
(2018) 10 GAU CK 0011
In the Gauhati High Court
Case No : Criminal Appeal No.315 Of 2014

**Sh B. R. Attri And Anr @APPELLANT@Hash Central Bureau Of
Investigation Cbi**

Date of Decision : 04-10-2018

Acts Referred:

Prevention of Corruption Act, 1988 — Section 7, 13(2), 13(1)(d), 13(1)(d)(i)(ii), 20
Indian Penal Code, 1860 — Section 120B, 415, 420, 468, 471, 477A
Code of Criminal Procedure, 1973 — Section 313

Citation : (2018) 10 GAU CK 0011

Hon'ble Judges : Rumi Kumari Phukan, J

Bench : Single Bench

Advocate : D. S. Choudhury, A. K Bhattacharya, B. K. Mahajan

Final Decision : Allowed

Judgement

1. As all the appeals arose from the same judgment in special case 164/2004 they are taken up together and being disposed with this common

judgment. Heard Mr. D. S. Choudhury, learned counsel for the appellants in Crl. Appeal 315/2014; Mr. A. K. Bhattacharya, learned counsel for the

appellant in Crl. Appeal 334/2014 and Mr. B. K. Mahajan, learned counsel for the Appellant in Crl. Appeal 336/2014. Also heard Mr. S. C. Keyal,

learned standing counsel, CBI.

2. During 1995-96 the Department of Telecommunications, here-in-after called DoT, Government of India, decided to provide Optical Fibre Cable

(OFC) Communication link on Imphalâ?"Moreh route in the State of Manipur. A survey of the route was conducted; a Project Estimate was prepared

& sanctioned. The total route length of the section is 108 kms which was divided into 27 sub-sections of 4 kms length each. The tenders were invited

and the work was executed through contractors separately for each sub-section. The terms, conditions & specifications of work are mentioned in the

tender document. The agreement was executed with the successful contractors. The over-all in-charge of the work was Divisional Engineer (DE) and

the Government is represented by him. The Sub-Divisional Engineer represents the Government at the site of work. The JTO supervised the day to

day work at site. The measurements were recorded by JTO in MB and bills were prepared by him. The cent percent work was checked by the Site

Engineer (SDE). The bills were pre-checked by JAO, passed by the DE; counter signed by the Director and paid by the concerned Accounts Officer.

3. The depth and protection of the cable was verified as per route index diagram three times immediate after execution of the work. The cable was

handed over to maintenance unit, coming to an end the responsibility of the OFC officials. After completion of trenching and laying of HDPE pipes in

the year 1998, the route was given for acceptance testing in the year 1999. The route was found to be satisfactory.

4. As per the survey report, as the entire sub-section fell in the hilly and rocky area it is not possible to lay the cable at the standard department and

hence the RCC protection had to be given over the cable. Hence acceptance testing of the OFC route had to be done by the T&D Circle. After

successful completion of acceptance testing, the route was handed over to the Eastern Telecom Region for maintenance purposes.

5. An FIR was lodged by the Inspector of Police of the CBI, Silchar on 26.10.2002 to the effect that they got a reliable information that the accused

public servants and different contractors while laying optic fibre cable which was awarded by the Divisional Engineer (OFC) to different contractors

during 1995-96 for execution in different subsections of the Imphal-Moreh route by paying excess amount in the tune of Rs. 4,03,142/- to those

contractors against approved rates and the tendered quantities of the work. The excess payments were made on account of deviations and in quantity

of works and increase in the quantity of the works including unauthorized payment against some items which were not tendered.

6. It is alleged that appellants while working in their respective capacities by abusing their official position and in connivance with the other officials

and the contractor/the appellant in criminal appeal 336/2014 (the appellant Sh. Prafulla Borah was awarded the contract to execute the OFC laying in

respect of SS 22, 24, 26 & 27 of Jorhat-Dimapur Kohima route) thereby caused undue loss to the exchequer by committing the following omissions

and commissions.

- (1) Approval of tenders at exorbitant rates much higher than the estimated rates.
 - (2) Deviations in the quantity of hard and rocky soil by increasing the same much more than the quantities indicated in the tenders, certifying the execution of increased quantities and causing payments accordingly by passing the questioned bills, apparently because the rates for these items were much higher than the estimated rates.
 - (3) Deviations in the execution of quantities of works for soft soil by decreasing the same apparently to favour the contractors because the rates of these items were lower than the estimated rates.
 - (4) Deviations in the concreting works by showing executions of increased quantities of concreting works against the tendered quantities.
 - (5) Falsely certifying the unwarranted concreting works and RCC/GI pipes laying and causing payments by passing the bills of the contractors for these items.
 - (6) Falsely certifying higher depth than the actual depths and excess payments against these items.
 - (7) Payments in excess of expenditure sanctioned in violation of rules.
7. Further it is alleged that the accused public servants and the contractors conspired among themselves and in pursuance of the said conspiracy, excess quantity of some items in the works was shown to have been executed unauthorizedly without ex-post-facto approval from the competent authority and payments were made at the tendered approved rate instead of departmental rates causing excess payment to the contractors. At the time of random technical checking conducted by the CBI during preliminary inquiry reveals that the appellants with collusion with the contractor have cheated the department by way of excess payment to the contractor towards execution of excess quantity of work without approval from the competent authority and that too at the approved rate instead of departmental rate and by making false entries in the MBs showing execution of various works which are not actually executed as recorded in the MB.

8. During investigation, the IO visited the spot and conducted a joint inspection, recorded statement of the witnesses, seized number of documents and after obtaining necessary sanction against the public servants submitted charge-

sheet against all the appellants u/s 120B/420/477A of the IPC read with Sections 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988.

9. The learned Trial Court accordingly took cognizance of the offence against appellants and framed charges u/s 120B/420/468/477A of the IPC read with Sections 13(2) read with Section 13(1) (d) of the Prevention of Corruption Act, 1988 and explained to the accused appellants to which they pleaded not guilty.

10. Prosecution examined as many as 23 witnesses and defence examined none. The plea of defence is of total denial. Statement of accused persons u/s 313 Cr.P.c. was recorded wherein they have denied the allegations.

11. The learned Trial Court on conclusion of trial convicted and sentenced appellants to r/i for 2 years with fine of Rs. 10,000/- each u/s 120B/420/468/477A of the IPC read with Sections 13(2) read with Section 13(1) (d) of the Prevention of Corruption Act, 1988 and in default to s/i for 6 months to be run concurrently.

12. Aggrieved by the aforesaid order and judgment of the conviction present appeals are preferred.

13. Appellants in criminal appeal 334/2014 was working as SDE(OFC) at Dimapur, the appellant in criminal appeal 336/2014 was a contractor, and both the appellants in criminal appeal 315/2014 were working as DE(OFC) at Guwahati.

14. I have heard the argument of learned counsels for both the parties at length and there is deliberation on both the sides on the evidence on record and the appreciation thereof. It has been vehemently contended by the learned counsel for the appellants that without proper appreciation of entire evidence on record, the learned Trial Court has come to a conclusion on the basis of surmises and conjecture, which is not sustainable in law. Per contra, according to the learned standing counsel, CBI, in view of apparent findings of excess payment by the appellants to the contractors for the work in question, as per the joint inspection report, against the estimated amount in the tender document, the appellants are rightly held guilty by the Trial Court which calls for no interference.

Contention raised by appellants (officials):

15. At the very outset, it is submitted that the basic allegations against the appellant is that the depth and protection of the cable and the type of soil was found different at the time of joint inspection, as that has been shown in the bills and the MBs. There are also allegations with respect to the execution of excess quantities without prior approval whereas witnesses have stated that excess quantities against the bills have been duly approved by the competent authority in writing and it is in the sub-section file but same is not produced.

It is pointed out that the Director OFC has no field duties; but, in accordance with the provisions contained in Clause 132 of the tender document, he can inspect the work during its progress, which is reproduced below:-

“All work under or in course of execution or executed in pursuance of the contract shall at all times be open to the inspection and supervision of the

Engineer-in-Charge and his authorized subordinates, and the contractor shall at all times during the usual working hours, and at all other times at which

reasonable notice of the intention of the Engineer-in-charge or his subordinate, to visit the works, shall have been given to the contractor, either himself

be present to receive orders and instructions, or have a responsible agent duly authorized in writing present for that purpose. Orders given to the

contractor's agent shall be considered to have the same force as if they have been given to the contractor himself. The work during its progress

can also be inspected by Director, Telecommunications and Chief General Manager Telecom.”

16. Another aspect which the Trial Court has observed that there has been a loss to the department because of the conspiracy of the appellants. It is

submitted that there is no material/evidence on record to show that there has been any loss to the department. When there is no loss to the department

then the question of any corresponding gain either to the Contractor or anybody else does not arise. In absence of any loss to the department, there

cannot be any offence made out against the appellants. The Hon'ble Supreme Court in the case of Ghulam Din Buch and Others Versus State

of J & K (1996) 9 SCC 239, in para 47, has held as under:-

“47. It thus appears that though these three appellants had sought to assist the carriers to cause wrongful gain to them by allowing transportation of

poles below 20 feet, ultimately no financial loss on this count was caused to the

State because the carriers had not been paid for poles carried by them which were below 20 feet. We are, therefore, of the view that these appellants also deserve to be acquitted, as were some of the Field Officers, who had accepted the undersized poles at the receiving point had been acquitted by the High Court.â??â?!

In the charge-sheet, it is mentioned that â??On the basis of findings of the random test checking, the approximate loss caused to the BSNL due to the defective works of the contractor have been got calculated through Sri S. Gupta, Engineering Officer, working in the office of DGM, BSNL, Telecom

Task Force, Silchar. Sri S. Gupta has been examined as PW- 13 in this case who has categorically said â??I did not calculate any loss in this case.â?

On this ground alone, the judgment is liable to be set aside.

17. Sh. S.K. Sikidar (PW-1) was specially deputed for repair of the damaged cables (OFC), which were damaged due to heavy rain, landslides, sinking of road as well as widening of road. In his cross-examination, he has stated as follows:-

â??I have been posted specifically for commissioning of OFC. The Route was hilly terrain and in rainy season there was lot of damage caused

because of landslide, moreover, there are sinking zone in the route and PWD also had started widening of road. Because of all these problems, the

said route could not be commissioned as targeted. As the old OFC laid on Dimapur-Kohima route had already been damaged and those cables were

replaced by new cable. OFC which were laid initially would not be same as those laid later. After I had joined 7 to 8 km OFC route have been

replaced by new cable where it was not possible to restore the damaged cable underground cable and cable laying trenches, for immediate measure

we have directed cable to be carried forward through over head alignment. AT was carried out by the staff of T&D circle which was controlled by

CGM at Jabalpur. AT verify the depth and protection provide on the route. AT team will accept the cable only when the standard of OFC was met.

During AT, we had submitted afresh route index diagram incorporating the changes had occurred after restoration work. â??

It is submitted that from the testimony of Sh. S. K. Sikidar (PW-1) that the work executed by the OFC staff/the appellants were verified as per Route

Index Diagram in respect of the depth of the cable and the protection applied to

it. Each time, it was found correct as recorded on Route Index

Diagram and the Measurement Book. The IO had admittedly seized all those documents; but, he deliberately did not place those documents on record,

obviously because no case is made out against the appellants in view of the said reports. The responsibility of the appellants, after handing over the

cable to the Maintenance Staff, came to an end and thereafter, it becomes the responsibility of the Maintenance organization. It is pointed out that the

CBI did not associate any person from the Maintenance organization during investigation.

18. The Ld. Trial Court relied upon the joint inspection report of CBI. It is submitted that there were 4 persons present during the inspection conducted

by CBI namely (1) Sh. Ranjeet Kumar Nath (PW-20), SDE, BSNL (2) Sh. Ranjeet Narayan Chakraborty (PW-17), SDE, BSNL (3) Sh. Kajal

Chanda, SD, OFC (4) Sh. T. Lotha Shitri (PW-21), Geologist, in addition to the IO (PW23). Out of the above persons, 3 witnesses namely Sh. Ranjeet

Kumar Nath (PW-20), Sh. Ranjeet Narayan Chakraborty (PW-17) and Sh. T. Lotha Shitri (PW-21) were examined in the Court. They have

contradicted each other w.r.t. preparation of joint Inspection Report at the spot and none of them could compare the Joint Inspection memo

observation with cable Route Index Diagram, which discredit the credibility of the joint inspection memo recorded by CBI. Sh. Ranjeet Kumar Nath

(PW- 20) deposed that Joint Inspection report was not prepared at site. Sh. R.N Chakarborty (PW-17) and Sh. Ranjeet Kumar Nath (PW-20) both

are material witnesses in this case who have stated that they have not correlated the Joint Inspection memo observations with their respective position

on Cable Route Index diagrams. Sh. R.N Chakarborty (PW-17) and Sh. Ranjeet Kumar Nath (PW-20) also stated that Culvert and Bridge are not

distinguishable and also many KMP are missing or not properly marked so joint inspection pits cannot be correlated with cable route index diagram.

Sh. Ranjeet Kumar Nath (PW-20) also stated that the CBI officials compared the Joint Inspection memo observations with Cable Route Index

Diagram but Sh. Joseph Krelo (IO) (PW-23) during cross-examination could not locate any of the pit on Cable Route Index diagram and stated that

departmental officials who were part of joint inspection team will be able to answer, for which they have already denied. So the joint inspection

conducted by CBI loses its evidentiary value.

Thus, the Trial Court evidently committed an error in relying upon the joint inspection report of CBI without any evidence on record.

19. It is contended that the Trial Court has committed error in holding that DE will verify the site and check 100% of work and pass the bill

accordingly, as the said finding is contrary to the evidence on record. PW-1 (S. K. Sikidhar), in the cross-examination has stated that "The SDE is

accountable for the 100% of the work and DE is responsible for 10% of the work. Similarly, PW-11 (S.C. Paul), in his cross-examination has stated

that "As per clause 192 of NIT there is no mention in clause 192 that DE is required to test check 10% of the work." PW-22 (T. Thangzalian),

also in his cross-examination has stated that "I have referred the tender document and cannot find that DE is required to test-check the trenches

every 100 meters or 10% of the work." PW-23 (Joseph Krelo-IO), in his cross-examination has stated that "Though I had referred the tender

document but I cannot tell the percentage of test check to be conducted by DE."

Thus, as per Clause 192 of tender document it's not mandatory to carry out test check, it's the discretion of DE to carry out test check where

ever it's considered necessary and as such, DE cannot be held responsible.

Excess payment

20. As regard the approval of excess amount from the competent authority, PW-18 (Sh. Montu Ranjan Dutta), in his examination-in-chief has stated

that

"In case there is excess quantity of work with regard to laying of OFC Cable and trenching, the work is compared with the tendered quantity and

then the bills along with MB and route index diagram are dealt with by concerned dealing clerk who will prepare the bills accordingly and submit the

same before the DE. On instruction of DE those bills are pre-checked by me and then again those bills are put before DE for approval of excess

quantity of work. The same approval order is counter signed by Director. If the Director is not empowered because of pecuniary jurisdiction then

same is put up before CGM Task Force North East for approval. After approval the bills are put up before accounts officer for payment." He

further stated that "I send those bills to DE if there is excess quantity of work.

Sometime DE directly processes the bills with regard to the excess

quantity of work and verbally obtains approval from CGM Task Force for excess quantity. Thereafter CGM makes notes post facto. They used to

take the approval of the competent authority in case of excess quantity of work.â??

As per Exhibit D-81, files of subsections 22,24,26 and 27 were seized vide seizure memo dated 22/12/2003 by Sh. Joseph Krelo (IO) from Samar

Kumar Panda DE(TP)-II/TF Dimapur. All necessary approvals for excess quantities are taken on the Note-Sheets of Sub-Section files, though the

subsection files have been seized by IO, but those files have not been produced before the Court and have been deliberately withheld as no case was

made out against the appellants. The adverse inference under section 114(g) be taken against the prosecution.

Though the matter of Approval of competent authority for excess quantities of work was not pertaining to charge sheet in specific, but Ld. Trial Court

raised the this issue in the judgment in spite of the fact that the Prosecution failed to produce any oral or documentary evidence to substantiate the

charge of approval of competent authority was not taken for excess quantities of work.

Deviation Statement

21. The learned Trial Court was of view that though PW-1 has proved the deviation statement but the deviation statement was required to be

approved by the Director. Thus deviation statement cannot in itself be sufficient proof of execution of excess quantity of work shown to have

been executed by the contractor in absence of prior permission to execute the same and same was paid at the approved rate not at departmental rate

which is lower than approved rate but in tender document nowhere it is mentioned that deviation statement is required to be provided along with the

bill then the question of its approving deviation statement does not arise. However the Deviation statements are available on the record as per Exhibit

D-69.

Payment of excess quantities at tender approved rates

22. As clause Para 46 and 47 of tender document the quantities/ figures are not firm and final and subject to change and amount payable to the

contractor shall be on the basis of actual work done by him at the rate approved

by department.(Para 46,47 of tender document are reproduced below)

46. The quantities/figures indicated in the tender schedule are approximate and are subject to change. Any change effected shall be binding on the tenderer / contractor as though included in the original tender schedule and any such change will not make the agreement void and it is therefore

essential that the tenderers binding all the documents carefully and not commit any mistake in analyzing the rates quoted and remain binding

notwithstanding any changes as aforesaid. No revision of tendered rates shall be considered on any ground whatsoever.

47. The quantities indicated in tender schedule shall not be considered as representing firm/final quantities. All works shall be measured by

Divisional Engineer or his authorized representatives. Amount payable to contractor shall be on the basis of actual work done by him at the rate

approved by department.

PW-1 (Sh. S.K.Sikidhar), in his cross-examination has stated that the tendered quantity are not final, these are estimation and it may vary during

execution of work. After completion of work, the bill is paid on the basis of actual work carried out on a subsection on tender approved rate. PW-11

(Sh. S. C. Paul), in his cross-examination stated that Payments to the contractor are regulated, as per clause 46 and 47 of NIT. PW-22 (Sh

T.Thangzalian), in his cross-examination has stated that The Contractors are required to be paid for 100% work executed by them in the approved

tendered rate. PW-23 (Sh. Joseph Krelo) IO, in his cross examination has also admitted that the payment to the contractor was made for actually

executed quantities at the approved rates.

It contends that from the above documentary and oral evidences on record, it is crystal clear that payment for excess quantities is to be made at

tender approved rates only and no excess payment has been made to the contractor. The excess payment alleged to have been made to the contractor

is merely the difference between the estimated cost and the actually executed cost. The estimated cost can never remain same in any case.

The Ld. Trial Court has wrongly concluded that the joint inspection memo is proved whereas in view of the contradictions among the testimonies

of PWs, who were members of the joint Inspection Team casts a serious doubt

about the authenticity and credibility of the Joint Inspection Memo.

â?¢ PW-17 (Sh. R.N.Chakarborty) stated that â?¢I had not consulted any document during inspection and post inspection. I did not have any opportunity to go through the documents during inspection. In my presence, none of the members had seen the documents which were in the possession of the IO. I do not know the correctness of the figures mentioned in the joint inspection memo as per tender document.â?¢

He further deposed that â?¢It is correct that no figures can be related with the tender document. Depth of trench is nowhere mentioned in the route index diagram. I have referred to the MB and route index diagram but could not find the depth at the corresponding points.â?¢ It is also stated that

â?¢I had no occasion of verify the depth, category of soil and the protection over the cable as no documents were shown to me during the inspection.

The category of soil was decided by all the members of the team. I am not an expert in classification of soil. One Geologist was there but no soil

scientist was there. It is correct that the site engineer is equally trained as any engineer in DOT. It is correct that the site engineer represents the

government at the site of work. It is correct that the site engineer is the competent authority to decide the depth and size of the trench, category of

soil and protection over the cable. The JTO and SDE both are Group-B Gazette Officers, None of the team members was competent to decide the

category of soil.â?¢ He further stated that â?¢It is correct that the depth recorded during joint inspection is not the correct depth of the cable trench as

it has not included the depth of the soil bed and the diameter of the protection pipe.â?¢

â?¢ PW-20 (Ranjeet Kumar Nath) stated that â?¢The Joint Inspection memo was not prepared on the spot. After the joint inspection memo was

typed it was handed over to the persons who were present at the office.â?¢ It is strange that this witness is talking about the memo being typed

whereas the memo on record is a handwritten document. This statement completely wipes out the credibility of the joint inspection memo, on which

the prosecution is heavily relying.

This witness further stated that â?¢The figures mentioned in the joint inspection memo cannot be co-related with the figures in the route index

diagram and MB. We are not allowed to mark the route index diagram. I did not

verify any of the figures mentioned in the joint inspection memo with MB or route index diagram.â? It is stated that â??I did not verify any figures mentioned in MB/Diagram with regard to the depth, protection and category of soil at any of the pits. I cannot say who had verified the points in the joint inspection report on route index diagram.â? He has further stated that â??The area was hilly and rocky and also prone to landslide and at places there are sinking zone also. There is possibility of soil and protection being washed away during heavy monsoon. Due to landslides and work by JCB, the cable gets damaged. Due to road widening the cable is shifted to safer area. The Inspection was conducted 7 years after laying of the cable and as such the soil in the trenches, the protection and depth of the trenches may not remain same. We had identified the status of soil that was excavated from the refilled soil. It is correct the status of soil at the time of making the trench for laying the cable will not be same as that with the refilled soil.â? He has categorically said that â??I had not decided the category of soil.â??

When the IO Sh. Joseph Krelo (PW- 23) was asked to co-relate the Joint Inspection observations with their respective position on cable route index diagram then his reply was that â??The Engineers from BSNL who were with the inspection team will be able to explain the matter.â??

Now, let us turn on the allegations of the depth of trench, type of soil and quality of protection. PW-21 (Sh.T.Lotha Shitari), who was a Geologist and

Joint Inspection team member, has stated in his cross that â??I am a Geologist not a soil scientist. â?! I am not specially trained to classify soil and I

had not worked in any laboratory which is concerned with testing of soil.â? He further stated that â??I do not know definition of soil as provided in

tender document.â? He has gone to the extent of saying that â??I do not know whether the soil that was verified by me was obtained from same

trench where cable was laid 7 years back.â??

â?¢ PW-13 (Sh. Subrat Gupta), in his cross has stated that â??disregarding whether the trenching was done on rocky soil, hard soil or soft soil or any

other type of soil, the soil category in the trench will change to only soft soil after reinstatement.â??

â?¢ PW-1 Sh. S.K. Sikidar has stated that â??The route was hilly terrain and in rainy season there was lot of damage caused because of landslide

more over there are sinking zones in the route and PWD also had started widening of route.â??

From the above evidences on record, it is clearly evident that neither Sh. R. N. Chakarborty (PW-17), Sh. Ranjeet Kumar Nath (PW-20) nor IO, Sh.

Joseph Krelo (PW-23) could correlate the Joint Inspection observations with their respective positions on cable route index diagram. The same is also

because of the reason that Sh. S.K. Sikidhar (PW-1), while repairing the cable, had replaced cable at some many places and had made the route index

diagram afresh in 2002 whereas the joint inspection is done by the CBI in the year 2003 (after 7 years) on the basis of original route index diagram

which was prepared in the year 1996-97. None of the joint team members was competent enough to decide the category of soil. On the contrary, it

has come on record that the site engineer was competent to decide the category of soil, the depth of trench and the protection to be provided.

Another fact which needs notice is that the execution of laying of OFC cable has been verified on two three occasions w.r.t. the depth and protection

of the cable, in comparison with the type of soil, before its commissioning and subsequent handing over of the cable to the maintenance department. It

has also come on record that the responsibility of the officers of OFC came to an end when the cable was handed over to the maintenance

department. The cable has been shifted from its original position after its laying and before conducting the joint inspection by CBI.

Ã? Requirements of RCC protection differ from site to site. As per Clause 232 of the tender document RCC protection is to be provided irrespective

of the depth. In some cases, RCC protection is also required to be provided at 165 cm depth e.g. on all Road Crossing and Culverts. The prosecution

has failed to lead any oral or documentary evidence to prove as to in which subsection and at what location Clause 245 of tender document was

violated.

Ã? As per Clause 46 and 47 of tender document the quantities/ figures are not firm and final and subject to change and amount payable to the

contractor shall be on the basis of actual work done by him at the rate approved by department.

â?¢ PW-(1) Sh. S.K.Sikidhar has stated that â??After actual execution of work, the bill is paid on the basis of actual work carried on a subsection on

tender approved rate. PW-(11)-Sh.S.C.Paul has stated that "Payments to the contractor are regulated, as per clause 46 and 47 of NIT." PW-

(18)-Sh. Montu Ranjan Dutta has stated that "Bills are pre-checked by JAO, The JAO verifies the soil, rate and quantity. PW-(22)-Sh

T.Thangzalian has stated that "The Contractor is required to be paid for 100% work executed by them in the approved tendered rate. PW-(23) Sh.

Joseph Krelo and IO in this case has also stated in cross examination that the payment to the contractor was made for actually executed quantities at the approved rates.

From the above documentary and oral evidences on record it is crystal clear that payment for excess quantities is to be made at tender approved rates only.

23. According to the Geological Survey of India, about 95% of the area of Nagaland is hard rock. According to survey report, the entire route is hilly and rocky. It will not be possible to lay cable at the standard depth of 1.65 metre. Hence, the protection of GI/RCC pipe and RCC is to be provided over the cable. This fact has also been admitted by Sh. S.K. Sikidhar (PW-1), Sh. Ranjeet Kumar Nath (PW-20), Sh. R.N. Chakraborty (PW-17), and the IO Sh. Joseph Krelo (PW-23).

24. As per clause 73E of Tender document, it is the obligation of the DE to pass the bills and make payment to the contractor through the paying authority. The procedure of passing the bills is as follows:-

Â® Bills are prepared by JTO and SDE (Site Engineers) on the basis of MB and Route Index Diagrams.

Â® Bills are submitted in the office of DE and JAO (Junior Accounts Officer) posted in the office of DE pre-checks the bill by comparing the same with the MB, Route Index Diagrams, approved tender rates, quantities and approval of excess quantities etc. After finding all the above in order, as per terms and conditions of the tender, he put up the bills before the DE for passing the same.

Â® The DE, after perusing the remarks of the JAO and MB and Route Index Diagram, passes the bills.

Â® After passing, the bills are forwarded to Director for approval.

Â® After the approval of the Director, the bills are forwarded to AO. The AO rechecks the MB, Route Index Diagrams, approved tender rates,

quantities and approval of excess quantities etc. Finding each and everything in order, he makes payment to the contractor.

In this way, the bills before coming to the DE and after the passing by DE are thoroughly checked at various stages and only thereafter, the payment

is made. It is noteworthy that the persons before and after the i.e. the JAO and AO respectively have been given clean chit by CBI by approving the

bills by them. Hence, the appellant cannot be faulted.

25. The payment to the contractor has been made proportionately since the cable has not been laid at the standard depth of 1.65 metre. The payments

have been made for the actually executed quantities at tender approved rates.

26. The Head Quarter of the DE was at Guwahati whereas the work was executed in the State of Nagaland. The execution of work is to be

supervised by the site engineer (SDE) who represents the government at site of work as per clause 72, the SDE(Site In-charge) is responsible and not

the appellants.

27. The Honâ??ble Supreme Court in the case of Abdulla Mohammed Pagarkar etc, V State (Union Territory of Goa, Daman and Diu) 1980

CRI.L.J.220, while dealing with a case where a public servant and a contractor were prosecuted under the Prevention of Corruption Act and Ss,

420,468,471 IPC for defrauding the Government by submitting false bills of the work done. Though the work was to be done departmentally it was

alleged that in-fact the public servant got the work done through the contractor whose tender was not accepted, held,

Though the work was got executed in flagrant disregard of the relevant rules and even of ordinary norms procedural behavior of governmental

officials and contractors, such disregard did not amount to any of the offences alleged against them. The onus of proof of the existence of every

ingredient of the charge always rest on the prosecution and never shift.

It was further held, No doubt there were several irregularities giving rise to a strong suspicion in regard to the bona fides of the accused in the matter

of the execution of the work but suspicion, however strong, could not be a substitute of proof.

28. The Ld.Trial Court did not appreciate that there is no proper sanction from the competent authority to prosecute the appellants. Particularly in

view of the fact (DOT) had refused sanction twice.

Contention raised on behalf of the appellant/contractor

29. It has been contended that the contractor/the appellant can no way be attributed to the criminality as they have duly participated in the tender

process and selected and there appears no any illegality as regards their role while awarding the contract. They have duly submitted the bid

documents and after due evaluation, the TEC has selected them. The evidence reveals that bills were passed by the appropriate authority and they

have no role to play in passing the bill. The MB was verified by the concerned Engineer and the bill was verified by the Site Engineer. By drawing

attention to the evidence on record, it is submitted that the loss calculation sheet prepared in this case is based on the data provided by the CBI not

from the office itself and as has been found above, data shown in the joint inspection report is itself not authentic or proved. The witness who

prepared the loss calculation himself stated that they are not at all sure about the correctness of the loss calculation or they were also not aware if the

work was awarded to the contractor at the departmental approved rate by the Director or has no idea about the correctness of the bill submitted by

the contractor.

30. Further it has been submitted that the evidence on record, runs counter to the allegation made against the appellant which is not at all suggestive of

preparation of bill in excess manner. Most of the witnesses have stated that bill was paid on actual work done by the contractors which is at par with

the terms of the tender agreement and as such there cannot be an allegation of raising false bill on the part of the contractor. Tender documents itself

provide that final bill may vary subject to the actual work done by the contractor. Accordingly, it has been urged that in view of the evidence on record

about the work site and the hilly condition etc. and in terms of the tender document, the variation of bill amount itself is not suggestive of criminality on

the part of the contractor. It contends that there is absolutely lack of evidence suggestive of criminal conspiracy on the part of the contractor with the

public servants at the time of awarding contractor nor there is requisite evidence to reflect the dishonest intention on the part of the accused appellant

to cheat the government. But however, the learned Trial Court relying only on the evidence of IO and the joint inspection report that was made after 7

years has held the accused appellants guilty without proper appreciation of entire

matters on record, hence, finding of guilt at the accused appellants is not sustainable.

Relevant Evidence on record:

31. As the whole case revolve around the joint inspection report made by the IO in presence of other witnesses, so let us start with the IO PW-23/Sh.

Joseph Krelo. Without narrating about the illegalities and irregularities that has been committed by each of the accused persons, he has stated about

seizure of various documents in connection of the case from the officials of the department concerned which is large in number. Regarding the

inspection, he has stated that in presence of two independent witnesses Sh. R. N. Chakroborty, SDE and Sh. T. L. Shitiri, he conducted joint

inspection on different dates as on

1. 27.05.2003, in JDK route in SS 22 at 11 places vide Ext. 78 Joint Inspection Memo

2. 28.05.2003 in JDK route in SS 24 at 6 places vide Ext. 77 Joint Inspection Memo

3. 29.05.2003 in JDK route in SS 26 at 2 places vide Ext. 79 Joint Inspection Memo

4. 30.05.2003 in JDK route in SS 26 at 4 places vide Ext. 80 Joint Inspection Memo

5. 02.06.2003 in JDK route in SS 26 at 6 places vide Ext. 81 Joint Inspection Memo

6. 03.06.2003 in JDK route in SS 27 at 5 places vide Ext. 82 Joint Inspection memo

7. 06.08.2003 in JDK route in SS 24 at 6 places vide Ext. 84 Joint Inspection Memo

8. 07.08.2003 in JDK route in SS 27 at 1 place vide Ext. 85 Joint Inspection Memo

Save and except exhibiting the joint inspection report, he has not stated about the discrepancy that was found during the inspection. He has stated that

after the completion of the joint investigation, he submitted the Charge-Sheet. In cross-examination, he has stated that Sh. M. L. Sharma did not pass

any bill and he could not say about the subsection wise bills passed by Sh. M. L. Sharma. He also could not answered about the calculation of the

approved rate for the entire section in the file. Further, he has admitted that he

conducted joint inspection only over a length of 0.18% of the total cable length involved in the case. It is stated that Sh. K. Chanda, Sh. R. N. Chakroborty, Sh. Ranjit Nath, officials from BSNL guided him in deciding the depth of the trenches and Sh. T. L. Shitiri guided him in category of soil. On the query made by the defence side as to whether protection of depth of the cable remain same after a long gap of execution, he has stated that depth may not remain same but protection of cable should remain same unless it has been disturb by the operation of other agencies, like widening of roads and removing the debris may also affect. It is also admitted that part of the OFC laying trenches fall under landslide area with heavy rainfall. It is stated that the tender quantities are not firm and final and payment to the contractor was made for actual executed quantities at the approved rate. The site engineer has to decide the category of soil and role of DE is to check some percentage of the work. On the query about the verification of the cable by maintenance organization after the execution of the work and at the time of handed over the cable to the maintenance organization, he has shown ignorance all about the same and admittedly he did not associate any person from the maintenance division.

32. Now let us discuss the evidence of the witnesses to the joint inspection and those are PW-17/Sh. R. N. Chakroborty, PW-20/Sh. Ranjit Kr. Nath, PW-21/Sh. T. L. Shitiri. All these three witnesses have stated about their presence at the time of inspection as stated by the IO that at the time of inspection in the subsections mentioned by the IO, category of soil, RCC protection and depth of trench were verified and recorded in the joint inspection memo. They, however, have not narrated about the discrepancy that was found at the time of joint inspection, save and except their presence and the signature to all the joint inspection memo.

33. In their cross-examination, PW-17 and PW-20 have stated that CBI Inspector has decided the locations where pits were to be dug and all the documents were in the possession of the Inspector and they were not consulted any of the documents by the IO and they did not have the opportunity to go through the documents. They do not know the correctness of the figures mentioned in the joint inspection memo and they also could not say whether points in the actual finding during joint inspection co-related with the points in the route index diagram nor it can be co-related with the tender

document. Although, in their evidence, IO has stated that PW-17 has verified the depth of the trenches but they have stated that they have no

occasion to verify the depth, category of soil, protection etc. as no document was shown to them. It is stated that none of the team members were

competent to decide the category of soil.

34. They further stated in cross-examination that depth of trench 1.65 meter is the standard depth for laying cable in the ordinary soil and 90 cm in the

rocky soil. The cable cannot be commissioned unless it is accepted by the AT team and AT officers are under the administrative control of CGM (T

& D) Circle, Jabalpur. They have admitted that AT was conducted twice, after laying of cable in each subsection, verifying the depth and protection

as per route index diagram. Cable was tested for the whole route at a time in respect of cable involved in this case. AT was done and after

acceptance by AT and the cable was handed over to the officers of maintenance organization and the responsibility of the OFC officers come to an

end after handing over the cable to the officers of ETR (maintenance) and it became the responsibility of the ETR to maintain the cable. He further

admitted that the category of soil dug from the reinstated trench will not be the same with the soil that was used at the time of digging trench for laying

cable. The part of the route is hilly area and prone to landslide and land erosion. The route is cleared of debris resulting from landslide by JCB. The

cable may also got damaged due to operation of JCB and the cable has been laid between the hill and the road. Due to heavy rainfalls, cables and soil

protection may get washed away.

35. In his cross-examination, PW-21 has stated that although he identified the category of soil and rock but he has not been trained to classify soil nor

had worked in laboratory regarding testing of soil. He has not been provided with the tender documents and does not know about the definition of soil

mentioned in the tender documents. He does not know whether the soil that was verified by him was obtained from the same trench where the cable

was laid 7 years back. He played no role in deciding the location of pits.

36. PW-4/Sh. Mahinder Singh, PW-5/Sh. Shriyans Kr. Jain and PW-6/Sh. A. K. Girotra have stated all about the prosecution sanction. PW-4 and

PW-5, however, in their cross-examination, have stated that initially department rejected the prosecution sanction but for the third time when the CBI

approach CVC (Central Vigilance Commission) prosecution was granted. They also stated that draft of the prosecution sanction was received from

the CBI and thereafter, the same draft was returned after signature. The other two witnesses could not recollect whether if the CBI forwarded the

draft prosecution sanction order to them or not.

37. PW-1/ S. K. Sikidar has stated all about OFC laying project and he was posted as SDE, Survey from 1994 to 2002 and supervise the work of

trenching, laying of OFC and OFC route survey on Imphal Moreh route. He has narrated all detail regarding the procedure followed in the department

of Telecom for laying of OFC, since preparation of the survey report, project estimate etc. till the award of contract by the TEC. In his detail

evidence, he has exhibited all the relevant documents like tender document, comparative statement and the awarding of work to the contractor with

the negotiated rate. He has also stated about some deviation statement submitted along with the bills pertaining to different subsections by the SDE

OFC.

In his cross-examination, he has stated that in regard to subsection 26 of the TEC after final assessment recommended that for awarding the work to

P. Bora, the 2nd lowest of the subsection for an amount of Rs. 8,99,100/- as reflected in Ext. 8 and work order has been issued by DET, OFC bearing

order No. DE/OFC/GH/T-6, dated 27.02.1996 (Ext. 13) for this subsection 26. The tender was awarded for an amount of Rs. 8,99,100/- and the final

bill of Rs. 10,06,854/- has been paid including all the items. Thus, a total amount of Rs. 1,07,854/- has been paid in excess on tender rate. Regarding

subsection 27, as per TEC report, L-1 contractor was P. Bora who quoted the amount of Rs. 6,35,200/- for the work of subsection 27 and after

completion of work, he was paid a total bill of Rs. 10,25,321/- as per Ext. 37 which is higher than the tendered value. However, if it is less than 25%

the deviation certificate is not required.

He has further stated that the tendered quantities are not final, these are estimation and it may vary during execution of work. After completion of

work, the bill is paid on the basis of actual work carried out on a subsection on tender approved rate. The bill is checked by JAO before passing by

divisional Engineer. The site engineer is competent to decide the category of soil in a subsection. During 1996-97 the deptt. was not using any anti

termite to protect the concreting work in a cable route. The exact period for termite attack cannot be predicted. He was posted at Divisional Engineer, Dimapur for commissioning the OFC route between Dimapur-Kohima which was started during 1996- 97. Acceptance Testing is carried out after completion of work which has been done by a different wing of DoT, i.e., T & D circle before handing over the route for maintenance to the telecom region. During A/T, the depth of the cable and its protection is tested as per route diagram submitted by the executing officer. A/T is accepting the route and declare it commissioned if the depth and protection are as per standard guidelines of DoT. The commissioning will be declared by T & D circle if it is found by them that the route is fit for commissioning. After execution of work, there may be widening of road undertaken by PWD, due to landslide, or sinking of road etc. there may be damage of original cable laid during execution and during restoration the original position of the cable may be shifted. The depth of the cable is not written in the route diagram submitted along with the bill. After few years depth of the cable will vary. Further, in his cross-examination, he has stated that he has been posted specifically for commissioning the OFC route. The route was hilly terrain and in rainy season there was lot of damage caused because of landslide moreover there are sinking zones in the route and PWD also had started widening the route. Because of all these problems, the said route could not be commissioned as targeted. As the old OFC laid on the Dimapur Kohima route had already been damaged, those cables were replaced by new cables. OFC which were laid initially would not be same as those cables. AT verified the depth and protection provide on the route. AT team will accept the cable only when the standard of OFC was met. OFC commissioned is done only after taking test and cable test of the route by the T & D circle. During AT, they had submitted a fresh route. An index diagram incorporating the changes had occurred after restoration work. During the execution of OFC work the site engineer was authorized to take his decisions with regard to classification of soil and protection required cable link trenches at the site. The depth of trenches are being specified according to the situation. At the time of road widening OFC route is not shifted. Over a period of 4 to 5 years the depth of the trenches may vary because of rain and work carried out by other agencies like PWD, Public health etc.

He has also stated that while executing the work, the site engineer will take prior approval for any variation along the route when work could not be carried out as per survey specification. The site engineer will verbally inform the superior office for approval. The execution work was carried out with contractors. Prior approval was required for extra work done by the contractor as per guideline given in the tender document. If the work is being executed at far flung areas verbal approval was required to be obtained. He does not think that payment can be released without the prior approval of deviation in the original work. When there is deviation from the original work to the extent of 25% certificates were required from Director OFC. Without which the bill will not be released by Accounts Officer. Bills are being prepared by site engineer and site supervisor on the basis of MB. Those bills and MBs had been submitted in the Court and were being exhibited in evidence. At the time of tender item of work mentioned in the tender documents were made on the basis of survey report, prepared after visual survey. It is not possible to make correct estimation of the work.

38. PW-7/Sh. Jibotosh Biswas, Sr. Accounts Officer, PW-8/Sh. K. K. Mishra, Jr. Accounts Officer, PW-11/Sh. S. C. Paul, Chief Accounts Officer, PW-14/Sh. Bhaskar Dey, Chief Accounts Officer have stated about the procedure for making project estimate and the sanction given by the higher authority and how the tender committee evaluated the tender papers and awarded the same till the payment of the bill to the contractors. They have exhibited several related documents relating to work order, payment made to the contractor, the different bills prepared in respect of work in question, issuance of cheque to the respective contractors, entries in the MBs, cash book and the calculation sheet prepared on the basis of the joint inspection report, wherein difference between the payment actually made as per MB/RA bills and report of joint inspection team in respect of different subsections of the Imphal Moreh route.

39. PW-11, in his cross-examination, has stated that RA bills and MBs were prepared by the site engineer in-charge after execution of the works and cheques are issued by the AO subject to approval of the competent authority and by observing all the official formalities. PW-14, who exhibited the MBs in his evidence, peculiarly stated in his cross-examination that he had never

dealt with MBs, the bills pertaining to subsections of the present case and he never personally involved in the execution of OFC laying work and is unable to throw any light if there were any anomalies in those documents. He has admitted that his evidence is based on the documents produced before him today in the Court and after going through those documents whatever written therein, he has given the evidence.

Except exhibiting the documents, their evidence is silent as about any specific part played by the accused persons in the whole process, either at the time of awarding tender and other related documents like preparation of bills, MBs, route index diagram etc. Prosecution cannot be eschewed from its liability to prove the criminal conduct on the part of each of the accused person.

40. PW-2/ Sh. Debashish Mitra, Branch Manager Bank of Baroda and PW-3/Sh. Rogin Boro, Chief Manager Union Bank of India have stated about

the seizure of documents by the IO pertaining to the account holder T. Murry and Prafulla Borah (both are contractor) from their bank through seizure

list vide Ext. 52 to Ext. 55.

41. PW-9/ Sh. Kamala Kanta Das, being an employee in the office of DE OFC has exhibited the documents, executed by the higher officials like DE,

Mr. B. R. Attri, M. L. Sharma, Navendra Kumar like Ext. 9 tender awarding letter, work awarding order, approval of successful tenderer pertaining

to different SS 22, SS 24, SS 26, SS 27 and the agreement entered between the officials and the contractor T. Murry and Prafulla Borah etc. etc. So

his evidence is confined to exhibiting the documents only. Similarly, the evidence of PW-10/Sh. Bipul Kumar Baruah and PW-12/Sh. S. R. Bali, PW-

13/ Sh. Subhabrata Gupta are confined towards exhibiting the documents to the work in question including the description of work as per tender

document. PW-12 has stated that as per Ext. 10(2), the approved rate was much higher than the estimated cost in respect of SS 26 and SS 27. In

cross-examination, he has however stated that he does not know if the cement concreting is provided over the cable or not and he has not mentioned

about the provision of cement concreting over the cable in his project estimate. He does not know whether detail estimate based on project estimate

sanctioned by CGM was prepared for each subsection. He also admitted that estimated cost of each subsection cannot be ascertain without preparing

detail estimate in subsection wise. It is stated that estimated cost of section is

less than the charges of trenching alone and the estimated cost shown to him in the Court was not prepared by him. Finally, he has also admitted that he was arrested by CBI in a trap case along with DGM and was under suspension.

42. PW-13, moreover has stated that the loss calculation was done on the basis of the CBI joint inspection report and it was made on the basis of difference between category of soil, depth of trench and type of protection. In cross-examination, he has stated that the OFC was laid only after clearance by AT unit after checking of depth. After successful commissioning of the route by the AT, the route is handed over for the maintenance to the maintenance unit. He has also admitted that CBI conducted random check after 7 years of execution and during this period, depth may vary for variety of reasons like widening of roads, landslides, natural calamities etc.

43. PW-15/Sh. A. Chakroborty and PW-16/Sh. Purna Boro have exhibited certain documents pertaining to the tender documents like the tender evaluation committee report, comparative statement pertaining to the different sections, project estimate and the letter given to the CBI intimating the posting period of officials in the Office of Director, Task Force and their evidence is not relevant.

44. PW-18/Sh. M. R. Dutta, in his evidence, has stated that at the relevant period in the year 1996, as JAO, his duty was to check the bills of the staff as well as the contractors and to pay the same. His evidence is reproduced below
"Bills come from site engineer, JTO/SDE and put up before DE OFC along with contractors bills, MB, Route Index Diagram. Then the bills are entered in the respective registers. In case there is excess quantity of work with regard to laying of OF cable and trenching, the work is compared with the tendered quantity and then the bills along with MB and Route Index Diagram are dealt with by concerned dealing clerk who will prepare the bills accordingly and submit the same before the DE. On the instruction of DE those bills are pre-checked by me then again those bills are put up before DE for approval of the excess quantity of work. The same approval order is countersigned by Director. If the Director is not empowered because of the pecuniary jurisdiction then same is put up before CGM Task Force North East for approval. After approval the bills are put up before Accounts Officer for payment. For excess quantity of work, SDE has to put

the file before the DE for the execution of excess quantity of work. Deviation statement is required to be prepared when the work executed exceeds the tendered quantity. He does not know about the requirements of the deviation statement and the approval of the competent authority regarding the excess work executed. The bills which are sent from the site to the office of DE OFC are forwarded to DE. At the instance of the DE OFC, he pre-check the bill. After pre-checking the bills he send those bills to the DE if there is any excess quantity of work. Sometimes DE directly process the bills with regard to the excess quantity of work and verbally obtains approval from the CGM Task Force for the excess quantity. Thereafter CGM makes notes post facto. They used to take the approval of the competent authority in case of quantity of work. It is necessary to take the approval from competent authority as difference in amount cannot be explained if the approval was not taken. When SDE changes the nature of the soil in the bill then automatically the rate of the soil changes.â??

45. He has exhibited the different MBs and the different bills which were pre-checked by officer concerned and passed by the DE and countersigned by the Director concerned. It is stated in cross-examination that many times DE takes approval of Director on telephone. After pre-checking the bill, generally DE gives approval with regard to the change of soil and excess quantity of work subject to assent from the higher level and sometimes approval is obtain post facto whenever it is felt necessary. He has no personal knowledge of the matter. Thus, he has not stated anything about the illegality in support of the charge leveled.

46. The evidence of PW-19/Sh. Samar Kr. Panda, one of the official of BSNL has simply stated about the seizure of documents by the IO from his office from the Office of the DGM, Task Force Dimapur and he signed the seizure list Ext. 83.

47. PW-22/Sh. T. Thangzlian, being one of the IO, seized certain amount of documents from the Office of the Director OFC and Office of CGM and he exhibited those seizure list from Ext. 87 to Ext.

90. In cross-examination, he has stated that he has not verified about the excess payment made to the contractors and also does not know how much the contractor was entitled and how much it was paid nor he knows anything about the tender documents and he was not a member of the joint

inspection team. FROM THE DEPOSITIONS OF THE AFORESAID VITAL PROSECUTION WITNESSES, IT REVEALS THAT Â?

Ã? Before inviting the tender, no sub-section wise survey, project estimate was prepared. After completion of tender process and after issuing the work order to the contractor, physical survey was conducted by the authority and on the basis of such survey report, project estimates were prepared.

Ã? The estimated quantities are not firm and final, that are subjected to change during the time of execution of the work as per clause 46 & 47 of the tender documents. It may be increased or it may be decreased. Any excess quantity required at the execution of the work would be deemed to have been included in the tender quantity and the payment to the contractor is made on the basis of the actual work done, it may be less, it may be more.

Ã? The entire Imphal Moreh route is hilly, rocky, landslide, soil erosion and sinking zone. It was extremely difficult to make the trench upto the standard depth of 165 cm. It was therefore essential to provide RCC/GI pipes and RCC protection of OF cable over the entire route.

Ã? The AT team had sought relaxation of depth of OFC trenches from the CGM, NEFT because the cable was not laid at the standard depth of 1.65 meter. The CGM accorded the relaxation of depth the OFC. Such facts have been stated none other than the prosecution witnesses. As the entire route is hilly and rocky area, therefore the project cost increases and a revised estimate was prepared and the same was duly approved by the CGM, Task force.

Ã? The work was executed in the year 1996. After completion of the work, the cable was offered to the AT team for inspection and as the AT team detected some defect at the first instance in the year 1999, therefore, the contractor was asked to rectify the same. After rectification of the defects, the cable was again offered to the AT team and the AT approved the same. Thereafter the cable was handed over to the maintenance organization. After handing over the cable to the maintenance organization, a team of 5 officers from the AT and the Maintenance organization was constituted and accordingly, they carried out the joint inspection as per the Route Index Diagram and after inspection, as everything was in order, the said team approved the same.

Ã? Thereafter, another inspection was carried out at the directorate level and the

said team also inspected the cable as per the Route Index Diagram

and after inspection, they accepted the cable and accordingly, the cable was formally handed over to the maintenance organization.

Ã? Thereafter, the SDE prepared the MB on the basis of the route index diagram and the bills and the same were rectified by the DE. The MBs had

been countersigned by the Director OFC

(P) and duly pre checked by the JAO, OFC (P) and finally the Accounts officer, Microwave project passed the bills and accordingly payment was

made to the contractor.

Ã? The CBI conducted the investigation in the year 2003 till that time more than 7 years have elapsed. During this period of seven years, the condition

of the cable has been changed due to land slide, soil erosion, damaged caused by the PWD etc, which has been corroborated by several prosecution

witnesses, but the CBI has neither collected any report from such organization nor exhibited the same.

Ã? That CBI has made the joint inspection without the route index diagram inasmuch as the same has not been exhibited in the case. The CBI has

also not exhibited the AT report, Joint inspection report prepared by the officers of the AT and the maintenance organization and the joint inspection

report prepared at the Directorate level. The sub-section file which contained about the deviation statement and the approval from the authority

although seized by the IO but not produced. Due to such serious lapse on the part of the IO, the authenticity of the joint inspection report is itself at

shake.

Ã? The CBI had not made the JAO, the ETR personal, CGM, Task Force NER, as witness and/or accused in the case, under whose supervision, the

work was executed and who had verified and/or inspected the work and approved the deviation. No any relevant document like tender document,

route index diagram, MBs etc. shown to the witnesses.

Ã? The CBI had prepared the joint inspection memo at their office and the signatures of the witnesses were taken at their office as well as in the hotel

after two days that too without allowing them to verify the figure recorded at the time of the inspection. The witnesses to the joint inspection has not

supported the content of the said report save and except their signature in the report.

Ã? At the time of carrying such joint inspection by the IO, no soil testing expert was with him nor any comparative chart was prepared having regard

to the route index diagram to show the actual amount tendered and about the deviation as regard the nature of soil, depth of trench etc. The only

verbal evidence of the IO which was not supported by documentary evidence and not corroborated by his own witness.

Ã? The official witnesses so far examined by prosecution except exhibiting the documents has not brought anything on record to reflect that the

officials entered into conspiracy with the contractor while awarding the contract, rather evidence reveals that the contract was awarded in due

manner after evaluation by tender evaluation committee. No any witness has stated about the irregularities in the tender process.

Ã? No calculation of loss is reflected from the evidence on record as alleged in the Charge-Sheet or in FIR. Entire evidence is non-specific to the

point of charge, rather it is general in nature which is discussed above.

FINDINGS

48. In view of all what have been discussed above, the deviation that has been found by the IO at the time of his inspection after 7 years of execution

of the work will not itself indicate the criminal liability of the officials as well as the private contractors. Evidence indicates prior approval was taken

for such deviation of work by the site engineer which is in the sub-section file that the said important file was withdrawn from producing before the

Court. The tender document says that estimated amount is not final, survey report says that entire area is hilly and rocky and the standard depth

cannot be acquired, damage to the cable may be caused due to natural calamity like heavy rain fall, soil erosion as well as broadening of road. The

cables were found working at the time of joint inspection at their places and the change of nature of soil and damage to the protection etc. appears to

be natural due to the above reasons. It reflects that the MBs have been countersigned by the Director, OFC, duly pre-checked by JAO, OFC (P) and

finally passed by Account Officer, Microwave Project and thereafter payment was made to the contractor on the basis of actually executed quantities

and at the approved tender rate. The prosecution witnesses, as discussed above, reveals that the work in question was completed as per tender

document and under the supervision of the authority and none of the witnesses

speak about any illegality except some deviation of nature in respect of soil and depth of the trench.

49. The notable aspect of the case is that the case was registered on source information by CBI but source is not disclosed. The higher authority of the department has not come forward with allegation and the case was independently investigated by the CBI officials and has conducted the joint inspection by the IO in presence of the police officials and the officials from the BSNL but none of the witnesses have supported the evidence of the IO on material aspect, rather they show ignorance about the findings made by the IO, whereas, the whole case revolves around the joint inspection made by the IO. No implicit reliance can be made upon such joint inspection report, the authenticity of which is itself clouded by shadow of doubts.

More so, the witnesses reveals that the loss calculation has been made on the basis of such report, the content of which is not at all proved. Similarly, the depth of the trench and deviation of soil have also been calculated having regard to the findings of the joint inspection report and comparison of the findings with the original status of the project obviously cannot be the same. The findings of the survey report indicates that the projected area was hilly and rocky and prone to the landslide, couple with the oral evidence (particularly in cross-examination) reveals stoutly that condition of soil and depth of trench cannot remain same for variety of reasons as has been discussed above.

50. The department concerned was reluctant to accord sanction to prosecution as has been stated by own witnesses of the department and they mechanically accord the sanction for the third time on the basis of the CBI report (draft prosecution sanction was prepared by CBI as stated by one of the witness) as the CBI approach to CVC. It reveals that while awarding sanction, there was no application of mind to the relevant documents as well the status of the officials, whether they can be removed by the person who has accorded the sanction.

51. According to the learned Standing counsel for the respondent/CBI excess quantity of work was executed without taking prior approval of the competent authority and payment was made for those excess quantity of work whereas according to the clause 78 of the tender document, contractor shall not make any change of any work under the contract without written

instruction from the site engineer, i.e. the DE. Refuting the said allegation, the learned counsel for the appellant pointing towards the evidence of IO as well as other witnesses, it has been urged that the witnesses said that the prior approval was taken for the excess work done for which excess payment has been made which aspect has entered in the subsection file and the same is not produced before the Court, despite seizure being made by the IO.

52. It has also been argued from the side of the respondent that supervising authority, i.e., the DE has to conduct test check of the OFC trenches and protection of cable which is not done contrary to the provision rendering them liable for such illegality. Referring to the clause 132 of the tender document, the learned counsel for the appellant has submitted that the said submission is not true as the said provision is not mandatory but a discretionary and for non-compliance of the same, it may amounts to irregularity but not an illegality and same cannot be attributed any criminal liability on the part of the official concerned. It has been submitted that the Accounts Officer, who checked the bill, found the same correct and passed the bill without any objection.

53. Further contention raised by the learned counsel for the respondent that even after lapse of 7 (seven) years from the execution of the work, the protection of the cable cannot be washed away and vanished neither the soil condition cannot turn into soft soil from hard/rocky soil that was found at the time of joint inspection and the joint inspection report is proved by the witnesses. The same submission has also been refuted by the learned counsel for the appellant that witnesses to the joint inspection itself reveals that the cable was found in the working condition and all the protection work was not vanished but found damaged condition. It is vehemently contended by the learned counsel for the appellant that in view of the evidence on record itself regarding the land condition and other various factors, the RCC protection as well as the soil condition cannot remain the same as the area was prone to the landslide also.

54. Another piece of argument by the learned counsel for the respondent that the accused appellant has raised the bills for the excess quantity of work which was never executed by them and there is violation of provision of different clauses 60 (F), 73 (D), 78, 192 , 220. In reply, the learned counsel for the appellant has strenuously contended that such a piece of argument has

no basis to rely as evidence on record never speak about violation of such conditions and the witnesses have admitted in their cross-examinations that the work was executed as per tender document and payment was made on the basis of the work actually executed by them.

55. On the case of the evidence on record, which has already been discussed, I found no force in the contention of the learned counsel for the respondent rather the submission of the appellant got support in terms of the evidence on record. Moreover, the veracity of the joint inspection report is itself at shake and not a proved document.

56. In view of the charge/allegations leveled, it was for the prosecution to prove affirmatively that the accused appellants by corrupt or illegal means or over abusing their positions obtained pecuniary advantage by making conspiracy with each other. But in the instant case, upon scrutiny of the evidence, it would go to show that save and except mechanically exhibiting the documents related to the work in question, the witnesses have not divulged anything on the above aspect. The prosecution cannot prove its case by mere exhibiting documents but authenticity and correctness of said documents also to be proved by the witnesses, which is absolutely lacking in this case.

57. Let us discuss the law pertaining to exhibiting of documents in evidence. In a landmark judgment, the law laid down by the Honâ??ble Supreme Court in AIR 1971 SC 1865, Sait. T. Khimsand and Ors. Vs. Yelamarti Satyam & Ors, is â??

Mere marking of an exhibit does not dispense with the proof of documents.

Further, in Sudhir Engineering Co. Vs. NEEPCO Roadways Ltd., Manu/DE/0401/1995 (1995 (34) DRLJ 86), the entire law relating to the marking of exhibits and tendering documents in evidence has been dealt with. It has been held that mere marking and exhibit on a document does not dispense with the formal proof thereof. Relevant para is extracted below â??

â??Let me now look at the law. Any document filed by either party passes through three stages before it is held proved or disproved. These are :

First stage : when the documents are filed by either party in the Court; these documents though on file, do not become part of the judicial record;

Second stage: when the documents are tendered or produced evidence by a party and the Court admits the documents in evidence. A document

admitted in evidence becomes a part of the judicial record of the case and constitutes evidence. Third stage: the documents which are held to be proved, not proved or disproved when the Court is called upon to apply its judicial mind by reference to Section 3 of the Evidence Act. Usually this stage arrives at the final hearing of the suit or proceeding.

I am of firm opinion that mere admission of document in evidence does not amount to its proof. Admission of a document in evidence is not to be confused with proof of a document. When the Court is called upon to examine the admissibility of a document it concentrates only on the document.

When called upon to form a judicial opinion whether a document has been proved, disproved or not proved the Court would look not at the document

alone or only at the statement of the witness standing in the box; it would take into consideration probabilities of the case as emerging from the whole

record. It could not have been intended of any law, rule or practice direction to expect the Court applying its judicial mind to the entire record of the

case, each time a document was placed before it for being exhibited and form an opinion if it was proved before marking it as an exhibit.

The marking of a document as an exhibit, be it in any manner whatsoever either by use of alphabets or by use of numbers, is only for the purpose of

identification. While reading the record the parties and the Court should be able to know which was the document before the witness when it was

deposed. Absence of putting an endorsement for the purpose of identification no sooner a document is placed before a witness would cause serious

confusion as one would be left simply guessing or wondering which was the document to which the witness was referring to which deposing.

Endorsement of an exhibit number on a document has no relation with its proof. Neither the marking of an exhibit number can be postponed till the

document has been held proved; nor the document can be held to have been proved merely because it has been marked as an exhibit. This makes the

position of law clear. Any practice contrary to the above said statement of law has no sanctity and cannot be permitted to prevail.

In 2010 4 SCC 491, LIC of India & Anr. Vs. Rampal Singh Bisen it has been held as below -

Mere admission of document in evidence does not amount to its proof. In other words, mere marking of exhibits on a document does not dispense

with its proof, which is required to be done in accordance with law. Under the law of evidence also it is necessary that content of documents are

required to be proved either by primary and secondary evidence. At the most admission of document may amounts to admission of content but not its

truth. Content of the documents cannot be proved by merely filing in the Court.â??

58. Although the learned counsel for the CBI in firm vehemence has contended that looking into the allegations leveled against the public servants and

the findings of the Trial Court needs to be confirmed, but looking into the manner in which the case was conducted by the IO and non-appreciation of

the relevant evidence by the Trial Court and discussion only one portion of evidence Â ignoring the entire evidence on record amounts to cause

prejudice to the case of the defence. Miserably, the learned Trial Court has not discussed the relevant cross-examination of the witnesses and we may

say so that even in their examination-in-chief, except exhibiting the documents to the work in question, their evidence is not specific to the allegations

leveled. It is the cardinal principles of the criminal jurisprudence that prosecution case is to prove the each and every charges leveled against the

accused to the heel and Court is to appreciate the entire evidence either oral or documentary in the touchstone of the authenticity. The Court is not

expected to pick and choose one portion of evidence to arrive its conclusion by ignoring the other aspect as to whether said portion of documents is

proved or substantiated as per law, which is found missing in this case. So far as the revelation by the witnesses, plausibility of involvement of

accused persons with the offence alleged is not forcefully made out, rather it indicates another view that the work in question was carried out without

any illegality. There may be some irregularity here and there for raising the cost of soil without having proper sanction at relevant time but in view of

the evidence surfaced, it also indicate on the basis of actual finding in the field the status of soil as well as depth of trench may differ which has

resulted the variation of cost against the estimate. As there is no clear picture depicted by the prosecution itself, the Court is not obliged to carry out

own exercise to arrive at a conclusion which is not otherwise proved.

59. Now, in the instant case, the impugned judgment reveals that the learned Trial Court counted the content of different exhibits regarding the bills,

MBs etc., whereas, the said documents were not proved by the witnesses themselves. Most of the witnesses in their cross-examination has stated that they have no personal knowledge about those exhibited documents and they have marked the document in the Court as shown to them and this was the evidence of the officials of the department concerned and in such pretext, it will be more vulnerable to decide the case on such unproved documents.

60. The notable aspect of the case is that the case was registered on source information by CBI but source is not disclosed. The higher authority of the department has not come forward with allegation and the case was independently investigated by the CBI officials and has conducted the joint inspection by the IO in presence of the police officials and the officials from the BSNL but none of the witnesses have supported the evidence of the IO on material aspect, rather they show ignorance about the findings made by the IO, whereas, the whole case revolves around the joint inspection made by the IO. No implicit reliance can be made upon such joint inspection report, the authenticity of which is itself clouded by shadow of doubts. More so, the witnesses reveals that the loss calculation has been made on the basis of such report, the content of which is not at all proved.

Similarly, the depth of the trench and deviation of soil have also been calculated having regard to the findings of the joint inspection report and comparison of the findings with the original status of the project obviously cannot be the same. The findings of the survey report indicates that the projected area was hilly and rocky and prone to the landslide, couple with the oral evidence (particularly in cross-examination) reveals stoutly that condition of soil and depth of trench cannot remain same for variety of reasons as has been discussed above.

61. The department concerned was reluctant to accord sanction to prosecution as has been stated by own witnesses of the department and they mechanically accord the sanction for the third time on the basis of the CBI report (draft prosecution sanction was prepared by CBI as stated by one of the witness) as the CBI approach to CVC. It reveals that while awarding sanction, there was no application of mind to the relevant documents as well the status of the officials, whether they can be removed by the person who has accorded the sanction.

62. According to the learned Standing counsel for the respondent/CBI excess quantity of work was executed without taking prior approval of the competent authority and payment was made for those excess quantity of work whereas according to the clause 78 of the tender document, contractor shall not make any change of any work under the contract without written instruction from the site engineer, i.e. the DE. Refuting the said allegation, the learned counsel for the appellant pointing towards the evidence of IO as well as other witnesses, it has been urged that the witnesses said that the prior approval was taken for the excess work done for which excess payment has been made which aspect has entered in the subsection file and the same is not produced before the Court, despite seizure being made by the IO.

63. It has also been argued from the side of the respondent that supervising authority, i.e., the DE has to conduct test check of the OFC trenches and protection of cable which is not done contrary to the provision rendering them liable for such illegality. Referring to the clause 132 of the tender document, the learned counsel for the appellant has submitted that the said submission is not true as the said provision is not mandatory but a discretionary and for non-compliance of the same, it may amounts to irregularity but not an illegality and same cannot be attributed any criminal liability on the part of the official concerned. It has been submitted that the Accounts Officer, who checked the bill, found the same correct and passed the bill without any objection.

64. Further contention raised by the learned counsel for the respondent that even after lapse of 7 (seven) years from the execution of the work, the protection of the cable cannot be washed away and vanished neither the soil condition cannot turn into soft soil from hard/rocky soil that was found at the time of joint inspection and the joint inspection report is proved by the witnesses. The same submission has also been refuted by the learned counsel for the appellant that witnesses to the joint inspection itself reveals that the cable was found in the working condition and all the protection work was not vanished but found damaged condition. It is vehemently contended by the learned counsel for the appellant that in view of the evidence on record itself regarding the land condition and other various factors, the RCC protection as well as the soil condition cannot remain the same as the area was prone to the landslide also.

65. Another piece of argument by the learned counsel for the respondent that the accused appellant has raised the bills for the excess quantity of work

which was never executed by them and there is violation of provision of different clauses 60 (F), 73 (D), 78, 192 , 220. In reply, the learned counsel

for the appellant has strenuously contended that such a piece of argument has no basis to rely as evidence on record never speak about violation of

such conditions and the witnesses have admitted in their cross-examinations that the work was executed as per tender document and payment was

made on the basis of the work actually executed by them.

66. On the face of the evidence on record, which has already been discussed, I found no force in the contention of the learned counsel for the

respondent rather the submission of the appellant got support in terms of the evidence on record. Moreover, the veracity of the joint inspection report

is itself at shake and not a proved document.

67. In view of the charge/allegations leveled, it was for the prosecution to prove affirmatively that the accused appellants by corrupt or illegal means

or over abusing their positions obtained pecuniary advantage by making conspiracy with each other. But in the instant case, upon scrutiny of the

evidence, it would go to show that save and except mechanically exhibiting the documents related to the work in question, the witnesses have not

divulged anything on the above aspect. The prosecution cannot prove its case by mere exhibiting documents but authenticity and correctness of said

documents also to be proved by the witnesses, which is absolutely lacking in this case.

68. In 1980 Criminal Law Journal 220, Abdullah Mohammad Pagarkar etc. Vs. State (Union Territory of Goa Daman Diu), where a public servant

and contractor were prosecuted under prevention of corruption act and Section 420, 468, 471 IPC for defrauding the government by submitting false

bills of the work done, it has held that though the work was got executed in flagrant disregard to the relevant rules and even ordinary norms of

procedural behavior of governmental official, contractor such disregard did not amount to say any of the offences alleged against them. The onus of

proof of existence of every ingredient of the charge always rest on prosecution and never shift. It was incumbent therefore on the State to bring out

beyond all reasonable doubt that the number of labourers actually employed in

carrying out the work was less than that stated in the summaries appended to the bills paid by the government, the accused could not be convicted relying on the mere impression of prosecution witnesses regarding the number of labourers employed from time to time. No doubt there several irregularities giving rise to strong suspicion in regard to the bonafide of accused in the matter of execution of the work but suspicion however strong, could not be substitute for proof. And it was not permissible to place the burden of proof of innocence on the person accused of criminal charge. It has been held in JT 2013 (8) SC 570, Sujit Bishwas VS. State of Assam, the suspicion however great it may be, cannot take place of proof and there is a large difference between something that will be proved. In criminal trial suspicion no matter how strong cannot and must not be permitted to take place of proof. This is for the reason that the mental distance may be and must be quite large and divides vague conjectures from sure conclusions. In a criminal case, the Court has a duty to ensure that mere conjecture and suspicion do not take the place of legal proof. The large distance between 'may be' true and 'must be' true, must be covered by way of clear, cogent and unimpeachable evidence produce by prosecution before an accused is condemn as convict and the basic and golden rule must be applied. An adverse inference can be drawn against accused only if the incriminating materials stands fully established and the accused is not able to furnish any explanation for the same.

69. The present case is required to be examined in the light of the aforesaid settled legal propositions. The work in question was completed in the year 1995-96 and the IO made a joint inspection in the year 2003 and come up with the allegation regarding deviation of soil in the work place, non finding of RCC protection, non having of required depth of the trench in the work in question and while arriving such finding, the prosecution has failed to brought all the necessary documentary as well as oral evidence for arriving such conclusions, so the said finding in the joint inspection is conjecture and summarizes. The evidence that has been surfaced indicates the reasons for non achieving the required depth of the trench and also the change of nature of soil and RCC protection as well. Already three level inspection was carried out after completion of said work at the time of delivery the work in question to the maintenance department and as such the say of

maintenance department on the subject was very much crucial but no such person was associated at the time joint inspection carried by the IO. The difficult terrain where the OFC was laid couple by different factors that arose at the time of the execution of work has made the authority to change the quantum of works, nature of soil on the basis of practical finding in the field which has been indicated by the evidence itself. In the given circumstances raising of bill for excess amount cannot be solely attributed as criminality while for such deviation, approval of the higher authority (the same was entered in the sub-section file, but not produced).

71. The official witness that has been examined by prosecution has not supported the allegation as leveled in the FIR and except mentioning about some excess in the running bills, their evidence is silent while about the unfair means adopted by the officials or the contractor while awarding the work and the execution. The bills were duly prepared and pre-checked by all the authorities having regard to the MBs and the Accounts Officer finally passed the bill without recording any sort of discrepancy on record. The learned Trial Court centered around his discussion only on the running bills which shows some excess amount but has not at all discussed all the material evidence on record. The appreciation of all evidence on record is a must prior to reaching a conclusion. As has been held in Sujit Biswas (supra), in criminal case charge has to be proved by clear, cogent and unimpeachable evidence and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny based on the comprehensive appreciation of all features of the case as well as the quality and credibility of the evidence brought on record. The Court must ensure that the miscarriage of justice is avoided and in the facts and circumstances of the case so demand, that the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, prevail or nearly a probable doubt but a fair doubt that is based upon reason and common sense. Further it is held that in the circumstances proved in a case consistent either with the innocence of the accused or with his guilt, that the accused is entitled to benefit of doubt.

The Section 415 of the IPC defines cheating as under :

â??Section 415 - Cheating - Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to

any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

An offence of cheating cannot be said to have been made out unless the following ingredients are satisfied :

- i) deception of a person either by making a false or misleading representation or by other action or omission;
- ii) fraudulently or dishonestly inducing any person to deliver any property; or
- iii) To consent that any person shall retain any property and finally intentionally inducing that person to do or omit to do anything which he would not do or omit.

For the purpose of constituting an offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation. Even in a case where allegations are made in regard to failure on the part of the accused to keep his promise, in absence of a culpable intention at the time of making initial promise being absent, no offence under Section 420 of the Indian Penal Code can be said to have been made out.

One of the ingredients of cheating as defined in Section 415 of the Indian Penal Code is existence of an intention of making initial promise or existence thereof from the very beginning of formation of contract.

72. None of the ingredient of cheating is proved in the instant case against any of the accused.

The Section 13 (1) (d) and Section 13 (2) of Prevention of Corruption Act read as follows :

13. Criminal misconduct by a public servant - (1) A public servant is said to commit the offence of criminal misconduct, -

(a) if he, -

(d) if he, -

(i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(ii) by abusing his position as a public servant, obtains for himself or for any

other person any valuable thing or pecuniary advantage; or

(iii) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest.

(2) Any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall be not less than (four years) but

which may extend to (ten years) and shall also liable to fine.â??

73. The learned counsel for the appellants strenuously argued that to convict an accused for an offence under Section 13 (1) (d) and 13 (2), the

prosecution must establish that by corrupt and legal means the accused has obtained for himself or for any other person any valuable things or

pecuniary advantage but in the present case there is no evidence on record the appellants/the public servants obtained any amount by corrupt or illegal

means and conviction of the public servants/the two appellants is not sustainable in absence of such requisite evidence. The decision of (2002) 5 SCC

86, Subash Parbat Sonvane Vs. State of Gujarat, is relied on the aspect.

74. In the aforesaid decision, para 6, it has been held that for convicting the person under Section 13 (1) (d) that there must be evidence on record that

the accused obtained for himself or others any valuable things or pecuniary advantage either by corrupt or illegal means or by adducing his position as

a public servant without any public interest. In the present case, there is a lack of evidence on the above aspect.

75. On the next, the appellants have relied upon the decision rendered by the Honâ??ble Apex Court in 2013 (3) JCC 1552, B. Jayaraj Vs. State of

A.P., wherein it has been held that the presumption under Section 20 of the P.C. Act can be drawn only in respect of offence under Section 7 and not

the offences under Section 13 (1) (d) (i) (ii) of the Act. In any event it is only on the proof of acceptance of illegal gratification presumption can be

drawn under Section 20 of the Act that such gratification was received or doing or for bearing any official act. Applying the proposition laid by the

aforesaid decision, the statutory presumption also cannot be drawn against the public servant/the appellants herein.

The upshot of the forgoing discussions will be â?

1) The prosecution did not laid down any foundational facts to arrived at a finding of dishonest intention on the part of the appellants nor any such

findings have been arrived at by the Trial Court.

2) The prosecution evidence does not establish neither the conspiracy nor any criminal misconduct on the part of the accused appellants as per the allegation.

3) None of the charges leveled is proved beyond all reasonable doubts.

For the aforementioned reasons the impugned judgment and order being unsustainable is set aside. The appeals are allowed and accused are acquitted from the charge. Appellants are on bail, their bail bonds stands discharged.