Supreme Court of India
Yusufalli Esmail Nagree vs The State Of Maharashtra on 19 April, 1967
Equivalent citations: 1968 AIR 147, 1967 SCR (3) 720
Author: R Bachawat
Bench: Bachawat, R.S.

PETITIONER:
YUSUFALLI ESMAIL NAGREE

Vs.

RESPONDENT:
THE STATE OF MAHARASHTRA

DATE OF JUDGMENT:
19/04/1967

BENCH:
BACHAWAT, R.S.
BENCH:
BACHAWAT, R.S.
HIDAYATULLAH, M.
VAIDYIALINGAM, C.A.

CITATION:
1968 AIR 147 1967 SCR (3) 720
CITATOR INFO :
R 1971 SC1162 (15,20,22)
R 1973 SC 157 (21,26)
RF 1975 SC1788 (20)
R 1986 SC 3 (28,144,146)

ACT:
Indian Evidence Act, 1872 (Act 1 of 1872) ss. 7 and 8-Tape recording-Value-Code of Criminal Procedure, 1898 (Act 5 of 1898) s. 162-Talk recorded on tape in seclusion with police decoy,-Police Officer in another room-If statement made to the police.
Constitution of India, Art. 20(3)-Police laid trap-Person makes incriminating statement not knowing the trap-If protected.

HEADNOTE:
On report of S, that the appellant had offered a bribe to 'him, which S did not accept, the Police laid a trap. S called the appellant at his residence and in the room where they alone were present, the appellant handed over the bribe to S. In the room a microphone of 'a tape recorder was concealed and their conversation recorded. The Police offi-cers and the radio mechanic kept concealed in another room.

S was the only eye-witness to the offer of the bribe and the tape was kept in the custody of the police inspector but was not sealed. The appellant was convicted under s. 165A I.P.C., which the High Court upheld. In appeal, this Court :-

HELD:The conviction must be upheld.

The contemporaneous dialogue between the appellant and S formed part of the' res gestae and is relevant and admissible under s. 8 of the Indian Evidence Act. The dialogue is proved by S. The tape record of the dialogue corroborates his testimony. The process of tape recording offers an accurate method of storing and later reproducing sounds. The imprint on the magnetic tape is the direct effect of the relevant sounds. Like a photograph of a relevant, incident, a contemporaneous tape record of a relevant conversation is a relevant fact and is admissible under s. 7 of the Indian Evidence Act. The time and place and accuracy of the recording must be proved by a competent witness and the voices must be properly identified. One of the features of magnetic tape recording is the ability to erase and re-use the recording medium. Because of this facility of erasure and re-use, the evidence, must be received with caution. The court must be satisfied beyond -reasonable doubt that the record has not been tampered with. [723 H-724 B, D]

Rup Chand v. Mahabir Parshad and Anr. A.I.R. 1956 Punj. 173; Mahindra Nath v. Biswanath Kundu 67 C.W.N. 191; approved.

S. Pratap Singh v. The State of Punjab, [1964] 4 S.C.R. 733 and

R. v. Maqsud Ali, [1965] 2 All E.R. 464; followed.

There was other evidence showing that the tape recording was not tampered with. The fact that the defence did not suggest any tampering lends assurance to the credibility of the other evidence. The courts below rightly held that the tape recorder faithfully recorded and reproduced the actual conversation. The use of the statements of both S and the appellant when the trap was laid, was not barred by s. 162 of the

721

Code of Criminal Procedure. 'The appellant was not making a statement to the sub-inspector of police or to any other police officer. He was not even aware that any police officer was listening to him. He was talking to S. No doubt S was a police decoy assisting the police in their investigation, but the statement of the appellant to S while making another offer of a bribe cannot be regarded as a statement by him to the police. Nor can the words uttered by S be regarded as a statement to the police. S was talking to the appellant. He knew that what he said was being recorded for subsequent use by the police officers. But he was not speaking to any police officer. There was a dialogue in which. S and the appellant took part. Each

spoke to the other, but neither made a statement to a police officer. [724 H; 725 D-F]
Ramkishan Mithanlal Sharma v. The State of Bombay, [1955] 1 S.C.R. 903, 922-23; referred to.
The appellant was not right in claiming protection under Art. 20(3) of the Constitution against the use of the statement made by him on the ,-,round that by the active deception of the police, he, was compelled to be a witness against himself The appellant was not compelled to be a witness against himself. He was free to talk or not to talk. His conversation with S was voluntary. There was no element of duress, coercion or. compulsion. His statements were not extracted from him in an oppressive manner or by force or against his wishes. The fact that the, tape recording was done without his knowledge is not of itself an objection to its admissibility in evidence. [726 B-D]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No213 of 1963.

Appeal by special leave from the judgment and order dated' July 2, 3, 1963 of the Bombay High Court in Criminal Appeal, No. 1243 of 1962.

B. M. Mistry, Jatendra Mahajan, and J. B. Dadachanji, for the appellant.

S. G. Patwardhan, R. N. Sachthey, S. P. Nayyar for R. H.- Dhebar, for the respondent.

The Judgment of the Court was delivered by Bachawat, J. In this appeal, the appellant challenges the legality of his conviction under S. 165-A of the Indian Penal Code. His wife Rukhanbai was the owner of the two house properties in 'F' ward of the Bombay Municipal Corporation.. The buildings were in a ruinous condition and she was served with notices under S. 354 of the Bombay Municipal Corporation Act requiring her to repair and secure them. The notices were not complied with and prosecutions under S. 471 of the Act were started against her in the Presidency magistrate's court. The summonses issued to her were served by affixation and on her failure to appear in court a bailable warrant for her arrest was issued. One Munir Ahmed Shaikh, a notice clerk attached to 'F' ward building department of the Bombay Muni--

cipal Corporation, was entrusted with the duty of serving the warrant. The charge against the appellant was that he offered to Shaikh on July 18, 1960, a sum of Rs. 25 and on August 2, 1960, a sum of Rs. 100 as a bribe for not executing the warrant. The appellant started making approaches to Shaikh from July 1, 1960. Shaikh reported the matter to the municipal commissioner who directed N. W. Naik to investigate into the matter. Naik was the administrative, officer of the corporation in charge of investigation of complaints regarding corruption, bribery and other malpractices. Over the telephone Shaikh arranged a meeting with the appellant in the evening of July 18, 1960 at the office of the India Metal Co., of which one A. M. Karachiwala was the proprietor. Naik under the assumed

name of C. J. Mehta went with Shaikh to the office of the India Metal ,Co. In the presence of Naik, the appellant offered a bribe of Rs. 25 to Shaikh on July 18, 1960 but Shaikh did not accept the bribe.

On August 2, 1960 the appellant had a telephone talk with Shaikh and fixed an appointment at 'Shaikh's residence in the evening. Shaikh lodged a complaint with the anti- corruption Bureau reporting the offer of a bribe of Rs. 25 on July 18 and the appointment at his residence in the evening_ of August 2. After the complaint was recorded, S. G. S. I. Mahajan obtained the necessary permission from the Chief Presidency magistrate to investigate into the offence. Mahajan decided to lay a trap. ,On a sofa in the outer room of Shaikh's residence he set up a microphone which was connected to a tape recorder in the inner room The microphone was concealed behind books. Mahajan, a radio mechanic and other members of his party remained in the inner room. Shaikh stayed in the outer room. The outer room and the person of Shaikh were searched and no cash was found. At the appointed hour, the appellant came to Shaikh's residence and was received by Shaikh in the Outer room. Shaikh and the appellant had an intimate conversation. The appellant offered :a bribe to Shaikh, produced ten currency notes of Rs. 10 each and gave them to Shaikh. When Shaikh gave the pre-arranged signal "Salim pan lao", Mahajan and other members of his party entered the outer room and found the currency notes in Shaikh's short pocket. The tape recorder was switched on as :Soon as the appellant arrived and was switched off after the signal was given. The conversation between Shaikh and the appellant was recorded in the tape recorder. The tape remained in the custody of Mahajan. From the shorthand notes made after the tape was replayed one Yakub prepared a transcription of the conversation. The accuracy of the transcription is admitted. At the trial of the case, the tape recorder was played in court.

The special judge for greater Bombay found the appellant guilty of the offence under S. 165-A of the Indian Penal Code and sentenced him to simple imprisonment for 18 months and a fine of Rs. 500, in default further imprisonment for six months. with the recommendation that he should be treated as class 1 prisoner. Karachiwalla, the proprietor of India Metal Co., at whose office the bribe of Rs. 25 was offered was charged at the trial with aiding and abetting the commission of the offence under S. 165-A, but was acquitted. The appellant preferred an appeal to the High Court. At the commencement of 'the appeal he waived formal notice for enhancement of the sentence. The High Court convicted the appellant under s. 165-A on both counts of the charge separately and sentenced him to rigorous imprisonment for one year on each count, the sentences to run concurrently, and a fine of Rs. 250 or in default rigorous imprisonment for three months on each count. The High Court decline& to recommend class 1 to the appellant. Subject to this modification of the sentence, the appeal to the High Court was dismissed. The appellant has filed this appeal by special leave.

With regard to the incident of July 18, 1960 the High Court was not inclined to accept the evidence of Shaikh without independent corroboration. The High Court found that Shaikh was substantially corroborated by Naik who had played the role of a detective. Mr. Mistry argued that Naik was an accomplice and his evidence should not be accepted without corroboration. It is not right to say that Naik was an accomplice. He did not provoke or participate in any crime. The defence counsel conceded in the High Court that Naik had no animus for giving false evidence. The High Court found Naik to be a reliable witness and worthy of credit and we see no ground for reviewing this

conclusion and the concurrent finding of the courts below that the charge of the offer of a bribe by the appellant to Shaikh on July 18, 1960 was proved.

Shaikh was the only eye-witness to the offer of the bribe on August 2, 1960. Mahajan the radio mechanic and other per- sons who kept themselves concealed in the inner room of Shaikh's residence did not witness the offer of the bribe, nor did they hear the conversation between Shaikh and the appellant. The High Court was not inclined to accept the evidence of Shaikh without corroboration. But the High Court found that his evidence was sufficiently corroborated by the tape recorder. The appellant handed over Rs 100 to Shaikh on August 2, 1960. The contemporaneous dialogue between them formed part of the res gestae and is relevant and admissible under S. 8 of the Indian Evidence Act. The dialogue is proved by Shaikh. The tape record of the dialogue corroborates his testimony. The process 72 4 of. tape, recording offers an accurate method of storing and later reproducing sounds. The imprint on the magnetic tape is the direct effect of the relevant sounds. Like a photograph of a relevant.incident, a contemporaneous tape record of a relevant conversation is a relevant fact and is admissible under s. 7 of the Indian Evidence Act. In Rup Chand v. Mahabir Parshad and another(1), a tape record of a former statement of a witness was admitted in evidence to shake the credit of the witness under s. 155(3) of the Indian Evidence Act. The case was followed in Manindra Nath v. Biswanath Kundu(2). In S. Pratap Singh v. The State of Punjab(1), the tape record of a conversation was admitted in evidence, to corroborate the evidence of witnesses who had stated that such a conversation had taken place. In R. v. Maqsud Ali(4) a tape record of a conversation was admitted in evidence, though the only witness who overheard it was not conversant with the language and could not make out what was said. If a statement is relevant, an accurate tape record of the statement is also relevant and admissible. The time and place and accuracy of the recording must be proved by a competent witness and the voices must be properly identified. One. of the features of magnetic tape recording is the ability to erase and re-use the recording medium. 'Because of this facility of erasure and re-use, the evidence must be received with caution. The court must be satisfied beyond reasonable doubt that the record has not been tampered with.

The radio mechanic did not hear the conversation but he proved that the tape recorded all the sounds produced in the room where only Shaikh and the appellant were present. The voices of the appellant and Shaikh were properly identified. The tape was not sealed and was kept in the custody of Mahajan. The absence ,of sealing naturally gives rise to the argument that the recording medium might have been tampered with before it was replayed. However, it was not suggested either in the cross examination of the prosecution witnesses or in the answers under s. 342, Criminal Procedure Code, that any tampering had taken place with the Recording. While admitting the accuracy of material parts of the conversation reproduced by the tape recorder, the appellant in his examination under s. 342 attempted to explain the conversation and the object of his visit and-said that-tie had gone to Shaikh's 'residence for obtaining repayment of a loan of Rs. 100 which he had advanced to Shaikh on July 19, 1960. The High Court rejected the appellant's explanations. Mr. Mistry was right in saying that the High Court could-not accept the inculpatory ,part and reject the exculpatory part of the appellant's answers 2,1.5 (1) A.I.R. 1956 Punj. 173.

(3) [1964] 4 S.C.R. 733.

(2) 67 C.W.N. 191.

(4) [1965] 2 All E.R. 464.

72 5 under S. 342. But there was other evidence showing that the tape recording 'was not tampered with. The fact that the defence did not suggest any tampering lends assurance to the credibility of the other evidence. The courts below rightly held that the tape recorder faithfully recorded and reproduced the actual conversation.

The appellant had walked into a pre-arranged trap. Mahajan and other police officers had hidden themselves in the inner room. Shaikh knew that the police officers were recording the conversation and was naturally on his guard while talking to the appellant. The appellant was not aware of the presence of the police officers. He was lulled into a sense of security and was off his guard. The offence of the attempt to bribe Shaikh on July 18, 1960 had already been committed and reported to the police and was under investigation on August 2, 1960 when Shaikh and the appellant met and talked. The evidence of the conversation was tendered at the trial of the offence committed on July 18, 1960 and of the connected offence committed on August 2, 1960. Mr. Mistry argued that in these circumstances, the use of the statements of both Shaikh and the appellant on August 2, 1960, was barred by S. 162 of the Code of Criminal Procedure. We are not impressed with this argument. The appellant was not making a statement to Mahajan or to any other police officer. He was not even aware that any police officer was listening to him. He was 'talking to Shaikh. No doubt Shaikh was a police decoy assisting the police in their investigation, but the statement of the appellant to Shaikh while making another offer of a bribe cannot be regarded as a statement by him to the police. Nor can the words uttered by Shaikh be regarded as a statement to the police. Shaikh was talking to the appellant. He knew that what he said was being recorded for subsequent use by the police officers. But he was not speaking to any police officer. There was a dialogue in which Shaikh and the appellant took part. Each spoke to the other but neither made a statement to a police officer. The case of Ramkishan Mithanlal Sharma v. The State of Bombay(1) shows that where identification parades are directed and supervised by police, officers and held in their presence and the panch witnesses take a minor part in the matter, the statements of the identifiers may be regarded as statements to the police officers. In the present case, the police officers set the stage for the drama in which the actors were Shaikh and the appellant. The officers hid themselves in the inner room and took no part in the drama. Neither of them can be regarded as having made a statement to a police officer as contemplated by S. 162.

Counsel claimed protection under Art. 20(3) of the Constitu- (1) [1955] S.C.R.903,922-23.

tion against the use of the statements made by the appellant on August 2, 1960. He argued that by the active deception of the police, the appellant was compelled to, be a witness against himself. Had the appellant known that the police had arranged a trap, he would not have talked as he did. Compulsion may take many forms. A person accused of an offence may be subject to physical or mental torture. He may be starved or beaten and a confession may be extorted from him. By deceitful means he may be induced to believe that his son is being tortured in an adjoining room and by such inducement he may be compelled to make an incriminating statement. But we cannot say

that in this case the appellant was compelled to be a witness against himself. He was free to talk or not to talk. His conversation with Shaikh was voluntary. There was no element of duress, coercion or compulsion. His statements were not extracted from him in an oppressive manner or by force or against his wishes. He cannot claim the protection of Art. 20(3). The fact that the tape recording was done without his knowledge is not of itself an objection to its admissibility in evidence. In saying so, the Court does not lend its approval to the police practice of tapping telephone wires and setting up hidden microphones for the purpose of tape recording.

The High Court rightly convicted the appellant of the offence under s. 165A of the Indian Penal, Code. Counsel pleaded for reduction of the sentence. The appellant is sixty years old. He is suffering from cardiac troubles. He was removed to jail from the hospital in an ambulance on July 29, 1963. He remained in jail until December 12, 1963 when he was released on bail. Having regard to these and other circumstances, we reduce the substantive sentence of imprisonment to the period of imprisonment already undergone by him. With this modification of the sentence, the appeal is dismissed.

Y.P. Appeal dismissed.