
FRUITS OF THE POISONOUS TREE - A STUDY OF THE ADMISSIBILITY OF ILLEGALLY OBTAINED EVIDENCE IN INDIA

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ABSTRACT

Unlike the Fourt Amendment under the Constitution of the United States which guarantees constitutional protection to Right to Privacy and US Courts treat illegally obtained evidence is inadmissible, the position in India is different due to the absence of any legislative or constitutional provision which expressly protects the Right to Privacy. The Apex Court by interpretation of Article 21 recognised Right to Privacy in Justice K. S. Puttaswamy v. Union of India but the Indian courts do not prohibit the admission of evidence which was obtained illegally. Firstly the paper discusses the current position of illegally obtained evidence in Indian courts and it Jurisprudence. The paper while establishes that the judiciary's current view by only considering the rule of relevancy, leaves the courts at a vulnerable standpoint, with emphasis on the 94th Law Commission Report, will discuss why the Indian judiciary must provide a more enforceable approach to Right to Privacy to ensure that the deeper human rights required by the current society are protected. Lastly, the paper contends that deterring police overreach to obtain evidence illegally is a possible remedy to ensure protection of Right to Privacy in India.

Keywords: Law of Evidence, Exclusionary Principle, Right to Privacy, Puttaswamy, Illegal Evidence

POSITION IN INDIA AND IT'S JURISPRUDENCE

[1.1] Relevancy and Admissibility.

Section 3 of The Bharatiya Sakshya Adhiniyam, 2023¹ is the statutory provision that lays down the rule of relevancy. The rule of relevancy states that only that evidence shall be admissible in court which tends to prove or disprove any fact in issue in a case². There are two types of relevancy; Legal Relevancy and Logical Relevancy, in which only the former is admissible and the test of legal relevancy is provided by Section 4 - 50 of BSA³ which renders evidence legally relevant as long as it falls under any one of the provisions⁴. This rule is derived by the definition of "relevant" in Section 2 (k) of the Act⁵. Admissibility is much different from relevancy as admissibility at first requires the evidence to be relevant and secondly, it requires that the admission of such evidence is not by any exclusionary principle⁶. The Apex Court in *Ram Bihari Yadav's case*⁷ held that admissibility of evidence is much different from relevancy for example, self incriminatory statement, although relevant is not admissible as it is protected by Article 20(3)⁸ and Section 137 of the BSA⁹.

[1.2] Test of Admissibility and the Controversial judgement in RM Malkani's Case.

The Indian judiciary is of the view that due to the Indian law of evidence being entirely codified and there being the absence of any constitutional or legislative provisions to bring into effect the exclusionary principle in regard to illegally obtained evidence, the courts are in no position to decline the same evidence, and the test of relevancy is the only test of admissibility - the SC held in *Pooran Mal's case*¹⁰. The same was the Apex Court's view in *RM Malkani's Case*¹¹ in regard to admissibility of illegally recorder telephonic conversions while establishing that the evidence obtained in such a way may be declined by the court at

¹ The Bharatiya Sakshya Adhiniyam, 2023, Act NO. 47 OF 2023, Acts of Parliament.

² Dash, Sidhartha Sekhar, Principles of Relevancy and Admissibility under the Indian Law of Evidence (December 8, 2017). International Journal of Engineering Technology Research & Management, 1(10), 19–21, 2017; <http://doi.org/10.5281/zenodo.4346420>, Available at SSRN: <https://ssrn.com/abstract=3796301>

³ *Id at 1.*

⁴ Smt. K.Latha, "Relevancy and Admissibility of documents in evidence"

⁵ *Id at 1.*

⁶ *Id. at 2.*

⁷ Ram Bihari Yadav vs. State of Bihar, AIR 1998 SC 1850.

⁸ India Const. Art. 23

⁹ *Id at 1.*

¹⁰ Pooran Mal v. Director of Inspection of Income Tax, (1974) 93 ITR 505 (SC).

¹¹ R.M. Malkani v. State of Maharashtra, AIR [1973] SC 157.

the judge's discretion if such evidence operates unfairly against the accused but it is rarely in practice in Indian courts¹². The Court in the *RM Malkani's case* also held that "*The telephonic conversation of an innocent citizen will be protected by Courts against wrongful or high handed interference by tapping the conversation. The protection is not for the guilty citizen against the efforts of the police to vindicate the law and prevent corruption of public servants.*" Therefore the controversial judgement places conviction before fundamental rights of citizen, which raises the question; how law enforcement can establish the guilt of an accused before a court's pronouncement?¹³

[1.3] Position post the Puttaswamy judgement.

It is pertinent to note that the judgements in the previous section was post the *Kharak Singh Judgement*¹⁴ which declared that Right to Privacy is not a constitutionally protected right. Post the Apex Court's Judgment in the *Puttaswamy Case*¹⁵, the three pronged test was created which declared overreaching state surveillance to violative of the Right of Privacy of the accused unless *procedure established by law* along with *due process of law* was followed¹⁶. The three pronged test consists of the following requirements; Firstly, Presence of legal provision for the action taken by the state. Secondly, whether the action was necessary for the state's objective. And lastly, the test of proportionality establishing rational nexus between the action taken and the objective that was needed to be achieved¹⁷. The Apex Court in two different landmark judgments, while finding that there was no involvement of *public safety* or *public emergency* in *Vinit Kumar's case*¹⁸ and illegally placing mobile phones under surveillance in contravention to Rule-419A of the Telegraph Act¹⁹ in *Jatinder Singh's case*²⁰, after establishing that the CBI's actions in both the cases did not pass the three pronged test, the SC held that supporting the state's violation of fundamental right to privacy in the former

¹² Jai Anant Dehadrai and Udipto Koushik Sarmah, Surveillance, Criminal Investigations and Admissibility of Illegally Obtained Evidence: The Operationalisation of Privacy Post K.S. Puttaswamy, SCC Online Blog. (Last Accessed: 10/08/24) Available at: <https://www.scconline.com/blog/post/2022/10/19/surveillance-criminal-investigations-and-admissibility-of-illegally-obtained-evidence-the-operationalisation-of-privacy-post-k-s-puttaswamy/>

¹³ Paras Marya, "A RELOOK AT THE ADMISSIBILITY OF ILLEGALLY OR IMPROPERLY OBTAINED EVIDENCE", NLIU LAW REVIEW, VOL VIII, ISSUE II.

¹⁴ *Kharak Singh vs The State Of U. P. & Others*, 1963 AIR 1295

¹⁵ *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1.

¹⁶ *Id. at 13*.

¹⁷ *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1. (Para 17)

¹⁸ *Vinit Kumar vs Central Beaurau Of Investigation And Ors*, 2019 SCC OnLine Bom 3155.

¹⁹ The Telegraph Act, 1885, Act No. 13 of 1885, Acts of Parliament

²⁰ *Jatinder Pal Singh vs Central Bureau Of Investigation & Ors*, 2022 SCC OnLine Del 135.

would conflict with the *Puttaswamy*²¹ judgement and in the later established that non-conformity to *due process of law* has rendered the surveillance arbitrary and therefore the court set aside the accusations against the accused²².

ROLE OF EXCLUSIONARY PRINCIPLE IN CRIMINAL JUSTICE

The term “*Fruits of a Poisonous Tree*” was coined by *Franfurter*.²³ The 94th Law Commission Report suggests that exclusion is the only form of sanction which can be an effective deterrence to law enforcement²⁴. This is true because it will not be easy for a victim of illegal search to seek other form of sanctions such as criminal sanction against the individual policeman with the amount of resources and evidence available to him in comparison to the state, similarly civil remedy and departmental sanctions are also ineffective²⁵. Evidence obtained illegally has a tendency to operate unfairly against the accused in a trial²⁶. Another valid argument is the purity of judicial process. By accepting illegally obtained evidence, the Indian courts support the illegality of the process²⁷. When the prosecutor takes evidence gained by the lawless enforcement of the law and, places it before a court, that court by accepting the offer of proof becomes inevitably drawn into the lawlessness²⁸. The leading argument in the matter is the perspective given by *Wigmore*²⁹ which states that the court does not accept the illegality but simply ignores it so that the ends justify the means. What is important to notice is that by ignoring the illegality, the court becomes a party to the illegality itself³⁰, which puts in question the authority of the judiciary in question as no one can judge his own case in which he has interest. Furthermore, in the absence of a provision regarding illegally obtained evidence, courts cannot possibly sanction police officers in such cases. The presence of a statutory provision changes the scenario; e.g., the SC in its landmark judgment in *Baldev Singh's Case*³¹ held evidence inadmissible as it was collected in contravention to Section 50 of the NDPS Act which provides procedural safeguards. Therefore the illegality

²¹ *Id. at 16.*

²² *Id. at 12.*

²³ *Nardone v U.S.* 308 U.S. 338 (1939)

²⁴ Law Commission, Evidence Obtained Illegally or Improperly, (Law Com No 94, 1983) (Para:10.2)

²⁵ Law Commission, Evidence Obtained Illegally or Improperly, (Law Com No 94, 1983) (Para:10.4)

²⁶ *Callis v. Gunn*, (1963) 2 All E.R. 677.

²⁷ Law Commission, Evidence Obtained Illegally or Improperly, (Law Com No 94, 1983) (Para:10.7)

²⁸ Paulson, G. Monrad, The Exclusionary Rule and Misconduct by the Police, 52 J. Crim.L. Criminology & Police Sci. 255, 258 (1961).

²⁹ Wigmore, Evidence (McNaughten Revision 1961), Vol.8 Article 2176

³⁰ Law Commission, Evidence Obtained Illegally or Improperly, (Law Com No 94, 1983) (Para:10.8)

³¹ *State of Punjab v Baldev Singh*, (1999) 6 SCC 172.

of police conduct in a trial can never be brought in question³². As long as the one is proved *guilty*, he remains a *defendant* in a trial which requires the court to be responsible for admission or declination of evidence before the accused is established guilty³³.

RIGHT TO PRIVACY REQUIRES ILLEGAL EVIDENCE TO BE INADMISSIBLE

Currently, the Indian judiciary cannot exclude illegally obtained evidence by broadly interpreting Article 21, as it will be judicial overreach³⁴. India falls within the first category in the categorisation provided in the Law Commission report³⁵ as the Indian judiciary follows a dangerously non restrictive approach³⁶ in relation to admission of illegally obtained evidence³⁷. The Indian Courts view the BSA as exhaustive and so they do not provide a deeper interpretation to it. Evidence can be illegally obtained by for example; illegal search, eavesdropping, telephone tapping, violating a person body and in many other ways³⁸. In this matter, English case laws are often referenced, those which are not even applicable in England anymore³⁹. Due to the belief that the guilty will go free, the Indian judiciary has set a questionable precedent and so the police pay no heed to maintaining procedural safeguard in ensuring fundamental rights of citizens are preserved⁴⁰. Justice B.N. Srikrishna Committee in it's report⁴¹ found that almost 9000 telephonic conversations are intercepted every month by the state and concluded the non-existence of any legislative or judicial mechanism to curb the same issue is violative of fundamental right to privacy as established under the Puttaswamy case.

³² Law Commission, Evidence Obtained Illegally or Improperly, (Law Com No 94, 1983) (Para:10.8)

³³ Paulson, G. Monrad, The Exclusionary Rule and Misconduct by the Police, 52 J. Crim. L. Criminology & Police Sci 255 (1961).

³⁴ Law Commission, Evidence Obtained Illegally or Improperly, (Law Com No 94, 1983) (Para:10.17)

³⁵ Law Commission, Evidence Obtained Illegally or Improperly, (Law Com No 94, 1983)

³⁶ State of Maharashtra v. Natwarlal Damodardas Soni, A.I.R. 1980 S.C. 593, Bai Radha v. State of Gujarat, A.I.R. 1970 S.C. 1396

³⁷ Ritwik Sharma, ADMISSIBILITY OF ILLEGALLY OBTAINED EVIDENCE VIS-A-VIS RIGHT TO PRIVACY UNDER ARTICLE 21 OF THE INDIAN CONSTITUTION, (Last Accessed : 10/8/2024), Available at:

<https://bharatchugh.in/2023/11/06/admissibility-of-illegally-obtained-evidence-vis-a-vis-right-to-privacy-underarticle-21-of-the-indian-constitution-guest-post/>

³⁸ Jain, S. N. "ADMISSIBILITY OF ILLEGALLY OBTAINED EVIDENCE." Journal of the Indian Law Institute, vol. 22, no. 3, 1980, pp. 322–27. JSTOR, <http://www.jstor.org/stable/43950696>. Accessed 8 Oct. 2024.

³⁹ Aarushi Mehta, A Study on the Admissibility of Evidence Obtained by Unlawful Means in Indian Courts in view of Right to Privacy as a Fundamental Right, Manupatra Articles, May 19, 2021

⁴⁰ Id.

⁴¹ Justice BN Srikrishna Committee, "Data Protection".

REMEDIAL MEASURES

[3.1] Inclusion of Section 166A.

The 94th Law Commission Report⁴² goes one step further to provide that section 166A may be implemented in the Indian Evidence Act (Currently, BSA⁴³). Although it was never implemented by the legislature, the section was constructed by the law commission, and under 166(1), it states that it is the discretion of the judge to declare an evidence which appears to have been obtained illegally or improperly to be inadmissible as it would hamper the reputation of judiciary to accept such evidence, and under 166(2) it provides that such determination of exclusion should be made after considering all circumstances surrounding the case, including the extent of violation of human dignity, the seriousness of the case, the importance of the particular evidence in the case, whether any harm was inflicted to the accused and whether circumstances justify the law enforcement's action such as prevention of destruction of evidence.

[3.2] Deterring Law enforcement's overreach.

The Apex Court in *Bhappa Singh's case*⁴⁴ quashed the action against police officer who conducted unlawful search but at the same time did not nullify the petitioner's claim. The absurd reason for such decision of the Supreme Court was to prevent similar petitions from arising. Therefore, judgements like this encourage law enforcement officers to violate fundamental right to privacy. Furthermore, the BNSS⁴⁵ already provide procedural safeguards in investigation. Therefore, there is a need for an express legislative provision to bring the deterrence in effect as currently, seeking for legal sanction against the police proves to be very problematic and have negative implications on the accused in a trial. A possible remedy could be the suing not the individual officer but the Government responsible for such conduct of the officer - the SC held in *Diamondstar Export's Case*⁴⁶ where the SC entitled the accused for interest to be charged on articles illegally seized.

⁴² Law Commission, Evidence Obtained Illegally or Improperly, (Law Com No 94, 1983) (Chapter 10A)

⁴³ Id. at 1.

⁴⁴ *Bhappa Singh v Ram Pal Singh*, 1981 Supp SCC 12

⁴⁵ The Bharatiya Nagarik Suraksha Sanhita, 2023, Act No. 45 of 2023, Acts of Parliament

⁴⁶ *Director General of Income Tax v Diamondstar Exports Ltd*, (2006) 5 SCC 564

CONCLUSION

In conclusion, judiciary's standpoint on the admissibility of illegally obtained evidence is created by cases such as *RM Malkani* and *Pooran Mal*. The precedents reflect an infraction between upholding *rule of law* and ensuring justice. The Bharatiya Sakshya Adhiniyam focuses only on relevancy, but, post-*Puttaswamy* jurisprudence requires evidence gathered in violation of Right to Privacy to be subject to judicial discretion. The absence of a codified principle for exclusionary principle along with the judiciary's reliance on expired English cases, has created a dangerous approach that risks undermining fundamental rights. Introducing provisions in BSA like the Section 166A of the Indian Evidence Act as recommended by the Law Commission and deterring the overreach of police aligns with the society's current need for need for respect of deeper human values.