
JUDICIAL INTERPRETATION OF ADMISSIBILITY OF ILLEGALLY OBTAINED EVIDENCE

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It is important to deliberate whether we as a society have moral limits which value personal liberty and privacy. To what extent are we willing to compromise our morals as well as personal liberty in pursuance of justice? With justice as an end goal if we are willing to compromise the means in which we pursue justice, then is it really justice then? We are faced with the question as to how far should there be discretion with the court in a criminal case to exclude or include evidence that has been obtained illegally or improperly. To decide whether illegally or improperly obtained evidence should be admissible in courts, we will be analysing and critiquing the current law by tracing the trajectory of our Judiciary as well as all these surrounding questions regarding admissibility of illegally or improperly obtained evidence and comparing it with other the law standing in other countries.

Without an express legal or constitutional prohibition against its admissibility, illegally obtained evidence remains admissible in criminal as well as civil trials in India. Illegally or improperly obtained evidence is allowed so long as it is relevant to the facts-in-issue at trial. This view has been followed by both British as well as Indian courts. Even though India recognizes an exception to this admissibility, being the Unfair Operation Principle, it has never been elaborated or actually applied.¹ The only exceptions to evidences which when obtained are inadmissible are coded in The Indian Evidence Act, 1872, being evidence obtained which is protected by “spousal privilege” under Section 122, or “state privilege” under Section 123 or even “attorney client privilege” under Section 126 and a few other exceptions as well. The viability of illegally obtained evidence is not mentioned anywhere in the code or even in the Constitution.

The case *R. M. Malkani v State of Maharashtra*² revolved around the question of whether a person could be held liable on the basis of incriminating evidence, illegally obtained of a

¹ Chicago 7th ed. Khagesh Gautam, "The Unfair Operation Principle and the Exclusionary Rule: On the Admissibility of Illegally Obtained Evidence in Criminal Trials in India," *Indiana International & Comparative Law Review* 27, no. 2 (2017): 147-190

² (1973) 1 SCC 471: AIR 1973 SC 157.

conversation between a coroner and a doctor, which recorded the coroner asking for a bribe. The contention of the illegality argument, on the basis of Section 25, of the Indian Telegraph Act of 1885, as well as the constitutional argument which argued that such procurement of evidence was not on the basis of procedure established by law was both rejected by the Court. The conversation was voluntary relevant and direct evidence was provided by the police officers. There was also no legal prohibition against the admissibility of illegally obtained evidence. The Court observed that though illegally obtained evidence is admissible, the value of such evidence may be affected as it was ruled that improperly obtained evidence will be analysed with due caution by the court. In the case of *Pooran Mal v Director of Inspection (Investigation)*³, Section 132 of the Income Tax of 1951 was challenged on the basis of unconstitutionality. A writ of prohibition was further sought by the petitioner in this case as he claimed that evidence seized as a result of an illegal search and seizure is against the spirit of the Constitution. He further invoked the clause in Article 20 dealing with “protection against self-incrimination.” He brought forward references to the 4th and 5th amendment enshrined in the United States. All these arguments were struck down. The reason given by the court was that the only factor for the test of admissibility to be taken into consideration in the Indian law of Evidence similar to the one in England would be the relevancy of the same; so long as the evidence acquired (no matter by whatever method) is relevant to the facts of the case, and provides enough evidence to prove a relevant issue in the case, it would be deemed to be admissible on the discretion of the court as there exists no express or implied prohibition in the Constitution or other law that evidence obtained as a result of illegal search or seizure is not liable to be shut out.

Despite the above two cases, validating the illegal obtaining of evidence as admissible in the Court of law, there is, however, an exception to the same. It was observed in the case of *State of Punjab v Baldev Singh*⁴ by the Supreme Court of India that an illicit article seized from the person of an accused during search conducted in violation of the safeguards provide in S. 50 of the Narcotics Drugs and Psychotropic Substances Act, 1985, cannot be used as admissible evidence as proof of unlawful possession of contraband on the accused.⁵ Using such evidence could possibly render the trial unfair. This judgment though is restricted to the NDPS Act.

³ (1974) 93 ITR 505, AIR 1974 SC 348.

⁴ A.I.R. 1999 S.C. 2378.

⁵ Ibid.

Seeing the unrest, human rights violations as well as increase in the cases where illegally obtained evidence was being admitted into courts, the 94th Law Commission Report on ‘Evidence obtained illegally or improperly : Proposed Section 166A, Indian Evidence Act, 1872’ was published in 1983. It suggests that there should be a discretion given to the Court to exclude evidence obtained illegally or improperly which would be guided by relevant factors suggested by it in a proper legislative amendment. The report also mentions how the law of “relevancy” followed in India is insufficient and unsatisfactory. It also suggests the addition of Section 166A to the Indian Evidence Act, 1872 which would help in dealing with illegally or improperly obtained evidence. Unlike the admissibility as seen in most courts in India and England, the law of Scotland takes a different approach. Instead of discretion to exclude, the judge is granted discretion in the way of informally laid out principles to include irregular or improper evidence. The major advantage of the Scottish approach is that it necessitates a continuing judicial scrutiny of police practices and shifts the burden of justifying improper action to where it belongs, namely on the police themselves. ⁶ In Australia the burden to prove admissibility is laid on the party who wants such evidence to be considered by the Court. The position in the United States is the most stringent when it comes to the admissibility of illegal evidence. Evidence is not admissible if it was obtained in an unlawful search of his/her property, such search conducted or abetted by persons under the authority of United States. In addition to this, all the information which is obtained by such illegal search is also inadmissible barring a few exceptions. *Boyd v. United States*⁷ is one of the most landmark decisions based on the exclusionary rule. The exclusionary rule is enshrined in the fourth amendment of the American Constitution. All the pieces of evidence which are collected in breach of the Fourth amendment are rejected as the concept of “Fruit of the poisonous tree” is applicable. ⁸

The argument used by courts in India was that right to privacy not being a fundamental right, nothing could bar the courts from using such evidence, even though the courts often did reprimand it and advised to believe/admit such evidence with a note of caution. But with the recent 2017 judgment of *Justice K.S. Puttaswamy (Retd.) v. Union of India* which has finally made right to privacy a fundamental right,⁹ it is time the courts re evaluate the current state of law. The recent high-profile political controversy around the 36 Rafale jets deal signed by India deals with the question of allowing illegally obtained documents on the grounds of relevance

⁶ 94th Law Commission Report

⁷ *Boyd v. United States*, 116 US 616 (1886).

⁸ *Nardone v. United States*, 308 U.S. 338 (1939).

⁹ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, 1 SCALE 10 2017.

in matters of national importance. Making Inter governmental agreements on confidentiality of evidence, claims of national security and sensitivity towards commercial interests as concerns of making public the details of the agreement.

The Court prosecutes the allegedly guilty because of the duty it has to enforce the criminal laws of the land and to punish those who have broken those laws. The State, as well as the Courts as enforcer and upholder of the law, cannot itself break the very laws it exists to uphold. By allowing such illegal evidence to be admissible, in a way you are giving superfluous powers to these authorities who being human often corrupt and misuse it often prying on an innocent man by turning the investigation and hunt for evidence into a wild goose chase. Allowing one illegality make way for a murky realm being the gray area, where there's no answer where the line should be drawn and where you should set a limit to what illegal actions can be allowed in the name of justice.