Possession of stolen mobile cannot amount to offence u/s 411 IPC: by Rakesh Kumar Singh

We know that police is normally arresting a person found with stolen mobile and charge-sheeting him for an offence punishable under Section-411 of IPC. This offence is non-bailable in nature and therefore, such person remains in jail for several days/months depending upon the fact as to in which court's jurisdiction his case falls.

2. The present paper discusses if the activity of police on this count is justified or not or the same infringes the fundamental right of liberty granted by the Constitution of India. In this paper, to arrive at a clear conclusion we will take help of relevant provisions from CrPC, IPC, Information Technology Act, General Clauses Act.

3. Before proceeding any further, we need to discuss Section-66B of Information Technology Act which reads as under:

> "66B. Punishment for dishonestly receiving stolen computer resource or communication device. Whoever dishonestly received or retains any stolen computer resource or communication device knowing or having reason to believe the same to be stolen computer resource or communication device, shall be punished with imprisonment of either description for a term which may extend to three years or with fine which may extend to rupees one lakh or with both".

4. Information Technology Act has not defined as to what is "stolen computer resource or communication device". Being a central Act, the General Clauses Act has to be seen for definition and it terms of Section-3(36), "computer resource or communication device" has to be treated as nothing but a movable property. Consequently, stolen "computer resource or communication device" mentioned in Section-66B is but a "stolen property". This term has not been defined by Information Technology Act. We have to take help of CrPC. Section-4 and 5 of CrPC read as under:

> "4. Trial of offences under the Indian Penal Code and other laws.- (1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

> (2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner of place of investigating, inquiring into, trying or otherwise dealing with such offences".

> "5. Saving.- Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force".

5. In terms of Section-4 & 5 of CrPC, we know that the matter related to other laws has to be dealt with in terms of CrPC unless such law provides to the contrary. The Information Technology Act though provides for some guidance but the same is for very limited purposes. As such, we have to look into the provisions of CrPC for several other purposes even in respect of IT Act. The term "stolen property" is not defined in CrPC but Section-2(y) of CrPC reads as under:

> "2(y) words and expressions used herein and not defined but defined in the Indian Penal Code (45 of 1860) have the meanings respectively assigned to them in that Code".

6. We have therefore to look into IPC, 1860 to ascertain the meaning of stolen property. Section-410 IPC reads as under:

> "410. Stolen property.- Property, the possession whereof has been transferred by theft, or by extortion, or by robbery, and property which has been criminally misappropriated or in respect of which criminal breach of trust has been committed, is designated as "stolen property", whether the transfer has been made, or the misappropriation or breach of trust has been committed, within or without India. But, if such property subsequently comes into the possession of a person legally entitled to the possession thereof, it then ceases to be stolen property".

7. It is clear that if the the property has come in the possession of anyone in any of the aforesaid manner, the same shall be treated as stolen property. IPC further punishes any person who dishonestly receives or retains any stolen property. It is provided in Section-411 which reads as under:

> "411. Dishonestly receiving stolen property.- Whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both".

8. The aforesaid is required to be compared with Section-66B of Information Technology Act. This provision has been quoted earlier in this paper but for ready reference it is again reproduced as under:

> "66B. Punishment for dishonestly receiving stolen computer resource or communication device. Whoever dishonestly received or retains any stolen computer resource or communication device knowing or having reason to believe the same to be stolen computer resource or communication device, shall be punished with imprisonment of either description for a term which may extend to three years or with fine which may extend to rupees one lakh or with both".

9. A bare look at both the provisions goes to shows that they are similarly worded and the only difference is in respect of fine, the IPC has not limited the quantum of fine but the IT Act has limited it to Rs. 1 lakh. A normal person after going through the expression "fine" employed in both the provisions will say that a sum of Rs.1 lakh is on higher side and therefore, Section-66B provides for more severe punishment as compared to Section-411 IPC. A close scrutiny however goes to show otherwise. Section-411 IPC has only said that offender shall be liable to be punished with fine. It however nowhere says as to what quantum. It is Section-63 IPC which throws some light on the issue and the same reads as under:

> "63. Amount of fine.- Where no sum is expressed to which a fine may extend, the amount of fine to which the offender is liable is **unlimited**, but shall not be excessive".

10. Quite clearly, Section-411 IPC will attract unlimited quantum of fine as compared to Section-66B of IT Act where quantum has been limited to a sum of Rs.1 lakh. As such, it has to be accepted that harsher punishment is provided in Section-411 IPC as compared to Section-66B of the IT Act.

11. Section-411 IPC applies to all kind of property and therefore it should be treated as a general provision. Whereas Section-66B of IT Act applies to a very particular kind of property and is therefore a special provision in respect of punishment regarding possession of such specific stolen property.

12. One of the properties is the stolen communication device possession whereof is punishable under Section-66B. This term "communication device" is defined in Section-2(1)(ha) of IT Act as under:

> "2(1)(ha) communication device means cell phones, personal digital assistance or combination of both or any other device used to communicate, send or transmit any text, video, audio or image".

13. Now, a mobile phone (as called popularly) will certainly fall within the ambit of "cell phones" or "other device used to communicate" and will therefore be a communication device. Consequently, if a person dishonestly receives or retains any stolen mobile phone with the knowledge/reasonable belief about such mobile phone being a stolen one, he shall be punishable under Section-66B of IT Act.

14. Similarly, such person would also be liable for punishment under Section-411 IPC. The question then arises as to whether such person would be liable under both the provisions. One may argue that as seen above, Section-411 IPC is general provision applying to all kind of stolen property whereas Section-66B of IT Act is a special provision applying only to a particular kind of stolen property and therefore, the same will override the Section-411 in respect of a mobile phone. One may further gets support for this assumption from Section-81 of IT Act which reads as under:

> "81. Act to have overriding effect. The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Provided that nothing contained in

> this Act shall restrict any person from exercising any right conferred under the Copyright Act, 1957 (14 of 1957) or the Patents Act, 1970 (39 of 1970)".

Section-5 of IPC also supports the above and reads as under:

> "5. Certain laws not to be affected by this Act.- Nothing in this Act shall affect the provisions of any Act for punishing mutiny and desertion of officers, soldiers, sailors or airmen in the service of the Government of India or the provisions of any special or local law".

15. There can hardly be any doubt that the IT Act is special enactment in respect of technological devices and therefore will have to be treated as special law. In terms of Section-5 of IPC, the provisions of IPC cannot affect the provisions of any special law.

16. Reading Section-5 IPC and Section-81 IT Act simultaneously, we have to accept that offence in respect of possession/retention of stolen mobile has been specifically carved out from the general offence punishable under Section-411 IPC and therefore, such offence shall only be punishable under Section-66B of IT Act.

17. One may point out the Section-77 and may argue that punishment provided under IT Act does not impact other punishment in any other law. Section-77 reads as under:

> "77. Compensation, penalties or confiscation not to interfere with other punishment. No compensation awarded, penalty imposed or confiscation made under this Act shall prevent the award of compensation or imposition of any other penalty or punishment under any other law for the time being in force".

18. The aforesaid provision in Section-77 is the result of an amendment. The unamended 77 was not having the word "penalty" while talking about other law. It was as under:

> "77. Penalties or confiscation not to interfere with other punishments. No penalty imposed or confiscation made under this Act shall prevent the

> imposition of any other punishment to which the person affected thereby is liable under any other law for the time being in force".

19. What becomes immediately clear is that the Section-77 has used three terms "compensation" "penalty" "confiscation" in respect of IT Act. It does not talk about the punishment under IT Act. Compensation and confiscation have nothing to do with the punishment. It appears that "penalty" also is not a punishment under IT Act. The Legislative intention is very clear to indicate that there is a difference between "penalty" and "punishment". In respect of other law, Section-77 has specifically used both the terms i.e. "penalty" and "punishment". This clarifies that in the opinion of the Legislature, both the terms i.e. "penalty" and "punishment" are different. It also becomes clear from Section-46 which provides for a separate statutory regime for adjudication on compensation and penalty. As such, Section-77 cannot be of any help while dealing with Section-66B.

20. In some of the punishing sections the term "penalty" has also been used. One may tend to argue that there is therefore no difference between penalty and punishment. The proposition may sound attractive but does not stand scrutiny. Some punishing sections though have used "penalty" the same has been used only in the marginal notes and not in the body of the sections. Body of even those sections still shows the expression "punish". Penalty provisions clearly shows that in the concerned sections related to penalty, the term "penalty" has been used in the body also. On an overall analysis, it becomes clear that when the Section-77 talks about "penalty" it basically indicates towards section-46 which provides for adjudicatory process regarding penalty and nothing else. For the purpose of Section-77, penalty and punishment are clearly two different terms.

21. It is at this stage that we have to go through Section-26 of General Clauses Act, 1897 which talks about offences under two enactments and reads as under:

> "26. Provisions as to offences punishable under two or more enactments - Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence".

22. It is clear that Section-26 gives a choice of prosecution and punishment. As is well known, one can make a choice only when there are atleast two things in existence for being chosen. If only

one thing remains in existence, there cannot be any question for choice and as such, Section-26 will not apply at all.

23. There are certain enactments which though creates specific offences but provide that the provisions thereof shall not be in derogation of other laws, or shall be in addition to other laws, or shall not affect punishment in other laws, or they are without prejudice to other laws etc. It is for those kind of enactments that the Section-26 was meant to be applicable. One of such enactments may be seen in the judgment of Hon'ble Supreme Court in **the Institute of Chartered Accountants of India vs Vimal Kumar Surana** dated 01.12.2010 where it dealt with an argument that a person cannot be prosecuted both for offences under Chartered Accountants Act, 1949 and IPC, 1860 and rejected the contention. It is however significant to note that it has heavily relied upon the expression "**without prejudice to any other proceedings which may be taken against him**" appearing in the Chartered Accountants Act, 1949 for coming to that conclusion. The Court had also clarified that the person will not be punished twice in terms of Section-26 of general clauses Act. Same is not the case for offences under Information Technology Act. As such, this judgment cannot be of any help in respect of the issue at hand.

24. We need to note some more provisions of the IT Act. Section-77B and 78 read as under:

> "77B. Offences with three years imprisonment to be bailable.- Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the offence punishable with imprisonment of three years and above shall be cognizable and the offence punishable with imprisonment of three years shall be bailable".
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> "78. Power to investigate offences.–Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), a police officer not below the rank of Inspector shall investigate any offence under this Act".

25. Interestingly, in terms of Section-77B the offence punishable under Section-66B clearly becomes a bailable offence. Further, Section-78 restricts the investigation and clarifies that officer below the rank of Inspector shall not investigate any offence.

26. Question then is: whether the police agaency by not invoking Section-66B in respect of stolen mobile or stolen computer can infringe the fundamental right of liberty granted by the

Constitution by invoking Section-411 IPC. It is clear that by invoking Section-411 IPC what the police is doing is to retain the person so accused of the offence in the jail as this offence is non-bailable. Police agency cannot be treated as empowered to make an activity non-bailable whereas the Parliament by enacting one special legislation has provided it as bailable. Liberty of any individual is paramount.

27. Seen in the proper context of individual liberty and overriding effect of IT Act, it is clear that whenever the police agency wants to allege any person with the fact that he had received or retained with knowledge any stolen mobile or stolen computer, it has necessarily to invoke Section-66B of IT Act and not Section-411 IPC and thereupon, the police is also liable to release such person on bail under Section-436 CrPC being a bailable offence unless of course, some other non-bailable offence is available in the case against such person.

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