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Delhi High Court

Before: JUSTICE MANMOHAN SARIN, HON'BLE MR. JUSTICE MADAN B. LOKUR

WP (CRL.) NO. 796/2007

COURT ON ITS OWN MOTION – Petitioner,

Versus

STATE & Others – Respondents.

Judgment reserved on: May 2, 2008, Judgment delivered on: August 21st, 2008

Mr. Arvind Nigam, Advocate and Amicus Curiae

Mr. Sanjay Jain, Sr. Advocate withMr. Vijay K. Sondhi, Mr. Varun Pareek and Mr. Kapil Arora, Advocates for NDTV. Mr. Vinay Bhasin and Mr. Ashok Bhasin, Sr. Advocates with Ms. Shivani Lal and Mr. Vishv Nidhi, Advocates for contemnor Mr. R.K. Anand along with Mr. R.K Anand in person. Mr. P.P. Rao, Sr. Advocate with Mr. Huzefa Ahmadi, Mr. H.R. Khan Suhel, Mr. Amaan Khan and Mr. Saif Khan, Advocates for contemnor Mr. I.U. Khan with Mr. I.U. Khan in person. Mr. S.P. Kalra, Sr. Advocate with Mr. Munish Malhotra for contemnor Mr. Sri Bhagwan Sharma withcontemnor Mr. Sri Bhagwan Sharma in person.

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MADAN B. LOKUR, J. – The question for our consideration is whether Mr. R.K. Anand and Mr. I.U. Khan, Senior Advocates and Mr. Sri Bhagwan Sharma, Advocate have committed criminal contempt of Court or not. We have found Mr. Anand and Mr. Khan guilty of criminal contempt of Court for reasons recorded in the judgment. Neither of them had tendered any apology or demonstrated contrition or repentance for their actions. Accordingly, towards the end of the judgment, we have pronounced the punishment awarded to them. We have found Mr. Sri Bhagwan Sharma not guilty of criminal contempt of Court.

Background facts:

2. On 30th May, 2007 a TV news channel – NDTV – carried a report relating to a "sting" operation. The report concerned itself with the role of a defence lawyer and the Special Public Prosecutor in an ongoing Sessions trial in what is commonly called the "BMW case".

3. On 31st May, 2007 a Division Bench of this Court, on its own motion, registered a writ petition being WP (Crl.) No. 796 of 2007 since it was of the opinion that if the reported contents were true, they raise serious issues concerning criminal justice administration. Under these circumstances, the Division Bench felt it expedient and in the interest of justice to ascertain the full facts from NDTV.

4. The Division Bench issued a direction to the Registrar General to collect all materials that may be available in respect of the telecast and also directed NDTV to preserve the original material including the CD/video pertaining to the sting operation.

5. It appears that simultaneously the learned Additional Sessions Judge before whom the BMW case was pending also instituted an inquiry into the contents of the report and on 1st June, 2007 the Managing Editor of NDTV produced before him three chips and five CDs containing the material in the three chips (which had the original unedited recording). However, since this Court was seized of the matter, the learned Additional Sessions Judge did not proceed further with the inquiry.

6. In compliance with the order dated 31st May, 2007 NDTV produced before the Registrar (General/Administration) of this Court, on 2nd June, 2007 six CDs. One of the CDs was said to be edited, while the remaining five were said to be unedited. The statement of Ms. Poonam Agarwal a reporter of NDTV was recorded to this effect and the CDs were placed in a sealed cover. Ms. Agarwal also stated that “The NDTV news channel does not have any other material in connection with the sting operation in question”. She undertook to preserve the original chips.

7. Subsequently, on 6th June, 2007 Ms. Agarwal submitted the transcripts of the six CDs. She also stated that the six CDs were “prepared from four spy camera chips which were recorded on different occasions”.

8. On 23rd July, 2007 Ms. Agarwal filed an affidavit (on the direction of the Court) concerning the sting or undercover operation from the stage it was conceived, attendant circumstances, details of recordings, time and place etc. The affidavit broadly states that on 20th April, 2007 NDTV had telecast a half-hour special on the BMW case and thereafter on 22nd April, 2007 one Mr. Sunil Laxman Kulkarni contacted her and told her that he had seen the half-hour programme and was impressed by it. He told her that he had some information relevant to the case and would like to meet her. She met Mr. Kulkarni the same day and again on the 23rd April, 2007 when he told her that there was a strong nexus between the prosecution and the defence in the BMW case and that he wanted to do a sting operation to make the nexus public.

9. At this stage, it may be broadly mentioned that Mr. Kulkarni claims to have witnessed an incident that occurred in the early morning of 10th January, 1999 when a BMW car allegedly driven by one Mr. Sanjeev Nanda in a drunken state caused the death of six persons. The police registered a case under Section 304 read with Sections 308 and 34 of the IPC and commenced their investigations. During the course of investigations, Mr. Kulkarni came forward as an eye witness to the incident. After investigations were complete, the police filed a challan, charges were framed against the accused (including Mr. Nanda) and the trial commenced before the Additional Sessions Judge.

10. Among others, the prosecution cited Mr. Kulkarni as its witness, but on 30th September, 1999 he was dropped from the list of witnesses, apparently on the instructions of the police.

11. Much later, by an order dated 19th March, 2007 the learned Additional Sessions Judge suo motu issued a summons to Mr. Kulkarni to depose as a court witness. The summons was returnable on 14th May, 2007 and the telecast by NDTV is mainly concerned with the events of this period. It may be mentioned for the record that Mr. Kulkarni was apparently not served with the summons, but appeared in Court and his examination in chief was recorded on 14th and 17th May, 2007 and he was partly examined by Mr. I.U. Khan (Special Public Prosecutor in the BMW case) on 29th May, 2007.

12. Earlier, on 28th April, 2007 a sting operation was carried out by Mr. Kulkarni and Mr. Deepak Verma of NDTV in the chamber of Mr. I.U. Khan in the Patiala House Courts. Mr. Kulkarni carried a hidden camera in his shirt (a button camera) and Mr. Verma also carried a hidden camera in a bag (a bag camera). The chip containing the recording made by the button camera was subsequently reformatted by NDTV after copying the contents onto a compact disc (CD). The original chip from the bag camera is available and we have viewed its contents.

13. A second sting operation was carried out by Mr. Kulkarni on 6th May, 2007 when he met Mr. R.K. Anand (Senior Advocate and learned counsel for the accused) in the VIP lounge at the Indira Gandhi International Airport (Domestic Terminal). The recording was carried out by using a button camera.

14. A third sting operation was carried out in the same manner by Mr. Kulkarni on 8th May, 2007 when he entered a car in which Mr. Anand was already sitting. Both Mr. Kulkarni and Mr. Anand travelled from outside the Delhi High court premises to South Extension where Mr. Kulkarni disembarked.

15. The fourth and final sting operation was carried out later in the evening on the same day when Mr. Kulkarni met Mr. Sri Bhagwan Sharma (an advocate and colleague of Mr. Anand) and Mr. Lovely (an associate of Mr. Anand and since deceased) in the South Extension Part II market.

16. The original chips used in the last three sting operations are available and we have viewed their contents.

17. Based on the four sting or undercover operations, NDTV telecast a programme called “India 60 Minutes” on 30th May, 2007. The programme begins with a short statement or introduction by Mr. Kulkarni. The programme was followed by the 9 O‟clock News on the same day and the 8 O‟clock News and the 9 O‟clock News on the 31st containing excerpts from the sting operation.

18. On 6th August, 2007 Mr. Kulkarni filed an affidavit (which was put up before the Court on 9th August, 2007) in which he stated, inter alia, that he was not interested in giving any interview to Ms. Agarwal but because of her repeated attempts and to get rid of her, he gave her an interview on 25 th April, 2007. According to Mr. Kulkarni, Ms. Agarwal was aggressive, adamant and had threatened him a lot. He says that in his meeting with Mr. Khan on 28th April, 2007 he put questions to him in the manner directed by Ms. Agarwal. The reference to “Bade Saheb” in that meeting meant senior police officials but Ms.

Agarwal “forced me to mean that Bade Saheb means Sh. R.K. Anand as it suits her whole story.” Mr. Kulkarni says that he met Mr. Anand, “following him on the instructions of Ms. Poonam Agarwal and forced me to converse with me (sic) regarding the case.”

19. The sum and substance of Mr. Kulkarni‟s affidavit is that the sting operation was masterminded by Ms. Agarwal for her ulterior purposes and to boost the TRP ratings of NDTV and that Mr. Kulkarni was “trapped” into participation.

20. On 7th August, 2007 on a consideration of the material available, that is, the CDs, the transcripts of the various programmes, viewing of the edited and unedited footage and the affidavits on record (other than the affidavit of Mr. Kulkarni) the Court noted that meetings took place on 28th April, 2007, 6th May, 2007 and 8th May, 2007 between Mr. Sunil Laxman Kulkarni, Mr. I.U. Khan Special Public Prosecutor, Mr. R.K. Anand, Senior Advocate and learned counsel for the accused, Mr. Sri Bhagwan Sharma, Advocate and colleague of Mr. Anand and Mr. Lovely a representative of Mr. Anand and that it was prima facie satisfied that these persons “have willfully and deliberately tried to interfere with the due course of judicial proceedings and administration of justice by the courts.” It was observed that prima facie their acts and conduct were intended to subvert the administration of justice in the pending BMW case and in particular influence the outcome of the pending judicial proceedings. Accordingly, in exercise of powers conferred by Article 215 of the Constitution proceedings for contempt of Court (as defined in Section 2(c) of the Contempt of Courts Act, 1972) were initiated against Mr. Anand, Mr. Khan and Mr. Sri Bhagwan Sharma and they were asked to show cause why they should not be punished accordingly. Notice was also issued Mr. Lovely but since he expired, the proceedings against him did not continue any further.

21. In response to the notice, Mr. Khan filed a reply affidavit dated 1 st October, 2007, while Mr. Sri Bhagwan Sharma and Mr. Anand filed their respective reply affidavit on 3rd October, 2007. Further affidavits and written submissions have also been filed by the alleged contemnors and they have been heard in extenso. Mr. Arvind Nigam, Advocate was appointed as Amicus Curiae and he has also been heard in detail. Some clarifications were sought from NDTV and they were given by Mr. Harish Salve and Mr. Sanjay Jain, Senior Advocates. We have had occasion to view the footage from the CDs and the original chips.

22. We may mention that during the course of hearing, NDTV made another telecast on 3rd December, 2007 suggesting therein that Mr. Kulkarni and Mr. Anand were known to each other for a considerable period of time and that Mr. Kulkarni had even stayed at the residence of Mr. Anand in Himachal Pradesh. We have merely taken note of this telecast as also the response of Mr. Anand in respect of this telecast.

Preliminary matters:

23. For the purposes of deciding on the show cause notice, Mr. Anand, who appeared in person, submitted five preliminary matters for our consideration. He was followed and supported on some issues by Mr. P.P. Rao Senior Advocate (ably assisted by Mr. Huzefa Ahmadi, Advocate) appearing for Mr. I.U. Khan.

24. Mr. Anand submitted firstly, that NDTV had committed contempt of Court by telecasting the programme on 30th May, 2007; secondly, the mass media needs to be checked and controlled, especially in respect of reporting pending cases, since it uses its reach to influence or prejudice mankind in general to hold a particular view which may not necessarily be the correct view; thirdly, this Court needs to lay down the law in respect of sting or undercover operations such as the ones that we are concerned with; fourthly, it is imperative for us to appreciate the nature of criminal contempt proceedings, with particular reference to the standard and onus of proof, and finally, the video recordings that are the primary material against the alleged contemnors are not admissible in evidence and are even otherwise unreliable. Mr. Anand has also filed certain interlocutory applications, which we will be dealing with later in the judgment.

Has NDTV committed contempt of Court?

25. Mr. Anand submitted that the expose by NDTV on 30th May, 2007 actually cast him in a bad light in as much as aspersions were made on his professional integrity and even otherwise it attacked his professional competence. According to him, viewers were made to believe that he is capable of resorting to unethical conduct to save his client from conviction (assuming his client is guilty). By casting aspersions on him and attacking his professional integrity and competence, NDTV has prevented him from fearlessly discharging his duties as an advocate for the cause of his client. Thus, it was contended, that actually NDTV had interfered in the administration and due course of justice. In this context, it was also submitted that NDTV had violated the „sub judice principle" by unfairly telecasting untruths or half truths thereby seriously prejudicing the pending proceedings in the BMW case. It was submitted that NDTV selectively telecast clandestinely obtained video clips with the intention of deliberately misleading the general public, and to make matters worse, it did not air the viewpoint of Mr. Anand but only telecast one side of the story on national television. The sum and substance of the contentions of Mr. Anand in this regard were that he is more a victim rather than a villain – in fact NDTV had committed criminal contempt rather than he.

26. On the issue whether or not proceedings should be initiated against NDTV for criminal contempt of Court, we wish to make it clear that Mr. Anand did not ask for a notice of criminal contempt to be issued to NDTV – he left it to our wisdom to take whatever steps are necessary.

27. We find that Mr. Anand has advanced a rather peculiar argument: he did not wish to move a petition against NDTV for committing contempt of Court, but he „invited" us to exercise our contempt power suo motu. We are of the opinion that since Mr. Anand has not moved any petition for initiating proceedings for contempt of Court against NDTV in respect of the telecast of 30th May, 2007 nor has he made any oral request in that regard, we should decline to consider his „suggestion". As regards exercise of suo motu jurisdiction, we are of the opinion that a Court should exercise its contempt jurisdiction sparingly, with scrupulous care and caution. Contempt of Court is serious business and no Court should wantonly invoke its contempt jurisdiction only because it is vested with the power to do so. Given the facts of this case, we are of the view that this is not one of those rare or brazen

cases where we should initiate suo motu action against NDTV for contempt of Court.

28. Consequently, it does not appear to be necessary to deal with the cases cited by Mr. Anand. However, we are doing so because we feel it necessary to clear the air in so far as the rights of litigants and their advocates are concerned. Even if a different perspective or view than the findings and views expressed by us can be propounded, that would not affect the finding on merits given by us in respect of criminal contempt having been committed by the alleged contemnors. This is because of overwhelming and unimpeachable evidence on record beckoning and calling for maintaining the purity of the stream of justice especially when it is sought to be polluted by those having a pivotal role within the system.

29. In support of his contention, Mr. Anand relied upon Ananta Lal Singh v. Alfred Henry Watson, AIR 1931 Calcutta 257, Telhara Cotton Ginning Co. Ltd. v. Kashinath Gangadhar Namjoshi, AIR 1940 Nagpur 110, Thirumalaiappa v. Kumaraswami, AIR 1956 Madras 621, In re Bhola Nath, 1961 Cri LJ 134, Damayanti v. S. Vaney, 1966 Cri LJ 9, Delhi Tamil Education Association v. J. Samimalai, 97 (2002) DLT 352 (DB) and an unreported decision of this Court H. Syama Sundara Rao v. Union of India, MANU/DE/9650/20061.

30. Ananta Lal Singh is important because it deals with allegations made in the mass media (in a newspaper) during the pendency of a trial. The Court noted and accepted the argument of learned counsel that a tendency to interfere with the due course of justice may be noticed in two ways: one form of contempt (which the Court watches very narrowly) is of “prejudicing mankind against persons who are on their trial raising an Available at www.manupatra.com atmosphere of prejudice against them by comment which is addressed to the public at large.” Another form of contempt is if aspersions are cast on „certain“ clients of an advocate such that it deters the advocate from continuing with his duty towards the client or embarrasses him in discharging that duty. Similarly, commenting on an advocate with reference to his professional conduct of cases may also amount to contempt of Court, if it has the tendency to or is calculated to interfere in the administration of justice. The Court cautioned, however, that, “… the Court‟s jurisdiction in contempt is not to be invoked unless there is real prejudice which can be regarded as a substantial interference with the due course of justice. It is not every theoretical tendency that will attract the action of the Court in its very special jurisdiction.”

31. Telhara Cotton is an instance of an attempt to cow down or browbeat an advocate so that he is deterred from continuing with the brief of his client. In this case a threat was given to an advocate that action would be taken against him unless he unconditionally withdrew an averment made in the written statement. This was held to be “a clear invasion of the counsel‟s right to represent his client‟s case loyally and properly and further interfered in the due performance of his duty towards his client.”

32. Reliance upon Thirumalaiappa is misplaced. That was a case in which (i) attacks were made against an advocate outside court precincts, (ii) the attacks were made two days after termination of the proceedings, and

(iii) the attacks had no bearing or relation to the proceedings that terminated. In these

circumstances, it was held doubtful if protection and consequent exercise of the summary jurisdiction of the Court was necessary. The insult to the advocate could not be construed as a condemnation of the system of administration of justice but would amount to a calumny upon an individual.

33. However, one important and noteworthy enunciation of law is mentioned in Thirumalaiappa. This is a passage from Oswald‟s Contempt of Court, Committal, Attachment, and Arrest upon Civil Process which reads as follows (page 91 of the 1910 edition):

“An insult to counsel may be punished as a contempt.

All publications which offend against the dignity of the Court, or are calculated to prejudice the course of justice, will constitute contempts. Offences of this nature are of three kinds – namely, those which (1) scandalize the Court; or (2) abuse the parties concerned in causes there; or (3) prejudice mankind against persons before the cause is heard. Under the first head fall libels on the integrity of the Court, its Judges, officers or proceedings; under the second and third heads anything which tends to excite prejudice against the parties, or their litigation, while it is pending. For example, attacks on or abuse of a party, his witnesses or solicitor, constitute contempts, though a mere libel on a party, not amounting to an interference with the course of justice, does not, the party being left to his remedy by action.”

34. We will have occasion, a little later when we are dealing with the merits of the case, to consider a fourth category of offence, namely, where both parties (the prosecution and the defense) collude to defeat the course of justice thereby virtually playing a fraud upon the Court.

35. Bhola Nath is not of any importance in so far as we are concerned since that decision related to contempt in the face of the Court. What is of relevance, though, is the reiteration of the principle that any interruption in the discharge of the duties of an advocate (in this case the Public Prosecutor) by reason of an attack on his integrity or a similar embarrassment would amount to contempt of Court. In the decision under review, the Public Prosecutor was so worried, unnerved and shocked that he wanted to give up the case entrusted to him.

36. Damayanti was again a case of contempt committed in the face of the Court. The defendant in that case threatened the plaintiff‟s advocate by saying that he (the defendant) would see to it that the plaintiff‟s advocate would go to jail, that two criminal cases had already been filed by the defendant against him and that he would shortly file two more criminal cases against him. This was held to be contempt of Court. Reference was also made to French v. French, (1824) 1 Hog. 134 wherein it was held:

“Advocates who appear for the parties being officers of Court, any abuse or insult or aspersions cast on them, which would interfere with the course of administration of justice, must necessarily be held to amount to contempt of Court.”

37. But what is of importance in Damayanti is that reliance was placed on Smith v. Zakeman, (1856) 26 LJ Ch 305 wherein it was observed that a threat for the purpose of intimidating a suitor would be contempt of Court and it was not relevant whether the threat had its effect or not. In our opinion, the principle laid down would equally apply in the event of a threat to an advocate, regardless of whether the advocate is cowed down by the threat or not. In R v. Machin, [1980] 3 All ER 151 it was noted that the gist of an offence of contempt of Court is "conduct which may lead and is intended to lead to a miscarriage of justice whether or not a miscarriage actually occurs." We agree with this exposition of the law.

38. In Delhi Tamil Education Association, the law on the subject was pithily, though in a somewhat narrow manner, stated in the following words:

"…all and every type of threat to an Advocate or a litigant does not and would not attract a criminal contempt jurisdiction of the Court unless it was specifically shown and established to have bred a tendency to prevent or deter the Advocate concerned from discharging his professional duty. The threat must have a nexus with and impact on the pending judicial proceedings so as to interfere in it or tend to do so to change or alter the course of justice. It must be a real and not a casual and imaginary and its degree must be such as to set an Advocate thinking and to constrain him to throw up his brief depriving the Court of his assistance to do justice."

39. Syama Sundara Rao reiterates and reaffirms the principles mentioned in the decisions referred to above, and in a sense extends the frontiers of contempt jurisdiction. It was held:

"However, any attempt made by a party to pressurize the opposite party or its advocate to withdraw a plea taken in the course of proceedings pending in court, amounts to direct interference with the administration of justice. Such an attempt, in our opinion, also takes in its fold, issuance of notices and filing of applications, etc. containing scurrilous, disparaging and derogatory remarks against the opposite party and its advocate. In preventing the respondent from putting forward its defense and pleas as may be deemed by it to be relevant for the purposes of adjudicating the case in hand, it cannot be a defense to state that any party … enjoys a privilege to pressurize the opposite party, much less his/her advocate. In our opinion, such an act amounts to creating impediments in the free flow of administration of justice. Any such attempt has to be treated as an attempt to interfere with and obstruct the administration of justice."

40. On the duty of the Court in dealing with such a situation, the Division Bench observed:

"It is thus the duty of the courts to protect the advocate from being cowed down into submission and under pressure of threat of menace from any quarter and thus abandon their clients by withdrawing pleas taken on their behalf or from withdrawing from the brief itself, which may prove fatal not only to the legal proceeding in question but also permit an impression to gain ground that adoption of such tactics are permissible or even acceptable."

41. From a review of the decisions cited before us, the following principles may be deduced,

in so far as the right of an advocate to conduct a case is concerned. The principles are:

1. It is of primary importance to ensure that the administration of justice is kept unsullied from any external influence whatsoever.

2. An advocate is an officer of the Court and if he is interrupted or hindered from performing his duty faithfully and devotedly to his client or from rendering effective assistance to the Court, a prima facie case for contempt of Court is made out.

3. It is irrelevant that the advocate is not actually prevented from performing his duty to his client or to the Court. It is enough to invite proceedings for contempt if the act complained of is such that it has a real tendency to do so.

4. While the nature of „contemptuous" acts may be several, some examples are where the client of an advocate is portrayed in such light that it is embarrassing for an advocate to represent him; where the professional competence, conduct or integrity of an advocate is doubted or criticized; where the advocate is sought to be cowed down or browbeaten through applications, notices or pleadings that are drafted in a manner calculated to make it difficult for an advocate to appropriately represent his client, etc. Prejudicing mankind against a person on trial (in the broader sense) may also invite action for contempt of Court.

5. The Court is obliged to satisfy itself that the act complained of results in the advocate running a real risk of not being able to perform his duty or that there is a real prejudice that the administration of justice may be interfered with or prejudicially affected or compromised. To put it negatively, the act complained of must not have only a theoretical tendency of preventing the advocate from performing his functions fearlessly.

6. It is also the duty of the Court to protect its officers (including advocates) from being maligned or suffer calumnies of a degree that interfere with the due course of justice.

7. The principles enunciated above are applicable only in respect of pending causes or causes that are imminent. Where the proceedings have terminated, an advocate is not entitled to complain of contempt of Court, but his remedy lies in taking recourse to the normal legal channels and processes of law.

8. Similarly, there is a thin line between preventing or tending to prevent an advocate from performing his duties and heaping calumny upon him. The latter does not necessarily interfere or tend to interfere in the administration of justice and may be otherwise actionable at law.

42. Since Mr. Anand did not press for initiating proceedings for contempt of Court against NDTV or its reporter, we need not decide whether any of these principles would come into play, one way or the other. We are also not required to express any opinion whether Ms. Agarwal or NDTV have committed contempt of Court and, therefore, we refrain from doing so. We may only mention that Mr. Anand has not denied meeting Mr. Kulkarni in the lounge in the domestic terminal in IGI Airport on 6 th May, 2007. It is true that the meeting was not

on the invitation of Mr. Anand, but it was with his consent. It is also possible that given the nature of the conversation that took place, Mr. Anand did not want to make a „scene" at a public place by shooing off Mr. Kulkarni. But surely, isn"t it rather odd that Mr. Anand and Mr. Kulkarni travelled together on 8th May, 2007 in Mr. Anand"s car from just outside the Delhi High Court premises all the way to South Extension without so much as whimper of protest from Mr. Anand?

43. We wondered why NDTV or Ms. Agarwal or both would want to „get after" Mr. Anand and Mr. Khan. In response, learned counsel for Mr. Khan submitted that Ms. Agarwal was rather aggressive in her attempts to get information about the BMW case from Mr. Khan, but when he refused her „overtures" she hatched a conspiracy to malign him. Reference was made to the affidavit dated 1st October, 2007 filed by Mr. Khan wherein he states that a few days prior to 19th April, 2007 the reporter started pressing him and his office for the statements of the witnesses and the case diary; she also wanted to interview Mr. Khan to enable her to telecast a programme on the BMW case. But when Mr. Khan declined to cooperate, she got annoyed and "adopted threatening tactics".

44. On 19th April, 2007 Mr. Vikas Arora, a colleague of Mr. Khan sent a telegram to the Chief Editor of NDTV with a copy to the Commissioner of Police, the Chairman of the Press Council of India and to the Deputy Commissioner of Police to the effect that the reporter was blackmailing them (Mr. Khan and Mr. Arora) to supply the statement of witnesses and the case diary in the BMW case and to give an interview in connection with the prosecution of the case. Upon refusal being communicated to her, the reporter threatened to expose Mr. Khan and Mr. Arora through some unknown person and would bring it on record that the police and the Public Prosecutor had been influenced and bribed by the accused. A request was made in the telegram to take action against the reporter and other persons behind the conspiracy.

45. As far as Mr. Anand is concerned, he stated in his affidavit dated 3rd October, 2007 that he was handed over a file containing serious allegations of a tax fraud committed by NDTV and some other entities. He was in the process of settling a First Information Report to the police and initiating a public interest litigation in connection with the tax fraud. NDTV was aware of the fact that Mr. Anand was in possession of the relevant papers and so the telecast was made on 30th May, 2007 to deter him from bringing the tax fraud out in the open.

46. As far as we are concerned, the alleged motive behind NDTV"s expose (as detailed by learned counsel for Mr. Khan and by Mr. Anand) is rather thin and in any case, irrelevant. NDTV or its reporter may or may not have had a grouse or a grudge against Mr. Anand or Mr. Khan but that cannot be used as a justification by them for committing contempt of Court. The motive may have some relevance to the genuineness or authenticity of the contents of the telecast, but that is a different matter altogether and we will advert to it at the appropriate stage. Suffice it to say that our principal concern is simply this: have Mr. Anand, Mr. Khan and Mr. Sri Bhagwan Sharma committed contempt of Court or not. What prompted the sting operation by NDTV is not of any consequence for answering this question. In this regard, reference may be made to Raja Ram Pal v. Hon'ble Speaker, Lok

Sabha, (2007) 3 SCC 184 wherein a similar contention was rejected by the Supreme Court in the following words:

“It has been contended by the petitioners that the circumstances did not warrant the exercise by the Houses of Parliament of the power of expulsion inasmuch as the persons behind the sting operations were driven by motives of pelf and profit. In this context, the learned counsel for the petitioners would refer repeatedly to the evidence, in particular, of Mr. Aniruddha Bahal as adduced before the Inquiry Committee of Lok Sabha wherein he would concede certain financial gains on account of arrangements with the television channels for telecast of the programme in question.

“We are unable to subscribe to this reasoning so as to find fault with the action that has been impugned before us. We are not concerned here with what kind of gains, financial or otherwise, those persons made as had conceived or engineered the sting operations leading to the material being brought into public domain through electronic media. This was not an area of anxiety even for the Houses of Parliament when they set about probing the matter resulting ultimately in expulsions. The sole question that was required to be addressed by the Inquiry Committees and the legislative chambers revolved around the issue of misconduct attributed to the individual Members bringing the House in disrepute. We, therefore, reject the above contention reiterating what we have already concluded, namely, that the expediency and necessity of exercise of such a power by the legislature is for determination by the latter and not by the courts.”

(emphasis ours) Investigations, court cases, investigative journalism and trial by media :

47. Mr. Anand submitted that NDTV did not adhere to journalistic norms in gathering information prejudicial to his interest and telecasting the programme on 30th May, 2007. It was submitted that NDTV should not have used a clandestine method of collecting „news‟ and it ought to have telecast his version of the events and his comments on the sting operation, which it did not, except after the event.

48. We are not really concerned with journalistic norms or how the mass media „behaves‟ in a given situation. This is really a matter that falls within the domain of journalists and broadcasters and their disciplinary bodies. The Courts come into the picture only if there is an allegation of transgression of the law by the media. Similarly, if there is an allegation of defamation by the media against an individual, he has a right to approach the Courts to redress his grievances. The Courts are not and cannot be expected to deal with subjective issues of bias, attitude, behavior etc. in reporting events.

49. However, since considerable arguments were advanced on the role of the media in matters such as the present, we think it appropriate to explain the legal limits for the benefit of those concerned.

50. There is no doubt, as observed by the Supreme Court in Rajendra Sail v. M.P. High Court Bar Association, (2005) 6 SCC 109 that the reach of the media is to every nook and corner of the world, particularly these days when we have 24-hour news channels and webcasts on the Internet. The Supreme Court also observed that a large number of people tend to

believe as correct that which appears in the print or electronic media. For these reasons alone, the mass media has to be circumspect while dealing with „news".

51. The Supreme Court has noted that Robertson & Nicol on Media Law express the view that the media"s general mechanism of self regulation has failed in the United Kingdom. The Press Complaints Commission has been regarded as a public relations operation and the National Union of Journalists has devised a code of conduct for its members but it is seldom enforced.

52. In D.N. Prasad v. Principal Secretary, 2005 Cri LJ 1901 it was observed:

"Unfortunately, it is not realized that any item of news telecast in the channels would reach persons of all categories, irrespective of age, literacy, and their capacity to understand or withstand. The impact of such a telecast on the society is phenomenal. ... Unfortunately, this uncontrolled or unedited telecast or propagation of news is resorted to [in] the name of exercise of right to freedom of speech and expression, or freedom of Press."

53. In Surya Prakash Khatri v. Smt. Madhu Trehan, 92 (2001) DLT 665 (FB) it was observed that the power of the Press is almost like nuclear power – it can create and it can destroy. Keeping this in mind, it is imperative for the media to exercise due care and caution before publication of a potentially damaging piece. It was said that such news reports are like a loaded gun and it may not be appropriate for the media to contend that it not know that the gun was loaded. It was observed that, "The editor of a newspaper or a journal has a greater responsibility to guard against untruthful news and publications for the simple reason that his utterances have a far greater circulation and impact than the utterances of an individual and by reason of their appearing in print, they are likely to be believed by the ignorant."

54. It was also observed that it is well settled that once proceedings in Court have begun, the media has no role to play in the administration of justice.

55. In the context of the last observation, it is necessary to refer to M.P. Lohia v. State of West Bengal, (2005) 2 SCC 686 wherein the Supreme Court deprecated the practice of a „trial by media" since it certainly interferes in the administration of justice. In this case, anticipatory bail in a dowry death case was declined by the Calcutta High Court and while a similar petition was pending in the Supreme Court, a magazine brought out an interview with the family of the deceased extensively giving their version of the events. This was deprecated by the Supreme Court. Similarly, in State of Maharashtra v. Rajendra Jawanmal Gandhi, (1997) 8 SCC 386 the Supreme Court observed that "A trial by press, electronic media or public agitation is the very antithesis of the rule of law."

56. However, what is of limited importance from M.P. Lohia in so far as we are concerned is whether the Supreme Court gave its assent to the principle of "strict liability contempt". This is so because it is not clear from a reading of the decision whether or not the magazine was aware of the pendency of the proceedings before the Supreme Court. It is quite possible that the magazine unknowingly took an incorrect decision to publish the interview and invited strict liability contempt.

57. Our attention was drawn to Indian Council of Legal Aid and Advice v. State, WP © No. 17595/2006 decided on 27th November, 2006 wherein this Court stated:

“The kind of media trial which is going on in this country creates bias not only in the minds of the general public but also vitiates the atmosphere and this certainly has the tendency to put pressure on the Magistrate or the Sessions Judge or on the court, while taking decisions, which is not a healthy sign for development of criminal jurisprudence. Media does not know what harm the media is doing by having a parallel trial and reporting the proceedings in a manner by giving the news which are detrimental sometimes to the accused who is facing trial and sometimes even to the prosecution. Judges are also human beings and when hue and cry is made by the media it is possible that the equilibrium of a Judge is also disturbed. It is high time that under the garb of freedom of press the parallel proceedings of media people in criminal trial should stop immediately.”

58. No doubt the advice given by this Court has gone unheeded and so we frequently come across instances of „trial by media“.

59. Mr. Anand placed reliance on R. v. Savundranayagan, [1968] 3 All ER 439 to suggest that the law in England is no different. This decision is of some importance and deals with two vital issues that we are concerned with. The first relates to „a press campaign of considerable magnitude“ in July 1966 in connection, inter alia, with the disappearance of Savundra and his past unsavory record. In this regard, the Court held that at that stage there was nothing to suggest that criminal proceedings were even in contemplation against him and, therefore, there was no question of any contempt of Court. It was held, “When an insurance company fails and its policy holders are left stranded, this is undoubtedly a matter of public interest and, indeed, public concern. When, in such circumstances, the moving figure in the company is a man with an unsavoury record who appears to have used large sums of the company“s money for his own purposes and disappeared abroad, the matter becomes a public scandal. There is no doubt that a free press has a right, and indeed the duty, to comment on such topics so as to bring them to the attention of the public. It is in the public interest that this should be done. Indeed, it is sometimes largely because of facts discovered and brought to light by the press that criminals are brought to justice. The private individual is adequately protected by the law of libel should defamatory statements published about him be untrue, or if any defamatory comment made about him is unfair. This court does not consider that any real complaint can be made about the press campaign in July, 1966, eighteen months before the trial.”

60. The second issue related to an interview of Savundra in February, 1967 shortly after his return to England. The Court observed that at that time it surely would have been obvious to everyone that he was about to be arrested and tried on charges of gross fraud. Commenting on the interview, it was held, “It must not be supposed that proceedings to commit for contempt of court can be instituted only in respect of matters published after proceedings have actually begun. No one should imagine that he is safe from committal for contempt of court if, knowing or having good reason to believe that criminal proceedings are imminent, he chooses to publish matters calculated to prejudice a fair trial. On any view the television interview with the appellant Savundra was deplorable. … None of the

ordinary safeguards for fairness that exist in a court of law were observed, no doubt because they were not understood. They may seem prosaic to those engaged in the entertainment business, but they are the rocks on which freedom from oppression and tyranny have been established in this country for centuries …. The court has no doubt that the television authorities and all those producing and appearing in televised programmes are conscious of their public responsibility and know also of the peril in which they would all stand if any such interview were ever to be televised in the future. Trial by television is not to be tolerated in a civilized society."

61. It was not suggested by Mr. Anand that there should be a total ban on reporting matters concerning judicial proceedings – far from it. Indeed, he cited In re: Harijai Singh, (1996) 6 SCC 466 to submit that freedom of the Press (in all its connotations) is a prerequisite for a democratic form of government and is regarded as "the mother of all liberties". But, at the same time, he submitted that those concerned with the media must maintain high professional standards and are obliged to verify the correctness of the news disseminated. Publication of false news cannot be regarded as a public service, but a disservice to the public. We cannot disagree. We may also add to this that publication of every bit of news does not necessarily serve the public interest.

62. The question posed by Mr. Anand, on this basis, was: what is the remedy available to an advocate during the conduct of a case, if he is maligned and vilified by irresponsible coverage in the media, as in the NDTV expose? This question arises, according to Mr. Anand, from the fact that NDTV did not present his version when it telecast the expose. To make matters worse, he submitted that an attempt was made by NDTV to get his viewpoint, but since he could not immediately respond being otherwise busy, this was projected by NDTV, according to Mr. Anand, as an attempt by him (that is Mr. Anand) to decline to put forth his point of view by stating that Mr. Anand was not available for his comments!

63. To highlight his travails and tribulations caused by the expose, Mr. Anand referred to Kartongen Kemi Och Forvaltning AB v. State, 2004 (72) DRJ 693. In this case, the Central Bureau of Investigation (CBI) filed a charge sheet after thirteen years of investigation, which included three years of "investigative journalism" by the media. In a petition against the framing of charges, it was conceded by learned counsel appearing for the CBI that there was no evidence showing the receipt of bribe money, but the CBI was on the trail for gathering such evidence. In this context, the Court observed:

"This case is a nefarious example which manifestly demonstrates how the trial and justice by media can cause irreparable, irreversible and incalculable harm to the reputation of a person and shunning of his family, relatives, and friends by the society. He is ostracized, humiliated and convicted without trial. All this puts at grave risk due administration of justice.

"It is common knowledge that such trials and investigative journalism and publicity of pre-mature, half baked or even presumptive facets of investigation either by the media itself or at the instance of Investigating Agency has almost become a daily occurrence whether by

electronic media, radio or press. They chase some wrong doer, publish material about him little realizing the peril it may cause as it involves substantial risk to the fairness of the trial. Unfortunately we are getting used to it."

64. We are unable to appreciate the relevance of this case, except to the extent that "investigative journalism" has been adversely commented upon. But, the real questions that this decision raises are: what is the media to do in a case where investigations go on interminably? Is the media expected to remain a silent spectator during the entire period? What if the investigations are shoddy or patently one-sided or are carried out with a „sweep it under the carpet" attitude? What about the rights of the victim of a vilification campaign – is he without recourse to any remedy in law? We propose to deal with these questions at the appropriate stage.

65. Mr. Anand cited another decision, which we find to be inapposite. This was Subhash Chander v. S.M. Aggarwal, 25 (1984) DLT 52. This case arose as a result of an interview given by a judge who tried a case in which he convicted the accused to death. The judge knew that the death sentence was awaiting confirmation in the High Court, but still he gave interviews to the press and even an interview on national television supporting the decision that he had given. The Court noted:

"What is exercising our minds and as we know the minds of all those concerned with law and justice is as to why does he [the judge] find it necessary to go to the press etc. to give interviews in respect of pending case knowing very well that his interviews were bound to create an atmosphere of prejudice against the accused in the mind of the general public?"

66. In discussing the „atmosphere of prejudice" mentioned in the question, the Court held that, "It cannot be denied that one of the most valuable rights of our citizens is to get a fair and impartial trial free from an atmosphere of prejudice. This right flows necessarily from Article 21 of the Constitution which makes it obligatory upon the State not to deprive any person of his life or personal liberty except according to the procedures established by law. It is, therefore, obligatory on all the citizens that while exercising their right they must keep in view the obligations cast upon them. If accused have a right to a fair trial then it necessarily follows that they must have a right to be tried in an atmosphere free from prejudice or else the trial may be vitiated on this ground alone."

67. On the impact of post-decision interviews pending an appeal (or confirmation as in this case) the Court observed:

"[S]howering praise on a judgment while its confirmation was sub- judice would certainly amount to creating prejudice in the mind of the general public and would make the task of the court very difficult. In such a case if the High Court comes to a different conclusion it will be faced with an additional burden of dispelling the impression from the public mind that the approach adopted by the lower court was correct."

68. In Brig. E.T. Sen v. Edatata Narayanan, 5 (1969) DLT 348 the allegation was that pending the trial of a complaint for libel, the respondents carried out a persistent one-sided press campaign against the cause of the petitioner with a view to poisoning the mind of the

general public and thereby hampering the course of justice. Among the allegations made by the petitioner was that the report of the Court proceedings was inaccurate and misleading and there was a display of headlines of a scaring and sensational character. In this context, it was held that, “Neither the press reporter nor the publisher of a newspaper can in my view, claim an indefeasible right to put his own gloss on the statements in Court by selecting stray passages out of context which may have a tendency to convey to the reader to the prejudice of a party to the proceedings, a sense different from what would appear when the statement is read in its own context. To reproduce stray misleading passages in bold headlines in order to attract the attention of casual readers may serve as an aggravating factor. Similarly, while reproducing the Court proceedings, no words may be added, omitted or substituted if their effect is to be more prejudicial to a party litigant than the actual proceedings. Any deviation in the report from the correct proceedings actually recorded must, if it offends the law of contempt of Court, render the alleged contemnor liable to be proceeded against.”

69. The above line of cases actually answer the questions posed by Mr. Anand in as much as the remedy available to him, if so advised, is to move against NDTV for defamation and for his client (the accused in the criminal case) to move for contempt of Court. Neither of these steps has been taken either by Mr. Anand or his client.

70. There does seem to be yet another remedy available and this is provided by Attorney-General v. Times Newspapers Ltd., [1972] 3 All ER 1136 and Attorney-General v. Times Newspapers Ltd., [1973] 3 All ER 54 and that is the remedy of an injunction. Both these decisions were cited by Mr. Anand and they deal with the case of the „thalidomide children‟ who were born with terrible deformities due to the mothers of the children taking a drug called thalidomide during pregnancy.

71. In 1961, litigation was initiated against the manufacturer of thalidomide, but that was settled by way of a compromise. Thereafter, in 1968 action was initiated by another group of aggrieved persons and during the pendency of that cause, the press and television published articles and gave commentaries, but within the bounds of the „sub judice rule‟. However, in 1972 a newspaper published a series of critical articles and a complaint was made to the Attorney-General that these articles amounted to a contempt of Court, but he took no action thereon. The case under discussion pertained to a further but as yet unpublished article in respect of which the Attorney- General sought an injunction from publication. On going through the draft article, the Court was of the opinion that the only effect of its publication would be to mobilize public opinion on the children‟s behalf and that the purpose of the publication was to affect the outcome of the pending litigation, in that the manufacturer would be persuaded to settle for a higher figure than it would be otherwise minded.

72. Given this background, the concern of the Court was ensuring that justice would be administered impartially. The Court considered the impact of the proposed publication on the administration of justice and concluded that there are three ways in which due and impartial administration of justice may be affected: first, it may affect and prejudice the mind of the tribunal itself; second it may affect witnesses who are to be called. “In an

extreme case the comment might amount to a threat to the witness sufficient to deter him from giving evidence at all, and even where the comment is temperate and in no sense threatening, it is well known that witnesses often have difficulty in reconstructing the events of an occurrence some time previously, and it is clearly possible that comment sufficiently strong and sufficiently often repeated might persuade a witness, quite unwittingly, to adopt a version of the events to which he speaks which is not the true version at all."; third, it may prejudice the free choice and conduct of a party himself. "..... it is quite clearly established that comment on a pending action, directed to the conduct and integrity of a party, may have a result of causing that party to abandon his claim or to settle his claim for a lower figure than he would otherwise have been prepared to accept. If a party is subjected to pressure by reason of unilateral comment on his case, and that pressure is of a kind which raises a serious prospect that he will be denied justice because his freedom of action in the case will be affected, then a contempt of court has been established and may be the subject of prosecution or injunction."

73. The Court referred to and cited the following from Skipworth's Case (1873) LR 9 QB 230:

"When an action is pending in a Court and anything is done which has tendency to obstruct the ordinary course of justice or to prejudice the trial, there is a power given to the Courts ... to deal with and prevent any such matter."

74. On the above facts, the Court concluded that the publication of the proposed article would seriously prejudice the cause of justice and would be a clear contempt of Court and so the Attorney-General was entitled to the injunction sought against its publication.

75. This view was upheld by the House of Lords. While doing so, Lord Reid observed:

"I do not think the freedom of the press would suffer, and I think the law would be clearer and easier to apply in practice if it is made a general rule that it is not permissible to prejudge issues in pending cases."

Lord Morris of Borth-y-Gest said, "When such unjustifiable interference is suppressed it is not because those charged with the responsibilities of administering justice are concerned for their own dignity: it is because the very structure of ordered life is at risk if the recognized courts of the land are so flouted that their authority wanes and is supplanted."

Lord Diplock observed, "The due administration of justice requires first that all citizens should have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities; secondly, that they should be able to rely on obtaining in the courts the arbitrament of a tribunal which is free from bias against any party and whose decision will be based on those facts only that have been proved in evidence adduced before it in accordance with the procedure adopted in courts of law; and thirdly that once the dispute has been submitted to a court of law, they should be able to rely on their being no usurpation by any other person of the function of that court to decide it according to law. Conduct which is calculated to prejudice any of these three requirements or to undermine the public confidence that they will be

observed is contempt of court."

76. Finally, on the issue of responsible journalism, Mr. Anand cited the ten principles enunciated in Reynolds v. Times Newspapers Ltd., [1999] 4 All ER 609. These principles are:

(a) The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.

(b) The nature of the information, and the extent to which the subject matter is of public concern.

(c) The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.

(d) The steps taken to verify the allegation.

(e) The status of the information. The allegation may have already been the subject of an investigation which commands respect.

(f) The urgency of the matter. News is often a perishable commodity.

(g) Whether comment was sought from the claimant (the aggrieved party). He may have information others do not possess or have not disclosed. An approach to the claimant will not always be necessary.

(h) Whether the [publication] contained the gist of the claimant‟s side of the story.

(i) The tone of the [publication] can raise queries or call for an investigation. It need not adopt allegations as statements of fact.

(j) The circumstances of the publication, including its timing.

77. On the basis of the case law cited before us on the issue of media ethics and conduct, infractions thereof which tend to or constitute interference with the administration of justice so as to constitute contempt, the following norms emerge.

1. The reach of the mass media is undoubtedly enormous. It can make contact with just about everybody, anywhere in the world. This range itself puts the media under the spotlight requiring it to act with a great degree of care and responsibility.

2. Most people tend to believe what is published in the mass media making it necessary for the media to ensure that what is being published is accurate. In respect of a potentially damaging publication, the media cannot feign ignorance or plead that it did not know that it had a „loaded gun‟.

3. The concept of self-regulation of the media appears to be a myth. There will always be a debate about whether, in a given case, the media has transgressed its limits so as to invite an injunction or later an action for contempt of Court. The less frequently this happens, the

better it is for an ordered society.

4. Once proceedings have begun in a court of law or are otherwise imminent, the media has no role to play in the form of „investigative journalism‟ or as a fact finder. The matter then rests entirely within the domain of the Court, litigants and their lawyers – no matter how long the litigation lasts. The media ought to keep its hands off an „active‟ case.

5. It follows from the above that before a cause is instituted in a Court of law, or is otherwise not imminent, the media has full play in the matter of legitimate „investigative journalism‟. This is in accord with our Constitutional principle of freedom of speech and expression and is in consonance with the right and duty of the media to raise issues of public concern and interest. This is also in harmony with a citizen‟s right to know particularly about events relating to the investigation in a case, or delay in investigation or soft-pedaling on investigations pertaining to matters of public concern and importance.

6. When a cause is pending in Court, the media may only report fairly, truly, faithfully and accurately the proceedings in the Court, without any semblance of bias towards one or the other party. The media may also make a fair comment in a pending cause without violating the sub-judice rule.

7. While trial by media ought to be deprecated, in the event any person feels victimized or unfairly treated by the media – either through a „trial by media‟ or otherwise – he is not without remedy. Proceedings for defamation or injunction can always be initiated in an appropriate case.

8. It is not very clear whether the principle of “strict liability contempt” is accepted in our jurisprudence or not. Until a definite conclusion is arrived at in an appropriate case, knowledge about the pendency of a case or its imminent institution is crucial in so far as the media is concerned. It may be said, to be on the safer side, that if the media (or reporter) is unaware about the pendency of a case, and comments on it, no case of contempt of Court can be made out.

9. In the administration of justice, no balancing act is permissible. It is not permissible to contend that the public interest or the right to know outweighs the administration of justice. Such a view may shake the very structural foundations of an impartial justice delivery system.

10.The norms mentioned above are in addition to the principles laid down in Reynolds, with which we are in agreement.

78. On the issue raised by Mr. Anand, so far as we are concerned, there has been no „trial by media‟ in as much as the telecast does not concern itself with the merits of the BMW case. The telecast merely seeks to project what NDTV believes to be the state of affairs in respect of the conduct of the lawyers handling the case. It seeks to project that state of affairs on the basis of material gathered by it through a set of sting operations. That NDTV is entitled to project its point of view is undoubted – it is squarely covered by the freedom of speech and expression. That it should have done so in and active case, with material

gathered in an intrusive and clandestine manner is another issue altogether, and we are immediately adverting to that issue.

79. We do appreciate that in respect of some cases (largely criminal cases) the justice delivery system in our country progresses virtually at a snail‟s pace and often an innocent person has no real remedy available to him, if he in framed in a matter, or is subjected to a „trial by media‟. As a result, seldom does anyone approach a court of law for relief either by way of an injunction or for damages in a case of „trial by media‟. Such being the reality, we are of the opinion that the Courts have a great responsibility and, therefore, need to be far more vigilant and proactive in protecting the rights and reputation of an individual from an unwarranted „trial by media‟. In a sense, the Courts have to energize the rule of law. While this may add to the burden of our criminal Courts, we are of the view that it is imperative for the Courts to protect a citizen from what may appear to be victimization – this is certainly the duty if not an obligation of Courts. This is all the more important in a pending matter. For example, if a person is arrested on the suspicion of having committed a crime, it is not the function of the media to „declare‟ him (by implication) innocent or guilty – that is within the exclusive domain of the judiciary. But if the accused is subjected to a „trial‟, either through the print or audio-visual medium, it may subconsciously affect the judgment of the judge, and that may well be to the prejudice of the accused – who is, in our justice delivery system, presumed innocent until proven guilty. In such a situation, the judge must be proactive by restraining the media from carrying out a parallel trial otherwise our criminal justice delivery system will be completely subverted. Failure to do so would result in an unfortunate situation arising in some cases as will be evident from what we discuss herein below.

80. Having said this, we find it difficult to accept the contention of Mr. Anand that he was subjected to a trial. It is true that the telecast has portrayed him negatively, but he had the choice of then moving the Courts for an injunction or now suing for damages. Mr. Anand does appear to have taken a step in the latter direction by issuing a notice to NDTV, but we have not been told if there has been any follow-up in that regard. In any event, both Mr. Anand and Mr. Khan were given adequate time and coverage by NDTV to explain their point of view, and they did. That they may or may not have come out trumps is another matter altogether and does not concern us in the least – it is for the viewers of the telecast to decide. Our limited concern is about the „trial by media‟ which we find has not happened in this case and so we leave it that.

What is the law on undercover operations?

81. Mr. Anand addressed us at length on the law relating to sting or undercover operations. While we do not see the relevance of this for deciding the merits of the issue before us, we are dealing with the decisions cited since this issue apparently arises quite frequently and our discussion may contribute to an understanding of the correct legal position. The broad contention of Mr. Anand is that a sting operation is unethical and that he was secretly trapped by NDTV and Mr. Kulkarni to say and do the things that he did.

82. To begin with, Mr. Anand referred to a passage from Regina v. Broadcasting Standards

Commission, ex p British Broadcasting Corporation, [2001] 1 QB 885 criticizing such an activity in the following words:

“It would be departure from proper standards if, for example, the BBC without justification attempts to listen clandestinely to the activities of a board meeting. The same would be true of secret filming of the board meeting. The individual members of the board would no doubt have grounds for complaint, but so would the board and the company as a whole.”

83. Similarly, reference was made to the following passage from Brannan v. Peek, [1947] 2 All ER 572:

“The court observes with concern and disapproval the fact that the police authority at Derby thought it right to send a police officer into a public house to commit an offence. It cannot be too strongly emphasized that, unless an Act of Parliament does so provide – and I do not think any Act of Parliament does so provide – it is wholly wrong for a police officer or any other person to be sent to commit an offence in order that an offence by another person may be detected. It is not right that police authorities should instruct, allow, or permit detective officers or plain clothes constables to commit an offence so that they can prove that another person has committed an offence.”

84. This decision was followed in In re M.S. Mohiddin, AIR 1952 Madras 561 wherein it was stated:

“But I have held in several cases already that there are two kinds of traps „a legitimate trap‟, where an offence has already been born and is in course, and „an illegitimate trap‟, where the offence has not yet been born and a temptation is offered to see whether an offence would be committed, succumbing to it, or not. Thus, where the bribe has already been demanded from a man, and the man goes out offering to bring the money but goes to the police and the magistrate and brings them to witness the payment, it will be „a legitimate trap‟, wholly laudable and admirable, and adopted in every civilized country without the least criticism by any honest man. But where a man has not demanded a bribe, and he is only suspected to be in the habit of taking bribes and he is tempted with a bribe, just to see whether he would accept it or not and to trap him, if he accepts it will be „an illegitimate trap‟ and, unless authorized by an Act of Parliament, it will be an offence on the part of the persons taking part in the trap who will all be “accomplices” whose evidence will have to be corroborated by untainted evidence to a smaller or larger extent as the case may be before a conviction can be had under a rule of Court which has ripened almost into a rule of law”

85. A similar view and sentiment was expressed in Rao Shiv Bahadur Singh v. State of Vindhya Pradesh, AIR 1954 SC 322.

86. Reference was also made to erudite and academic articles on the subject, but we are not inclined to discuss them in this judgment. The views of various scholars, based on the law in some other countries, lead us to conclude as follows:

1. A sting operation by a private person or agency is, by and large, unpalatable or

unacceptable in a civilized society. A sting operation by a State actor is also unacceptable if the State actor commits an offence so that an offence by another person is detected.

2. A State actor or a law enforcement agency may resort to hidden camera or sting operations only to collect further or conclusive evidence as regards the criminality of a person who is already suspected of a crime.

3. The law enforcement agency must maintain the original version of the actual sting operation. Tampering with the original video or audio clips of a sting operation may lead to a presumption of the spuriousness of the entire operation.

4. A sting operation cannot be initiated to induce or tempt an otherwise innocent person to commit a crime or entrap him to commit a crime.

5. Normally, if a private person or agency unilaterally conducts a sting operation, it would be violating the privacy of another person and would make itself liable for action at law.

6. A sting operation must have the sanction of an appropriate authority. Since no such authority exists in India, and until it is set up, a sting operation by a private person or agency, ought to have the sanction of a court of competent jurisdiction which may be in a position to ensure that the legal limits are not transgressed, including trespass, the right to privacy of an individual or inducement to commit an offence etc.

87. The law in India in this regard is still in the process of development, but we feel that the views expressed by us help in a better understanding of the subject and implementation of the law.

88. In Bhupendra Singh Patel v. State (CBI), Cri. M.C. No.59/2004 decided on 10th November, 2004 a first information report was lodged against a journalist who conducted a sting operation in which he bribed the Additional Private Secretary of a Union Minister of State with the avowed object of exposing corruption at the highest level in government. While declining to quash the first information report, this Court held that immunity is given to a bribe-giver where he is unwilling to pay illegal gratification to a public servant and approaches the police to get the public servant trapped while accepting a bribe. However, in the case under review, the accused bribed the public servant on three occasions and in not a single instance did he report the matter to the police in advance, otherwise they could have laid a legally admissible trap and apprehended the bribe takers. To make matters worse, the accused did not inform the police even after the transaction was complete.

89. Similarly, in Shri Bharadwaaj Media Pvt. Ltd. v. State, W.P. (Crl) No.1125/2007 decided on 27th November, 2007 this Court declined to quash a first information report against a private television channel and some of its officials who had conducted an undercover operation wherein a Member of Parliament received money for raising questions in the House. This Court was of the opinion that prima facie an offence had been committed by the bribe-givers as well as by the bribe-takers.

90. Learned counsel for Mr. Khan referred to an important decision of the Supreme Court on

the question of entrapment. In Ramjanam Singh v. State of Bihar, AIR 1956 SC 643 it was said:

“Whatever the criminal tendencies of a man may be, he has a right to expect that he will not be deliberately tempted beyond the powers of his frail endurance and provoked into breaking the law; …… it is one thing to tempt a suspected offender to overt action when he is doing all he can to commit a crime and has every intention of carrying through his nefarious purpose from start to finish, and quite another to egg him on to do that which it has been finally and firmly decided shall not be done.

The very best of men have moments of weakness and temptation, and even the worst, times when they repent of an evil thought and are given an inner strength to set Satan behind them; ….”

91. This decision was cited for the purpose of contending that, at worst, Mr. Khan had no „evil‟ design and that it could be said that he was entrapped into committing an indiscretion.

92. Reference was also made to Major E.G. Barsay v. State of Bombay, [1962] 2 SCR 195 to contend that in the case of an entrapment, it would not be appropriate to rely on the testimony of a trap witness, since he is partisan

– the evidence of a trap witness would need corroboration. In this context, reference was also made to R v. Governor of Pentonville Prison, [1989] 3 All ER 701, Mirza Akbar v. King-Emperor, AIR 1940 PC 176 and Natwarlal Sakarlal Mody v. State of Bombay, 26 (1984) DLT 64 and Kehar Singh v. State, (1988) 3 SCC 609 to suggest that the evidence of a conspirator cannot be relied upon without corroboration. We do not see the relevance of these decisions, particularly since Mr. Khan is said to be the victim of a conspiracy and not a co-conspirator. The evidence of a trap witness (Mr. Kulkarni in this case – assuming he is a trap witness) is not the sole basis on which notice has been issued to the alleged contemnors. The evidence against the alleged contemnors is to be found in the chips and CDs

– and these need no corroboration if they are found to be authentic and not tampered with.

93. In R v Looseley, [2001] 4 All ER 897 the House of Lords dealt with „fairness of proceedings‟ as occurring in Section 78 of the Police and Criminal Evidence Act, 1984 and held that the expression “is directed primarily at matters going to fairness in the actual conduct of the trial.” This is not limited to substantive fairness but also includes procedural fairness. Therefore, if the admission of evidence has such an adverse effect on the fairness of the proceedings, then the Court may exclude it. Among the factors that the Court may take into consideration in this regard are the circumstances in which the evidence was obtained.

94. Among the more important decisions on the subject is Court on its own motion v. State, 2008 (100) DRJ 144 (for convenience referred to as the School teacher case). In this case, a television news channel aired a programme on 30th August, 2007 in which it was shown

that a school teacher was forcing a school girl into prostitution. Subsequently, a crowd gathered at the school gate, and being aghast at the conduct of the teacher, they raised slogans and demanded that she be handed over to them. In the commotion and mayhem that followed, the school teacher was physically attacked and her clothes torn. This incident was telecast nationwide and was also reported in the daily newspaper Hindustan Times on 7th September, 2007.

95. As a follow up action, the Delhi Government suspended the teacher and then dismissed her from service.

96. The police investigated the allegations made against the school teacher and it was revealed that someone, who had some monetary dispute with her, in connivance with another person, hatched a plan to trap her in a stage-managed act of forcing girls into prostitution. The girl who was allegedly being forced into prostitution was neither a school girl nor a sex worker but a journalist who wanted to make a name for herself. The whole episode was stage managed and was nationally shown as a “sting operation”.

97. Investigations revealed that the school teacher was not involved in any prostitution racket and no evidence was found against her to support the allegations of child prostitution. However, as a result of the sting operation, the reputation of the school teacher was irreparably damaged, her modesty was outraged, she was physically manhandled and her clothes torn. In so far as the persons involved in the stage-managed operation are concerned, they are being prosecuted for various offences and the TV channel was prohibited from transmitting anything through cable television networks or any other platform throughout the country for one month.

98. While disposing of the case, a Division Bench of this Court noted that freedom of the Press is a valuable right but it carries with it a responsibility and a duty to be truthful and to protect the rights of others. The Division Bench noted that entrapment of any person should not be resorted to and should not be permitted. Reference was made to a decision of the Supreme Court of the United States being Keith Jacobson v. United States, 503 US

540.

99. The United States Supreme Court observed that: (i) the State must not originate a criminal design and induce an innocent person to commit a crime so that he may be prosecuted; (ii) if the State does so, it is its duty to prove beyond reasonable doubt that the defendant was predisposed to commit the criminal act prior to first being approached by government agents.

100. The Division Bench deplored the thought of inducing a person to commit an offence which he is not otherwise likely to or inclined to commit and then make it a part of a sting operation. The Division Bench observed that it was permissible for the media to use tools of investigative journalism but that did not permit the media to induce a person to commit a crime.

101. On the suggestion of learned Amicus Curiae appointed by it, the Division Bench

proposed certain guidelines in respect of sting operations, which are not necessary to be repeated here, but with which we generally agree.

102. The School teacher case is a classic example of the dangers of a sting operation per se as well the weakness in our justice delivery system to respond to a misdemeanor of this type expeditiously, effectively and efficaciously. While the sting operation conducted on Mr. Anand and Mr. Khan may be criticized on ethical grounds and as violating their privacy and may have left them with a sense of having been deceived by Mr. Kulkarni, to say that they were trapped into indiscretions would certainly not be correct because the tenor of the conversations that they had with Mr. Kulkarni does not suggest that they were being led up the garden path. The conversations were, by and large and in the circumstances, quite normal and showed that Mr. Anand and Mr. Khan were in control of the conversations. Moreover, both Mr. Anand and Mr. Khan are seasoned lawyers with a tremendously long stint at the Bar and it is difficult to imagine that they would not have suspected anything amiss had the conversation with Mr. Kulkarni been anything but normal. The tragedy really lies not in the alleged entrapping or cheating of Mr. Anand and Mr. Khan but in their willingness to meet and converse with Mr. Kulkarni, when they, as seasoned lawyers, ought to have known better. Furthermore, we have seen Mr. Anand himself and through his emissary negotiating the quantum of payment to Mr. Kulkarni to secure a perceived advantage for his client by influencing him and thereby interfering with the judicial process.

103. At this stage, we may deal with the contention urged on behalf of Mr. Khan that he did nothing wrong in meeting with Mr. Kulkarni. It was submitted that Mr. Khan was the Special Public Prosecutor and Mr. Kulkarni was a witness for the prosecution and it was, therefore, but natural for them to meet and converse. Reliance was placed upon Hukam Singh v. State of Rajasthan, (2000) 7 SCC 490 and Banti v. State of Madhya Pradesh, (2004) 1 SCC 414.

104. In both the cited decisions the Supreme Court observed that the Public Prosecutor was entitled to interview a witness to enable him (the Public Prosecutor) to know the stand that the witness may adopt when examined in Court. Of course, there cannot be any quarrel with this proposition. However, it may be recalled that Mr. Kulkarni was not a potential witness for the prosecution when he met Mr. Khan in his chambers in Patiala House on 28th April, 2007 – Mr. Kulkarni had already been dropped as its witness by the prosecution. When he met Mr. Khan he was summoned as a Court witness. Therefore, the two decisions relied on do not assist Mr. Khan.

105. In any event, we cannot read too much into that meeting per se since Mr. Kulkarni entered Mr. Khan‟s chamber uninvited and without an appointment or a notice. What would one expect Mr. Khan to do in that event except to throw Mr. Kulkarni out or behave rather civilly? Mr. Khan chose the more dignified course and he certainly cannot be faulted for that. What he can be faulted for, if at all, is the conversation that he had with Mr. Kulkarni and we will consider that issue in due course.

106. We may mention here that the Press Complaints Commission in England has drawn up a Code of Practice and item 7 thereof reads as follows:

“Journalists must not obtain or publish material obtained by using clandestine listening devices or by intercepting private telephone conversations.”

107. We had noted earlier that Mr. Kulkarni had stated on affidavit that the sting operation was, in a sense thrust upon him by Ms. Agarwal and that she „manipulated‟ the entire sequence of events with the intention of showing Mr. Anand and Mr. Khan in a poor light. We do not wish to comment on the affidavit of Mr. Kulkarni. The affidavit was filed by him without any permission from this Court and without any direction having been given to him to do so. We also feel that any comment on the affidavit of Mr. Kulkarni may be capitalized on in the BMW case by either of the parties. We, therefore, refrain from saying anything, one way or another, on the contents of the affidavit.

Can video recordings be used as evidence? Can the contents of a chip be used as evidence?

108. The crux of the matter really lies in the authenticity of the programme telecast on 30th May, 2007 and in this regard, we are of the opinion that Mr. Anand and the other noticees have really missed the point.

109. We all know that in so far as audio or visual evidence is concerned, it is necessary to produce the original material. In the case of a photograph, the negative is necessary without which the photograph may not be relied on. In so far as taped material is concerned, Mr. Anand and learned counsel for Mr. Khan cited several judgments that we will, of course, deal with.

110. In the case of digital recordings, such as the ones that we are concerned with, the original is not the video footage but the chip or the microchip on which the recording is made. To put it loosely, the chip or microchip is the negative while the video footage is the photograph produced from that negative. All original chips (except one) on which the recordings were made are available with NDTV and were produced and we viewed the contents thereof. No contention was raised by anybody that the chips were tampered with. Issues of morphing or doctoring the video footage would certainly arise provided the original chips were missing or had been re-recorded on by wiping out the original recording. That has not happened in the present case in any chip (except one). Even if the video footage were doctored or morphed (as it can be), it would make no difference at all, as long as the original chips existed because the original chips could be used to verify the contents of the video footage. This is much like a doctored photograph – its authenticity can be easily verified from the negative. The problem would arise only if the original chip or the negative of a photograph were not available.

111. In the present case, since all the original chips (except one) are in existence, we have no hesitation in accepting the genuineness and authenticity of the video footage which led to the telecast on 30 th May, 2007. But, what about the chip that has been re-recorded on, wiping out the original?

112. Mr. Anand made a reference to N. Sri Rama Reddy v. Shri V.V. Giri, AIR 1971 SC 1162 which was explained by Mukharji, J in Ram Singh v. Col. Ram Singh, 1985 (Supp) SCC 611 as laying down the propositions that tape recorded conversation is admissible in evidence

and that if it contains the previous statement made by a witness, it may be used to contradict his evidence before the Court.

113. In Mahabir Prasad v. Surinder Kaur, AIR 1982 SC 1043 it was held that a tape recorded conversation can only be relied upon as corroborative evidence of a conversation and in the absence of evidence of any such conversation, the tape recorded conversation is indeed no proper evidence and cannot be relied upon.

114. Mr. Anand took us through Quamarul Islam v. S.K. Kanta, AIR 1994 SC 1733, The State v. Ravi, 2000 Cri LJ 1125 and Subhash Sharma v. Central Bureau of Investigation, 2004 I AD (Delhi) 526, Jayalakshmi Jaitly v. Union of India, 99 (2002) DLT 448, Amar @ Bahadur v. State, 120 (2005) DLT 267, Asokan v. State of Kerala, 1982 Cri LJ 173, M.S. Narayana Menon v. State of Kerala, (2006) 6 SCC 39 and Rabindra Kumar Dey v. State of Orissa, (1976) 4 SCC 233 but these cases were either decided on the evidence recorded or they do not lay down any new or different principle than what has already been mentioned above. Consequently, they are of no further value or assistance for our present purposes.

115. The sheet anchor of Mr. Anand‟s submission on this topic (as also that of learned counsel for Mr. Khan) is the conclusions given by Fazal Ali, J in Ram Singh. It was held, in regard to the admissibility of a tape recorded statement, as follows:

1. The voice of the speaker must be duly identified by the maker of the record or by others who recognize his voice. In other words, it manifestly follows as a logical corollary that 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 safe or official custody.

6. The voice of the speaker should be clearly audible and not lost or distorted by other sounds or disturbances.

116. Mukharji, J referred (without disagreement) to the conclusions in R v. Maqsud Ali, [1965] 2 All ER 464 that tape recorded material was admissible in evidence provided the accuracy of the recording can be proved and the voices recorded can be properly identified and that the evidence is relevant and otherwise admissible. There cannot, however, be any question of laying down any exhaustive set of rules by which the admissibility of such evidence should be judged. R v. Robson, [1972] 2 All ER 699 was a case in which the tape

recording was held admissible for the following reasons:

“(i) the court was required to do no more than satisfy itself that a prima facie case of originality had been made out by evidence which defined and described the provenance and history of the recordings up to the moment of production in court and had not been disturbed on cross-examination; in the circumstances that requirement had been fulfilled.

(ii) the court was satisfied, on the balance of probabilities, that the recordings were original and authentic and their quality was adequate to enable the jury to form a fair assessment of the conversations recorded in them and should not be excluded on that account.”

117. It was held in Ram Singh that the tape recordings, “as we have heard” were misleading and could not be relied on because in most places they were unintelligible and of a poor quality and of no use and so their potential prejudicial effect outweighed the evidentiary value of the recordings.

118. Reference was made to Sumitra Debi Gour v. Calcutta Dyeing & Bleaching Works, AIR 1976 Calcutta 99 wherein it was held, in connection with regard to a tape recording without the knowledge and consent of the person concerned, who may be unknowingly trapped into it, that: “… anything which is born of trickery or trapping or cunningness should be very cautiously and carefully considered by the court before it is admitted and accepted.” On the issue of stealthy tape recording it was observed in Joginder Kaur v. Surjit Singh, AIR 1985 P&H 128 that such a recording “proves nothing else than an effort to create evidence.”

119. In R v. Stevenson, [1971] 1 All ER 678 it was held that, “Just as in the case of photographs in a criminal trial the original unretouched negatives have to be retained in strict custody so should original tape recordings.”

120. The sum and substance of all these decisions cited by Mr. Anand is that the expose is either not „evidence“ that may be used against him or is untrustworthy and unreliable.

121. On the other hand, learned Amicus pointed out, relying on Raja Ram Pal that a bald denial of the contents of a video tape is not adequate to doubt its authenticity – there should be material to show that the video clippings are doctored or morphed. This view was reiterated in Jagjit Singh v. State of Haryana, (2006) 11 SCC 1. In R.M. Malkani v. State of Maharashtra, (1973) 1 SCC 471 it was noted that in Shri N. Sri Rama Reddy, Yusufalh Esmail Nagree v. State of Maharashtra, AIR 1968 SC 147 and S. Pratap Singh v. State of Punjab, AIR 1964 SC 72 a conversation or dialogue recorded on a tape recording machine was accepted as admissible evidence. But, it was pointed out that such a conversation is admissible provided: first, the conversation is relevant to the matters in issue; second, there is identification of the voice; third, the accuracy of the tape recording is proved by eliminating the possibility of erasing the tape record. “A contemporaneous tape record of a relevant conversation is a relevant fact and is admissible under Section 8 of the Evidence Act. It is res gestae. It is also comparable to a photograph of a relevant incident. The tape recorded conversation is therefore a relevant fact and is admissible under Section 7 of the Evidence Act.” This is, of course, subject to ascertaining the genuineness of the tape recording and its being free from tampering or mutilation.

122. Neither Mr. Anand nor Mr. Khan have doubted their voice in the video clippings; they have not disputed that the video clippings contain their images; they have not disputed that the meetings in the video tapes took place with Mr. Kulkarni; they have not doubted the conversation that they had with Mr. Kulkarni. We may note that Mr. Anand has pointed out some “errors” in the video footage such as the lips are not in sync with the words spoken at some places; there is a five second gap in the video footage; a lady suddenly appears (rather unclearly and fleetingly) when the video camera is switched on at one point of time; the counter suddenly jumps by about a thousand numbers; there is a discrepancy in the time shown in the clock at one place; the reporter stated on affidavit that Mr. Kulkarni could not switch on/off the camera, but that is belied by the fact that he switches off the camera when he goes to the toilet; at some places the voice is admittedly inaudible as is clear from the transcript provided by NDTV etc. Mr. Anand submitted that there are several more discrepancies or mistakes in the video recording leading to the conclusion that the videotapes were not reliable evidence. He further submitted that he has challenged the authenticity of the video tapes by giving specific examples and has not given a bald or vague denial.

123. Assuming all this to be so, it really does not advance Mr. Anand‟s case (or for that matter of Mr. Khan) any further. This is because the original chips (except one) are in existence and available. Therefore, even if the video footage is discarded, we need only view the original chips to decide whether the contents digitally recorded thereon make out a case of contempt of Court having been committed by the alleged contemnors.

124. As luck would have it, the only original chip that is not available with NDTV is the one containing a recording (taken by a button camera carried by Mr. Kulkarni) of a meeting between Mr. Kulkarni and Mr. Khan in the latter‟s chamber in Patiala House Courts on 28 th April, 2007. However, that meeting was recorded with two cameras – one a button camera carried by Mr. Kulkarni and the other a bag camera carried by Mr. Deepak Verma of NDTV. There is no discrepancy between the two recordings – both audio as well as visual – except that the angle of the camera is naturally different. The button camera also carries a personal conversation between Mr. Khan and Mr. Kulkarni just outside Mr. Khan‟s chamber, but we are not concerned with that, except to a limited extent. We are primarily concerned with the conversation that takes place within the chamber of Mr. Khan and about this there can be no dispute since the conversation picked up by both the hidden cameras is the same. Additionally, in a subsequent interview given by Mr. Khan to NDTV on 31st May, 2007 (which is not denied by him) he stated as follows:

“Barkha Dutt: Well, heads have already begun to roll after the NDTV expose. I U Khan the public prosecutor on the case, the man whose job it was to prove the police allegations has been dropped by the Delhi Police as the prosecutor, he is likely to be replaced by Rajiv Mohan. Mr. Khan however told NDTV earlier in the day that while he was the man on the tape, that we have broadcast he believes that he had done absolutely nothing wrong and the media interpretation of his role is incorrect.

I U Khan to Anasuya Roy –

I U 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 Sahab" 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."

125. Under the circumstances, we have to proceed on the basis that the entire video footage produced before us is genuine, authentic and unimpeachable evidence. We also say this having viewed the original chips except one, which was not preserved.

126. The fact that Mr. Anand was able to point out some discrepancies in the video footage clearly suggests that he has been given full access to all the material and so he cannot make a grievance of non compliance with the principles of natural justice in the sense that he was not given an adequate opportunity to defend himself. That apart, (as noticed above) the discrepancies pointed out by him are not in the original chips but in the video recording made out of those chips. Even if we ignore the video recording, we are left with the original chips which we have played back and which do not contain any significant or material discrepancy.

127. It must be remembered that tape recorded material is concerned with only one of our senses – the sense of hearing, while video recorded material is concerned with two senses – the sense of hearing and that of sight. To that extent, the specific arguments that may be available to challenge the authenticity of tape recorded material may not be applicable mutatis mutandis to video recordings. In addition to demonstrating that the sound is tampered with, it must be shown that the images are also tampered with.

128. Looked at in this light, there can be no doubt about the relevance or admissibility of the contents of the original chips which are then recorded on video footage. As observed in Robson the Court has to be prima facie satisfied as to the originality of the recordings. Even in Ram Singh the Supreme Court heard the tapes and then held them to be unreliable. Following these two decisions, and to give an opportunity to Mr. Anand and Mr. Khan to demonstrate to us the lack of integrity in the video recordings, we saw the video recordings in open Court (though on a Saturday) in their presence but found nothing odd to make us doubt the originality of the recordings or the contents thereof. Even if the "offending" portions are removed from consideration, the sum and substance of the conversations and their gist are more than apparent.

129. That we need to move with the times and accept and recognize that technology of the 1980s is quite different from the technology of this century, is clear from a reading of State of Maharashtra v. Praful B. Desai, (2003) 4 SCC 601 where recording of evidence by video conferencing was held permissible in law. It is true that the technology of this century also enables an expert to doctor or morph video material, but there is no allegation in the present case that NDTV has doctored or morphed images for some purpose. A viewing of

the original chips and video recordings leaves us in no manner of doubt of the genuineness and reliability of the footage. In view of the above, we have no hesitation in rejecting the contention of Mr. Anand and Mr. Khan regarding the integrity of the video recordings and certainly that of the chips.

How are criminal contempt proceedings to be dealt with?

130. Over the years, the nature of criminal contempt proceedings has been settled by various decisions of the Supreme Court. Nevertheless, Mr. Anand and learned counsel for Mr. Khan thought it necessary to take us through some key judgments.

131. S. Abdul Karim v. M.K. Prakash, (1976) 1 SCC 975 laid down the proposition that the standard of proof required to establish a charge of criminal contempt is the same as in any other criminal proceeding. The Supreme Court did not go into the issue whether mens rea is an indispensible ingredient of the offence of contempt but observed that the Courts would be loathe in punishing a contemnor if the act or omission complained of was not willful, deliberate and, as mentioned in Debabrato Bandopadhyay v. State of West Bengal, AIR 1969 SC 189 “It is only when a clear case of contumacious conduct not explainable otherwise, arises that the contemnor must be punished”. This is, of course, distinguishable from a case where an innocent person is induced by certain circumstances or factors to say something improper, which may perhaps be on the borderline of the law. (H.L. Sehgal v. State, ILR (1985) II Delhi 921).

132. In J.R. Parashar v. Prashant Bhushan, (2001) 6 SCC 735 it was held that proceedings for criminal contempt of Court are quasi-criminal and summary in nature. From this, two consequences follow: first, the alleged contemnor must be intimated the facts, with sufficient particularity, for which proceedings are intended to be launched to enable him to effectively defend himself; second, if there is any reasonable doubt of the existence of a state of facts, that doubt must be resolved in favour of the alleged contemnor. The expression “sufficient particularity” was stressed by learned counsel for Mr. Khan, who contended that the notice issued to his client was vague and lacked sufficient particulars. In this context reference was made to Manohar Joshi v. Damodar Tatyaba, (1991) 2 SCC 342 which was a case under the Representation of the People Act, 1951. It was held that an allegation of corrupt practices during an election relates to an offence of a quasi-criminal nature. Therefore, not only must the allegations be specific, but the person called upon to face the charges should be apprised of the evidence against him so that he can meet the allegations. Additionally, it was held that a heavy burden rests upon a person alleging a corrupt practice to prove strictly all the ingredients of the charge. It was submitted that the general principles laid down would, mutatis mutandis, apply to a charge of criminal contempt.

133. Learned counsel for Mr. Khan sought to introduce some principles of criminal law regarding appreciation of evidence (both oral and documentary) by relying upon Harchand Singh v. State of Haryana, AIR 1974 SC 344, Chunni Lal v. The State, 2006 [2] JCC 878, Suraj Mal v. The State, AIR 1979 SC 1408, Minakshi Bala v. Sudhir Bala, JT 1994 (4) SC 158 and Vikramjit Singh v. State of Punjab, 2007 [1] JCC 64. We are of the opinion that these

decisions are not at all relevant since we are not dealing with a criminal offence under the Indian Penal Code. Moreover, as already noted, contempt jurisdiction is a summary jurisdiction and a trial is not called for unless it is unavoidable in view of some peculiar facts.

134. On the burden of proof, reliance was placed upon Chhotu Ram v. Urvashi Gulati, (2001) 7 SCC 530 and Mritunjoy Das v. Sayed Hasibur Rahaman, (2001) 3 SCC 739 wherein it was noted that the burden of proof is guided by the principle “he who asserts must prove”. One of the reasons for this, as explained in Re Bramblevale Ltd. [1969] 3 All ER 1062 is that contempt of Court is an offence of a criminal character and a contemnor may be sent to prison for it. It must, therefore, be satisfactorily proved. If two equally consistent possibilities exist, it cannot be said, beyond a reasonable doubt, that an offence has been committed. Mritunjoy Das was followed in Bijay Kumar Mahanty v. Jadu, (2003) 1 SCC 644. [See also M.R. Parashar v. Dr. Farooq Abdullah, (1984) 2 SCC 343 and Biman Bose v. State of West Bengal, (2004) 13 SCC 95]. Reliance was also placed upon V.G. Nigam v. Kedar Nath Gupta, (1992) 4 SCC 697 for the proposition that willful conduct is a primary and basic ingredient of an offence of criminal contempt.

135. Two important conclusions have been given in Murray & Co. v. Ashok Kumar Newatia, (2000) 2 SCC 367, namely, that the contempt jurisdiction is a special jurisdiction to punish an offender for his contemptuous conduct or obstruction to the majesty of the law and that what is necessary for the imposition of a punishment is a substantial interference with the course of justice. In Murray & Co. it was held (as in Dhananjay Sharma v. State of Haryana, (1995) 3 SCC 757) that deliberately filing a false affidavit in Court or making a false statement on oath would also amount to a contempt of Court if it tends to cause obstruction in the due course of judicial proceedings or impedes and interferes with the administration of justice.

136. Obviously, it is not in every case that action for contempt would be necessary. Given the wide powers available with a Court exercising contempt jurisdiction, it cannot afford to be hypersensitive and, therefore, a trivial misdemeanor would not warrant contempt action. Circumspection is all the more necessary because, as observed in Supreme Court Bar Association v. Union of India, (1998) 4 SCC 409) the Court is in effect the jury, the judge and the hangman; while in M.R. Parashar and H.L. Sehgal it was observed that the Court is also a prosecutor. Anil Ratan Sarkar v. Hirak Ghosh, (2002) 4 SCC 21 reiterates this.

137. Mr. Anand cited Bal Thackrey v. Harish Pimpalkhute, (2005) 1 SCC 254 for the purpose of explaining the procedure to be followed for registering a criminal contempt petition. The Supreme Court approved the procedure laid down by this Court in Anil Kumar Gupta v. K. Suba Rao, ILR (1974) 1 Delhi 1. We cannot see the relevance of this decision for our present purposes. We are dealing with a suo motu notice for contempt of Court and not the registration of a criminal contempt petition.

138. On another aspect of the procedure to be followed, reference was made to Daroga Singh v. B.K. Pandey, (2004) 5 SCC 26 for the proposition that the principles of natural justice are required to be followed and if the alleged contemnor desires to cross examine a

person who has filed (anything) against him, he may be permitted to do so. Reference was also made to M/s Bareilly Electricity Supply Co. Ltd. v. The Workmen, 1971 (2) SCC 617 and Union of India v. Varma, AIR 1957 SC 882 to contend that even if the principles laid down in the Evidence Act do not apply to contempt proceedings, the principles of natural justice must be followed such that the decision is not liable to be impeached on the ground that the procedure followed was not in accordance with that which obtains in a Court of law. Moreover, this does not imply that what is not evidence can still be relied upon. "... no materials can be relied upon to establish a contested fact which are not spoken to by persons who are competent to speak about them and are subjected to cross-examination by the party against whom they are sought to be used." Relying upon L.K. Advani v. Central Bureau of Investigation, 66 (1997) DLT 618 it was submitted that only that „evidence" can be relied upon which is capable of being converted into legal evidence. Relying on Subhash Chand Chauhan v. C.B.I., 2005 [1] JCC 230 it was submitted that if some evidence is unproved, it cannot be relied upon. This submission was made by Mr. Anand in the context of an application being Crl. M. No. 13782 of 2007 filed by him to cross examine the reporter of NDTV. We will be dealing with this application in due course.

139. It was emphasized by Mr. Anand that if denials by an alleged contemnor are vague or general, then they should not be accepted; but in the present case, he has specifically denied the allegations made against him in considerable detail and so if an opportunity is not given to him to cross- examine the reporter, he would not be getting a fair deal and the principles of natural justice would be violated. Reliance in this regard was placed on Jagjit Singh v. State of Haryana, (2006) 11 SCC 1.

140. Learned Amicus cited Baradakanta Mishra v. The Registrar of Orissa High Court, (1974) 1 SCC 374 wherein the Supreme Court noted that all the three clauses of Section 2(c) of the Contempt of Courts Act, 1971 that define "criminal contempt" define it in terms of obstruction of or interference with the administration of justice. It was further noted that broadly the Act accepts that proceedings in contempt are always with reference to the administration of justice. With reference to the three sub- clauses of Section 2(c) of the Act, the Supreme Court observed that sub- clauses (i) and (ii) deal with obstruction and interference respectively in the particular way described therein, while sub-clause (iii) is a residuary provision by which any other type of obstruction or interference with the administration of justice is regarded as a criminal contempt. A little later in the decision (citing R v. Gray [1900] 2 QB 36) it was said that the contempt jurisdiction should be exercised "with scrupulous care and only when the case is clear and beyond reasonable doubt."

141. In Rachpudi Subba Rao v. Advocate General, (1981) 2 SCC 577 the Supreme Court considered the scope of the expressions "administration of justice" appearing in sub-clause (iii) of Section 2(c) of the Act and "course of judicial proceedings" appearing in sub-clause (i) and (ii) thereof. It was observed that the expression "administration of justice" is far wider in scope than the expression "course of judicial proceedings". The words "in any other manner" further extend its ambit and give it a residuary character. It was emphasized that: "although sub-clauses (i) to (iii) describe three distinct species of "criminal contempt" they are not mutually exclusive. Interference or tendency to interfere with any judicial

proceeding or administration of justice is a common element of sub-clauses (ii) and (iii)."

142. "Administration of justice" has been explained in Attorney-general v. Times Newspapers Ltd., [1973] 3 All ER 54 in the speech of Lord Diplock that we have extracted above.

143. Influencing someone who might be called as a witness to alter his evidence or to decline to testify would amount to interference in the administration of justice. It was further said, "Contempt of court is punishable because it undermines the confidence not only of the parties to the particular litigation but also of the public as potential suitors, in the due administration of justice by the established courts of law."

144. In Contempt of Court by C.J. Miller (3rd edition) it is said on page 324 that "Interference with the administration of justice may also be occasioned through conduct which carries a substantial risk of influencing a witness in an improper manner." It is further stated that, "It has long been clear that it [is] an offence at common law to use threats or persuasion to witnesses to induce them not to appear in courts of justice, or to endeavour to persuade a witness to give evidence in a particular sense or to alter the evidence already given."

145. Learned counsel for NDTV referred to Balogh v. St. Albans Crown Court, [1975] 1 QB 72 which is a rather interesting case that dealt with contempt in the face of the Court. This was sought to be equated with the power to "to make an order of committal of its own motion against a person guilty of contempt of court." But that really begged the question: what is "of its own motion"? Lord Denning MR referred to some cases and commentaries such as those of Blackstone and Oswald, and concluded that contempt in the face of the Court led to instant punishment or punishment on the spot, unlike punishment rendered on motion. It was never confined to conduct which a judge saw with his own eyes and so contempt in the face of the Court is the same thing as contempt which the Court can punish of its own motion and it really means contempt in the cognizance of the Court. In other words, contempt "of its own motion" is a species of contempt in the face of the Court. Some instances were given of this such as contempt (i) in the sight of the Court, (ii) within the court room but not seen by the judge, and (iii) at some distance from the Court. In this context it was said that the power to punish for contempt is a summary power, it is a great power and it is a necessary power. Striking a note of caution, the Court observed:

"As I have said, a judge should act of his own motion only when it is urgent and imperative to act immediately. In all other cases he should not take it upon himself to move. He should leave it to the Attorney- General or to the party aggrieved to make a motion in accordance with the rules …. The reason is so that he should not appear to be both prosecutor and judge: for that is a role which does not become him well."

146. Stephenson LJ agreed that the remedy of contempt is a summary remedy, but "when a judge of the High Court or Crown Court proceeds of his own motion, the procedure is more summary still. It must never be invoked unless the ends of justice really require such drastic means; it appears to be rough justice; it is contrary to natural justice; and it can only

be justified if nothing else will do."

147. In Amrik Singh v. State, 1971 (3) SCC 215 the Supreme Court emphasized that it is the duty of the Court, brevi manu, to prevent in contempt interference in the administration of justice. Similarly, in Daroga Singh v. B.K. Pandey, (2004) 5 SCC 26 the Supreme Court noted that it has "repeatedly been held" that the procedure prescribed either under the Code of Criminal Procedure or under the Evidence Act is not attracted to proceedings under the Contempt of Courts Act. "The High Court can deal with such matters summarily and adopt its own procedure. The only caution that has to be observed by the Court in exercising this inherent power of summary procedure is that the procedure followed must be fair and the contemners are made aware of the charges leveled against them and given a fair and reasonable opportunity."

148. Referring to Vinay Chandra Mishra, In re (1995) 2 SCC 584 the Supreme Court held that "… criminal contempt no doubt amounts to an offence but it is an offence sui generis and hence for such an offence, the procedure adopted both under the common law and the statute law in the country has always been summary."

149. Finally, learned Amicus drew our attention to Reliance Petrochemicals Ltd. v. Indian Express Newspapers, (2004) 9 SCC 580 wherein it is said, "The question of contempt must be judged in a particular situation. The process of due course of administration of justice must remain unimpaired. Public interest demands that there should be no interference with judicial process and the effect of the judicial decision should not be pre-empted or circumvented by public agitation or publications. It has to be remembered that even at turbulent times through which the developing countries are passing, contempt of court means interference with the due administration of justice."

150. From the decisions cited before us, the following principles emerge as important considerations in dealing with cases of criminal contempt of Court:

1. The contempt jurisdiction of a Court is sui generis; it is a special jurisdiction and a summary jurisdiction. The Court is in effect the jury, the prosecutor, the judge and the hangman and so the jurisdiction has to be exercised with great caution and circumspection.

2. Action for contempt may be taken only if there is a substantial interference in the administration of justice. A Court should not be hypersensitive and take umbrage at every trivial misdemeanor. A Court should punish for contempt only if the act or omission complained of is deliberate and contumacious.

3. Proceedings for contempt are quasi-criminal in nature. While it may not be necessary to prove mens rea, but the standard of proof is that of proof beyond a reasonable doubt. This is because an alleged contemnor may be sent to prison for criminal contempt of Court.

4. Since proceedings for contempt of Court are quasi criminal in nature, the alleged contemnor must be duly informed, with sufficient particularity, of the allegations against him so that he may effectively defend himself.

5. The burden of proof is on the person asserting that there is a contempt of Court.

6. The Court is entitled to devise its own procedure for dealing with contempt of Court, and the generally accepted criminal law principles or the Evidence Act are not applicable to such proceedings. However, the principles of natural justice must be adhered to. Summary justice may be rough justice, but it should be fair.

151. We will, of course, keep these principles in mind while deciding whether any of the noticees have committed contempt of Court. But before we do that, it is necessary to deal with the submission of learned counsel appearing for Mr. Khan that the notice of contempt was vague or lacked sufficient particularity.

152. It may be recalled that notice was issued on 7th August, 2007 keeping in mind the provisions of Article 215 of the Constitution and Section 2(c) of the Contempt of Courts Act, 1971. Article 215 of the Constitution reads as follows:

“215. High Courts to be courts of record – Every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself.”

153. Section 2(c) of the Contempt of Courts Act, 1971 reads as follows:

“2. Definitions: – In this Act, unless the context otherwise requires,

(a) xxx

(b) xxx

(c) criminal contempt” means the publication (whether by words, spoken or written, or by signs, or by visible representations, or otherwise) of any matter or the doing of any other act whatsoever which –

(i) scandalises or tends to scandalise, or lowers or tends to lower the authority of any court ; or

(ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding ; or

(iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner;

(d) xxx”

154. Nobody has any doubt that the notice was not issued in contemplation of sub-clause (i) above and so we are really concerned with sub-clauses (ii) and (iii) of Clause (c) above.

155. A perusal of the order dated 7th August, 2007 (which is rather detailed) would show that it was passed after due deliberation and hearing learned Amicus. The order details the

full facts of the case, including the material then before the Court, and it is only thereafter that the provisions of Clause (c) above were invoked. Certain facts in this regard are undisputed. Firstly, that the telecast of 30th May, 2007 concerned itself with a pending trial, namely, the BMW case; secondly, the telecast strongly suggested that Mr. Khan and Mr. Anand were colluding in the BMW case and that Mr. Kulkarni was known to both of them, perhaps more to Mr. Anand than to Mr. Khan; thirdly, the impression given by Mr. Anand and Mr. Khan in their conversations with Mr. Kulkarni leaves no manner of doubt that Mr. Kulkarni was knowingly in touch with both of them, which is unusual for a person who was a witness for the prosecution; fourthly, if the reported contents of the telecast are true, then the conduct of Mr. Khan and Mr. Anand has a direct impact on the BMW case so as to attract sub-clause (ii) concerning a judicial proceeding, or in any event sub-clause (iii) concerning the administration of justice as broadly defined in Section 2(c) of the Contempt of Courts Act, 1971 and; finally, the overall impression conveyed by the telecast was that Mr. Kulkarni was suborned.

156. What is important to appreciate in the present case is that it is a rather unusual one, particularly in terms of the material available. In run of the mill cases of contempt of Court, there is usually a complainant who brings forth either oral or documentary evidence that relates to the past conduct of the alleged contemnor. Such material can be the subject of varying interpretations depending upon its presentation. However, in the present case, even though the subject matter is the past conduct of the noticees, the evidence is available in an audio-visual form and is in a sense „live" so that it can be viewed at any time, and one does not have to go by impressions or affidavits alone. A playback of the CDs and its visual presentation cannot leave anyone in doubt about the nature of the alleged contempt. Whether the conduct of Mr. Anand and Mr. Khan is contemptuous or not is another matter altogether, but there can be no doubt that the contents of the CDs vividly portray the contempt alleged to have been committed by them. This is a case where, because of the nature of the material available, we cannot apply traditional defences of vagueness or lack of sufficient particularity – the alleged contempt is very much before our eyes and within our hearing as also that of the noticees. The noticees have also viewed the contents of the original chips as well as the contents of the CDs and they are, therefore, fully aware of not only what has transpired, but also the basis on which notice was issued to them by this Court. Under the circumstances, they cannot claim to be blissfully unaware or feign ignorance of the offence that they are alleged to have committed, nor can they successfully complain of vagueness or lack of material particulars concerning their conduct or otherwise disabling them from effectually defending themselves – the entire material is available to them in an audio-visual form. Actually, the noticees Mr. Khan (through his learned counsel) and Mr. Anand himself have made elaborate submissions in their attempt to explain their spoken words, gestures, expressions as they appear in the video footage. For instance, Mr. Anand (in respect of a portion of the conversation that we will advert to a little later) has urged that his quoting double the amount demanded by Mr. Kulkarni was only to mock him and to suggest that he was only joking. Similarly, Mr. Khan sought to explain the cordial conversation that he had with Mr. Kulkarni (outside his chamber in Patiala House Courts) including the offer of drinks as an attempt to humour him on account of the intimidation and insecurity felt by him due to the presence of Mr. Deepak Verma. It is, therefore, evident that full opportunity has been provided to the noticees and they have

availed of this full opportunity to urge each and every defence that could be urged. The contention of learned counsel for Mr. Khan is, therefore, rejected.

157. We also need to deal with various applications filed by Mr. Anand. In Crl. M. No. 13782 of 2007 Mr. Anand has sought leave to cross-examine Ms. Agarwal. It is the submission of Mr. Anand that there are material contradictions in the affidavits of Ms. Agarwal in regard to the sequence of events and the attendant circumstances relating to the sting operations. In our opinion, we are not directly concerned with the affidavits filed by Ms. Agarwal except to the extent that she has placed on record a true copy of the contents of the chips, that is, the video recording of the sting operations and the transcripts of the conversations that had taken place between the dramatis personae. The chips are the primary material and there is nothing to suggest that in her affidavits Ms. Agarwal adds to or detracts from the actual contents of the chips. We have only to see the contents of the chips (which we have) and decide whether the noticees have committed contempt of Court or not. Cross-examination of Ms. Agarwal will not add to the material on record nor will it subtract anything from it.

158. Why the sting operations were conducted is strictly not our concern. We have expressed our view that a sting operation by a private agency, without any sanction from anyone would be unpalatable and unethical and we need not add anything more to it. In the present case, public airing of the sting operations has served a public purpose, while in the School teacher case, it has not. But, that is not (and cannot be) the test of the ethical propriety of conducting a sting operation. The application is, accordingly, rejected.

159. Crl. M. No. 4010 of 2008 is an application for initiating proceedings for perjury against NDTV and Ms. Agarwal for deliberately making false statements on affidavit and fabricating evidence. It is also alleged that the non-applicants have violated the undertaking given to this Court that the chips would be kept without destruction. We are not satisfied that NDTV or Ms. Agarwal deliberately made any false statement on oath so as to mislead us. There is also nothing to suggest that they fabricated false evidence, either for this purpose, or otherwise. We have found that the chips have not been tampered with and that is our only concern. If the chips are tampered with or destroyed, it may well be to the advantage of the noticees and, therefore, we feel that they should not be unduly worried about the non-preservation of one of the original chips.

160. Crl. M. No. 4011 of 2008 is an application for a direction to learned counsel for NDTV to disclose the name of the employee or concerned officer of NDTV on whose instructions Mr. Harish Salve, Senior Advocate furnished a false clarification in this Court on 24 th September, 2007. Ex facie, this application deserves to be rejected.

161. Crl. M. No. 4012 of 2008 is an application for sending the original chips and CDs for forensic examination to ensure that they are not edited, fabricated or tampered with.

162. Crl. M. No. 4150 of 2008 is an application for placing all the chips before this Court and for a direction to prepare a copy of the chips for being given to the applicant.

163. The contents of all these applications suggest that they have been moved in desperation and for exerting pressure on NDTV or Ms. Agarwal. The application concerning

the forensic examination of the chips has been filed apparently to delay the proceedings, since no substantial submissions were made, as we have noted above, challenging the authenticity of the original chips. As far as the CDs are concerned, we are not solely relying on them oblivious of the contents of the chips. The original chips are in the safe custody of NDTV and it is not necessary that they should be filed in Court. The contents of these chips have been viewed by the noticees and the CDs containing their contents have been handed over to them. To this extent, the noticees surely cannot have any grievance. Consequently, we reject all these applications.

164. We now propose to deal with the issue squarely facing us: do the contents of the chips disclose an offence of criminal contempt of Court having been committed by the noticees?

ON MERITS

165. Before discussing the merits of the conduct of the alleged contemnors, it is appropriate to state a few conclusions that we have arrived at after hearing all concerned and after viewing the original chips and video recordings.

166. First, the material has to be considered as a whole, rather than in disjunctive bits and pieces. Therefore, we have to decide the matter on the basis of the overall impact of the material, rather than on its sentence by sentence analysis.

167. Second, the conversations between Mr. Kulkarni and the alleged contemnors largely concerned the BMW case, even though the case was not specifically mentioned in the discussions. In fact, no one raised any doubt about the conversations relating to the BMW case and all the hearings took place on this factual premise.

168. Third, Mr. Kulkarni was quite familiar with the three alleged contemnors and each one of them was aware of this.

169. Fourth, for finding the alleged contemnors guilty of criminal contempt, it is not necessary for us to go so far as to conclude that they had prejudiced or interfered with or obstructed the due course of the judicial proceeding or interfered with or obstructed the administration of justice in any other manner. It is enough for our purposes if there is sufficient material to show that their conduct was such that it had the tendency to interfere with the due course of the judicial proceeding or had the tendency to interfere with or obstruct the administration of justice in any other manner. It is, therefore, not at all necessary for us to answer the question whether the alleged contemnors had entered into any conspiracy in respect of the BMW case.

170. The first, second and fourth conclusions really need no elucidation. In so far as the third conclusion is concerned, relevant portions of the conversations between the alleged contemnors would clearly bring out the familiarity that Mr. Kulkarni had with them and that each one of them was aware of this. Having said this, we also need to study the material before us to determine whether any of the noticees are guilty of criminal contempt. We propose to simultaneously attempt both.

171. The first sting operation is the meeting that Mr. Kulkarni had with Mr. Khan on 28th April, 2007 in the Patiala House Court complex. Soon after Mr. Kulkarni enters the chamber of Mr. Khan, he is introduced by Mr. Khan to the others present in the chamber in the following words: Mr. 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 day when this unfortunate incident happened. He was going on foot to the Nizamuddin Railway station.

172. There is then a conversation concerning “Bade Saheb” which we propose to deal with in detail a little later. The conversation in regard to Bade Saheb runs as follows:

Mr. Khan: Ab court ne (coughs) we dropped you … court ne… (unclear). Mr. Kulkarni: No, no, you … I think the state told you to drop, right, if I‟m not wrong?

Mr. Khan: Those were the instructions I received from the Headquarters and that‟s why I got the SHO statement recorded that „on the instructions 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. Mr. Kulkarni: Ya, I know that because I still remember, still remember. Mr. Khan: Inhone mera haath dabaya, khoob dabaya. Maine kaha main kya karoo, agar individual client ho to samjha bhi lo, department hai. (They pressed me hard, very hard. What can I do – it is possible to explain to an individual client, but this the department).

Mr. Khan: Bade Saheb se mile? Nahi mile? Mukalat hi nai hoi? (Did you meet Bade Saheb? You didn‟t meet him? You have not met him)? Mr. Kulkarni: Ab yeh kya jhanjhat aur? (What is this new problem)? Mr. Khan: Nah nahi kuch nahi hoga. Ab High Court mein unhone petition file kar di hai ki Kulkarni ki statement xxx. (Nothing will happen. They have petitioned the High Court that Kulkarni‟s statement …).

173. There is also a personal conversation recorded by Mr. Kulkarni‟s button camera (which is not denied by Mr. Khan) wherein Mr. Khan invites Mr. Kulkarni apparently to his residence (which is accepted by Mr. Kulkarni) for a drink of good scotch whisky. One of the topics that Mr. Kulkarni wanted to discuss, and take the advice of Mr. Khan, was on the question whether he should accept the summons calling him as a Court witness. In fact, the conversation begins and ends on this note as is clear from the following. The conversation runs as follows: Mr. Kulkarni: Summons Bombay challa gaya thaa, ab waha se reject ho ke ayaa hua hai. Ab loon ke na loon? Baad me mere ko raat ko ghar pe…. (The summons had gone to Bombay but it has come back. Should I accept it or not? Later in the evening at the house……).

Mr. Khan: Tum mere ko miloge kab, yeh batao? (Tell me, when will you meet me?) Mr. Kulkarni: Aap batao kyonki mere ko … SHO se meri baat hui hai. Aap usko … (You let me know because … I have spoken to the SHO…). Mr. Khan: Tum thehre kahan ho? (Where are you staying)? Mr. Kulkarni: Main to thehra hoo out of Delhi.

Mr. Khan: Out of Delhi?

Mr. Kulkarni: Out of Delhi, haan.

Mr. Khan: Sham ke keh baje aaoge? (At what time will you come in the evening)?

Mr. Kulkarni: Aaj nahi aaonga ... main koi zaroor ... sham ko. Sunday aaram rehta hai aur ... (I will not come today. .... Sunday is relaxed). Mr. Khan: Sunday ko kis waqt aaoge? (At what time will you come on Sunday)?

Mr. Kulkarni: Aap batao mere ko. (You tell me).

Mr. Khan: Aapko kaun time suit karta hai? (What time suits you)? Mr. Kulkarni: Koi bhi. (Anytime).

Mr. Khan: Saat aur aath ke darmiyan? (Between 7 and 8)? Mr. Kulkarni: Haan. Theek hai. (Yes, OK).

Mr. Khan: Kal xxxx (not intelligible).

Mr. Kulkarni: Lekin kisi ko batao mat. (But don‟t tell anybody). Mr. Khan: Nahi ji. Sawal hi nahi paida hota. (No question about it). Mr. Kulkarni: Na, na.

Mr. Khan: Aur tumhare liya bahut badhiya scotch rakhi hui hai maine. (I have some very good scotch for you).

Mr. Kulkarni: Scotch ...

Mr. Khan: Bahut badhiya. (Very good).

Mr. Kulkarni: Acha. Baki sab khairiyat sab? (Is everything OK)? Mr. Khan: Sab khairiyat. Xxx Khuda ka xxx (Everything is OK). Mr. Kulkarni: Chalo. Kal mulakat hogi. (We will meet tomorrow). Mr. Khan: Saat aur aath ke darmiyan. ([Come] Between 7 and 8).

174. The conversation ends in this note:

Mr. Kulkarni: Main, vese meri K.K. Paul se baat hui hai, lekin maine abhi tak nahi bola hoo. I have not received summons at all. Woh mere ko bata dena. (I had a talk with K.K. Paul [the Police Commissioner] but I have not told him. I have not received the summons at all. You tell me [what to do]). Mr. Khan: Kal tum aajao. (Come tomorrow).

Mr. Kulkarni: Main ... huh? Woh hamare dono ki baat hogi. (That will be between us).

Mr. Khan: Theek hai. (OK).

175. In the second sting operation at the Indira Gandhi International Airport on 6th May, 2007 the conversation between Mr. Kulkarni and Mr. Anand is as follows:

Mr. Kulkarni: Ab kya strategy banana hai batao. (Tell me what should be the strategy)?

Mr. Kulkarni: Maine message bheja tha Khan saab ke paas … aapko shayad mila hoga. (I had sent the message to Mr. Khan. You may have received it). Mr. Anand: Haan … mil gaya tha. (Yes, I received it).

176. There is then some talk about money and the cross-examination of Mr. Kulkarni. The conversation in this regard is as follows: Mr. Anand: Haan ab … ab mujhe batao… Ab batao mere ko. (Now tell me). Mr. Kulkarni: Mujhe bola dhai crore doonga … aap batao mere ko. (He told me that he will give two-and-a-half crore. You advise me). Mr. Anand: Hain?

Mr. Kulkarni: Dhai crore.

Mr. Anand: Tu paanch crore maang le. (You ask for five crore). Mr. Kulkarni: Mein paanch crore maang leta hoo. (I will ask for five crore). Mr. Anand: Tere ko cross-examine maine zaroor karna hai. (I will definitely cross-examine you).

Mr. Kulkarni: Aur doosri baat … cross-examine aap karoge mere ko? (Another thing … you will cross-examine me)? Mr. Anand laughs.

177. There is also some conversation concerning a meeting with Mr. Khan and this is as follows:

Mr. Anand: Any how tum Khan sahab se baat kar lo. (You talk to Mr. Khan).

Mr. Kulkarni: Unko bolna … aap unko phone kar ke bolna main aa jaunga … mere se baat kar lena kyunki mera aur aapka milna theek nahi hai. (You phone him up and tell him that I will be coming and that he should speak to me, because it is not proper for us to meet).

Mr. Anand: Nahi …

Mr. Kulkarni: Jab bhi mereko zaroorat padegi main ghar pe aa jaunga, mujhe pata hai … (Whenever it is necessary, I will come to your house). Mr. Anand: Chalo let me come back tomorrow evening, you come and meet me in the night … in the farm … don‟t meet me outside … Mr. Kulkarni: Nahi aaj jaroori tha isliye main mila … nahi to main … I avoid it. (Today it was necessary that is why I met you). Mr. Anand: Nahi farm pe milna. (Come to the farm).

Mr. Kulkarni: Aur doosri baat … yeh inhe bhi jante ho … yeh dekho its Commando … ok. (This is not intelligible).

Mr. Anand: Ya, tomorrow evening, bye!

178. In the third sting operation on 8th May, 2007 in Mr. Anand‟s car, with regard to Mr. Khan, the relevant conversation between Mr. Anand and Mr. Kulkarni runs like this:

Mr. Kulkarni: Yeh log kya karte hai, pata hai aapko. (Do you know what these people do?) Mr. Anand: Arre bhaiyya … unko karne do jo … mujhe to jo bataya hua hai woh bata diya maine …. Acha Khan ki to ghar ki baat hai. (Let them do [what they want]. I have told [you] what was told to me. [The next sentence is colloquial and therefore difficult to translate, but

it conveys that Mr. Khan is a part of the family].

Mr. Kulkarni: Haan vo to Khan sahab ke apne ghar ki baat hai. (Yes, Mr. Khan is a part of the family).

Mr. Anand: Yeh to tum usko keh nahi sakte ho ki tumhe paise mil rahe hain. (But you cannot [should not?] tell him [Mr. Khan] that you are getting paid).

179. The relevant conversation between Mr. Anand and Mr. Kulkarni with regard to the petition filed in the High Court challenging the summoning order under Section 311 of the Cr.P.C. is as follows: Mr. Kulkarni: Kal kya mereko nikaal rahe ho kya … 311 se? (Will you get me out of the 311 issue tomorrow)?

Mr. Anand: Nikaal do? (Should I take you out)?

Mr. Kulkarni: Nahi, nahi mat nikalna. (No, don‟t).

Mr. Anand: Nahi nikalta. (I won‟t take you out).

Mr. Kulkarni: Nahi, nahi mat nikalna… withdraw karva do na aap… jab main aapke saath hoo, jo marzi karne ke liye tayyar hoo. To yeh kaye ke liye High Court main laga diya aapne? Aur mere upar aapko itna bhi bharosa nahin hai kya? Theek hai, gussa ho jata hoo…. (No, don‟t. Have it withdrawn. I am with you and willing to do whatever you want. Then why has this [petition] been filed in the High Court? Do you not have faith in me? OK, I get angry sometimes…).

Mr. Anand: Nahi, nahi. (No).

Mr. Kulkarni: Lekin aana hai… depose karna hai. (I have to depose). Mr. Anand: Ab usse kya baat karni hai…batao? Reasonable baat karo. (What is to be said to him? Be reasonable).

Mr. Kulkarni: Aap decide karo. (You decide).

Mr. Anand: Tum decide karo. Woh to you decide. (You decide).

180. In the context of receiving the Court summons, the conversation between Mr. Kulkarni and Mr. Anand is as follows:

Mr. Kulkarni: Bus baat hi kuch nahi … Patiala House Court main jakar meine de diya … Khan sahab ne vo din mereko summon lene ke liye mana kar diya … ab theek hai vo … vo to obviously hona hi tha … ab mereko message pahuchana tha … vo pahuch gaya. (That day Mr. Khan told me not to accept the summons. I had to convey a message and that has been conveyed).

Mr. Anand: Toh liya kya summon. (So did you take the summons?) Mr. Kulkarni: Main kahan se summon liya … bilkul nahi. (No, I did not take the summons).

Mr. Anand: To summon nahi liya abhi tak?

Mr. Kulkarni: Na.

Mr. Anand: So you have not taken the summon?

Mr. Kulkarni: Na … not at all… jab tak aap nahi bataoge, Khan sahab nahi bataenge tab main summon kaise lu….” (No, not at all. Until you or Mr. Khan advise me, how can I take the summons?).

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

Mr. Kulkarni: Ab yahi baat to yahi hai na … maine summon nahi liya hai … aap pata kar lo … maine summon nahi liya hai … jab vahan Bombay main jake … unhone phir vahin panga chaloo kar diya na. (I have not taken the summon. You may find out).

181. In the context of the deposition to be made by Mr. Kulkarni, Mr. Anand says, Mr. 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.

Mr. Kulkarni: Kitna mangoo? (How much should I ask for)? Mr. Anand: Chodo na … baat samjha kar yaar ……. (Leave it. Try to understand …….)

182. With reference to the meeting that Mr. Kulkarni had with Mr. Khan on 28th April, 2007 the conversation between Mr. Anand and Mr. Kulkarni is as follows:

Mr. Kulkarni: ….. yeh, doosri baat hai ki ekdum vo din bhi Khan sahab ke saath bahut log the. (That day, there were many people with Mr. Khan). Mr. Anand: Hmm Mr. Kulkarni: Yeh nahi tha ki akele Khan saheb the. (It is not that Mr. Khan was alone).

Mr. Anand: Hmm Mr. Kulkarni: Phir bhi maine bahar bulake unko bolne ki koshish ki. Lekin phir bhi vo unke peeche itni bheed lagi rehti hai. (I called him outside to try and speak to him, but there are still so many people with him). Mr. Anand: But natural, yaar, professional hai. (It‟s but natural – he is a professional).

Mr. Kulkarni: But rush xxx all the time.

Mr. Kulkarni: Abhi main office main nahi aata … main bahar utar jata hoo. (I will not come to your office just now. I will get down outside). Mr. Anand: xxx Mr. Kulkarni: Haa Mr. Anand: Talk to me around seven forty five.

Mr. Kulkarni: OK Mr. Anand: OK Mr. Kulkarni: Sir …

Mr. Anand: Then we‟ll decide about it.

183. In the same vein, the conversation continues a little later: Mr. Kulkarni: Main aajoo bajoo main paune aath baje … aap mere ko bula lena. (I will be around at a quarter to eight. Please call me). Mr. Anand: Give me a call at seven forty five.

Mr. Kulkarni: Ji.

Mr. Anand: On my office number.

Mr. Kulkarni: Ha ... ha ... ha (Yes). Aur iska bhi number mein de deta hoo... Jaya bhi aayegee ... isko leke aayo? (I will give you that number also [referring to his wife Jaya]. Can I bring her)?

Mr. Anand: Tum aa jana yaar. (You come along).

Mr. Kulkarni: Theek hai... aur vo copy fax kar di hogi mere khayal se. (OK. I think the copy would have been faxed [referring to a document mentioned earlier]).

Mr. Anand: Hogi to tum le aana yaar ... kya dikkat hai ... aur ye lo xxx (If you have it, then bring it along. what is the difficulty.... Take this). Mr. Kulkarni: Phir mere khayaal se 311 udega nahi na, blood sample ka udega? (Then I think [the petition under Section 311 of the Cr. P.C.] will not be dismissed. What about the blood sample)?

Mr. Anand: Hain?

Mr. Kulkarni: Kyon udaye ... jab tumhare paas paise bante hai to mein kyon udayoo? (Why should it be dismissed? When you can make money [on it] then why should I get it dismissed)?

184. With reference to the BMW case the conversation between Mr. Anand and Mr. Kulkarni is as follows:

Mr. Kulkarni: Isme bachana hai na usko Sanjeev ko? (Sanjeev [the accused in the BMW case] has to be saved in this)?

Mr. Anand: Bachana hai. Kabhi kisika bura mat kiya karo ... Panga lene ka kya faydaa. (He has to be saved. Don‟t harm anyone. There is no benefit in creating a problem).

Mr. Kulkarni: Theek hai. (OK).

Mr. Kulkarni: Nahi... lekin kaise kya karna hai vo aapne aur Khan saheb ne decide karna hai... After all it was merely an accident. (But you and Mr. Khan have to decide what has to be done).

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

185. The nature of the conversations in the three sting operations, the contents of the conversations and the location of the meetings clearly show that Mr. Kulkarni was quite familiar with Mr. Anand and also with Mr. Khan. The several references made to Mr. Khan in the conversations between Mr. Kulkarni and Mr. Anand clearly bring out the fact that Mr. Anand knew that Mr. Kulkarni was in touch with Mr. Khan. Similarly, Mr. Khan knew that Mr. Kulkarni was in touch with Mr. Anand. We have no doubt about this.

The case against Mr. I.U. Khan:

186. There is only one occasion when Mr. Khan and Mr. Kulkarni meet with each other and that is on 28th April, 2007 in the chamber of Mr. Khan in the Patiala House Courts. The meeting was without any appointment but it was not objected to by Mr. Khan. On the contrary, Mr. Khan and Mr. Kulkarni leave the chamber together to have a private and personal conversation. In the third sting operation, Mr. Kulkarni tells Mr. Anand that Mr. Khan is a very busy man and Mr. Anand acknowledges it. This quite clearly suggests that even though Mr. Khan is a very busy man, Mr. Kulkarni had free access to him. 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.

187. On going through the recording of the sting operation of 28th April, 2007 and on a reading of the available transcript, it is clear that Mr. Khan was very keen to examine Mr. Kulkarni as a prosecution witness (and he specifically stated so). But, apparently because of the decision of the prosecution (which was opposed by Mr. Khan), Mr. Kulkarni was dropped as a witness. Then suddenly, Mr. Khan asks Mr. Kulkarni whether he has met “Bade Saheb” and expressed some surprise when Mr. Kulkarni responded in the negative. Thereafter, there is some conversation between Mr. Khan and Mr. Kulkarni wherein Mr. Khan informs him that the Trial Court cannot require his statement to be recorded. This is followed by a private and personal conversation between Mr. Khan and Mr. Kulkarni to the effect that they should meet in the evening over a drink. We are again mentioning the private and personal conversation only to indicate the familiarity between Mr. Kulkarni and Mr. Khan. In fact, from the recording taken of this conversation from the bag camera, it is quite clear that Mr. Kulkarni and Mr. Khan are quite familiar with each other so much so that Mr. Khan even rests his hand on the shoulder of Mr. Kulkarni at one stage. Who is Bade Saheb?

188. There was much debate about the identity of Bade Saheb. According to learned Amicus, it has reference to none other than Mr. Anand but according to Mr. Khan, it has reference to a senior police officer. Learned counsel for Mr. Khan relied on the immediately preceding sentences in the conversation regarding Mr. Kulkarni being dropped as a witness by the prosecution. The contention was that the flow of the conversation suggests that Bade Saheb refers to someone from the prosecution, which in the context means a senior police officer. 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.

189. The contention of Mr. Khan cannot be accepted since in the personal conversation (recorded by the button camera), Mr. Kulkarni informs Mr. Khan that he has had a talk with Mr. K.K. Paul [the Police Commissioner]. Mr. Paul, though a senior police officer, is not referred to as Bade Saheb in the conversation. Moreover, earlier in the conversation when Mr. Khan asks Mr. Kulkarni whether he has met Bade Saheb, Mr. Kulkarni replies in the negative instead of telling him that he had spoken to Mr. K.K. Paul. Looking at the

conversation as a whole and in its proper context, we find it difficult to accept the contention of learned counsel for Mr. Khan that Bade Saheb has reference to one or more senior police officers.

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. However, Mr. Kulkarni has stated in his affidavit dated 6th August, 2007 that Ms. Poonam Agarwal "forced me to mean that Bade Saheb means Sh. R.K. Anand as it suits her whole story."

191. We are not prepared to accept the affidavit of Mr. Kulkarni in this regard for three reasons. Firstly, the conversation between him and Mr. Deepak Verma was impromptu and a part of the sting operation continuum. The expression "Bade Saheb" came up only during the sting operation. It is nobody‟s case that Ms. Poonam Agarwal had any prior knowledge of this expression. Secondly, there is no doubt that during the course of the live recording, Ms. Poonam Agarwal did not meet Mr. Kulkarni, and so there was no question of her pressurizing him to say to Mr. Deepak Verma that Bade Saheb referred to Mr. Anand. Thirdly, the explanation given by Mr. Kulkarni in the video recording is contemporaneous and spontaneous unlike the explanation in the affidavit that came much later.

192. In our opinion, the affidavit of Mr. Kulkarni is an afterthought. For the very same reasons we do not accept the explanation given by Mr. Khan in his subsequent interview to NDTV on 31st May, 2007 to the effect that Bade Saheb has reference to one or more senior police officer.

193. Therefore, we hold that Bade Saheb referred to by Mr. Khan has reference only to Mr. Anand and that Mr. Khan was a little surprised that Mr. Kulkarni had not yet met Mr. Anand.

194. Even otherwise, it is difficult to accept the suggestion of Mr. Khan that Bade Saheb refers to a senior police officer, since it causes more questions to be raised. Why would Mr. Kulkarni want to meet with senior police officers, particularly when he has been dropped as a prosecution witness? There is nothing to suggest that Mr. Kulkarni frequently met senior police officers whenever he was in Delhi, and so why should he meet them on this particular occasion? On the other hand, there is enough material to show that Mr. Kulkarni was quite familiar, if not friendly, with Mr. Khan and Mr. Anand. Mr. Kulkarni had access to Mr. Khan‟s chamber without an appointment. He also had free access to Mr. Anand and in fact took a ride with Mr. Anand in his car without any semblance of a protest from Mr. Anand.

195. Consequently, whichever way one looks at it, it is difficult to accept the contention of Mr. Khan that Bade Saheb refers to a senior police officer – the reference can only be to Mr. Anand.

196. We may also note the conversation that Mr. Kulkarni had with Mr. Anand on 6th May, 2007 in the VIP lounge of the Indira Gandhi International Airport (Domestic Terminal) which

shows that he had easy access to Mr. Anand. This conversation and the conversation that Mr. Kulkarni had with Mr. Anand in his car on 8th May, 2007 clearly show that Mr. Anand knew that Mr. Kulkarni was in contact with Mr. Khan, and Mr. Kulkarni knew that Mr. Anand was in contact with Mr. Khan. The first sting operation on 28th April, 2007 in the chamber of Mr. Khan clearly suggests that Mr. Khan knew that Mr. Kulkarni was in touch with Mr. Anand. In other words, all three of them knew that they were in contact with one another.

197. In the second sting operation on 6th May, 2007 at the Indira Gandhi International Airport, Mr. Kulkarni informed Mr. Anand that he had sent a message to Mr. Khan and he enquired from him (Mr. Anand) whether he had received the message. Mr. Anand replied in the affirmative. Towards the end of the conversation, Mr. Anand tells Mr. Kulkarni to talk to Mr. Khan.

198. In the conversation that Mr. Kulkarni had with Mr. Anand in his (Mr. Anand‟s) car on 8th May, 2007 there are several references to Mr. Khan and we need not repeat them here.

199. With the knowledge that Mr. Khan had of the familiarity that Mr. Kulkarni and Mr. Anand had, the only course open to him, as an honest prosecutor, would be to inform the prosecution (regardless of when Mr. Khan came to know of it) that one of its witnesses was more than an acquaintance of the defence lawyer. Mr. Khan does not say that he ever brought this to the notice of the prosecution. In this regard, Mr. Khan clearly failed in his duty as a prosecutor, who is expected to be fair not only to his client but also to the Court.

200. It has been said by the Supreme Court in Shakila Abdul Gafar Khan v. Vasant Raghunath Dhoble, (2003) 7 SCC 749:

“Justice has no favourite, except the truth. It is as much the duty of the prosecutor as of the court to ensure that full and material facts are brought on record so that there might not be miscarriage of justice.”

201. Similarly, it is said in Zahira Habibulla H. Sheikh v. State of Gujarat, (2004) 4 SCC 158:

“The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, …….”

202. In view of the above, there is no doubt that the conduct of Mr. Khan is rather unbecoming of a prosecutor. But the question that arises is whether this demonstrates, beyond a reasonable doubt, that Mr. Khan has committed criminal contempt of Court?

203. We do not know the extent of Mr. Khan‟s awareness of the “association” between Mr. Anand and Mr. Kulkarni. Was he aware, for example that both of them could be “mixed up” and could sabotage the prosecution case in the BMW trial? In hindsight, the answer must certainly be in the affirmative – but hindsight enables us to draw on knowledge that was not available at the relevant time. But, that apart, Mr. Khan is a seasoned lawyer with decades of practice behind him. Surely, the proximity between Mr. Kulkarni and Mr. Anand (however little that may have been) would have aroused his suspicion – and the natural corollary to that suspicion would be that their proximity (however little) would impact on the BMW case

in only one way. Mr. Khan would have certainly realized this.

204. In addition, we find that the conversation that Mr. Khan had with Mr. Kulkarni with regard to accepting the Court summons, followed by an invitation from Mr. Khan to Mr. Kulkarni to visit his residence for a drink is totally unwarranted in the circumstances. Relevant extracts of this conversation read as follows:

Mr. Kulkarni: Summons Bombay challa gaya thaa, ab waha se reject ho ke ayaa hua hai. Ab loon ke na loon? Baad me mere ko raat ko ghar pe…. (The summons had gone to Bombay but it has come back. Should I accept it or not? Later in the evening at the house……).

Mr. Khan: Tum mere ko miloge kab, yeh batao? (Tell me, when will you meet me?) Mr. Kulkarni: Aap batao kyonki mere ko … SHO se meri baat hui hai. Aap usko … (You let me know because … I have spoken to the SHO…). Then, Mr. Khan: Sunday ko kis waqt aaoge? (At what time will you come on Sunday)?

Mr. Kulkarni: Aap batao mere ko. (You tell me).

Mr. Khan: Aapko kaun time suit karta hai? (What time suits you)? Mr. Kulkarni: Koi bhi. (Anytime).

Mr. Khan: Saat aur aath ke darmiyan? (Between 7 and 8)? Mr. Kulkarni: Haan. Theek hai. (Yes, OK).

Finally, Mr. Kulkarni: Main, vese meri K.K. Paul se baat hui hai, lekin maine abhi tak nahi bola hoo. I have not received summons at all. Woh mere ko bata dena. (I had a talk with K.K. Paul [the Police Commissioner] but I have not told him. I have not received the summons at all. You tell me [what to do]). Mr. Khan: Kal tum aajao. (Come tomorrow).

Mr. Kulkarni: Main … huh? Woh hamare dono ki baat hogi. (That will be between us).

Mr. Khan: Theek hai. (OK).

205. Learned counsel for Mr. Khan submitted that there is nothing wrong if the Special Public Prosecutor is in contact with a prosecution witness. Perhaps not – but the „contact" between Mr. Khan and Mr. Kulkarni stretches well beyond that. They are on extremely familiar terms and moreover, their discussion goes several steps further than what one would expect. They discuss (or at least propose to discuss) strategy in the BMW case, particularly with reference to the Court summons. Was that at all necessary?

206. Does Mr. Khan"s more than normal familiarity with Mr. Kulkarni and his failure to bring all relevant facts to the notice of the prosecution or the Court amount to criminal contempt? Does his silence interfere or tend to interfere with the due course of the judicial proceeding or interfere or tend to interfere with or obstruct or tend to obstruct the administration of justice in any manner? In our opinion, the answer to both these questions must be in the affirmative – in any event there is definitely a tendency to interfere with the due course of a judicial proceeding or a tendency to interfere or obstruct the administration of justice. If Mr.

Khan knew, and there is no doubt about it, that Mr. Kulkarni and Mr. Anand were in touch, and Mr. Khan chose not to inform the prosecution or the Court about it, his silence 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 describes Mr. Kulkarni as the prime witness in the BMW case and the star witness of the prosecution. In Mr. Khan‟s perception, Mr. Kulkarni is undoubtedly no ordinary witness and Mr. Anand is certainly no ordinary lawyer – he is the advocate for the accused.

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 to 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.

208. A reference was made by learned Amicus, though not with any great vigour, to the opinion expressed by Mr. Khan that the Trial Court could not require Mr. Kulkarni‟s statement to be recorded. This is merely an opinion expressed by Mr. Khan to Mr. Kulkarni and it cannot in any manner be interpreted to mean that there is any contempt of Court committed by Mr. Khan merely by expressing his opinion in private. Even if Mr. Khan had expressed this opinion publicly, it would, to our mind, not make any difference at all since it is a completely innocuous opinion.

209. We may note a submission made by learned counsel for Mr. Khan to the effect that Mr. Khan was intimidated by the towering presence of Mr. Deepak Verma, who is said to be a burly man. We cannot accept this submission. The nature of the conversation that Mr. Khan has with Mr. Kulkarni belies this suggestion. Moreover, there were several people present in the chamber of Mr. Khan and so he had the safety of numbers. Furthermore, on viewing the original chips and the video recording, it is clear to us that there was not an iota of „fear‟ on Mr. Khan. Then there is the private and personal conversation that Mr. Khan has with Mr. Kulkarni. The contents of the conversation, the manner in which it was conducted (with Mr. Khan‟s hand on the shoulder of Mr. Kulkarni) and in the somewhat close proximity of Mr. Deepak Verma show clearly that Mr. Khan and Mr. Kulkarni were familiar with each other and that the presence of Mr. Deepak Verma was certainly not a deterrent. Finally, in his interview with Ms. Anasuya Roy, Mr. Khan clearly says that he is “not denying anything at all”. That interview was the first of its kind given by Mr. Khan and was contemporaneous. It is, under these circumstances, quite clear to us that the submission made by learned counsel for Mr. Khan does not have any substance.

The case against Mr. Sri Bhagwan Sharma:

210. Mr. Sri Bhagwan Sharma is an associate advocate of Mr. Anand and is also one of the learned counsel for the accused. As regards his defence, he has adopted the arguments advanced by Mr. Anand. The only material against him is the video recording taken on 8th May, 2007. It is not disputed before us that Mr. Sri Bhagwan Sharma met Mr. Kulkarni in the South Extension Part II market and was joined by one Mr. Lovely (since deceased). Mr. Sri Bhagwan Sharma is a mature lawyer with considerable experience and obviously can be assumed to be fully conscious of and understanding the consequences of each of his actions. The video recording reveals that Mr. Sri Bhagwan Sharma met Mr. Kulkarni in the evening and was with him for a while and till Mr. Lovely, another associate of Mr. Anand came on the scene. The conversation that Mr. Sri Bhagwan Sharma has with Mr. Kulkarni reveals the anxiety and discomfiture of Mr. Kulkarni on being made to wait for a third person (Mr. Lovely), about whom he keeps on enquiring and who is described as a close confidant and right hand man of Mr. Anand (referred to in the conversation as Boss). Barring the usual banter, the conversation records Mr. Kulkarni‟s desire to speak directly to Mr. Nanda, without any middleman. Mr. Kulkarni also sought instructions with regard to receiving eh Court summons. After a considerable lapse of time, the wait for Mr. Lovely ends. Thereafter, there is some conversation with Mr. Lovely where huge sums are discussed with his (Mr. Kulkarni) share being preserved. We need not go into the conversation that Mr. Kulkarni had with Mr. Lovely for reason that Mr. Lovely has since passed away and is not a noticee in the suo motu contempt proceedings.

211. From a perusal of the entire recorded conversation of 8th May, 2007 we are left the impression that and Mr. Sri Bhagwan Sharma was not the main actor and was in fact waiting for the arrival of Mr. Lovely (since deceased). While reference to the BMW case and Mr. Nanda appear in the conversation that he had with Mr. Kulkarni, on the basis of the conversation taken as a whole, the role of Mr. Sri Bhagwan Sharma at best could be described as a facilitator, while the main emissary of Mr. Anand was Mr. Lovely and his assignment was to make him wait till Mr. Lovely appeared on the scene. On the basis of the conversation taken as a whole, it is difficult to hold Mr. Sri Bhagwan Sharma guilty of criminal contempt.

212. It is true that as one of the lawyers for the accused, Mr. Sri Bhagwan Sharma had no business to be in touch with Mr. Kulkarni and the fact that he was in touch with Mr. Kulkarni is, in itself, totally unethical and unprofessional, but it would be difficult to say, on the material before us, that Mr. Sri Bhagwan Sharma had influenced or had attempted to influence Mr. Kulkarni in any manner whatsoever, or to alter the course of justice. The contact that Mr. Sri Bhagwan Sharma had with Mr. Kulkarni may be a relevant factor to take into consideration for other proceedings. In our opinion it would be stretching the matter a little too far to say that merely because Mr. Sri Bhagwan Sharma had met Mr. Kulkarni on the evening of 8th May, 2007 (and perhaps on some other occasions also but for which there is no clear evidence, but it seems more than likely) that, by itself, must mean that Mr. Sri Bhagwan Sharma has committed criminal contempt of Court.

213. However, we do express our displeasure at the conduct of Mr. Sri Bhagwan Sharma for conversing with Mr. Kulkarni who had been a witness for the prosecution. As a defence lawyer, Mr. Sri Bhagwan Sharma had no business to be in touch with Mr. Kulkarni and for

this he invites our displeasure. But, in our opinion, his conduct does not amount to criminal contempt of Court. We may note that we have taken into consideration the fact that Mr. Sri Bhagwan Sharma was not a major player in the entire operation or even in the BMW case and was only a “junior” or sidekick of Mr. Anand, and acting on his instructions as his Man Friday. The case against Mr. R.K. Anand:

214. There is absolutely no doubt that the role of Mr. Anand is dubious, to say the very least. The first sting operation clearly brings out the connection that Mr. Khan and Mr. Kulkarni have with Mr. Anand, who is like the „team leader‟ who must be made aware of everything that is going on. That appears to be the reason why Mr. Khan is surprised that Mr. Kulkarni has not yet met Mr. Anand. Admittedly, there is no direct reference to Mr. Anand in the first sting operation, but that hardly makes any difference. In our opinion, the reference to Bade Saheb is quite clear and even if it is not so, there is enough other material on the basis of which it is possible to hold Mr. Anand guilty of criminal contempt. We propose to deal with each such category of material.

Familiarity between Mr. Anand and Mr. Kulkarni:

215. The second and third sting operations make it explicit that Mr. Kulkarni had easy access to Mr. Anand. This, by itself, is extremely odd considering that Mr. Kulkarni is the prime witness and the star witness for the prosecution and Mr. Anand is the lawyer for the accused in that very case. Mr. Anand and Mr. Kulkarni meet in the VIP lounge of the airport; Mr. Kulkarni says that he will come to his house, but Mr. Anand invites Mr. Kulkarni to his farm – the conversation being:

Mr. Kulkarni: Jab bhi mereko zaroorat padegi main ghar pe aa jaunga, mujhe pata hai … (Whenever it is necessary, I will come to your house). Mr. Anand: Chalo let me come back tomorrow evening, you come and meet me in the night … in the farm … don‟t meet me outside … Mr. Kulkarni: Nahi aaj jaroori tha isliye main mila … nahi to main … I avoid it. (Today it was necessary that is why I met you). Mr. Anand: Nahi farm pe milna. (Come to the farm).

216. Then again the possibility of a meeting in Mr. Anand‟s office: Mr. Kulkarni: Ha … ha … ha (Yes). Aur iska bhi number mein de deta hoo… Jaya bhi aayegee … isko leke aayo? (I will give you that number also [referring to his wife Jaya]. Can I bring her)?

Mr. Anand: Tum aa jana yaar. (You come along).

Mr. Kulkarni: Theek hai… aur vo copy fax kar di hogi mere khayal se. (OK. I think the copy would have been faxed [referring to a document mentioned earlier]).

Mr. Anand: Hogi to tum le aana yaar … kya dikkat hai … aur ye lo xxx (If you have it, then bring it along. what is the difficulty…. Take this).

217. Mr. Kulkarni has access to Mr. Anand over the telephone and to his office. This is clear from the following:

Mr. Anand: Abhi main office main nahi aata … main bahar utar jata hoo. (I will not come to your office just now. I will get down outside). Mr. Anand: xxx Mr. Kulkarni: Haa Mr. Anand: Talk to me around seven forty five.

Mr. Kulkarni: OK Mr. Anand: OK Mr. Kulkarni: Sir …

Mr. Anand: Then we‟ll decide about it.

Then again, Mr. Kulkarni: Main aajoo bajoo main paune aath baje … aap mere ko bula lena. (I will be around at a quarter to eight. Please call me). Mr. Anand: Give me a call at seven forty five.

Mr. Kulkarni: Ji.

Mr. Anand: On my office number.

218. That Mr. Kulkarni could gain easy entry into Mr. Anand‟s car further shows their familiarity and proximity. There was no protest or objection from Mr. Anand. In fact, his car stopped to pick up Mr. Kulkarni – it was not as if Mr. Kulkarni forced his way into the car. All the material that we have referred to above clearly shows the lack of any distance between Mr. Anand and Mr. Kulkarni. We ask: Is it ethical or even proper for a defence lawyer to be so familiar with the star prosecution witness? What does their proximity suggest?

Discussions regarding money:

219. There is also talk of some money between Mr. Anand and Mr. Kulkarni. There is a mention of two-and-a-half crore versus five crore in this manner:

Mr. Anand: Haan ab … ab mujhe batao.. Ab batao mere ko. (Now tell me). Mr. Kulkarni: Mujhe bola dhai crore doonga … aap batao mere ko. (He told me that he will give two-and-a-half crore. You advise me). Mr. Anand: Hain?

Mr. Kulkarni: Dhai crore.

Mr. Anand: Tu paanch crore maang le. (You ask for five crore). Mr. Kulkarni: Mein paanch crore maang leta hoo. (I will ask for five crore). Mr. Anand: Tere ko cross-examine maine zaroor karna hai. (I will definitely cross-examine you).

220. Then there is the admonition by Mr. Anand to Mr. Kulkarni not to be unreasonable:

Mr. 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.

Mr. Kulkarni: Kitna mangoo? (How much should I ask for)?

221. There is also a financial benefit that Mr. Kulkarni may get in connection with the

petition challenging the summons issued to Mr. Kulkarni under Section 311 of the Cr.P.C. The conversation in this regard is as follows:

Mr. Kulkarni: Phir mere khayaal se 311 udega nahi na, blood sample ka udega? (Then I think [the petition under Section 311 of the Cr. P.C.] will not be dismissed. What about the blood sample)?

Mr. Anand: Hain?

Mr. Kulkarni: Kyon udaye … jab tumhare paas paise bante hai to mein kyon udayoo? (Why should it be dismissed? When you can make money [on it] then why should I get it dismissed)?

222. That Mr. Kulkarni is receiving some money is not to be disclosed to Mr. Khan:

Mr. Kulkarni: Haan vo to Khan sahab ke apne ghar ki baat hai. (Yes, Mr. Khan is a part of the family).

Mr. Anand: Yeh to tum usko keh nahi sakte ho ki tumhe paise mil rahe hain. (You cannot [should not?] tell him [Mr. Khan] that you are getting paid).

223. We ask: Should the defence lawyer discuss anything about any money at all with the star prosecution witness – even jokingly? Discussions on strategy and future course of action:

224. There is a discussion between Mr. Anand and Mr. Kulkarni about the strategy to be adopted in the case with regard to the receipt of summons by Mr. Kulkarni. This is as follows:

Mr. Kulkarni: Ab kya strategy banana hai batao. (Tell me what should be the strategy)?

Mr. Kulkarni: Maine message bheja tha Khan saab ke paas … aapko shayad mila hoga. (I had sent the message to Mr. Khan. You may have received it). Mr. Anand: Haan … mil gaya tha. (Yes, I received it). Then again, Mr. Kulkarni: Bus baat hi kuch nahi … Patiala House Court main jakar meine de diya … Khan sahab ne vo din mereko summon lene ke liye mana kar diya … ab theek hai vo … vo to obviously hona hi tha … ab mereko message pahuchana tha … vo pahuch gaya. (That day Mr. Khan asked me not to accept the summons. I had to convey a message and that has been conveyed).

Mr. Anand: Toh liya kya summon. (So did you take the summons?) Mr. Kulkarni: Main kahan se summon liya … bilkul nahi. (No, I did not take the summons).

Mr. Anand: To summon nahi liya abhi tak?

Mr. Kulkarni: Na.

Mr. Anand: So you have not taken the summon?

Mr. Kulkarni: Na … not at all… jab tak aap nahi bataoge, Khan sahab nahi bataenge tab main summon kaise lu….” (No, not at all. Until you or Mr. Khan advise me, how can I take the summons?).

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

Mr. Kulkarni: Ab yahi baat to yahi hai na … maine summon nahi liya hai … aap pata kar lo … maine summon nahi liya hai … jab vahan Bombay main jake … unhone phir vahin panga chaloo kar diya na. (I have not taken the summon. You may find out).

225. There is a discussion about the effect of the petition challenging the summons issued to Mr. Kulkarni under Section 311 of the Cr.P.C. Mr. Kulkarni: Phir mere khayaal se 311 udega nahi na, blood sample ka udega? (Then I think [the petition under Section 311 of the Cr. P.C.] will not be dismissed. What about the blood sample)?

Mr. Anand: Hain?

Mr. Kulkarni: Kyon udaye … jab tumhare paas paise bante hai to mein kyon udayoo? (Why should it be dismissed? When you can make money [on it] then why should I get it dismissed)?

226. There is talk about what statement Mr. Kulkarni should make: Mr. 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.

227. In the context of the BMW case itself:

Mr. Kulkarni: Isme bachana hai na usko Sanjeev ko? (Sanjeev [the accused in the BMW case] has to be saved in this?) Mr. Anand: Bachana hai. Kabhi kisika bura mat kiya karo … Panga lene ka kya faydaa. (He has to be saved. Don‟t harm anyone. There is no benefit in creating a problem)?

Mr. Kulkarni: Theek hai. (OK).

Mr. Kulkarni: Nahi… lekin kaise kya karna hai vo aapne aur Khan saheb ne decide karna hai… After all it was merely an accident. (But you and Mr. Khan have to decide what has to be done).

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

228. The conclusions that can be drawn from this conversation are more than obvious.

Complicity between Mr. Anand and Mr. Khan:

229. There are plenty of discussions between Mr. Anand and Mr. Kulkarni relating to Mr. Khan.

230. There is, first of all, some discussion about a message delivered to Mr. Khan, which

was received also by Mr. Anand.

Mr. Kulkarni: Ab kya strategy banana hai batao. (Tell me what should be the strategy)?

Mr. Kulkarni: Maine message bheja tha Khan saab ke paas … aapko shayad mila hoga. (I had sent the message to Mr. Khan. You may have received it). Mr. Anand: Haan … mil gaya tha. (Yes, I received it).

231. There is also a discussion of a meeting with Mr. Khan in the following words:

Mr. Anand: Any how tum Khan sahab se baat kar lo. (You talk to Mr. Khan).

Mr. Kulkarni: Unko bolna … aap unko phone kar ke bolna main aa jaunga … mere se baat kar lena kyunki mera aur aapka milna theek nahi hai. (You phone him up and tell him that I will be coming and that he should speak to me, because it is not proper for us to meet).

232. There is talk of Mr. Khan being a member of the family and yet, for some reason, he should not know about payments being received by Mr. Kulkarni. This is apparent from the following conversation: Mr. Kulkarni: Yeh log kya karte hai, pata hai aapko. (Do you know what these people do?) Mr. Anand: Arre bhaiyya … unko karne do jo … mujhe to jo bataya hua hai woh bata diya maine …. Acha Khan ki to ghar ki baat hai. (Let them do [what they want]. I have told [you] what I was told to me. [The next sentence is colloquial and therefore difficult to translate, but it conveys that Mr. Khan is a part of the family].

Mr. Kulkarni: Haan vo to Khan sahab ke apne ghar ki baat hai. (Yes, Mr. Khan is a part of the family).

Mr. Anand: Yeh to tum usko keh nahi sakte ho ki tumhe paise mil rahe hain. (You cannot [should not?] tell him [Mr. Khan] that you are getting paid).

233. Mr. Kulkarni took advice from Mr. Khan about receiving the Court summons and this is within the knowledge of Mr. Anand, as is clear from the following conversation:

Mr. Kulkarni: Bus baat hi kuch nahi … Patiala House Court main jakar meine de diya … Khan sahab ne vo din mereko summon lene ke liye mana kar diya … ab theek hai vo … vo to obviously hona hi tha … ab mereko message pahuchana tha … vo pahuch gaya. (That day Mr. Khan asked me not to accept the summons. I had to convey a message and that has been conveyed).

Mr. Anand: Toh liya kya summon. (So did you take the summons?) Mr. Kulkarni: Main kahan se summon liya … bilkul nahi. (No, I did not take the summons).

Mr. Anand: To summon nahi liya abhi tak?

Mr. Kulkarni: Na.

Mr. Anand: So you have not taken the summon?

Mr. Kulkarni: Na … not at all… jab tak aap nahi bataoge, Khan sahab nahi bataenge tab main summon kaise lu….” (No, not at all. Until you or Mr. Khan advise me, how can I take the summons?).

234. Mr. Kulkarni reported to Mr. Anand about the meeting that he had with Mr. Khan on 28th April, 2007 in the following words: Mr. Kulkarni: ….. yeh, doosri baat hai ki ekdum vo din bhi Khan sahab ke saath bahut log the. (That day, there were many people with Mr. Khan). Mr. Anand: Hmm Mr. Kulkarni: Yeh nahi tha ki akele Khan sahab the. (It is not that Mr. Khan was alone).

Mr. Anand: Hmm Mr. Kulkarni: Phir bhi maine bahar bulake unko bolne ki koshish ki. lekin phir bhi vo unke peeche itni bheed lagi rehti hai. (I called him outside to try and speak to him, but there are still so many people with him). Mr. Anand: But natural, yaar, professional hai. (It‟s but natural – he is a professional).

235. About the assistance Mr. Kulkarni can give to the defence is discussed with Mr. Anand in the following words – the decision being that of Mr. Khan and Mr. Anand:

Mr. Kulkarni: Isme bachana hai na usko Sanjeev ko? (Sanjeev [the accused in the BMW case] has to be saved in this?) Mr. Anand: Bachana hai. Kabhi kisika bura mat kiya karo … Panga lene ka kya faydaa. (He has to be saved. Don‟t harm anyone. There is no benefit in creating a problem)?

Mr. Kulkarni: Theek hai. (OK).

Mr. Kulkarni: Nahi… lekin kaise kya karna hai vo aapne aur Khan saheb ne decide karna hai… After all it was merely an accident. (But you and Mr. Khan have to decide what has to be done).

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

236. The entire material leaves a bitter taste in the mouth about the goings- on in the BMW case and there is no manner of doubt whatsoever that there was complicity between Mr. Khan and Mr. Anand and that Mr. Kulkarni was aware of it and was apparently trying to use it to his advantage. It is not necessary for us to comment on the conduct of Mr. Kulkarni, nor would it be proper, but there can be absolutely no doubt that Mr. Khan and Mr. Anand were, somehow or the other, more than “mixed up” in the BMW case.

237. It is also important to note that the sting operation is the only material presently available and it discloses the fact that the dramatis personae had been in touch earlier also – the sting operations were clearly not their first meetings. That being so, we will never know what transpired between them prior to the sting operations, but it was certainly something not very pleasant.

238. We are left without a shadow of doubt in our mind, on the basis of the material before us, in more features than one, that Mr. Anand was a key player in interfering or at least tending to interfere in the due course of a judicial proceeding and interfering or obstructing

or at least tending to interfere or obstruct the administration of justice in any other manner. We are also left with no doubt in our mind that the unshakeable truth is that Mr. Anand is guilty of criminal contempt of Court.

Punishment:

239. What then is the sentence or punishment to be meted out to the contemnors? As far as we are concerned, Mr. Anand and Mr. Khan are seasoned lawyers of this Court with decades of practice behind them. Mr. Anand has held prestigious elective positions in the legal fraternity, including the Bar Council of Delhi. He has also been a Member of Parliament in the Rajya Sabha. That he should indulge in sharp practices may have taken many in the legal fraternity by surprise. Mr. Khan is known for his legal acumen and forensic skills and that is perhaps the reason why he was appointed as a Special Public Prosecutor in the BMW case. That he would betray the trust that the prosecution reposed in him, in the manner that he did, was perhaps beyond the realm of contemplation of the prosecuting agency. As far as Mr. Anand and Mr. Khan are concerned, in our view, the higher the position they hold, the greater the responsibility on them and higher the expectations that others may have from such eminent persons.

240. In this background, we have considered and deliberated upon the punishment that should be imposed on Mr. Anand and Mr. Khan. We are not dealing with a young lawyer who, driven by ambition and desire to make his career and in his over zealousness, transgresses the limits by crossing the Laxman Rekha or unwittingly or unknowingly commits criminal contempt. We are dealing with Senior Advocates, who are expected to conduct themselves as gentlemen and role models for younger members of the Bar. Both Mr. Anand and Mr. Khan are fully aware of all the intricacies and nuances of the law of contempt. They have not tendered any apology, conditional or unconditional, expressed any contrition or repentance for their conduct.

241. In these circumstances, we feel the adequate punishment would be to prohibit them from appearing before this Court and the Courts subordinate to it for a specified period and also to recommend to the Full Court that they should be stripped of their designation as Senior Advocates. In this context, we may refer to a decision of a Division Bench of this Court authored by one of us (Manmohan Sarin, J.), titled Court on its own Motion v. Rajiv Dawar, 2007 I AD (DELHI) 567. In that case, the defence lawyer had assured the accused of his release on bail for a sum of Rs.30,00,000/- having spoken to “the people, who would be responsible for his release on bail”. After being given a full opportunity of representing his case, he was found guilty of criminal contempt and substantially interfering with the administration of justice. In that case, the contemnor had refunded Rs.4,00,000/- as directed by the Bar Council and a plea was made to bring a quietus to the matter. This submission was rejected by the Bench holding:

“…… To our mind, it is essential that aberration committed by those who are integral part of the administration of justice are sternly and firmly dealt with. Magnanimity and latitude should be available to those who are not knowledgeable or conversant with the system or commit the offence unwittingly or innocently. We may also observe that throughout these

prolonged proceedings, despite several opportunities being available, there has not even been expression of any slightest remorse or regret on the part of respondent-contemnor and he continues to maintain his high ground."

A fine of Rs.2,000/- was imposed on the contemnor. Further, in exercise of powers conferred by Article 215 of the Constitution of India, he was debarred from appearing in this Court and the Courts subordinate to it for a period of two months while permitting him to discharge his professional duties in terms of consultation etc.

242. We are of the view that the ratio of the above case would apply to the present situation, particularly as regards the punishment to be given to Mr. Anand and Mr. Khan. We accordingly direct:

(i) In exercise of powers conferred by Article 215 of the Constitution of India, Mr. R.K. Anand and Mr. I.U. Khan are prohibited from appearing in this Court or the Courts subordinate to it for a period of four months from today. However, they are free to discharge their professional duties in terms of consultation, advises, conferences, opinions etc.

(ii) Mr. R.K. Anand and Mr. I.U. Khan, on account of their conduct, have forfeited the right to enjoy the honour conferred on them by this Court of being designated Senior Advocates. We recommend to the Full Court to strip them of their designation as such.

(iii) The Registrar General will put up our recommendation to Hon"ble the Chief Justice within a month for placing the matter before the Full Court for consideration and a decision be taken thereon.

(iv) Both Mr. R.K. Anand and Mr. I.U. Khan will each pay a fine of Rs.2,000/- for committing criminal contempt of Court.

243. Finally, we may place on record the fact that we have been ably assisted throughout by Mr. Arvind Nigam, Advocate, who had the unpleasant task of rendering assistance in a matter where senior advocates of the Bar were involved. He spared no effort in rendering able assistance and we found the same to be of a high caliber and quality. Mr. Nigam truly performed the task of an Amicus Curiae in ably assisting the Court in formulating the legal propositions and giving an objective and impartial assessment. We recommend to Hon"ble the Chief Justice to suo motu consider designating Mr. Arvind Nigam as a Senior Advocate of this Court.

244. A free copy of this judgment and order be handed over today to the learned Amicus, learned counsel for NDTV, Mr. R.K. Anand, Mr. I.U. Khan, Mr. Sri Bhagwan Sharma under the signatures of the Courtmaster.

245. In the event that Mr. Anand or Mr. Khan may wish to take up the matter further, we direct NDTV to preserve the original chips until 31 st December, 2008. If there are no further orders from any Court in respect of the original chips, NDTV may thereafter reformat them or otherwise utilize them.

246. The suo motu criminal contempt petition is disposed of as above.

Madan B. Lokur, J.

Manmohan Sarin, J.

August 21, 2008