

# **PROPRIETY AND LEGALITY OF HIDDEN OR FORCED STING OPERATION AS EVIDENCE - A NECESSARY EVIL!**

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The expression 'Sting operation' seems to have emerged from the title of a popular movie called the "Sting" which was screened sometime in the year 1973. The movie was based on a somewhat complicated plot hatched by two persons to trick a third person in to committing a crime. Being essentially a deceptive operation, through designed to nab a criminal, a sting operation raised certain moral and ethical questions. The victim who is otherwise innocent, is lured into committing a crime on the assurance of absolute secrecy and confidentiality of circumstances raising the potential question as to how such a victim can be held responsible for the crime which he would not have committed but for the enticement. Another issues that arises from such operation is the fact that the means deployed to establish the commission of the crime itself involves a culpable act.<sup>1</sup>

Use of sting operation in evidence obtained unauthorizedly without consent or the knowledge of the stinged person has been debatable due to the fact that;

First, it affects the privacy under Art. 21 and impose unreasonable restriction on freedom of speech under Art. 19 (1) (a) of the Constitution of India.

Secondly, it may provide state enforcing agencies to invoke secret devices to catch the criminals by way of entrapment which itself is dubious product unacceptable in Law of evidence.

In **R.K. Anand Vs. Registrar, Delhi High Court**<sup>2</sup> Supreme Court appears to have taken more progressive trend of admissibility of sting operation as a mechanism to expose the corruption of some underneath dealings in judicial trials. Basic legitimacy of the sting operation and sting programe telecast by N.T. T.V. Channel was upheld because it revealed the collusion between prosecution

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1. Rajat Prasad V. C.B.I 2014 (5) Scale 574: 2014 AIR (SCW) 3116. 2014 (7) JT 206; 2014 (6) SCC 495.
  2. 2009 (8) SCC 106

lawyer I.U. Khan and defence lawyer R.K. Anand for diluting the case of Sanjeev Nanda. Sanjeeva Nanda a business typhoon was the person who crushed his car on six steeping roadsiders in state of drunkenness.

The prosecution and defence lawyer connived with the alone witness Kulkarni who, after giving initial statements before police under section 162 of code of Crimianial Procedure and before Magistrate under section 164 turned hostile subsequently during tiral.

The three persons I.U. Khan the prosecution lawyer, R.K. Anand the defence lawyer and Sunil Kulkarni the prosecution witness were seen together in a car talking in terms of changing his earlier version of statement by Kulkarni in lieu of 1.5 crore rupees. Subsequently, Sunil Kulkarni had refused to identify the Sanjeeva Nanda as driver of the car while in earlier statements before investigating officer and Magistrate he had clearly stated for the identification of Sanjeev Nanda driving the car and stepping him down from the seat of car.

In this case the court did not condemn the sting program telecast as a piece of media trial. Programe anchored by Poonal Agrawal of ND T.V. and Barkha Singh respectively in two installments showing that some people were trying to subvert the BMW trial and state of criminal administration of justice in this country. Nothing in the programe suggested that accused in BMW case was guilty or innocent .The programe did not relate to the accused but mainly about two lawyers representing two sides.

What was shown was proved to be substantially true and accurately programmed thus not tended to influence the proceedings in BMW trial. The larger public interest served by it was so important that the little risk should not be allowed to stand in its way.<sup>3</sup>

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3. Pronouncement for the test of credibility of video tapes in this case, for admission in evidence was influenced by the decision of the U.S. Court of Appeal of the State of North Carolina in case of State of **North Carolina V. Michael Odell Sibley** which itself referred the earlier decision of same court on **State V. Cannon 92 NC App. 246**. In both the cases the conditions land own for admissibility of videotape was:-

1. Testimony that the motion picture or videotape fairly and accurately illustrates the events filmed (illustrative purpose).
2. Proper testimony concerning the checking and operation of the video camera and the chain of evidence concerning the videotape.
3. Testimony that the photographs introduced at trial were the same as those (the witness) had inspected immediately after processing (substantive purpose).

But judicial opinion as regards sting operation by enforcing agencies is still highly restrictive as courts are fearful of opening of Pandana's Box and hurting the right to privacy.

Evidence of sting operation in U.S.A. is recognized but not in India. Even in U.S.A. where sting operations are used by law enforcement agencies to apprehend suspected offenders involved in different offences like drug trafficking, political and judicial corruption, prostitution, property theft, traffic violations etc., the criminal jurisprudence differentiates between the trap for the unwary innocent and the trap for run away and those criminal who are predisposed to crime and there is no other alternative to catch them.<sup>4</sup>

In USA, thus, sting into that situation is approved where government agents merely afford opportunities or facilities for the commission of the offence but censure "the situation where the crime is the product of the creative activity" of law enforcement officials. In the latter type of cases only the defence of the entrapment beyond reasonable doubt is recognised as a valid defence in the USA. If properly founded such a defence could defeat the prosecution.<sup>5</sup>

In **Keith Jacobson V United States**<sup>6</sup> decided on 6th April 1992 by U.S. Supreme Court deprecating the entrapped sting, "that in their zeal to enforce law, law protectors must not originate a criminate design, implant in an innocent person's mind a disposition to commit a criminal act, and then induce the commission of the crime so that the government may prosecute, where government or their agents induce an individual to break the law and defence of entrapment is at issue, the establishing and answering by reasonable doubt that the defendant was predisposed to commit the criminal act prior to first being approached by Government agents". The Court further declared that law "enforcement officials go too far when they implant in the mind of an innocent person a disposition to commit an offence and induce its commission in order that they may prosecute". The Court held in very unambiguous terms that the Government should not play on the weakness of innocent party and beguile the party into committing a crime which the

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4. Testimony that the videotape had not been edited and that the picture fairly and accurately recorded the actual appearance of the area photographed.

4. In *Sherman Vs. United State* (356 US 359 (1958))

5. *Saroell Vs. United States* (287 US 435 (1932))

6. 503 US 540

party otherwise would not have attempted. While artifice and stratagem may be employed to catch those who are engaged in criminal enterprises, there would be a need to prove that the person in question had a predisposition to commit the said criminal act prior to being approached by the enforcement agencies. The Government must not punish an individual for an alleged offence which is the produce because of the creative activity of its own officials.

In **R.V. Mack**<sup>7</sup> it has been observed by Canadian Supreme court that illegality of entrapment occurs when

- (a) the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a bonafide inquiry and,
- (b) although having such a reasonable suspicions or acting in the course of a bonafide inquiry, they go beyond providing an opportunity and in doing the commission of an offence.

The Supreme Court of Canada illustrated following factors to test the acceptability of evidence of sting:-

- (1) The type of crime being under investigation and the availability of other techniques for the police detection of its commission;
- (2) Whether an average person with both strengths and weaknesses in the position of the accused would be induced into the commission of a crime;
- (3) The persistent and number of attempts made by the police before the accused agreed to committing the offence.
- (4) The type of inducement used by police including deceit, artifice, fraud, trickery or reward;
- (5) The timing of the police conduct in particular whether the police have instigated the offence or become involved in ongoing criminal activity.
- (6) Whether the police conduct involves an exploitation of human characteristics such as emotions or compassion, sympathy and friendship;

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7. (1988) 2 ) SCR 903

- (7) Whether the police appear to have exploited a particular vulnerability of a person such as a mental handicap or a substance addiction;
- (8) The proportionality between the police involvement as corrupted to the accused, including an assessment of the degree has caused or risked by the police as compared to the accused and the commission of any illegal acts by the police themselves;
- (9) The existence of any threats implied or express made to the accused by the police or their agents;
- (10) Whether the police conduct is directed at undermining other constitutional values.

In **R.V. Loosely**<sup>8</sup> British House of Lord has shown a tougher judicial opinion. It has declared that:-

- 1) “A prosecution founded on entrapment would be an abuse of Courts’ process. The court will not permit the prosecutorial arm of the State to behave this way”.
- 2) Entrapment is not a matter going only to the blameworthiness or culpability of the defendant and hence, to sentence as distinct from conviction. Entrapment goes to the propriety of their being a prosecution at all for the relevant offence, having regard to the State’s enrolment in the circumstances in which it was committed.

Earlier in **R V. Sang**<sup>9</sup>, where House of Lords observed, “The conduct of the police where it has involved the use of an agent provocateur may well be a matter to be taken into consideration in mitigation of sentence; but under the English system of criminal justice, it does not give rise to any discretion on the part of the judge himself to acquit the accused or to direct the jury to do so, notwithstanding that he is guilty of the offence”.

Indian law regarding evidentiary value of sting operation is still in a flux. Sting operation conducted by the law enforcement agencies themselves have not been recognised as absolute principles of crime detection and proof of criminal acts. Such operations by enforcement agencies are yet to be experimented and tested in

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8. (2001) UKHL 53)

9. (1980) AC 402

India and legal acceptance of those by our legal system is yet to be answered **Rajat Prasad V. C.B.I.**<sup>10</sup> Nonetheless, private sting or media sting is being recognized by courts but criminal liability of individuals operating sting is still unclear. However, in case of **Court on its own motion V. State (Delhi)**.<sup>11</sup> The Delhi High Court observed: While trial by media ought to be deprecated, in the event any person feels victimized or unfairly treated by media, he may always free to invoke the proceedings for deformation or injunction. But the Court doubted an strict liability. Moreover, Court's observation about remedy sought to be the aggrieved was confined to the media trial and not in general sting hurting the person or privacy rights of the victim of a forced sting or sting made out without knowledge of the stinged.

As far as sting operation by T.V. Channels is concerned, it has been approved and even appreciated by Supreme Court as an independent crime exposure mechanism in the case of **R.K. Anand Vs. Registrar Delhi High Court**<sup>12</sup> and **Raja Ram Pal Vs. Hon'ble Speaker Lok Sabha**.<sup>13</sup>

In **Raja Ram Pal's** case A private T.V. Channel Aaj Tak had telecast a programme on 12th December, 2005 depicting 10MPS of Lok Sabha and one of Rajya Sabha accepting money, directly or through middlemen, as consideration for raising certain questions in the House or for otherwise speaking certain causes for those offering the lucre. This led to extensive publicity in media. Presiding officers of each Houses of Parliament instituted inquires through separate committees.

On the basis of the report of the Inquiry committees all the 11 Members from Lok Sabha and Rajya Sabha were expelled from their respective Houses and the Supreme Court affirmed the expulsion on the basis of credibility of sting operations and the genuine cause for exposure of corruption.

The expulsion of members after inquiry and approval by Supreme Court on the basis of evidence of sting operation made by the Aaj Tak T.V. Channel goes to give a clear hint of acceptability of evidence of sting operation conducted by T.V. channels for public

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10. 2014 (5) Scale 574; 2014 AIR (SCW) 3116; 2014 (7) JT 206; 2014 (6) SCC 495.

11. 2009 (5) R.C.R. (Criminal) 652; 2009 Cri LJ 677; 2008 (05) DRJ 557.

12. 2009 (8) SCC 106

13. (2007 (2) JT 1; 2007 (3) SCC 184; 2007 (1) Scale 241)

purpose or the exposure of corruption on the part of govt. officials, ministers and legislatures.

But, since sting operation on one hand breaches the inviolability of privacy and on other hand susceptible to spoil the image of an honest and innocent person, if done by way of fabrication it can't be licensed in flat manner. Judgment of Delhi High Court in case of **Court on its own motion Vs. State Delhi**<sup>14</sup> is a test illustration on the point. A news item was reported in daily News paper of Times of India dated 7 September, 2007 in respect of a sting operation relating to one Mrs. Uma Khurana. Prior to the said date, Live India, a Television News Channel aired a programme on 30th August, 2007 regarding the above said sting operation conducted by it showing Mrs. Uma Khurana a teacher with a Delhi Government school, purportedly forcing a girl student in prostitution. Subsequent to the said telecast aghast at the said act of the teacher a crowd gathered at the school gate and started raising slogans demanding handing over of Mr. Khurana to them. In the Communication and mayhem that followed some persons physically attacked Mrs. Uma Khurana and even tore her clothes. Shocked by the aforesaid incident and subsequent to public outcry the Directorate of Educational Govt. of Delhi first suspended Mrs. Khurana and later dismissed her from service, in exercise of special powers vested in the govt. Police also sprung in to action and started investigation. Later the aforementioned News was published in Hindustan Times which indicated that there was something more to the whole sting operation than what met to the eyes. In the aforesaid news it was stated that the girl who had been shown as a student who was allegedly being forced into prostitution by Mr. Uma Khurana was neither a school girl nor a prostitute but a budding journalist eager to make a name in the media world. Taking in to account gravity of the situation Delhi High Court took suo moto cognizance of the matter.

After investigation in police report evidence was not found against Mrs. Uma Khurana and whole story was false. The string operation used against an innocent lady teacher damaged her reputation in the eyes of public and even her modesty was outraged in the sense that she was manhandled and her clothes were torn by some people.

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14. 2008 (2) A.D. Delhi 1; 2008 (1) CCR 132; 2008 (146) DLT 429

Delhi High Court expressing grave concern about such incident and to ensure that sting operation might not be misused many guidelines to avoid its misuse.

Influenced by the judicial view point of U.S. Supreme Court delivered in Keith Delhi High Court declared:-

Firstly, There is no doubt and there is no second opinion that “Truth” is required to be shown to the public in public interest and the same can be shown whether in the nature of sting operation or otherwise but what we feel is that entrapment of any person should not be resorted to and should not be permitted.

Secondly, Giving inducement to a person to commit an offence, which is otherwise not likely and inclined to commit, so as to make the part of the sting operation is deplorable and must be deprecated by all concerned including the media. Sting operations showing acts and facts as they are truly and actually happening may be necessary in public interest and as a tool for justice, but a hidden camera cannot be allowed to depict something which is not true, correct and is not happening but has happened because of inducement by entrapping a person.

Thirdly, the duty of the press as the fourth pillar of democracy is immense. It has great power and with it comes increasing amount of responsibility. No doubt the media is well within its rightful domain when it seeks to use tools of investigative journalism to bring us face to face with ugly underbelly of the Society. However, it is not permissible for the media to entice and try to actively induce an individual into committing an offence which otherwise he is not known and likely to commit. In such cases there is no predisposition. If one were to look into our mythology even a sage like Vishwamitra succumbed to the enchantment of “Maneka”.

Fourthly, It would be stating the obvious that the media is not to test the individuals by putting them though what one might call the “inducement test” and portray it as a scoop that has uncovered a hidden or concealed truth. In such cases the individual may as well claim that the person offering inducement is equally guilty and party to the crime, that he/



she is being accused of this would infringe upon individuals to privacy.

The Court cautioning the media to make sting in self restrained manner made following observations:-

- 1) Truth is required to be shown to the public in general interest and the same can be shown whether in the nature of sting operation or otherwise but entrapment of any person should not be resorted to and should not be permitted.
- 2) No doubt the media is well within its rightful domain when it seeks to use tools of investigative journalism to bring us face to face with ugly underbelly of the society. However, it is not permissible for the media to entice and try to actively induce an individual into committing an offence which otherwise is not known and likely to commit.
- 3) The press council of India should also examine and can take initiative in this regard.
- 4) There must be concurrent record in writing of the various stages of sting operation. While the transcript of the recordings may be edited, the films and tapes themselves should not be edited. Both edited and unedited tapes to be produced before a three members committee to be constituted by the Ministry of Information of Broadcasting. The committee will be headed by a retired High Court Judge to be appointed by the Government in consultation with the High Court and two members, one of which should be a person not below the rank secretary and another member to be not below the level of Additional Commissioner of the police. Before sting operation the permission must necessarily to be obtained by the said committee. The permission to telecast the sting operation will be granted by the committee after satisfying itself that it is in public interest to telecast the same. The safeguard is necessary since those who sought sting operation themselves commit the offences of impress ovation, criminal trespass under false pretence and making a person commits an offence.
- 5) The Chief Editor of the channel shall be made responsible for self regulation and ensure that the programmes are consistent with the Rules under?.....and complying with all

legal and administrative requirements under various statutes in respect of content broadcast on channel.

- 6) Broadcasters/Media shall observe general community standards of decency and civility in news content, taking particular care to protect the interest and sensitivities of children and general family viewing.
- 7) News should be reported with due accuracy which requires the verification (to the fullest extent possible) and presentation of all facts that are necessary to understand a particular event or issue.
- 8) Infringement of privacy is a sensitive issue and, therefore, greater degree of responsibility should be exercised by the channels while telecasting any such programmes, as may be breaching privacy of individuals.

Channels must not use materials relating to person's personal or private affairs or which invade the individuals' privacy unless there is identifiable larger public interest reasons for the material to be broadcast or published.

But unless specific civil or criminal liability is fixed on sting broadcast by legislation, these guidelines are more in the nature of judicial teachings and preaching and without any strictly enforceable sanction.

In **Rajat Prasad Vs. CBI**<sup>15</sup> case Supreme Court declared that:

- 1) The cause of journalism and its role and responsibility in spreading information and awareness stands it on better footing than entrapment stings conducted by enforcement agencies in India. It is only in cases where the question reasonably arises whether the sting operation had a stake in the favours that are allegedly sought in return for the bribe that the issue will require determination in the course of a full judged trial. then only the sting operation or channel may have to face the trial for conspiracy under section 120B of IPC.
- 2) Not only a journalist even a citizen performs sting operation who has no connection with the favour that is allegedly

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15. Rajat Prasad V. C.B.I 2014 (5) Scale 574; 2014 AIR (SCW) 3116. 2014 (7) JT 206; 2014 (6) SCC 495.

sought in exchange for the bribe, cannot be imputed with the necessary intent to commit the offence of abetment under section 12 of Prevention of corruption Act, or 2014 section 120 B IPC.<sup>16</sup>

Rajat Kumar's case, thus, permits the sting made by a disinterested journalist or person prompted by desire to expose corruption in public life without motive to seek any favour in exchange.

## CONCLUSION

Thus, a few conclusions about the status of sting operation may be observed:-

- i Sting operation is covered by Art.19 (1) (a) if the private sting is made to exhibit the exposure of state of affairs which it believes to be true.
- ii Auto-visuals of sting operation may be permitted to be exhibited to the extent it does not amount to media trial and does not affect even unconsciously or sub-consciously merit of the case during pendency of trial. Moreover, Court must be pro-active and vigilant in protecting rights and reputation of individuals.

When a case 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 other party. The media may also make a fair comment in pending case without violating the sub-judice rule. In the event of any person who is victimized by media, he may imitate proceedings for injunction of the report and civil or criminal proceedings for defamation in an appropriate case.

- iii 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.

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16. In this case, a minister was made to accept bribe money him inducing (motive) him to do certain favour. Intention was to discredit the minister on eve of election to gain the political mileage. Offence under section 12 of Prevention of Corruption Act, 1988 and section 120B was made out against the conspirators i.e. sting operators.

- iv A State actor or a law enforcement agency may resort to hidden camera or sting operations only the criminality of a person who is already suspected of a crime.
- v The law enforcement agency must maintain the original version of the actual sting operation tampering with the original video or audio clips of sting operation may lead to a presumption of the spuriousness of the entire operation.
- vi 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.
- vii 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.
- viii 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.
- ix A crime committed by Investigative agencies or Tele board casters does not stand obliterated or extinguished merely because its commission is claimed to be in public interest. Stingers whether private or public authorities are judicially accountable for their conduct. Only public interest of urgent and emergency nature may overweigh the sting operation done clandestinely with hidden camera.