling the sting recordings fabricated, manufactured, and

distorted, he also relies on the very same sting recordings to make out some point or the other in his defence. For example, in paragraph S of the affidavit it is stated as follows:

“S. That in fact, this alleged witness Sunil Kulkarni had earlier attempted to meet the Respondent in his office. It is a matter of chance that Shri Amod Kanth the then Director General of Police, Arunachal Pradesh was present with the Respondent in his office. Sunil Kulkarni was rebuffed, rebuked and was asked to leave Respondent’s office in the presence of Shri Kanth. Thereafter, Sunil Kulkarni was physically thrown out from the office of Respondent. Shri Amodh Kanth also rebuked him for his conduct.

This fact **stands corroborated by the transcript** in which it has been stated by Sunil Kulkarni as under:-

“Kul: *mujhe koi to message nahi mil raha tha. Phir panga yeh ho raha ki when u told me I don’t want to discuss*

(mujhe koi message nahi mil raha tha phir panga yeh ho raha ki when u told me I don’t want to discuss.”

“Kul: *“beech main aap par gussa ho gaya tha.*

(Beech me aap par gussa ho gaya tha, aap ka koi neta log hain, ek aaddmi jisne mere ko aisa kheencha tha).

Kul: *vo aapka ek neta log hain ek Neta isne mereko aisa Kheecha tha*

(Ek neta tha usne mere kko aisa kheencha tha, aisa kheencha tha, bola sahib ne milne ko manakar diya, bigar gaya, kaha bhag jao, bhag jao, aisa bola).”

“**From the above transcript, it is clear** that the Respondent had no intention at any time to meet the said witness. He was thrown out physically from the office of Respondent. He was told not to meet the Respondent as they are not interested in any one.”

Similarly in paragraph Z10 it is stated as follows:

“Z10.....The deponent has never tried or intended to influence this witness so as to interfere in the course of justice. On the other hand, deponent have rebuked and rebuffed him & told him not to ask for any money. **Rather the witness was advised to speak the truth** and not to falsely implicate the Nanda’s. Respondent has gone to the extent of telling him to have fear from God since everyone is answerable for his acts to God.....”

And again in paragraph 17 it is stated as follows:

“17.....The deponent had no intention to discuss the subject matter of the case with Sunil Kulkarni. The discussion was started by Sunil Kulkarni by alleging that;

Kul *“kal kya mereko nikaal rahe ho kya...311 se.”*

Anand: *Karoon...*

Kulkarni *nahi*

Kulkarni *No, nahi nikalna*

Kulkarni *nahi, nahi, mat nikalna..withdraw karva lo na aap. Jab Main aapke saath ho jo marzi karne ke liya tyaar ho to yeh kay ke liye High Court main lagwa diya aapne...mere upar aapko itna bhi bharosa nahin hain kya..theek hain gussa ho jata hoon main....*

Kulkarni lekin aana hain depose karma hain.”

“The aforesaid transcript of Sunil Kulkarni would clearly indicate that he himself was suggesting that he is prepared to make any kind of statement. It is not that the deponent wanted him to make a statement in a particular manner. It is not that the deponent was trying to influence the witness. The witness had already taken a decision to make a statement in a particular manner not at the instance of the deponent.”

Further in Paragraph 23

“23.....The below noted conversation would substantiate the stand of the deponent.

*Kul: kitna mango.
Anand: chodo...baat samjha kar...aadmi ki zindagi main aur Bhi bade kaam aate hain. Aisa nahi karte”*

“The whole conversation about reasonableness was in the form of an admonishment and advice so that no money is demanded. If the deponent wanted to deal with the witness or influence the witness or negotiate the terms of settlement, at that point of time, the deponent could have discussed since the demand of 2.5 crores was already allegedly made by the witness but categorically telling the witness to not to talk about the money and reminding of the relations would negate the discussion about the money part in the whole transcript. The reference to the utterances by Sunil Kulkarni.

*Kul: “isme bachana hain usko sanjeev ko..
Anand: kabhi kisika bura mat kiya karo.
Anand: Kabhi kisi ka bura nahin kara karo..aisa bhala karne se hi Aadmi ko acha xx...kisii ko jhoota nahi phasana chahiya....nikal dena chahiye...
Anand: aage jake bhi bhagwan ko jawaab dena hota hain yaar ...aage bhi jawaab...kya fayda karne...xxx...
Anand: Bachane se phir bhi ache rehta hain...phasane me To bura kaam hota hain...main to kisi main interested hi nahin hoon.”*

First of all...”

Further in paragraph 24

“24. That during the course of conversation and in view of the past acquaintance Sunil Kulkarni had with the deponent, number of irrelevant statements were made by the witness. One such part was in relation to Amodh Kanth. The important conversation which came to light during the course of the talks was;

“Uska koi taluk nahin..phir bhi yeh amod kanth ke peeche kyon pada hua K.K.Paul.”

91. He thus accepts the entire recordings in both the stings. For, it is absurd even to suggest that the sting recordings are true and correct if those are seen as supporting his explanations (which,

in any event, are quite un-statable!) but are otherwise false and fabricated.

92. In a rearguard action Mr. Altaf Ahmed took us one by one through all the paragraphs in different affidavits filed by RK Anand in which the sting recordings were described as false, fabricated, doctored, morphed and manipulated. But those allegations are simply not compatible with the other statements in his affidavits as noted above and his responses in regard to the sting operations at different times. The denials in the affidavits are nothing more than ornamental pleas.

93. We also see no substance in the anomalies and alleged inter correlation in the sting recordings as pointed out on behalf of RK Anand on the basis of the eight minute CD which he got prepared from the materials supplied to him by the Court. Along with the other materials we also viewed eight minute CD produced by RK Anand. In the CD an attempt is made to show that the frames in the sting recordings some times jumped out of the sequence number and such other technical flaws. The objections raised by RK Anand were fully explained by the affidavit filed by Dinesh Singh on behalf of NDTV. In the affidavit it was explained

“80...the alleged discrepancies in the CDs produced before the Court and supplied to the appellants occurred primarily due to conversion of the recorded material from chips into CDs, via the intermediary medium of tapes. Shri Singh further explains the gap occurring at certain points of the recording as due to displacement of the ear-plus connector i.e. the device uses to attach the button lens and the microphone with the recording device.”

94. Mr. Altaf Ahmed also made the grievance that the High Court failed to consider his defence. According to him NDTV had conceived the sting operation as pre-empted measure against Shri Anand, who was consulted in his professional capacity in connection with a matter in which NDTV in collusion with one Mrs. Sumana Sain and IRS officer was indulging in massive tax evasion. The materials in support of the allegations and in particular RK Anand's connection with the matter are so vague and tenuous that we don't consider it worthwhile to go into that question.

95. On a careful consideration of the materials on record we don't have the slightest doubt that the authenticity and integrity of the sting recordings was never disputed or doubted by RK Anand. As noted above he kept on changing his stand in regard to the sting recordings. In the facts and circumstances of the case, therefore, there was no requirement of any formal proof of the sting recordings. Further, so far as RK Anand is concerned there was no violation of the principles of

natural justice inasmuch as he was given copies of all the sting recordings along with their transcripts. He was fully made aware of the charge against him. He was given fullest opportunity to defend himself and to explain his conduct as appearing from the sting recordings. The High Court viewed the microchips used in the spy camera and the programme telecast by TV channel in his presence and gave him further opportunity of hearing thereafter. The sting recordings were rightly made the basis of conviction and the irresistible conclusion is that the conviction of RK Anand for contempt of court is proper legal and valid calling for no interference.

IU KHAN'S APPEAL

96. The sting on IU Khan was done on April 28, 2007 in one of the lawyers' chambers at the Patiala House court premises. The video CD begins by showing Poonam Agarwal fixing the recording device and the button camera on Kulkarni's person sitting inside the car. Then Kulkarni and Deepak Verma together enter the Patiala House. They move around in the court premises for a long time till just before the lunch recess they are able to find IU Khan sitting in someone else's chamber. The chamber seems to be quite crowded with people all the time coming and going away. The first exchange of greetings between IU Khan and Kulkarni as he, accompanied with Deepak Verma, enters into the chamber is not audible. But then IU Khan is heard describing Kulkarni, in a general sort of introduction to those present there, as 'the prime witness in the BMW case', 'star witness' 'a very public spirited and devoted man' etc. Kulkarni starts chatting with him about the summons issued to him by the court in the BMW case. In the meanwhile someone else comes into the chamber. IU Khan greets him loudly and starts talking to him. After a while, on Kulkarni's request, both IU Khan and Kulkarni come out of the chamber and some conversation between the two takes place outside the chamber. After the meeting is over Kulkarni and Deepak Verma together return back. As the recording devices carried by them are still on the conversation that takes place between the two is naturally recorded. Kulkarni does not allow Deepak Verma to go directly to the TV Channel's vehicle parked outside the Court premises where Poonam Agarwal would be waiting

for their return, saying that they are bound to be followed. Instead, they take an auto-rickshaw and go to Pargati Maidan at a short distance from the court. From there they contact Poonam Agarwal on mobile phone, who goes there and joins them and de-wires Kulkarni.

Only partial transcript of the sting recording submitted to Court:

97. The recording of this sting operation is more than an hour long. But the transcript of this sting recording submitted to the Court by NDTV is confined only to the exchange between IU Khan and Kulkarni. In the absence of the full transcript it becomes difficult and cumbersome to see what transpired between Kulkarni and Deepak Verma immediately before and after the meeting with their subject. In our view that part of the sting recording was also highly relevant and important for judging the true import of the exchange that took place between Kulkarni and IU Khan. We are surprised that the High Court did not notice this big omission in the transcript of the first sting and we record our disapproval of NDTV in withholding the full transcript of the sting recording.

Full transcript/recording of IU Khan's interview by TV channel on May 31, 2007 not on record:

98. Further, it is noted above that in the morning of May 31, 2007 one Anusuya Roy, a reporter from NDTV had interviewed IU Khan at his residence for his response to the programme telecast the previous evening. The interview was telecast live from around 8 to 8.23 in the morning. But that was the only time the full interview was shown and later only one statement made by IU Khan in course of the interview was incorporated in the programmes telecast in the evening of May 31. What is more significant, however, is that NDTV did not present before the High Court either the full recording of the interview or its transcript and what we find on the High Court record is only the statement that was used in the programmes telecast on May 31, 2007 and that runs as follows;

“IU Khan: I am not denying anything at all, I am not denying it but the interpretation, meaning and inferences which were drawn are totally wrong, unfounded and totally inconsonance (sic) with the actual record that I am producing before you. Kulkarni also has used the word ‘Bade Saheb’ means the big officer, high officer of the police headquarter. In his deposition in the court also he had used the word Bade Saheb twice and when the explanation was sought, he explained that by bade saheb I mean senior officer of the police headquarter, it was unconnected to Mr. R.K. Anand as it has been wrongly, mischievously and calculatedly projected by you people.”

Confusion in submitting copies of sting recording to High Court:

99. Yet again, there is serious confusion about the production of the recording of the first sting on the microchip of the spy camera carried by Kulkarni before the High Court. It is noted above that on June 1, 2007 **three chips and five CDs** were produced before the trial court. Those were returned back because in the meanwhile the proceeding was initiated by the High Court. On June 2, 2007 six CDs were submitted before the High Court. On that date Poonam Agarwal stated before the Registrar that one of the CDs (marked '1') was edited and the other five CDs (marked '2' to '6') were unedited. She also said that NDTV news channel did not have any other material in connection with the sting operation in question. On June 6, 2007 she submitted the transcripts of the recordings. In the statement made on that date she said that she had earlier submitted six CDs. Those CDs were duplicated from **four** spy camera chips which were recorded on different occasions. After copies of the CDs were given to the proceedees as directed in the order dated August 7, 2007 issuing show cause notices to them, a grievance was made before the Court that they were supplied only five CDs, though the number of CDs submitted before the High Court was six. It was then explained on behalf of NDTV that the contents of two CDs were copied onto a single one and thus the number of CDs was reduced from six to five. It was of course stated that a fresh set of six CDs each would again be supplied to all the three proceedees. The High Court apparently accepted the explanation given by NDTV (High Court order dated 24.9.2007). But the lapse was far more serious as would appear from the affidavit dated October 1, 2007 filed by Poonam Agarwal to explain the position. In her affidavit she stated that in the first sting (on IU Khan) two spy cameras were used, one carried by Kulkarni and the other by Deepak Verma. The recording of the first sting was thus on two microchips one in Kulkarni's camera and other in the bag camera of Deepak Verma. In the other three stings there was a single spy camera carried by Kulkarni, on each occasion having a fresh microchips. Thus for all the four stings a total number of five chips were used. The contents of the microchip in Kulkarni's spy camera used for the first sting (on IU Khan) were copied onto magnetic tape and then to a CD. That microchip was then reformatted for other uses. The other four microchips were available in their original and undisturbed condition. For preparation of the programme telecast on May 30 the contents of all the five chips, including the

one that was reformatted, were used. However, the five unedited CDs (marked '2' to '6') that were submitted before the High Court on June 2, 2007 were copies from the four microchips that had remained in their original and undisturbed condition. The sixth CD (marked as '1') was the copy of the programme that was telecast. **The recording on the microchip in Kulkarni's camera used for the first sting operation, though available on magnetic tape and CD was not submitted to the High Court because the microchip itself was reformatted.** She further stated that while supplying CDs to the noticees in pursuance to the direction of the Court, "a mistake occurred in that, one of the CDs given to the noticees (sic) was not taken from the "four chips but the CD which is a copy of the formatted chip containing the recording done by Mr. Kulkarni". She further stated that a CD made from the mother tape of the formatted chip was being filed along with the affidavit before the High Court.

100. What follows from the affidavit may be summarised as follows; (I) the conduct of NDTV before the High Court in a vary serious proceeding was quite cavalier and causal. (II) At the time the High Court issued show cause notices to the three proceedees it did not have before it the recording on one of the five microchips used in the sting operations. (III) The materials given to the proceedees along with show cause notice were not exactly the same as submitted before the High Court. (IV) The explanation in the form of Poonam Agarwal's affidavit came on October 1, 2007 on the same day when IU Khan filed his reply affidavit in response to the show cause notice.

101. In those circumstances it was not wrong for IU Khan to state in paragraphs 14 and 15 of his memorandum of appeal as under:

"14.... This finding is again against the material on record as the original chip of the button camera carried by Mr. Kulkarni was formatted by the NDTV in violation of the direction issued by the Hon'ble Court. This part of the conversation is not available in the transcript of the bag camera."

"15. Because the CD of the button camera firstly cannot be relied upon as it was filed after the reply was filed by the appellant on 1.10.2007..."

Lapses have no effect on RK Anand's case or even on case of IU Khan:

102. We have recounted here some of the noticeable lapses committed by NDTV in the proceedings that were overlooked by the High Court. Having regard to seriousness of the proceeding

we should have wished that it was free from such lapses. But it needs to be made absolutely clear that the irregularities pointed out above were in regard to the first sting concerning IU Khan. These in no way affect RK Anand or alter his position. The discussions and findings recorded above in respect of RK Anand thus remains completely unaffected by the mistakes pointed out here.

103. Further, having regard to the defence taken by IU Khan the aforementioned lapses do not have any material affect on his case either. But before proceeding to examine his defence and how the High Court dealt with it, it would be necessary to see what conversation is shown to have taken place in the sting recordings between Kulkarni and IU Khan.

THE EXCHANGE BETWEEN KULKARNI & IU KHAN:

Khan: *Meet Kulkarni, he is the prime witness in the BMW case. He is our star witness and he is a very public spirited and devoted man and incidentally, he was in Delhi on the way/day when this unfortunate incident happened. He was going on foot to the Nizamuddin Railway Station.*

A BIT FOLLOWS THAT IS HARD TO UNDERSTAND

Kulkarni: *Mein barbad ho gaya, sir.*

Khan: *How?*

Kulkarni: *This particular thing is only you and myself are aware of. But I am not aware of anything, anything. I don't want to go again with that particular guy. I lost my mother, I don't know where my father is. I'm just roaming around for 8 years. Ab yeh mujhe kyun bulaya gaya hai?*

Khan: *Ab court ne (coughs) we dropped you....court ne (unclear)*

Kulkarni: *No, no you....I think the state told you to drop, right, if I'm not wrong?*

Khan: *These were the instructions I received from the Headquarters and that's why I got the SHO statement recorded that "on the instruction of the SHO and the ACP, such and such witness has been dropped". Then how can I make a statement? My clients are Delhi Police. Whatever instructions they will give, I will act upon it. I was very keen to examine you.*

Kulkarni: *Ya, I know that because I still remember, still remember.*

Khan: *Inhone mera haath dabaya xxxbhi dabaya, khoob dabaya, maine kaha main kya karoo, agar individual client ho to samjha bhi lo, department hai.*

Khan: *Bade Sahab se mile? Nahi mile? Mulakat hi nahi hooyi?*

Kulkarni: *Ab yeh kya jhanjhat aur?*

Khan: *Nahi nahi kuch nahi hoga, ab High Court mein unhone petition file kar di hai ki Kulkarni ki statement xxxxxxx.*

Kulkarni: *To woh record karenge nahi na?*

Khan: *Nahi.*

Kulkarni: *Pakka?*

Khan: *Tum mauj karo...hum...humne drop kar diya, court ko kya...who is he is to say that it should be recorded.*

Someone: *Investigation to court kar sakta hai, pur mode of investigation to determine nahi kar sakta.*

Khan: *Exactly, they cannot decide the mode of investigation*

SOMEBODY ENTERS THE CHAMBER

Kulkarni: *Khan Sahab, ek minute, chale jata hoo, mein sham to ghar pe xxxxaa jaon ga.*

Khan: *Ha, ha who to ana hi hai, ghar pe nahi xxx*

Kulkarni: *Who to abhi dilli mein aya hoo to aya hoo, ek second.*

Khan: *In Delhi, you're our guest.*

Kulkarni: *Inka nahi!*

Khan: *Na inke nahi.*

Khan: *Aapka aur hamara personal effort/rapport (not clear) hai*

Kulkarni: *Who to alag hi baat hai.*

Khan: *Aur, bhai yaar thanda peeke jana.*

Kulkarni: *Nahi thanda nahi, bus ek second khali, kyonki wahi xxxx*

THEY COME OUT OF THE CHAMBER AND TALK

Kulkarni: *Summons Bombay challa gaya thaa, ab waha se reject ho ke ayaa hua hai. Ab loon ken na loon? Baad me mere ko raat ko ghar pe (Mr. Khan cuts in)*

Khan: *Tum mere ko miloge kab, yeh batao?*

Kulkarni: *Aap batao kyonki mere ko....SHO se meri baat hui hai. Aap usko...(Mr. Khan cuts in)*

Khan: *Tum thehre kahan ho?*

Kulkarni: *Main to thehre hoo out of Delhi.*

Khan: *Out of Delhi?*

Kulkarni: *Out of Delhi, Haan.*

Khan: *Sham ko keh baje aaoge?*

Kulkarni: *Aaj nahi aaonga...mein kal zarror...shamko. Sunday aaram reheat hai aur....*

Khan: *Sunday ko kis waqt aaoge?*

Kulkarni: *Aap batao mere ko.*

Khan: *Aapko suit kaunsa time karta hai?*

Kulkarni: *Koi bhi.*

Khan: *Saat aur aath ke darmiyan?*

Kulkarni: *Hann, theek hai.*

Khan: *Kalxxx*

Kulkarni: *Lekin kisi ko bhi batao mat.*

Khan: *Nahi ji, sawal hi paida nahi hota yaar.*

Kulkarni: *Na, na.*

Khan: *Aur tumhare liye bahut badiya scotch rakhi hui haixxxx*

Kulkarni: *Scotch..laughs*

Khan: *Bahut badiya xxxx*

Kulkarni: *Acha baki sab khairyat sahib?*

Khan: *Sab khairyat xx.Khuda ka xxx*

Kulkarni: *Chalo, kal mulaqat hogi*

Kulkarni: *Ok, main... (Mr.Khan cuts in)*

Khan: *Saat aur aath ke darmiyan*

Kulkarni: ***Main, vese meri K K Paul se baat hui hai, lekin maine abhi tak nahin bola hoo I have not received summons at all. Woh mere ko bata dena.***

Khan: *Kal tum aajao*

Kulkarni: *Main...Huh? Woh hamare dono ki baat hogi,*

Khan: *Theek hai.*

104. After this Kulkarni and Deepak Verma return back. As walking along they naturally talk about the sting done by them together.

105. As we shall see presently much depends on what IU Khan meant when he asked Kulkarni whether he had met 'Bade Saheb'.

106. As noted above IU Khan does not deny the conversation that is shown to have taken place between him and Kulkarni. In his first response, that is, in the interview given to NDTV on the morning following the telecast he said that he did not deny anything at all, he did not deny (the utterances) but the inferences sought to be drawn were totally unfounded and wrong. When he said 'Bade Saheb' he meant some high officer in the police headquarter. He also said that was the way Kulkarni used to refer to superior officers in the police headquarter(s) and that is how he had referred to them in his deposition before the trial court. When the trial court asked Kulkarni to clarify he explained that Bade Saheb meant a superior officer of the police headquarter. The words Bade Saheb, according to IU Khan, did not in any way refer to RK Anand.

107. And this was broadly his defence before the High Court.

High Court dealing with IU Khan Defence:

108. The High Court did not accept his defence. The High Court held that there was great familiarity between IU Khan, Kulkarni and RK Anand. In this regard it observed as follows;

"We have noted above that there are several references to Mr. Khan in the conversations of Mr. Kulkarni with Mr. Anand. We cannot overlook these since they suggest a tacit arrangement or at least an understanding between Mr. Khan, Mr. Anand and Mr. Kulkarni".

109. In coming to this conclusion, as is evident from the above quoted observation the High Court relied a great deal upon the conversations between Kulkarni and RK Anand (vide paragraphs 196, 197 & 198 of the High Court Judgment).

110. The High Court further held that when IU Khan asked Kulkarni whether he had met

‘Bade Saheb’ he only meant RK Anand. It rejected IU Khan’s stand that what he meant by the expression was a senior police officer. The High Court observed that no material was produced on behalf of IU Khan in support of the statement that in course of his deposition before the trial court Kulkarni used the expression ‘Bade Saheb’ to mean a senior police officer. It further observed that in the sting operation, just before the conclusion of the meeting, Kulkarni had said that he had met K.K. Paul (who was then the Police Commissioner). The passage referred to is as follows;

“Kulkarni: Main, vese meri K K Paul se baat hui hai, lekin maine abhi tak nahin bola hoo I have not received summons at all. Woh mere ko bata dena”.

111. This, according to the High Court, clearly showed that Kulkarni referred to the Police Commissioner by his name and not by the expression ‘Bade Saheb’. High Court further observed that for Kulkarni there was no reason to meet the senior police officers particularly when he was dropped as prosecution witness. There was nothing to suggest that while in Delhi Kulkarni used to meet the senior police officers. On the other hand there was sufficient evidence to show that he was very familiar with both IU Khan and RK Anand, had easy access to both of them and used to frequently meet them. The High Court then took up Kulkarni’s affidavit that supported IU Khan’s plea that by the expression he had meant some senior police officer and not RK Anand and rejected it on a number of grounds.

112. After giving the reasons for rejecting the stand of IU Khan the High Court held that Bade Saheb was none else then RK Anand observing as follows;

*“190. On the other hand, when we watched the recording of the events of 28th April, 2007 from the button camera, we noted that towards the end of the recording, **Mr. Deepak Verma asked Mr. Kulkarni about the identity of Bade Saheb and Mr. Kulkarni responded by saying that it is Mr. Anand.** There is no suggestion that this part of the video recording is doctored or morphed.....”.*

(emphasis added)

113. The High Court further observed that as IU Khan was fully aware that Kulkarni, a prosecution witness was on highly familiar terms with a senior defence lawyer RK Anand, he was obliged to inform the prosecution about it and by not doing so he clearly failed in his duty as a prosecutor who was expected to be fair not only to his client but also to the Court. His conduct was, therefore, plainly unbecoming of a prosecutor. The High Court then proceeded to consider whether

the conduct of IU Khan amounted to a criminal contempt of court. In this regard the Court refers to the conversation between IU Khan and Kulkarni taking place outside the chamber in which a second meeting was fixed up for the following evening with IU Khan giving Kulkarni the inducement of good scotch whisky. From the exchange between the two the court inferred that the extent of familiarity between the two was rather more than normal. IU Khan was aware that Kulkarni was on equally, if not more familiar, terms with RK Anand. Coupled with this his failure to inform the prosecution or the Court about the connection between Kulkarni and RK Anand had the potential and the tendency to interfere or obstruct the natural course of the BMW case and certainly the administration of justice, particularly when Mr. Khan himself described Mr. Kulkarni as the prime witness in the BMW case and the 'star witness of the prosecution'. Finally the court held

“207. Under these circumstances, we are left with no option but to hold that Mr. Khan was quite familiar with Mr. Kulkarni; Mr. Khan was aware that Mr. Kulkarni was in touch with Mr. Anand; Mr. Khan was not unwilling to advise Mr. Kulkarni or at least discuss with him the issue of accepting the summons sent by the trial court to Mr. Kulkarni. We also have no option but to hold that Mr. Khan very seriously erred in not bringing important facts touching upon the BMW case to his client's notice, the prosecution. The error is so grave as to make it a deliberate omission that may have a very serious impact on the case of the prosecution in the Trial court. Consequently, we have no option but to hold Mr. Khan criminally liable, beyond a shadow of doubt, for actually interfering, if not tending to interfere with the due course of the judicial proceeding, that is the BMW case, and thereby actually interfering, if not tending to interfere with the administration of justice in any other manner”.

Submissions on behalf of IU Khan:

114. Mr. P. P. Rao, learned Senior Advocate appearing for IU Khan mainly submitted that even if the sting recording is accepted as true, on the basis of the exchange that took place between his client and Kulkarni it cannot be said that he acted in a way or colluded in any action aimed at interfering or tending to interfere with the prosecution of the accused in the BMW case or interfering or tending to interfere with or obstructing or tending to obstruct the administration of justice in any other manner. He further submitted that the findings of the High Court were based on assumptions that were not only completely unfounded but in respect of which the appellant was given no opportunity to defend himself. The High Court held the appellant guilty of committing criminal contempt of court referring to and relying upon certain alleged facts and circumstances that

did not form part of the notice and in regard to which he was given no opportunity to defend himself. Mr. Rao submitted that along with the notice issued by the High Court the appellant was not given all the materials concerning his case and he was thus handicapped in submitting his show cause. He further submitted that the High Court erroneously placed the case of his client at par with RK Anand and convicted him because RK Anand was found guilty even though the two cases were completely different. Mr. Rao was also highly critical of the TV channel. He questioned the propriety of the sting operation and the telecast of the sting programme concerning a pending trial and involving a court witness without any information to, much less permission by the trial court or even the High Court or its Chief Justice. Mr. Rao submitted that when Kulkarni first approached Poonam Agarwal she thought it imperative to first obtain the approval of her superiors before embarking upon the project, but it did not occur to anyone, including her superiors in the TV channel to obtain the permission or to even inform at least the Chief Justice of the Delhi High Court before taking up the operation fraught with highly sinister implications. Mr. Rao also assailed the judgment coming under appeal on a number of other grounds.

SUBMISSIONS CONSIDERED:

115. We have carefully gone through all the materials concerning IU Khan. We have perused the transcript of the exchange between Kulkarni and IU Khan and have also viewed the full recording of the sting several times since the full transcript of the recording is not available on the record.

IU Khan's conduct quite improper:

116. We have not the slightest doubt that the exchange between Kulkarni and IU Khan far crosses the limits of proper professional conduct of a prosecutor (especially engaged to conduct a sensational trial) and a designated Senior Advocate of long standing. We are not prepared to accept for a moment that on seeing Kulkarni suddenly after several years in the company of a 'burly stranger' (Deepak Verma) IU Khan became apprehensive about his personal safety since in the past some violent incidents had taken place in the court premises and some lawyers had lost their lives and consequently he was simply play-acting and pampering Kulkarni in order to mollify him. The

plea is not borne out from the transcript and much less from the video recording. In the video recording there is no trace of any fear or apprehension on his face or in his gestures. He appears perfectly normal and natural sitting among his colleagues (and may be one or two clients) and at no point the situation appears to be out of his control. As a matter of fact, we feel constrained to say that the plea is not quite worthy of a lawyer of IU Khan's standing and we should have much appreciated had he simply taken the plea of an error of discretion on his part.

117. Coming back to the exchange between IU Khan and Kulkarni, we accept that the transcript of the exchange does not present the accurate picture; listening to the live voices of the two (and others present in the chamber) on the CD gives a more realistic idea of the meeting. We grant everything that can be said in favour of IU Khan. The meeting took place without any prior appointment from him. Kulkarni was able to reach him, unlike RK Anand, without his permission or consent. IU Khan did not seem to be overly enthused at the appearance of Kulkarni. Accosted by Kulkarni, he spoke to him out of civility and mostly responded only to his questions and comments. There were others present in the chamber with whom he was equally engaged in conversation. He also greeted someone else who came into the chamber far more cheerfully than Kulkarni. But the undeniable fact remains that he was talking to him all the time about the BMW trial and the related proceedings. Instead of simply telling him to receive the summons and appear before the court as directed, IU Khan gave reassurances to Kulkarni telling him about the revision filed in the High Court against the trial court's order. He advised him to relax saying that since he had dropped him (as a prosecution witness) the court was no one to ask for his statement. The part of the exchange that took place outside the chamber was worse. Inside the chamber, at one stage, IU Khan seemed even dismissive of Kulkarni but on coming out he appeared quite anxious to fix up another meeting with him at his residence giving promising good Scotch whisky as inducement. IU Khan would be the first person to deny any friendship or even a long acquaintanceship with Kulkarni. The only common factor between them was the BMW case in which one was the prosecutor and the other was a prosecution witness, later dropped from the list of witnesses. A lawyer, howsoever, affable and sociable by disposition, if he has the slightest respect for professional ethics, would not allow

himself such degree of familiarity with the witness of a criminal trial that he might be prosecuting and would not indulge with him into the kind of exchange as admittedly took place between IU Khan and Kulkarni. We are also not prepared to believe that in his conversation with Kulkarni, IU Khan did not mean what he was saying and he was simply trying to somehow get rid of Kulkarni. The video of the sting recordings leaves no room for doubt that IU Khan was freely discussing the proceeding of BMW case with Kulkarni and was not at all averse to another meeting with him rather he was looking forward to it. We, therefore, fully endorse the High Court finding that the conduct of IU Khan was inappropriate for a lawyer in general and a prosecutor in particular.

CRIMINAL CONTEMPT???

118. But there is a wide gap between professional misconduct and criminal contempt of court and we now proceed to examine whether on the basis of materials on record the charge of criminal contempt of court can be sustained against IU Khan.

119. The High Court held that there was an extraordinary degree of familiarity between IU Khan, Kulkarni and RK Anand and each of them knew that the other two were equally familiar with each other. So far as BMW trial is concerned Kulkarni was a link between IU Khan and RK Anand. IU Khan, by reason of his familiarity both with RK Anand and Kulkarni would also know about the game that was afoot for the subversion of the trial. He failed to inform the prosecution and the court about it and his omission to do so was likely to have a very serious impact on the trial. He was, therefore, guilty of actually interfering with due course of judicial proceeding, in the BMW case.

120. In the two sting recordings concerning RK Anand there are ample references to IU Khan to suggest a high degree of familiarity between the three. But in the sting on IU Khan the only words used by him that might connect him to RK Anand through Kulkarni are 'Bade Saheb'. If 'Bade Saheb' referred to RK Anand, the involvement of IU Khan needs no further proof. The question, however, is whether that finding can be safely arrived at.

121. Now, what are the materials that might suggest that while asking Kulkarni whether he had met Bade Saheb, IU Khan meant RK Anand. Apart from the piece of conversation between Deepak Verma and Kulkarni when they were returning after meeting with IU Khan, relied upon by

the High Court, there is another material, for whatever its worth, that doesn't find any mention in the High Court judgment. It is Kulkarni's statement in his interview recorded at the NDTV studio. He said as follows;

“He (IU Khan) directed me to Mr RK Anand is in that video you can find ‘Bade Saheb’. He meant that Mr. RK Anand.”

122. We mention it only because it is one of the materials lying on the record. Not that we rely on it in the least. Having known the conduct of Kulkarni throughout this episode as discussed in detail in the earlier part of the judgment it is impossible to rely on this statement and we don't even fault the High Court for not taking any note of it.

123. The only other positive material in this regard is the one referred to by the High Court. The High Court observed that towards the end of the recording by the button camera, “**Mr. Deepak Verma asked Mr. Kulkarni about the identity of Bade Saheb and Mr. Kulkarni responded by saying that it is Mr. Anand.**” But the reference by the High Court to that particular piece of conversation between Deepak Verma and Kulkarni is neither complete nor accurate. We have noted earlier that the transcript submitted to the High Court by NDTV was incomplete and it covered only the exchange between Kulkarni and IU Khan. If the High Court had before it the full transcript of the entire recording it might have taken a different view. We have viewed the CD labelled as “Button Spy cam Recording done by Sunil Kulkarni. IU Khan Sting Operation” a number of times and we find that on the way back after meeting IU Khan, Kulkarni was being quite voluble. He spoke to Deepak Verma and gave him some instructions. A part of their conversation, relevant for our purpose is as follows:

EXCHANGE BETWEEN KULKARNI & DEEPAK VERMA:

Kulkarni: Humming some tune

Kulkarni: Don't go to car directly. We'll take an auto

Deepak Verma: Take an auto?

Kulkarni: Haan. Thoda sa aage chalen ge

Kulkarni: Aap ne suna nahin? “Bade Saheb se mile ya nahin?”

Deepak Verma: Haan

Kulkarni: Ab dekho kal you will get [unclear..] you what you want

Deepak Verma: Kal aap Bade Saheb se milne ja rahe hain?

Kulkarni: Na, Haan unke ghar pe. No, you don't have to come. You just come and stay outside.

Theek hai na?

[unclear...] Haan ab to aap ke samne hua sab kucchh

Deepak Verma: Bade Saheb woh hai, Anand?

Kulkarni: Hmm.

Noise of some auto/heavy vehicle engine

Deepak Verma: [Unclear...] Ek baar iska Photograph lein....Iska photograph aaya ki nahin aaya?

Kulkarni: Aaya. Aaya, aaya.

Kulkarni: Pukka trail hoga hamara. Hundred percent Tail hoga.

Deepak Verma: Police Waale ko kaise kah raha tha who? Gaadi Dilwao

yaar..

124. From the manner of speaking Kulkarni appeared to be giving the impression that everything went off according to the plan. He also tended to be slightly melodramatic. (He would not go to the car directly because they were bound to be followed!)

125. Now, while examining what Kulkarni understood or rather what he wanted Deepak Verma to believe what was meant by 'Bade Saheb' it is necessary to bear in mind that the whole object of the sting was to uncover the alleged unholy alliance between the defence and the prosecution. It was based on the premise that the prosecution was colluding with the defence in the effort to save the accused in the BMW case. In that situation for Kulkarni, who for his own reasons was anxious to get NDTV's help for doing the sting, it was natural to find out and show to Deepak Verma some link between IU Khan and RK Anand irrespective of whether or not there was, in reality, any link between the two. There is no way to find out whether Kulkarni really believed that by 'Bade Saheb' IU Khan meant RK Anand (Like everything else even on this issue he changed his

stand from time to time!) or he just wanted Deepak Verma to believe so. But even if Kulkarni really understood Bade Saheb to mean RK Anand, that would not change the position much. For our purpose it is not important what Kulkarni or Deepak Verma or any one else understood (truthfully or otherwise!) by that expression. One may use an expression to mean a certain thing but to the listener it may mean something quite different. What is important here is to judge what IU Khan meant when he used that expression. In our view, on the basis of the exchange between Kulkarni and Deepak Verma, it will be highly unsafe to hold that when IU Khan asked Kulkarni whether he had met ‘Bade Saheb’ he meant RK Anand.

126. The High Court rejected IU Khan’s explanation that what he meant by ‘Bade Saheb’ was some senior officer in the police headquarter. According to IU Khan, Kulkarni was in the habit of directly approaching the superior police officers and he would refer to them by that expression. In support of the plea in his reply affidavit (paragraph 12) IU Khan stated as follows:

“Even during the course of his deposition in court Mr. S. Kulkarni had used the expression **“Bade Sahab”** while referring to the higher police officers. The Ld. trial court also translated the same in English while recording the statement as **“higher police officers”**. In the cross-examination Mr. S. Kulkarni has stated **“I had voluntarily gone to the higher police officers of the police headquarter”**”.

The High Court rejected the aforesaid plea observing as follows;

“It was further submitted that during the recording of Mr. Kulkarni’s evidence on an earlier occasion, a reference to Bade Saheb was made more than once. “Bade Saheb” was then translated and recorded in the deposition to mean senior police officers. **Learned counsel for Mr. Khan, however, did not produce any material to support the last submission”**.

(emphasis added)

127. Mr. P. P. Rao submitted that the approach of the High Court was quite unfair. The proceeding before the High Court was not in the nature of a suit or a criminal trial. In response to the notice issued by the Court the appellant had made a positive statement in his reply affidavit. The statement was not formally traversed by anyone. There was, therefore, no reason for the appellant to assume that he would be required to produce evidence in support of the statement. In case the High Court felt the need for some evidence in support of the averment it should have at least made it known to the appellant. But the High Court without giving any inkling to the appellant rejected the plea in the final judgment. The appellant was thus clearly denied a proper opportunity to defend

himself. We find that the submission is not without substance. The proceeding before the High Court was under the Contempt of Courts Act and the High Court was not following any well known and well established format. In that situation it was only fair to give notice to the proceedees to substantiate the pleas taken in the reply affidavit by leading proper evidence. It must, therefore be held that the High Court rejected a material plea raised on behalf of the IU Khan without giving him any opportunity to substantiate it.

128. Further, as noticed above, the High Court, for arriving at the finding that there was a high degree of familiarity among IU Khan, Kulkarni and RK Anand has repeatedly used the transcripts of the meetings between Kulkarni and RK Anand. It is indeed true that in the exchanges between Kulkarni and RK Anand there are many references to IU Khan. That may give rise of a strong suspicion, of a common connection between the three. But having regard to the charge of criminal contempt any suspicion howsoever strong cannot take the place of proof and we don't feel it wholly prudent to rely upon the exchanges between Kulkarni and RK Anand to record a finding against IU Khan.

129. Further, according to the High Court, the essence of culpability of IU Khan was his omission to inform the prosecution and the Court "that one of its witnesses was more than an acquaintance of defence lawyer".

130. Mr. P. P. Rao submitted that the High Court convicted the appellant for something in regard to which he was never given an opportunity to defend himself. From the notice issued by the High Court it was impossible to discern that the charge of criminal contempt would be eventually fastened on him for his failure to inform the court and the prosecution about the way Kulkarni's was being manipulated by the defence. Mr. Rao further submitted that the reason assigned by the Court to hold the appellant guilty was based purely on assumption. The appellant was given no opportunity to show that, as a matter of fact, after Kulkarni met him at the Patiala House on April 28, 2007 he had informed the concerned authorities that after being summoned by the court Kulkarni was back to his old tricks. He further submitted that the appellant, given the opportunity, could also show that the decision to not examine him as one of the prosecution witnesses was taken by the concerned

authorities in consultation with him. We find substance in Mr. Rao's submission.

131. In our considered view, on the basis of materials on record the charge of criminal contempt cannot be held to be satisfactorily established against IU Khan. In our opinion he is entitled to the benefit of doubt.

PROCEDURE FOLLOWED BY THE HIGH COURT:

132. A lot has been argued about the procedure followed by the High Court in dealing with the matter. On behalf of RK Anand it was strongly contended that by only asking for the copies of the original sting recordings and allowing the original microchips and the magnetic tapes to be retained in the custody of NDTV the High Court committed a serious and fatal lapse. Mr. Gopal Subramaniam also took the view that though the final judgment passed by the High Court was faultless, it was nevertheless an error on its part to leave the original sting recordings in the safe custody of the TV channel. On principle and as a matter of proper procedure, the Court, at the first instance, ought to have taken in its custody all the original electronic materials concerning the stings.

133. At first the direction of the High Court leaving the microchips containing the original sting recordings and the magnetic tapes with the TV channel indeed appears to be somewhat strange and uncommon but a moment's thought would show the rationale behind it. If the recordings on the microchips were fake from the start or if the microchips were morphed before notice was issued to the TV channel, those would come to the court in that condition and in that case the question whether the microchips were genuine or fake/morphed would be another issue. But once the High Court obtained their copies there was no possibility of any tampering with the microchips from that stage. Moreover, the High Court might have felt that the TV channel with its well equipped studio/laboratory would be a much better place for the handling and conservation of such electronic articles than the High Court Registry. On the facts of the case, therefore, there was no lapse on the part of the High Court in leaving the microchips in the safe custody of the TV channel and in any event it does not have any bearing on the final decision of the case.

134. However, what we find completely inexplicable is why, at least at the beginning of the proceeding, the High Court did not put NDTV, along with the two appellants, in the array of

contemnors. Looking back at the matter (now that we have on the record before us the appellants' affidavits in reply to the notice issued by the High Court as well as their first response to the telecast in the form of their live interviews), we are in the position to say that since the contents of the sting recordings were admitted there was no need for the proof of integrity and correctness of the electronic materials. But at the time the High Court issued notices to the two appellants (and two others) the position was completely different. At that stage the issue of integrity, authenticity and reliability of the sting recordings was wide open. The appellants might have taken the stand that not only the sting recordings but their respective responses shown by the TV channel were fake and doctored. In such an event the TV channel would have been required to be subjected to the strictest proof of the electronic materials on which its programmes were based and, in case it failed to establish their genuineness and correctness, it would have been equally guilty, if not more, of serious contempt of court and other criminal offences. By all reckoning, at the time of initiation of the proceeding, the place of NDTV was along with the appellants facing the charge of contempt. Such a course would have put the proceeding on a more even keel and given it a more balanced appearance. Then perhaps there would have been no scope for the grievance that the High Court put the TV channel on the complainant's seat. And then perhaps the TV Channel too would have conducted itself in a more careful manner and the lapses as indicated above in the case of IU Khan might not have occurred.

THE PUNISHMENT: PROHIBITION AGAINST APPEARING IN COURTS

135. We were also addressed on the validity of the High Court's direction prohibiting the two appellants from appearing before the High Court and the courts subordinate to it for a period of four months. Though by the time the appeals were taken up for hearing the period of four months was over, Mr. Altaf Ahmed contended that the High Court's direction was beyond its competence and authority. In a proceeding of contempt punishment could only be awarded as provided under the Contempt of Courts Act, though in a given case the High Court could debar the contemnor from appearing in court till he purged himself of the contempt. He further submitted that professional misconduct is a subject specifically dealt with under the Advocates Act and the authority to take

action against a lawyer for any professional misconduct vests exclusively in the State Bar Council, where he may be enrolled, and the Bar Council of India. The Counsel further submitted that a High Court could frame rules under section 34 of the Advocates Act laying down the conditions subject to which an advocate would be permitted to practise in the High Court and the courts subordinate to it and such rules may contain a provision that an advocate convicted of contempt of court would be barred from appearing before it or before the subordinate courts for a specified period. But so far the Delhi High Court has not framed any rules under section 34 of the Act. According to him, therefore, the punishment awarded to the appellant by the High Court had no legal sanction.

136. Mr. Nageshwar Rao learned Senior Advocate assisting the Court as *amicus* shared the same view. Mr. Rao submitted that the direction given by the High Court was beyond its jurisdiction. In a proceeding of contempt the High Court could only impose a punishment as provided under section 12 of the Contempt of Courts Act, 1971. The High Court was bound by the provisions of the Contempt of Courts Act and it was not open to it to innovate any new kind of punishment in exercise of its powers under Article 215 of the Constitution or its inherent powers. Mr. Rao submitted that a person who is a law graduate becomes entitled to practise the profession of law on the basis of his enrolment with any of the State Bar Councils established under the Advocates Act, 1961. Appearance in Court is the dominant, if not the sole content of a lawyer's practice. Since, the authority to grant licence to a law graduate to practise as an advocate vests exclusively in a State Bar Council, the power to revoke the licence or to suspend it for a specified term also vests in the same body. Further, the revocation or suspension of licence of an advocate has not only civil but also penal consequences; hence, the relevant statutory provisions in regard to imposition of punishment must be strictly followed. Punishment by way of suspension of the licence of an advocate can only be imposed by the Bar Council, the competent statutory body, after the charge is established against the advocate concerned in the manner prescribed by the Act and the Rules framed thereunder. The High Court can, of course, prohibit an advocate convicted of contempt from appearing before it or any court subordinate to it till the contemnor purged himself of the contempt. But it cannot assume the authority and the power statutorily vested in the Bar Council.

137. Mr. Gopal Subramaniam the other *amicus*, however, approached the issue in a slightly different manner and took the middle ground. Mr. Subramaniam submitted that the power to suspend the licence of a lawyer for a reason that may constitute contempt of court and at the same time may also amount to professional misconduct is a power to be exercised by the disciplinary authority i.e. the Disciplinary Committee of the State Bar Council where the concerned advocate is registered or the Bar Council of India. The Supreme Court has held that even it, in exercise of its powers under Article 142, cannot override statutory provisions and, assuming the position of the Disciplinary Committee, suspend the licence of a lawyer. Such a course cannot be followed even by taking recourse to the appellate powers of the Supreme Court under section 38 of the Advocates Act while dealing with a case of contempt of court (and not an appeal relating to professional misconduct as such). But approaching the matter from a different angle Mr. Subramaniam submitted, it is, however, open to the High Court to make rules regulating the appearance of advocates in courts. He further submitted that although the Delhi High Court has not framed any specific rules regulating the appearance of advocates, it is settled law that power vested in an authority would not cease to exist merely because rules prescribing the manner of exercise of power have not been framed.

138. The contention that the direction debaring a lawyer from appearing before it or in courts subordinate to it is beyond the jurisdiction of the High Court is based on the premise that the bar is akin to revocation/suspension of the lawyer's licence which is a punishment for professional misconduct that can only be inflicted by the Bar Council after following the procedure prescribed under the Advocates Act. The contention finds support from the Constitution Bench decision of this Court in *Supreme Court Bar Association vs. Union of India*, (1998) 4 SSC 409. In paragraph 37 of the decision the Court observed and held as under:

“37. The nature and types of punishment which a court of record can impose in a case of established contempt under the common law have now been specifically incorporated in the Contempt of Courts Act, 1971 insofar as the High Courts are concerned and therefore to the extent the Contempt of Courts Act, 1971 identifies the nature or types of punishments which can be awarded in the case of established contempt, it does not impinge upon the inherent powers of the High Court under Article 215 either. No new type of punishment can be created or assumed.”

In paragraphs 39 & 40 it observed:

“39. Suspending the licence to practise of any professional like a lawyer, doctor, chartered accountant etc. when such a professional is found guilty of committing contempt of court, for any specified period, is not recognised or accepted punishment which a court of record either under the common law or under the statutory law can impose on a contemnor in addition to any of the other recognised punishments.”

“40. The suspension of an advocate from practise and his removal from the State roll of advocates are both punishments specifically provided for under the Advocates Act, 1961, for proven “professional misconduct” of an advocate. While exercising its contempt jurisdiction under Article 129, the only *cause* or matter before this Court is regarding commission of contempt of court. There is no cause of professional misconduct, properly so called, pending before the Court. This Court, therefore, in exercise of its jurisdiction under Article 129 cannot take over the jurisdiction of the Disciplinary Committee of the Bar Council of the State or the Bar Council of India to punish an advocate by suspending his licence, which punishment can only be imposed after a finding of “professional misconduct” is recorded in the manner prescribed under the Advocates Act and the Rules framed thereunder.”

In Paragraph 57 it observed:

57. In a given case, an advocate found guilty of committing contempt of court may also be guilty of committing “professional misconduct”, depending upon the gravity or nature of his contumacious conduct, but the two jurisdictions are separate and distinct and exercisable by different forums by following separate and distinct procedures. The power to punish an advocate by suspending his licence or by removal of his name from the roll of the State Bar Council for proven professional misconduct vests exclusively in the statutory authorities created under the Advocates Act, 1961, while the jurisdiction to punish him for committing contempt of court vests exclusively in the courts.”

Again in paragraph 80 it observed:

“80. **In a given case it may be possible for this Court or the High Court, to prevent the contemnor advocate to appear before it till he purges himself of the contempt but that is much different from suspending or revoking his licence or debarring him to practise as an advocate.** In a case of contemptuous, contumacious, unbecoming or blameworthy conduct of an Advocate-on-Record, this Court possesses jurisdiction, under the Supreme Court Rules, itself, to withdraw his privilege to practice as an Advocate-on-Record because that privilege is conferred by this Court and the power to grant the privilege includes the power to revoke or suspend it. The withdrawal of that privilege, however, does not amount to suspending or revoking his licence to practice as an advocate in other courts or tribunals.”

139. The matter, however, did not stop at *Supreme Court Bar Association. In Pravin C Shah vs. K. A. Mohd. Ali and Another*, (2001) 8 SCC 650, this Court considered the case of a lawyer who was found guilty of contempt of court and as a consequence was sought to be debarred from appearing in courts till he purged himself of contempt. Kerala High Court has framed Rules under

section 34 of the Advocates Act and rule 11 reads thus:

“No advocate who has been found guilty of contempt of court shall be permitted to appear, act or plead in any court unless he has purged himself of the contempt.”

140. An Advocate, notwithstanding his conviction for contempt of Court by the Kerala High Court continued to freely appear before the courts. A complaint was made to the Kerala State Bar Council on which a disciplinary proceeding was initiated against the advocate concerned and finally the State Bar Council imposed a punishment on him debaring him from acting or pleading in any court till he got himself purged of the contempt of court by an order of the appropriate court. The concerned advocate challenged the order of the State Bar Council in appeal before the Bar Council of India. The Bar Council of India allowed the appeal and set aside the interdict imposed on the advocate. The matter was brought in appeal before this Court and a two judges' Bench hearing the appeal framed the question arising for consideration as follows:

“When an advocate was punished for contempt of court can he appear thereafter as a counsel in the courts, unless he purges himself of such contempt? If he cannot, then what is the way he can purge himself of such contempt?”

The Court answered the question in paragraphs 27, 28 and 31 of the judgment as follows:

“27. We cannot therefore approve the view that merely undergoing the penalty imposed on a contemnor is sufficient to complete the process of purging himself of the contempt, particularly in a case where the contemnor is convicted of criminal contempt. The danger in giving accord to the said view of the learned Single Judge in the aforesaid decision is that if a contemnor is sentenced to a fine he can immediately pay it and continue to commit contempt in the same court, and then again pay the fine and persist with his contemptuous conduct. There must be something more to be done to get oneself purged of the contempt when it is a case of criminal contempt.”

“28. The Disciplinary Committee of the Bar Council of India highlighted the absence of any mode of purging oneself of the guilt in any of the Rules as a reason for not following the interdict contained in Rule 11. Merely because the Rules did not prescribe the mode of purging oneself of the guilt it does not mean that one cannot purge the guilt at all. The first thing to be done in that direction when a contemnor is found guilty of a criminal contempt is to implant or infuse in his own mind real remorse about his conduct which the court found to have amounted to contempt of court. Next step is to seek pardon from the court concerned for what he did on the ground that he really and genuinely repented and that he has resolved not to commit any such act in future. It is not enough that he tenders an apology. The apology tendered should impress the court to be genuine and sincere. If the court, on being impressed of his genuineness, accepts the apology then it could be said the contemnor has purged himself of the guilt.”

“31. Thus a mere statement made by a contemnor before court that he apologises is hardly

enough to amount to purging himself of the contempt. The court must be satisfied of the genuineness of the apology. If the court is so satisfied and on its basis accepts the apology as genuine the court has to make an order holding that the contemnor has purged himself of the contempt. Till such an order is passed by the court the delinquent advocate would continue to be under the spell of the interdict contained in Rule 11 of the Rules.”

141. More importantly, another Constitution Bench of this Court in *Ex. Capt. Harish Uppal vs. Union of India and Another*, (2003) 2 SCC 45, examined the question whether lawyers have a right to strike and/or give a call for boycott of Court(s). In paragraph 34 of the decision the Court made highly illuminating observations in regard to lawyers' **right** to appear before the Court and sounded the note of caution for the lawyers. Para 34 of the decision need to be reproduced below:

“34. One last thing which must be mentioned is that **the right of appearance in courts is still within the control and jurisdiction of courts. Section 30 of the Advocates Act has not been brought into force** and rightly so. Control of conduct in court can only be within the domain of courts. Thus Article 145 of the Constitution of India gives to the Supreme Court and Section 34 of the Advocates Act gives to the High Court power to frame rules including rules regarding condition on which a person (including an advocate) can practise in the Supreme Court and/or in the High Court and courts subordinate thereto. Many courts have framed rules in this behalf. Such a rule would be valid and binding on all. Let the Bar take note that unless self-restraint is exercised, courts may now have to consider framing specific rules debaring advocates, guilty of contempt and/or unprofessional or unbecoming conduct, from appearing before the courts. **Such a rule if framed would not have anything to do with the disciplinary jurisdiction of the Bar Councils. It would be concerning the dignity and orderly functioning of the courts. The right of the advocate to practise envelopes a lot of acts to be performed by him in discharge of his professional duties. Apart from appearing in the courts he can be consulted by his clients, he can give his legal opinion whenever sought for, he can draft instruments, pleadings, affidavits or any other documents, he can participate in any conference involving legal discussions, he can work in any office or firm as a legal officer, he can appear for his clients before an arbitrator or arbitrators etc.** Such a rule would have nothing to do with all the acts done by an advocate during his practice. He may even file *vakalat* on behalf of a client even though his appearance inside the court is not permitted. Conduct in court is a matter concerning the court and hence the Bar Council cannot claim that what should happen inside the court could also be regulated by them in exercise of their disciplinary powers. The right to practise, no doubt, is genus of which the right to appeal and conduct cases in the court may be a specie. **But the right to appear and conduct cases in the court is a matter on which the court must and does have major supervisory and controlling power. Hence courts cannot be and are not divested of control or supervision of conduct in court merely because it may involve the right of an advocate.** A rule can stipulate that a person who has committed contempt of court or has behaved unprofessionally and in an unbecoming manner will not have the right to continue to appear and plead and conduct cases in courts. The Bar Councils cannot overrule such a regulation concerning the orderly conduct of court proceedings. On the contrary, it will be their duty to see that such a rule is strictly abided by. Courts of law are structured in such a design as to evoke respect and reverence to the majesty of law and justice. The machinery for dispensation of justice according to law is operated by the court. Proceedings inside the courts are always expected to be held in dignified and orderly manner. The very sight of an advocate, who is guilty of contempt of court or of unbecoming or unprofessional

conduct, standing in the court would erode the dignity of the court and even corrode its majesty besides impairing the confidence of the public in the efficacy of the institution of the courts. The power to frame such rules should not be confused with the right to practice law. While the Bar council can exercise control over the latter, the courts are in control of the former. The distinction is clearly brought out by the difference in language in Section 49 of the Advocates Act on the one hand and Article 145 of the Constitution of India and Section 34(1) of the Advocates Act on the other. Section 49 merely empower the Bar Council to frame rules laying down conditions subject to which an advocate shall have a right to practise i.e. do all the other acts set out above. However, Article 145 of the Constitution of India empowers the Supreme Court to make rules for regulating this practice and procedure of the court including inter alia rules as to persons practising before this Court. Similarly Section 34 of the Advocates Act empowers High Courts to frame rules, inter alia to lay down conditions on which an advocate shall be permitted to practice in courts. Article 145 of the Constitution of India and Section 34 of the Advocates Act clearly show that there is no absolute right to an advocate to appear in a court. An advocate appears in a Court to such conditions as are laid down by the Court. **It must be remembered that Section 30 has not been brought into force and this also shows that there is no absolute right to appear in a court. Even if Section 30 were to be brought into force control of proceedings in a court will always remain with the court. Thus even then the right to appear in court will be subject to complying with conditions laid down by courts just as practice outside courts would be subject to conditions laid down by the Bar Council of India.** There is thus no conflict or clash between other provisions of the Advocates Act on the one hand and Section 34 or Article 145 Constitution of Indian on the other.”

(emphasis added)

142. In both *Pravin C. Shah* and *Ex. Capt. Harish Uppal* the earlier Constitution Bench decision was extensively considered. The decision in *Ex. Capt. Harish Uppal* was later followed in a three judge Bench decision in *Bar Council of India vs. The High Court of Kerala*, (2004) 6 SCC 311.

143. In *Supreme Court Bar Association* the direction prohibiting an advocate from appearing in court for a specified period was viewed as a total and complete denial of his right to practise law and the bar was considered as a punishment inflicted on him.¹ In *Ex. Capt. Harish Uppal* it was seen not as punishment for professional misconduct but as a measure necessary to regulate the court's proceedings and to maintain the dignity and orderly functioning of the courts. We may respectfully add that in a given case a direction disallowing an advocate who is convicted of criminal contempt from appearing in court may not only be a measure to maintain the dignity and

¹ Though in Paragraph 80 of the decision, as seen earlier there is an observation that in a given case it might be possible for this court or the High Court to prevent the contemnor advocate to appear before it till he purge himself of the contempt.

orderly functioning of the courts but may become necessary for the self protection of the court and for preservation of the purity of court proceedings. Let us, for example, take the case where an advocate is shown to have accepted money in the name of a judge or on the pretext of influencing him; or where an advocate is found tampering with the court's record; or where an advocate is found actively taking part in faking court orders (fake bail orders are not unknown in several High Courts!); or where an advocate has made it into a practice to browbeat and abuse judges and on that basis has earned the reputation to get a case transferred from an 'inconvenient' court; or where an advocate is found to be in the habit of sending unfounded and unsubstantiated allegation petitions against judicial officers and judges to the superior courts. Unfortunately these examples are not from imagination. These things are happening more frequently than we care to acknowledge. We may also add that these illustrations are not exhaustive but there may be other ways in which a malefactor's conduct and actions may pose a real and imminent threat to the purity of court proceedings, cardinal to any court's functioning, apart from constituting a substantive offence and contempt of court and professional misconduct. In such a situation the court does not only have the right but it also has the obligation cast upon it to protect itself and save the purity of its proceedings from being polluted in any way and to that end bar the malefactor from appearing before the courts for an appropriate period of time. It is already explained in *Ex. Captain Harish Uppal* that a direction of this kind by the Court cannot be equated with punishment for professional misconduct. Further, the prohibition against appearance in courts does not affect the right of the concerned lawyer to carry on his legal practice in other ways as indicated in the decision.

144. We respectfully submit that the decision in *Ex-Capt. Harish Uppal vs. Union of India* places the issue in correct perspective and must be followed to answer the question at issue before us.

145. Lest we are misunderstood it needs to be made clear that the occasion to take recourse to the extreme step of debarring an advocate from appearing in court should arise very rarely and only as a measure of last resort in cases where the wrong doer advocate does not at all appear to be genuinely contrite and remorseful for his act/conduct, but on the contrary shows a tendency to

repeat or perpetuate the wrong act(s).

146. Ideally every High Court should have rules framed under section 34 of the Advocates Act in order to meet with such eventualities but even in the absence of the Rule the High Court cannot be held to be helpless against such threats. In a matter as fundamental and grave as preserving the purity of judicial proceedings, the High Court would be free to exercise the powers vested in it under section 34 of the Advocates Act notwithstanding the fact that Rules prescribing the manner of exercise of power have not been framed. But in the absence of statutory Rules providing for such a course an advocate facing the charge of contempt would normally think of only the punishments specified under section 12 of the Contempt of Courts Act. He may not even imagine that at the end of the proceeding he might end up being debarred from appearing before the court. The rules of natural justice, therefore, demand that before passing an order debaring an advocate from appearing in courts he must be clearly told that his alleged conduct or actions are such that if found guilty he might be debarred from appearing in courts for a specific period. The warning may be given in the initial notice of contempt issued under section 14 or section 17 (as the case may be) of the Contempt of Courts Act. Or such a notice may be given after the proceedee is held guilty of criminal contempt before dealing with the question of punishment.

147. In order to avoid any such controversies in future all the High Courts that have so far not framed rules under section 34 of the Advocates Act are directed to frame the rules without any further delay. It is earnestly hoped that all the High Courts shall frame the rules within four months from today. The High Courts may also consider framing rules for having Advocates on Record on the pattern of the Supreme Court of India. Suborning a witness in a criminal trial is an act striking at the root of the judicial proceeding and it surely deserves the treatment meted out to the appellant. But the appellants were not given any notice by the High Court that if found guilty they might be prohibited from appearing in the High Court, and the courts subordinate to it, for a certain period. To that extent the direction given by the High Court was not in conformity with the principles of natural justice. But as to the consequence of that we shall deal with in due course.

THE QUESTION OF SENTENCE:

148. Having regard to the misdeeds of which RK Anand has been found guilty, the punishment given to him by the High Court can only be regarded as nominal. We feel that the leniency shown by the High Court in meting out the punishment was quite misplaced. And the view is greatly reinforced if one looks at the contemnor's conduct before the High Court. As we shall see presently, before the High Court the contemnor took a defiant stand and constantly tried to obstruct the proceedings.

THE DIVERSIONARY & INTIMIDATORY TACTICS IN THE PROCEEDING:

149. Even as contempt notices were issued by the High Court, or even before it, some diversionary and even intimidatory tactics were employed to stonewall the proceeding initiated by it.

Kulkarni's Affidavit:

150. The first in the series was an affidavit filed on August 6, 2007 by Kulkarni in regard to the stings done by him. The affidavit was not called for by the Court and it was filed quite gratuitously. It was a jumble of non-sense, half truths and lies. Kulkarni made all conceivable and even some inconceivable allegations against NDTV in general and Poonam Agarwal in particular. He stated that Poonam Agarwal had recorded his first interview on April 25, 2003 and thereafter on several other dates till the last one in the last week of May before the telecast. It is not clear on whose behalf Poonam Agarwal would take his earlier interviews because she had joined NDTV only two years prior to July 2007. He then alleged that Poonam Agarwal subjected him to "Gobel's technique" (sic. Goebbels's) to make him 'illicit' (sic. elicit) certain answers 'to' (sic. from) RK Anand and IU Khan in a particular manner. What is of significance in Kulkarni's affidavit, however, is that it anticipated what in the sting recordings might prove fatal for RK Anand and IU Khan and tried to do the ground work for their defence. In regard to his meeting with IU Khan, Kulkarni said that he met and spoke to him in the manner directed by Poonam Agarwal. He further said on affidavit that when IU Khan asked him if he had met 'Bade Saheb' he implied some senior police official but it was Poonam Agarwal who forced him to say that IU Khan referred to RK

Anand. Now, this is exactly what IU Khan said in his interview to the TV channel and what he would say later in his show cause to the High Court. He also said that as agreed between the two in the meeting of April 28, 2007, he again met IU Khan in the evening but the conversation that took place in that meeting exposed NDTV story and, therefore, that recording was withheld from being telecast.

151. Similarly, in regard to his meeting with RK Anand, Kulkarni said that he met him on being forced by Poonam Agarwal. He further said on affidavit that he had mentioned the sum of rupees two and half crores to RK Anand on the direction of Poonam Agarwal. He himself had neither any idea nor the intention to ask him for any money. He further said that on the mention of the sum of money RK Anand was shocked and he rebuked him by making the sarcastic remark that he should ask for five crores and not only two and half crores. He said that he got the message that no demand for money would be entertained. The similarity between what Kulkarni said in his affidavit and what RK Anand had to say about this matter and the manner in which he would say it is unmistakable. We are unable to believe that the manner in which Kulkarni's affidavit foreshadows the proceedees defence was simply coincidental. It does not require much imagination to see that Kulkarni had once again switched over sides and he had joined hands with those whom he had earlier tried to trap in the stings.

152. In one of the paragraphs of the affidavit there is a ludicrous description of his meeting with Lovely. It is stated that despite persistent request by him for a meeting there was no positive response from RK Anand. Then, "suddenly a Sardar Ji came and started talking with me. In his pocket I saw some flash light beeping which alerted me that I was trapped. I was upset and wanted to convey all the facts to Hon'ble Court but Ms. Poonam Agarwal prevailed over me and dissuaded me to do the same". Even this apparently absurd story was not without purpose; its object was to provide for the existence of another recording, apart from his own sting, of his meeting with Lovely.

153. The recording, by Lovely, of their meeting was the second diversionary attempt in the proceeding before the High Court.

Another audio recording of the meeting between Kulkarni & Lovely:

154. The High Court registry received an audio cassette along with a letter from one Sunil Garg. In the letter it was stated that the cassette had the recording of some conversation between Lovely and Kulkarni. The cassette proved to be completely blank. Then on notice being issued to him Garg appeared in Court and made a statement on oath. He said that Kulbir Singh alias Lovely was his friend. Shortly before his death he had come to him and handed over to him two audio cassettes saying that those contained the recordings of his conversation with Kulkarni. He had earlier sent one of the two cassettes without playing it on the recorder. He later came to learn from the newspaper reports the cassette was blank. He then played the other cassette and found it had the recording of some conversation between his friend Lovely and someone else. He recognised the voice of his friend Lovely. He submitted the other cassette in the High Court.

155. We would have completely ignored Kulkarni's affidavit and Garg's audio cassettes as foolish and desperate attempts to create some defence, not worthy of any attention. But there is something more to come that is impossible to ignore.

“REQUEST” FOR RECUSAL:

156. Of all the obstructive measures adopted before the High Court the most unfortunate and undesirable came from RK Anand in the form of a petition 'requesting' Manmohan Sarin J., the presiding judge on the bench dealing with the matter, to recuse him from the proceeding. This petition, an ill concealed attempt at intimidation, was, as a matter of fact, RK Anand's first response to the notice issued to him by the Court. He stated in this petition that he had the feeling that he was not likely to get justice at the hands of Manmohan Sarin J. He further stated alluding to some past events, that he had tried his best to forget the past and bury the hatchet but the way and the manner in which the matter was being dealt with had caused the greatest damage to his reputation. He made the prayer that the recusal application should be heard in camera and the main matter be transferred to another bench of which Sarin J. was not a member. Along with the petition he filed a sealed cover containing a note and the materials giving rise to the belief that he was not likely to get justice at the hands of Sarin J.

157. The recusal petition was primarily based on the plea that he had reasonable apprehension

of bias, for Sarin J. was personally hostile to him. The self perceived hostility between the applicant (RK Anand) and Sarin J. dated back to 1984 when he was still a lawyer. They had a quarrel then that had led to an exchange of verbal abuses. In 1988 Sarin J. (still a lawyer), in his position as the Vice President of the Delhi High Court Bar Association, had moved a resolution before the Association's executive committee opposing any proposal for the applicant's nomination for appointment as a judge of the Delhi High Court. Sarin J., as a lawyer, had among his clients, the magazine, 'India Today' (Living Media) and the owners of NDTV were closely associated with 'India Today'. Sarin J., as an advocate had done the cases of the applicant's brothers whom he had referred to him. It was stated that the judge, thus, might have been privy to some family gossip causing him to be prejudicially disposed towards the applicant. The applicant had earlier sent a complaint to the Prime Minister against the Law Minister, who was one of his (applicant's) political rival. In the complaint, apart from the Law Minister, allegations were also made against the then Chief Justice of the High Court. And in that connection it was alleged that the Chief Justice had around him a coterie of Judges that included Sarin J. On the arrest of a sitting judge of the Delhi High Court by the CBI the media had gone to Sarin J. for his comments and even this, it was stated, might lead him to harbour ill will against the applicant. In a civil case for damages arising from the BMW case the matter was settled between the parties (one of the victims of the accident on the one side and the family of the accused Sanjeev Nanda on the other). But Sarin J. who was a member of the bench before which the matter came up for recording the settlement, did not allow it to be said in the compromise petition that the accident was caused by a truck and not by any car. It showed, according to the applicant, that Sarin J. had some pre-conceived notion that the accident was caused by the car driven by Sanjeev Nanda. The bench had appointed as *amicus curiae* a lawyer personally hostile to the applicant. And lastly the applicant had moved the Chief Justice on the administrative side to assign the matter to some other bench.

158. In one glance, the grounds on which recusal was asked for appear fit to be rejected out of hands. But the court gave the matter far greater importance than it merited, apparently because it saw a personal angle in it. The petition was heard for three days before it was rejected by the order

dated October 4, 2007. It is a long order running into twenty seven pages authored by Sarin J. The order dealt with all the grounds advanced in support of the recusal petition and effectively showed that there was no truth or substance in any of those grounds. In regard to the 1988 resolution of the Bar Association allegedly passed against RK Anand at the instance of Mr. Sarin the Court called for the Association's Register of Resolutions for the years 1988 and 1989. From the Association's Register it transpired that at the relevant time Mr. Sarin was not an office bearer of the Association but was simply a member of its Executive Committee. Further, there was no resolution concerning RK Anand. A resolution of the nature stated in the recusal application was passed against someone from the Judicial Service. It is true that one Mr. Tufail, the Joint Secretary of the Association had wished to move a resolution against RK Anand too and was given the permission to do so by the Executive Committee. But he did not actually move any resolution and later said that he did not have necessary proof in support of the allegations and the matter was dropped. As regards the complaint to the Prime Minister in which Sarin J. was said to be a member of the alleged coterie around the Chief Justice, Sarin J. commented that until a copy of the complaint was filed with the recusal application he was not even aware of it. Having thus dealt with the rest of the allegations made in the recusal application, the order, towards its end, said something which alone was sufficient to reject the request for recusal. It was pointed out that the applicant had a flourishing practice; he had been frequently appearing in the court of Sarin J. ever since he was appointed as a judge and for the past twelve years was getting orders, both favourable and unfavourable, for his different clients. He never complained of any unfair treatment by Sarin J. but recalled his old 'hostility' with the judge only after the notice was issued to him.

In the order the concerned judge further observed:

“The path of recusal is very often a convenient and a soft option. This is especially so since a Judge really has no vested interest in doing a particular matter. However, the oath of office taken under Article 219 of the Constitution of India enjoins the Judge to duly and faithfully and to the best of his knowledge and judgment, perform the duties of office without fear or favour affection or ill will while upholding the constitution and the laws. In a case, where unfounded and motivated allegations of bias are sought to be made with a view of forum hunting / Bench preference or brow-beating the Court, then, succumbing to such a pressure would tantamount to not fulfilling the oath of office.”

159. The above passage, in our view, correctly sums up what should be the Court's response in the face of a request for recusal made with the intent to intimidate the court or to get better of an 'inconvenient' judge or to obfuscate the issues or to cause obstruction and delay the proceedings or in any other way frustrate or obstruct the course of justice. We are constrained to pause here for a moment and to express grave concern over the fact that lately such tendencies and practices are on the increase. We have come across instances where one would simply throw a stone on a judge (who is quite defenceless in such matters!) and later on cite the gratuitous attack as a ground to ask the judge to recuse himself from hearing a case in which he would be appearing. Such conduct is bound to cause deep hurt to the judge concerned but what is far greater importance is that it defies the very fundamentals of administration of justice. A motivated application for recusal, therefore, needs to be dealt with sternly and should be viewed ordinarily as interference in the due course of justice leading to penal consequences.

160. The other Judge on the bench, however, it seems was unable to bear the onslaught and he took the easy way out. He expressed his inability to concur with the order passed by presiding judge observing that "the nature of the controversy before us pertains to my learned brother alone. It revolves around a number of factual assertions, which can only be known to my learned brother personally, and which must necessarily be examined in the light of the law on the subject. Therefore, I consider it inappropriate to express any opinion in the matter, one way or the other." Having passed the brief separate order he declined to take any further part in the proceeding.

161. This development provided RK Anand with another opportunity to carry on his offensive further. He unhesitatingly availed of the opportunity and filed an application (Crl. M. 11677/2007) for clarification/review of the order dated October 4, 2007 dismissing his recusal petition. Review was sought primarily on the ground that the order of Sarin J. was not the order by the bench since the other judge had declined to concur with him. After the other judge opted out of the bench, the Chief Justice put Lokur J. in his place. Consequently, the clarification/review application came before Sarin J., sitting with Lokur J., and the first thing this bench was told, and with some assertiveness too, was that it was not competent to hear the application and it could only be heard by

the previous bench as it arose from an order passed by that bench.

162. The clarification/review application was rejected by a long order dated November 29, 2007 authored by Lokur J. As we shall see, henceforth all substantive orders in the proceeding were written, not by the presiding judge, but by Lokur J. and the significance of it is not lost on us. The application for recusal though rejected was not completely unsuccessful. It left a lasting shadow on the proceeding.

163. Here, it may be noted that apart from filing an application for its clarification/review before the High Court, the order rejecting the recusal application was also sought to be challenged before this Court by filing SLP (Crl) No. 7374 of 2007. The SLP was, however, withdrawn on December 14, 2007. Nevertheless, the challenge to the High Court order rejecting the recusal application is still not given up and paragraphs H & I of the Grounds in the present Memo of appeal expressly seek to assail that order.

164. Both Mr. Salve and Mr. Subramaniam strongly submitted that the appellant had plainly no respect for the court or the court proceedings. Mr. Salve submitted that the recusal application was a brazen attempt to browbeat the High Court and in that attempt the appellant succeeded to a large extent since the prohibition to appear before the courts for a period of only four months could only be considered as a token punishment having regard to the gravity of his conduct. Mr. Subramaniam also felt strongly about the recusal application but before taking up the issue he fairly tried to give another opportunity to the appellant stating that perhaps even now the appellant might wish to withdraw the grounds in the SLP challenging the order passed by the High Court on the recusal application. The appellant was given ample time to consider the suggestion but later on enquiry Mr. Altaf Ahmed stated that he had not pressed those grounds in course of his submissions exercising his discretion as the Counsel but he had no instructions to get those grounds deleted from the SLP.

165. The action of the appellant in trying to suborn the court witness in a criminal trial was reprehensible enough but his conduct before the High Court aggravates the matter manifold. He does not show any remorse for his gross misdemeanour and instead tries to take on the High Court by

defying its authority. We are in agreement with Mr. Salve and Mr. Subramaniam that punishment given to him by the High Court was wholly inadequate and incommensurate to the seriousness of his actions and conduct. We, accordingly, propose to issue a notice to him for enhancement of punishment. We also hold that by his actions and conduct the appellant has established himself as a person who needs to be kept away from the portals of the court for a longer time. The notice would therefore require him to show-cause why the punishment awarded to him should not be enhanced as provided under section 12 of the Contempt of Courts Act. He would additionally show-cause why he should not be debarred from appearing in courts for a longer period. The second part of the notice would also cure the defect in the High Court order in debarring the appellant from appearing in courts without giving any specific notice in that regard as held in the earlier part of the judgment.

166. We have so far been considering the two appeals proper. We now proceed to examine some other important issues arising from the case.

THE ROLE OF NDTV:

167. NDTV came under heavy attack from practically all sides for carrying out the stings and airing the programme based on it. On behalf of RK Anand the sting programme was called malicious and motivated, aimed at defaming him personally. Mr. P P Rao appearing for IU Khan questioned the propriety of the stings and the repeated telecast of the sting programme concerning a pending trial and involving a court witness. Mr. Rao submitted that before taking up the sting operations, fraught with highly sinister implications, the TV channel should have informed the trial court and obtained its permission. If for any reason it was not possible to inform the trial judge then permission for the stings should have been taken from the Chief Justice of the Delhi High Court. Also, it was the duty of that TV channel to place the sting materials before the court before telecasting any programme on that basis.

168. Mr. Gopal Subramaniam submitted that this case raised the important issue regarding the nature and extent of the right of the media to deal with a pending trial. He submitted that a sting

operation was, by its nature, based on deception and hence, overriding public interest alone might justify its publication/telecast. Further, since the operation was based on deception the onus would be heavy on the person behind the sting and publication/telecast of the sting materials to establish his/her *bona fide*, apart from the genuineness and truthfulness of the sting materials. In regard to sting operations *bona fide* could not be assumed. In this case, therefore, it was the duty of the High Court to inquire into and satisfy itself whether the sting operation was a genuine exercise by the TV channel to expose the attempted subversion of the trial. He further submitted that the affidavit of Poonam Agarwal was not sufficient to arrive at the conclusion that the action of the TV channel was genuine and *bona fide* and the matter required further enquiry. Mr. Subramaniam further submitted that the act of publication/telecast and the contents of publication/telecast, though interlinked, were still needed to be viewed separately and whether or not a publication or telecast was justified would, to a large extent, depend, as much on the contents of the publication/telecast, as the act of publication/telecast itself. He further submitted that, in the facts of the case, the sting operation was in public interest and there was nothing objectionable there. But the same cannot be said of the telecast. The date on which the programme was telecast (May 30, 2007- when Kulkarni's cross-examination was still pending), the "slant" given to the episode by the NDTV presenters, and the way opinions were solicited from eminent lawyers, left much to be explained by the TV channel. Learned Counsel submitted that a question may arise whether NDTV was justified in telecasting the programme based on the sting when they were not in a position to vouch for Kulkarni's character. He, however, submitted that the TV channel must at least be given credit for transparency – it made a public disclosure, in the same telecast, that (a) Kulkarni had withdrawn his consent for the telecast; (b) it did not know if any money had in fact changed hands, and (c) it could not vouch for Kulkarni's character. It also gave the contemnors a chance to state their version of the story. In conclusion Mr Subramaniam submitted that it would be difficult to conclude that NDTV was guilty of contempt or of conducting a media trial although the "slant in the telecast was regrettable overreach."

169. The other *amicus* Mr. N. Rao was more severe in his criticism of the telecast of the sting programme by NDTV. He maintained that NDTV was equally guilty of contempt of court, though

under a different provision of law. Mr. Rao submitted that the programme was an instance of, what is commonly called, 'trial by media' and it was telecast while the criminal trial was going on. He submitted that in our system of law there was no place for trial by media in a *sub-judice* matter. Mr. Rao submitted that freedom of speech and expression, subject of course to reasonable restrictions, was indeed one of the most important rights guaranteed by the Constitution of India. But the press or the electronic media did not enjoy any right(s) superior to an individual citizen. Further, the right of free and fair trial was of far greater importance and in case of any conflict between free speech and fair trial the latter must always get precedence. Mr. Rao submitted that though the law normally did not permit any pre-censorship of a media report concerning an ongoing criminal trial or *sub-judice* matter, any person publishing the report in contravention of the provisions of law would certainly make himself liable to the proceeding of contempt. Mr. Rao further submitted that the immunity provided under section 3 (3) of the Contempt of Courts Act was not available to the TV channel in terms of proviso (ii) Explanation (B) to sub-section (3) and thus the telecast of the sting programme by NDTV clearly fell in the prohibited zone under the Act. He further submitted that in such an event, a plea of 'larger public good' was not a legal defence. In support of his submission he cited several decisions of this court in (i) *Saibal Kumar Gupta and Others vs. B.K.Sen and Another.*, 1961 3 SCR 460 (473) (ii) *In Re: P.C.Sen*, 1969 2 SCR 649 (651,653,654,658) (iii) *Reliance Petrochemicals Ltd. vs. Proprietors of Indian Express Newspapers, Bombay Pvt. Ltd.*, (1988) 4 SCC 592 pr. 32,34,95,38 (iv) *M. P. Lohia vs. State of W. B.*, (2005) 2 SCC 686 pr. 10.

170. Mr. Salve learned Senior Advocate appearing for NDTV, on the other hand, defended the telecast of the programme. Mr. Salve submitted that commenting on or exposing something foul concerning proceedings pending in courts would not constitute contempt if the court is satisfied that the report/comment is substantially accurate, it is *bona fide* and it is in public interest. He referred to the new section 13 in the Contempt of Courts Act substituted with effect from March 17, 2006 which is as under:

“13. Notwithstanding anything contained in any law for the time being in force,-

(a) no court shall impose a sentence under this Act for a contempt of court unless it is

satisfied that the contempt is of such a nature that it substantially interferes, or tends substantially to interfere with the due course of justice;

- (b) **the court may permit, in any proceeding for contempt of court, justification by truth as a valid defence if it is satisfied that it is in public interest and the request for invoking the said defence is *bona fide*.**”

(emphasis added)

171. Mr. Salve submitted that in a situation of this kind two competing public interests are likely to arise; one, purity of trial and the other public reporting of something concerning the conduct of a trial (that may even have the tendency to impinge on the proceedings) where the trial, for any reason, can be considered as a matter of public concern. With regard to the case in hand Mr. Salve submitted that in the sting programmes there was nothing to influence the outcome of the BMW trial. But even if the telecast had any potential to influence the trial proceedings that risk was far outweighed by the public good served by the programme. He further submitted that in a case where two important considerations arise, vying with each other, the court is the final arbiter to judge whether or not the publication or telecast is in larger public interest; how far, if at all, it interferes or tends to interfere with or obstructs or tends to obstruct the course of justice and on which side the balance tilts. In support of his submission he relied upon a decision of the House of Lords in *Re Lonrho plc and others*, [1989] 2 All ER 1100 paragraphs 7.2 and 7.3 at 1116.

172. We have already dealt with the allegations made on behalf of RK Anand while considering his appeal earlier in this judgment and we find no substance in those allegations.

Reporting of pending trial:

173. We are also unable to agree with the submission made by Mr. P. P. Rao that the TV channel should have carried out the stings only after obtaining the permission of the trial court or the Chief Justice of the Delhi High Court and should have submitted the sting materials to the court before its telecast. Such a course would not be an exercise in journalism but in that case the media would be acting as some sort of special vigilance agency for the court. On little consideration the idea appears to be quite repugnant both from the points of view of the court and the media. It would be a sad day for the court to employ the media for setting its own house in order; and media too

would certainly not relish the role of being the snoopers for the court. Moreover, to insist that a report concerning a pending trial may be published or a sting operation concerning a trial may be done only subject to the prior consent and permission of the court would tantamount to pre-censorship of reporting of court proceedings. And this would be plainly an infraction of the media's right of freedom of speech and expression guaranteed under Article 19(1) of the Constitution. This is, however, not to say that media is free to publish any kind of report concerning a *sub-judice* matter or to do a sting on some matter concerning a pending trial in any manner they please. The legal parameter within which a report or comment on a *sub-judice* matter can be made is well defined and any action in breach of the legal bounds would invite consequences. Compared to normal reporting, a sting operation is an incalculably more risky and dangerous thing to do. A sting is based on deception and, therefore, it would attract the legal restrictions with far greater stringency and any infraction would invite more severe punishment.

Sting programme whether trial by media??

174. The submissions of Mr. N. Rao are based on two premises: one, the sting programme telecast by NDTV was of the genre, 'trial by media' and two, the programme interfered or tended to interfere with or obstructed or tended to obstruct the proceedings of the BMW trial that was going on at the time of the telecast. If the two premises are correct then the rest of the submissions would logically follow. But are the two premises correct? What is trial by media? The expression 'trial by media' is defined to mean:

“the impact of television and newspaper coverage on a person's reputation by creating a widespread perception of guilt regardless of any verdict in a court of law. During high publicity court cases, the media are often accused of provoking an atmosphere of public hysteria akin to a lynch mob which not only makes a fair trial nearly impossible but means that, regardless of the result of the trial, in public perception the accused is already held guilty and would not be able to live the rest of their life without intense public scrutiny.”

175. In light of the above it can hardly be said that the sting programme telecast by NDTV was a media trial. Leaving aside some stray remarks or comments by the anchors or the

interviewees, the programme showed some people trying to subvert the BMW trial and the state of the criminal administration of justice in the country (as perceived by the TV channel and the interviewees). There was nothing in the programme to suggest that the accused in the BMW case were guilty or innocent. The programme was not about the accused but it was mainly about two lawyers representing the two sides and one of the witnesses in the case. It indeed made serious allegations against the two lawyers. The allegations, insofar as RK Anand is concerned, stand established after strict scrutiny by the High Court and this Court. Insofar as IU Khan is concerned, though this Court held that his conduct did not constitute criminal contempt of court, nonetheless allegations against him too are established to the extent that his conduct has been found to be inappropriate for a Special Prosecutor. In regard to the witness the comments and remarks made in the telecast were never subject to a judicial scrutiny but those too are broadly in conformity with the materials on the court's record. We are thus clearly of the view that the sting programme telecast by NDTV cannot be described as a piece of trial by media.

Stings & telecast of sting programmes not constituting criminal contempt:

176. Coming now to section 3 of the Contempt of Courts Act we are unable to appreciate Mr. Rao's submission that NDTV did not have the immunity under sub-section (3) of section 3 as the telecast was hit by proviso (ii) Explanation (B) to that sub section. Section 3 of the Act insofar as relevant is as under:

“3. Innocent publication and distribution of matter not contempt.- (1) A person shall not be guilty of contempt of court on the ground that he has published (whether by words, spoken or written, or by signs, or by visible representations, or otherwise) any matter which interferes or tends to interfere with, or obstructs or tends to obstruct, the course of justice in connection with any civil or criminal proceeding pending at that time of publication, if at that time he had no reasonable grounds for believing that the proceeding was pending.

(2) xxx

(3) A person shall not be guilty of contempt of court on the ground that he has distributed a publication containing any such matter as is mentioned in sub-section (1), if at the time of distribution he had no reasonable grounds for believing that it contained or was likely to contain any such matter as aforesaid:

Provided that this sub-section shall not apply in respect of the distribution of-

(i) any publication which is a book or paper printed or published otherwise than in conformity

with the rules contained in section 3 of the Press and Registration of Books Act, 1867 (25 of 1867);

- (ii) any publication which is a newspaper published otherwise than in conformity with the rules contained in section 5 of the said Act.

Explanation.- For the purposes of this section, a judicial proceeding-

(a) is said to be pending-

(A) xxx

(B) in the case of a criminal proceeding under the Code of Criminal Procedure, 1898 (5 of 1898), or any other law-

(i) where it relates to the commission of an offence, when the charge-sheet or challan is filed, or when the court issues summons or warrant, as the case may be, against the accused, and

(ii) in any other case, when the court takes cognizance of the matter to which the proceeding relates, and xxx

(b) xxxx”

177. Section 5 provides that a fair criticism of a judicial act concerning any case which has been heard and finally decided would not constitute contempt.

178. Sub-section (1) of section 3 provides immunity to a publisher of any matter which interferes or tends to interfere with, or obstructs or tends to obstruct the course of justice in any civil or criminal proceeding if he reasonably believed that there was no proceeding pending. A sub-section (3) deal with distribution of the publication as mentioned in sub-section (1) and provides immunity to the distributor if he reasonably believed that the publication did not contain any matter which interfered or tended to interfere with, or obstructed or tended to obstruct the course of justice in any civil or criminal proceeding. The immunity provided under sub-section (3) is subject to the exceptions as stated in the proviso and explanations to the sub-section. We fail to see any application of section 3(3) of the Contempt of Courts Act in the facts of this case. In this case there is no distribution of any publication made under sub-section (1). Hence, neither sub-section (3) nor its proviso or explanation is attracted. NDTV did the sting, prepared a programme on the basis of the sting materials and telecast it at a time when it fully knew that the BMW trial was going on. Hence, if the programme is held to be a matter which interfered or tended to interfere with, or

obstructed or tended to obstruct **the due course of** the BMW case then the immunity under sub-section (1) will not be available to it and the telecast would clearly constitute criminal contempt within the meaning of section 2 (c) (ii) & (iii) of the Act. But can the programme be accused of interfering or tending to interfere with, or obstructing or tending to obstruct **the due course of** the BMW case. Whichever way we look at the programme we are not able to come to that conclusion. The programme may have any other faults or weaknesses but it certainly did not interfere with or obstruct the due course of the BMW trial. The programme telecast by NDTV showed to the people (the courts not excluded) that a conspiracy was afoot to undermine the BMW trial. What was shown was proved to be substantially true and accurate. The programme was thus clearly intended to **prevent** the attempt to interfere with or obstruct the due course of the BMW trial.

STINGS & TELECAST OF STING PROGRAMMES SERVED IMPORTANT PUBLIC CAUSE

179. Looking at the matter from a slightly different angle we ask the simple question, what would have been in greater public interest; to allow the attempt to suborn a witness, with the object to undermine a criminal trial, lie quietly behind the veil of secrecy or to bring out the mischief in full public gaze? To our mind the answer is obvious. The sting telecast by NDTV was indeed in larger public interest and it served an important public cause.

180. We have held that the sting programme telecast by NDTV in no way interfered with or obstructed the due course of any judicial proceeding, rather it was intended to prevent the attempt to interfere with or obstruct the due course of law in the BMW trial. We have also held that the sting programme telecast by NDTV served an important public cause. In view of the twin findings we need not go into the larger question canvassed by Mr Salve that even if the programme marginally tended to influence the proceedings in the BMW trial the larger public interest served by it was so important that the little risk should not be allowed to stand in its way.

Excesses in the telecast:

181. We have unequivocally upheld the basic legitimacy of the stings and the sting programmes telecast by NDTV. But at the same time we must also point out the deficiencies (or

rather the excesses) in the telecast. Mr. Subramaniam spoke about the 'slant' in the telecast as 'regrettable overreach'. But we find many instances in the programme that cannot be simply described as 'slants'. There are a number of statements and remarks which are actually incorrect and misleading. In the first sting programme telecast on May 30, 2007 at 8.00 pm the anchor made the opening remarks as under:

"Good Evening,... an NDTV expose, on how the legal system may have been subverted in the high profile BMW case. In 1999 six people were run over allegedly by a BMW driven by Sanjeev Nanda a young, rich industrialist but 8 years later every witness except one has turned hostile. Tonight NDTV investigates did the prosecution, the defence and the only witness not turned hostile Sunil Kulkarni collude..."

182. The anchor's remarks were apparently from a prepared text since the same remarks were repeated word by word by another anchor as introduction to the second telecast on the same day at 9:00 pm.

183. Further, in the 9 o'clock telecast after some brief introductory remarks, clips from the sting recordings are shown for several minutes and a commentator from the background (probably Poonam Agarwal) introduces the main characters in the BMW case. Kulkarni is introduced by the commentator in the following words:

"Sunil Kulkarni, a passerby, who allegedly saw the accident but inexplicably dropped as witness by prosecution. They claim he had been bought by the Nandas. This despite the fact that he is the only witness who still says the accident was caused by a 'black car' with two men in it one of them called Sanjeev."

184. [This statement does not find place in the manuscript of the telecast furnished to the court and can be found only by carefully watching the CD of the telecast submitted before the court. We are again left with the feeling that NDTV did not submit full and complete materials before the court and we are surprised that the High Court did not find it amiss]

185. In the first statement Kulkarni is twice described as the only witness in the BMW case who after eight years had not turned hostile. The statement is fallacious and misleading. Kulkarni was not being examined in the court as prosecution witness and, therefore, there was no question of his being declared 'hostile' by the prosecution. He was being examined as a Court witnesses. Nevertheless, the prosecution was cross-examining him in detail in course of which he was trying

to sabotage the prosecution case.

186. The second statement is equally, if not more, fallacious. In the second statement it is said that Kulkarni was 'inexplicably' dropped as a prosecution witness. We have seen earlier that Kulkarni was dropped as a prosecution witness for good reasons summed up in the Joint Commissioner's report to the trial court and there was nothing 'inexplicable' about it. In the second statement it is further suggested that the prosecution's claim that Kulkarni was bought over by the accused was untrue because he was the only witness who still said that the accident was caused by a black car with two men in it, one of them being called Sanjeev. It is true that in his deposition before the court Kulkarni said that the accident was caused by a black car but he resiled from his earlier statements made before the police and the magistrate in a more subtle and clever way than the other two prosecution witnesses, namely, Hari Shankar Yadav and Manoj Malik. Departing from his earlier statements he said in the court that he heard one of the two occupants of the car addressing the other as 'Sanch or sanz' (and not as Sanjeev). Further, though admitting that Sanjeev Nanda was one of the occupants of the car, he positively denied that he got down from the driving seat of the car and placed someone else on the driving seat of the car causing the accident. Thus the damage to the prosecution case that he tried to cause was far more serious than any other prosecution witness. It is not that NDTV did not know these facts. NDTV was covering the BMW trial very closely since its beginning and was aware of all the developments taking place in the case. Then why did it introduce the programme in this way, running down the prosecution and presenting Kulkarni as the only person standing upright while everyone else had fallen down? The answer is not far to seek. One can not start a highly sensational programme by saying that it was prepared with the active help of someone whose own credibility is extremely suspect. The opening remarks were thus designed to catch the viewer and to hold his/her attention, but truth, for the moment at least was relegated to the sidelines. It is indeed true that later on in the programme facts concerning Kulkarni were stated correctly and he was presented in a more balanced way and Mr. Subramaniam wanted to give NDTV credit points for that. But the impact and value of the opening remarks in a TV programme is quite different from what comes later on. The later corrections were for the sake

of the record while the introductory remarks had their own value.

187. Further, on the basis of the sting recordings NDTV might have justifiably said that IU Khan, the Special Prosecutor appeared to be colluding with the defence (though this court found that there was no conclusive evidence to come to such a finding). But there was no material before NDTV to make such allegation against the prosecution as a whole and thus to run down the other agencies and people connected with the prosecution. There are other instances also of wrong and inappropriate choice of words and expressions but we need not go any further in the matter.

188. Another sad feature is its stridency. It is understandable that the programme should have started on a highly sensational note because what was about to be shown was really quite shocking. But the programme never regained poise and it became more and more shrill. All the interviewees, highly eminent people, expressed their shock and dismay over the state of the legal system in the country and the way the BMW trial was proceeding. But as the interview progressed, they somewhat tended to lose their self restraint and did not pause to ponder that they were speaking about a *sub-judice* matter and a trial in which the testimony of a court witness was not even over. We are left with the feeling that some of the speakers allowed their passions, roused by witnessing the shocking scenes on the TV screen, to get better of their judgment and made certain very general and broad remarks about the country's legal system that they might not have made if speaking in a more dispassionate and objective circumstances. Unfortunately, not a single constructive suggestion came from anyone as to how to revamp the administration of criminal justice. The programme began on negative note and remained so till the very end.

Conduct of NDTV in proceeding before High Court:

189. In the earlier part of the judgment some of the glaring lapses committed by NDTV in the proceeding before the High Court are already recounted. Apart from those one or two other issues need to be mentioned here that failed to catch the attention of the High Court. It seems that at the time the sting operations were carried out people were actually apprehensive of something of that kind. Vikas Arora, Advocate had stated in his complaint (dated April 19, 2007) about receiving such a threat from Poonam Agarwal. NDTV in its reply dated April 26, 2007 had denied the

allegations in the complaint, at the same time, declaring its resolve to make continuous efforts to unravel the truth. At the same time Poonam Agarwal was planning the stings in her meetings with Kulkarni. As a matter of fact, the first sting was carried out on IU Khan just two days after giving reply to Arora's complaint. Further, from the transcript of the first sting carried out on RK Anand on May 6, 2007 it appears that he too had expressed some apprehension of this kind to which Kulkarni responded by saying that he did not have money enough to eat how could he do any recording of anyone. (It is difficult to miss the irony that the exchange took place while RK Anand was actually being subjected to the sting). It thus appears that at that time, for some reason, the smell of sting was in the air. In those circumstances we find it strange that in the affidavits filed on behalf of NDTV there should be absolutely no reference to Vikas Arora's complaint. In the earlier part of the judgment we have examined the affidavits filed by Poonam Agarwal and found that she states about all the aspects of the sting operations in great detail. But surprisingly those affidavits do not even refer to, much less deal with the complaint of Vikas Arora despite the striking similarity between the threat that was allegedly given to him and his senior IU Khan and the way the sting operation was actually carried out on IU Khan.

190. There is another loose end in the whole matter. Kulkarni's sting meeting with IU Khan had ended with fixing up another meeting for the following Sunday at the latter's residence. (It was the setting up of this meeting that is primarily the basis for holding him guilty of misconduct as the Special Public Prosecutor). One should have thought that this meeting would surely take place because it provided a far better opportunity for the sting. With 'good Scotch whisky' flowing it was likely that the planners of the stings would get more substantial evidences of what they suspected. But we are not told anything about this meeting: whether it took place or not? If it took place what transpired in it and whether any sting recording was done? If it did not take place what was the reason for not keeping the appointment and giving up such a good opportunity. Here it may be noted that Kulkarni also in his affidavit filed before the High Court on August 6, 2007 stated that as arranged between them he again met IU Khan in the evening but the sting recording of that meeting was withheld by NDTV because that falsified their story. Kulkarni, as was his wont, might be

telling lies but that was an additional reason for NDTV to clarify the issue regarding the second meeting between the two.

191. The next meeting between Kulkarni and IU Khan that was fixed up in the sting meeting on April 28, 2007 might or might not have taken place but there can be little doubt that they met again between April 28, 2007 and May 31, 2007 (the day following the first sting telecast) when Kulkarni gave IU Khan the 'certificate' that he had accepted the summons on his advice (which was submitted by IU Khan before the trial court when he withdrew from the case).

192. The affidavits filed on behalf of NDTV are completely silent on these aspects.

193. These omissions (and some similar others) on the part of NDTV leave one with the feeling that it was not sharing all the facts within its knowledge with the court. The disclosures before the Court do not appear to be completely open, full and frank. It would tell the court only so much as was necessary to secure the conviction of the proceedees-wrong doers. There were some things that it would rather hold back from the court. We would have appreciated the TV channel to make a fuller disclosure before the High Court of all the facts within its knowledge.

194. Having said all this we would say, in the end, that for all its faults the stings and the telecast of the sting programme by NDTV rendered valuable service to the important public cause to protect and salvage the purity of the course of justice. We appreciate the professional initiative and courage shown by the young reporter Poonam Agarwal and we are impressed by the painstaking investigation undertaken by NDTV to uncover the Shimla connection between Kulkarni and RK Anand.

195. We have recounted above the acts of omission and commission by NDTV before the High Court and in the telecast of the sting programme in the hope that the observations will help NDTV and other TV channels in their future operations and programmes. We are conscious that the privately run TV channels in this country are very young, no more than eighteen or twenty years old. We also find that like almost every other sphere of human activity in the country the electronic news media has a very broad spectrum ranging from very good to unspeakably bad.

196. The better news channels in the country (NDTV being one of them) are second to none

in the world in matters of coverage of news, impartiality and objectivity in reporting, reach to the audience and capacity to influence public opinion and are actually better than many foreign TV channels. But that is not to say that they are totally free from biases and prejudices or they do not commit mistakes or gaffes or they some times do not tend to trivialise highly serious issues or that there is nothing wanting in their social content and orientation or that they maintain the same standards in all their programmes. In quest of excellence they have still a long way to go.

197. A private TV channel which is also a vast business venture has the inherent dilemma to reconcile its business interests with the higher standards of professionalism/demands of profession. The two may not always converge and then the TV channel would find its professional options getting limited as a result of conflict of priorities. The media trips mostly on TRPs (television rating points), when commercial considerations assume dominance over higher standards of professionalism.

198. It is not our intent here to lay down any reformist agenda for the media. Any attempt to control and regulate the media from outside is likely to cause more harm than good. The norms to regulate the media and to raise its professional standards must come from inside.

ROLE OF THE LAWYER

199. The other important issue thrown up by this case and that causes us both grave concern and dismay is the decline of ethical and professional standards among lawyers. The conduct of the two appellants (one convicted of committing criminal contempt of court and the other found guilty of misconduct as Special Prosecutor), both of them lawyers of long standing, and designated Senior Advocates, should not be seen in isolation. The bitter truth is that the facts of the case are manifestation of the general erosion of the professional values among lawyers at all levels. We find today lawyers indulging in practices that would have appalled their predecessors in the profession barely two or three decades ago. Leaving aside the many kinds of unethical practices indulged in by a section of lawyers we find that even some highly successful lawyers seem to live by their own rules of conduct. We have viewed with disbelief Senior Advocates freely taking part in TV debates or giving interviews to a TV reporter/anchor of the show on issues that are directly the subject

matter of cases pending before the court and in which they are appearing for one of the sides or taking up the brief of one of the sides soon after the TV show. Such conduct reminds us of the fictional barrister Rumpole, ‘the Old Hack of Bailey’, who self deprecatingly described himself as an ‘old taxi plying for hire’. He at least was not bereft of professional values. When a young and enthusiastic journalist invited him to a drink of Dom Perignon, vastly superior and far more expensive than his usual ‘plonk’, ‘Château Fleet Street’, he joined him with alacrity but when in the course of the drink the journalist offered him a large sum of money for giving him a story on the case; ‘why he was defending the most hated woman in England’, Rumpole ended the meeting simply saying

“In the circumstance I think it is best if I pay for the Dom Perignon”

200. We express our concern on the falling professional norms among the lawyers with considerable pain because we strongly feel that unless the trend is immediately arrested and reversed, it will have very deleterious consequences for administration of justice in the country. No judicial system in a democratic society can work satisfactorily unless it is supported by a bar that enjoys the unqualified trust and confidence of the people, that share the aspirations, hopes and the ideals of the people and whose members are monetarily accessible and affordable to the people.

201. We are glad to note that Mr. Gopal Subramaniam, the *amicus* fully shared our concern and realised the gravity of the issue. In course of his submissions he eloquently addressed us on the elevated position enjoyed by a lawyer in our system of justice and the responsibilities cast upon him in consequence. His Written Submissions begin with this issue and he quotes extensively from the address of Shri M C Setalvad at the Diamond Jubilee Celebrations of the Bangalore Bar Association, 1961, and from the decisions of this Court in *Pritam Pal vs. High court of Madhya Pradesh*, 1993 Supp (1) SCC 529 (observations of Ratnavel Pandian J.) and *Sanjeev Datta, In Re*, (1995) 3 SCC 619 (observations of Sawant J. at pp 634-635, para 20).

202. We respectfully endorse the views and sentiments expressed by Mr. M.C. Setalvad, Pandian J. and Sawant J.

203. Here we must also observe that the Bar Council of India and the Bar Councils of the

different states cannot escape their responsibility in this regard. Indeed the Bar council(s) have very positively taken up a number of important issues concerning the administration of justice in the country. It has consistently fought to safeguard the interests of lawyers and it has done a lot of good work for their welfare. But on the issue of maintaining high professional standards and enforcing discipline among lawyers its performance hardly matches its achievements in other areas. It has not shown much concern even to see that lawyers should observe the statutory norms prescribed by the Council itself. We hope and trust that the Council will at least now sit up and pay proper attention to the restoration of the high professional standards among lawyers worthy of their position in the judicial system and in the society.

This takes us to the last leg of this matter.

THE LARGER ISSUE: BMW TRIAL GETTING OUT OF HAND:

204. Before laying down the records of the case we must also advert to another issue of great importance that causes grave concern to this Court. At the root of this odious affair is the way the BMW trial was allowed to be constantly interfered with till it almost became directionless. We have noted Kulkarni's conduct in course of investigation and at the commencement of the trial; the fight that broke out in the court premises between some policemen and a section of lawyers over his control and custody; the manner in which Hari Shankar Yadav, a key prosecution witness turned hostile in court; the curious way in which Manoj Malik, another key witness for the prosecution appeared before the court and overriding the prosecution's protest, was allowed to depose only to resile from his earlier statement. All this and several other similar developments calculated to derail the trial would not have escaped the notice of the Chief Justice or the judges of the Court. But there is nothing to show that the High Court, as an institution, as a body took any step to thwart the nefarious activities aimed at undermining the trial and to ensure that it proceeded on the proper course. As a result, everyone seemed to feel free to try to subvert the trial in any way they pleased.

205. We must add here that this indifferent and passive attitude is not confined to the BMW trial or to the Delhi High Court alone. It is shared in greater or lesser degrees by many other High Courts. From experience in Bihar, the author of these lines can say that every now and then one

would come across reports of investigation deliberately botched up or of the trial being hijacked by some powerful and influential accused, either by buying over or intimidating witnesses or by creating insurmountable impediments for the trial court and not allowing the trial to proceed. But unfortunately the reports would seldom, if ever, be taken note of by the collective consciousness of the Court. The High Court would continue to carry on its business as if everything under it was proceeding normally and smoothly. The trial would fail because it was not protected from external interferences. Every trial that fails due to external interference is a tragedy for the victim(s) of the crime. More importantly, every frustrated trial defies and mocks the society based on the rule of law. Every subverted trial leaves a scar on the criminal justice system. Repeated scars make the system unrecognisable and it then loses the trust and confidence of the people. Every failed trial is also, in a manner of speaking, a negative comment on the State's High Court that is entrusted with the responsibility of superintendence, supervision and control of the lower courts. It is, therefore, high time for the High Courts to assume a more pro-active role in such matters. A step in time by the High Court can save a criminal case from going astray. An enquiry from the High Court Registry to the concerned quarters would send the message that the High Court is watching; it means business and it will not tolerate any nonsense. Even this much would help a great deal in insulating a criminal case from outside interferences. In very few cases where more positive intervention is called for, if the matter is at the stage of investigation the High Court may call for status report and progress reports from police headquarter or the concerned Superintendent of Police. That alone would provide sufficient stimulation and pressure for a fair investigation of the case. In rare cases if the High Court is not satisfied by the status/progress reports it may even consider taking up the matter on the judicial side. Once the case reaches the stage of **trial** the High Court obviously has far wider powers. It can assign the trial to some judicial officer who has made a reputation for independence and integrity. It may fix the venue of the trial at a proper place where the scope for any external interference may be eliminated or minimized. It can give effective directions for protection of witnesses and victims and their families. It can ensure a speedy conclusion of the trial by directing the trial court to take up the matter on a day-to-day basis. The

High Court has got ample powers for all this both on the judicial and administrative sides. Article 227 of the Constitution of India that gives the High Court the authority of superintendence over the subordinate courts has great dynamism and now is the time to add to it another dimension for monitoring and protection of criminal trials. Similarly Article 235 of the Constitution that vests the High Court with the power of control over sub-ordinate courts should also include a positive element. It should not be confined only to posting, transfer and promotion of the officers of the subordinate judiciary. The power of control should also be exercised to protect them from external interference that may sometime appear overpowering to them and to support them to discharge their duties fearlessly.

206. In light of the discussions made above we pass the following orders and directions.

1. The appeal filed by IU Khan is allowed and his conviction for criminal contempt is set aside. The period of four month's prohibition from appearing in Delhi High Court and the courts sub-ordinate to it is already over. The punishment of fine given to him by the High Court is set aside. The Full Court of the Delhi High Court may still consider whether or not to continue the honour of Senior Advocate conferred on him in light of the findings recorded in this judgment.
2. The appeal of RK Anand is dismissed subject to the notice of enhancement of punishment issued to him as indicated in paragraph 165 of the judgment. He is allowed eight weeks time from the date of service of notice for filing his show-cause.
3. Those of the High Courts which have so far not framed any rules under section 34 of the Advocates Act, shall frame appropriate rules without any further delay as directed in paragraph 147 of the judgment.
4. Put up the appeal of RK Anand after the show-cause is filed.

[B.N. AGRAWAL]

.....J.

[G.S. SINGHVI]

.....J.

[AFTAB ALAM]

.....J.

New Delhi,
July 29, 2009.

