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ADMISSIBILITY OF ILLEGALLY OBTAINED EVIDENCE

By

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At times the functionaries of the State may indulge in illegal methods of obtaining evidence in their zeal to bring the culprits to book. This evidence may be reliable, yet it raises the question of admissibility because it is tainted with illegality. The Indian Evidence Act does not give an answer to this question, except that it s. 27 of the Act provides that if anything is discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much information as relates distinctly to the fact thereby discovered may be proved. It is obvious that s. 27 will apply even though the information may have obtained by the police through means not fair. Apart from this statutory countenance of unfair means in obtaining evidence, should as a matter of policy illegally obtained evidence be allowed to be admitted in evidence. There are several methods by which evidence may be illegally obtained, e.g., by eavesdropping, illegal search, violating the body of a person and other methods which shocks the human conscience.

We may begin by givings the Supreme Court judgment in Ukha Kolhe v. State of Maharashtra.1 The accused in this case was prosecuted under the Bombay Prohibition Act. He was involved in a car

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1. A.I.R. 1963 S.C. 1531.

accident at about 2.30 a.m. He went to the Civil Hospital at 6 a.m. On examination, he was found "smelling of alcohol", and thereupon, his blood was taken at the instance of the attending doctor and collected in a phial. The phial was sealed and was later delivered to the police officer. On examination of the blood by the Chemical Examiner, it was found that there was concentration of alcohol to the extent of 0.069 per cent. weight in volume. This concentration being more than the prescribed limit, the burden of proof lay on the accused to prove that the liquor consumed was a medicinal or toilet preparation under s. 66(3) of the Act.

Section 129A(1) of the Act provides that a prohibition officer or a police officer can take a person, suspected of having consumed liquor, to an authorised registered medical practitioner for the purpose of medical examination or collection of blood. The blood so collected is to be sent to the Government Chemical Examiner for examination. The blood of the accused in this case was not collected at the instance of the prohibition or the police officer. Accordingly the accused contended that since the blood was not collected under the conditions stated in the section, the report of the Chemical Examiner was not admissible in evidence. 2 According to s. 129A(8) of the Act, however, nothing in s. 129A "shall preclude the fact that the person accused of an offence has consumed an intoxicant from being proved otherwise than in accordance with the provisions of this section." The Supreme Court

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2. Section 129B of the Act makes the report of a chemical examiner admissible in evidence without examining the chemical examiner. The section reads as follows:

"Any document purporting to be --

(a) a certificate under the hand of a registered medical practitioner, or the Chemical Examiner or Assistant Chemical Examiner to Government, under section 129A or an officer appointed under sub-section (a) of that section, or

(b) a report under the hand of any registered medical practitioner in any hospital or dispensary maintained by the State Government or a local authority, or any other registered medical practitioner authorised by the State Government in this behalf, in respect of any person

f.n. contd..

3

by a majority negativing the contention of the accused held that "production for examination of a person b fore a registered medical practitioner during the course of investigation by a competent officer who has reasonable ground for believing that the person has consumed an intoxicant and for establishing that fact examination is necessary, is not the only method by which consumption of an intoxicant may be proved." The result of examination of blood held otherwise than in conditions mentioned in S.129A of the Act could be proved by virtue of sub-section (8) of the Act.4 Das Gupta, J., disagreeing with the view

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f.n. 2 contd.

examined by him or upon any matter or thing duly submitted to him for examination or analysis and report,

may be used as evidence of thefacts stated in such certificate, or as the case may be, report, in any proceedings under this Act; but the court may if it thinks fit, and shall, on the application of th prosecution or theaccused person, summon and examin any such person as to the subject-matter of his certificat or as the case may be, report".

Since the blood of the accused was not taken under conditions stated in s. 129A, sub-section (a) of s. 129B was not applicable to th situation; and sub-section (b) of the latter speaks of report of a "registered medical practitioner" and therefor this was also not applicable.

3. The decision was 4 to 1. The majority judgment deliv red by Shah, J., and the dissenting judgm nt by Das Gupta, J.

4. In the court's opinion th Chemical Examiner's report of the result of examination of blood collected not in accordance with conditions prescribed in s. 129A of the Act could be admissible under s. 510 of the Criminal Procedure Code which makes admissibl in evidence the report of a chemical examiner. "Criminal Procedure" is in th concurrent list of the Constitution. It was argued that by th enactment of sections 129A and 129B in th Act, s. 510 of the Code stood repealed in its application to offences under the Bombay Prohibition Act. The court did not accept the argument since in its view s. 129B was not wholly repugnant to s. 510 of the Code and in th situation like the present s. 510 of the Cod was not r pealed.

of the majority held that in proving the alcoholic content of the blood the specific procedure prescribed in s. 129A must be followed. Since the prescribed procedure was not followed in this case, the result of blood test could not be admissible in evidence.

As the two opinions in the judgment itself show, two views of the language used in the statute are possible. The purpose of this paper is not to discuss which of the two literal interpretations is better, but to suggest that there is one other angle also from which the case could be examined, viz., whether the doctor by taking blood committed battery on the accused, and if so whether the evidence collected in such a manner should be admissible in the court.

The first question then is, did the doctor obtain the evidence illegally? The rights of private persons to interfere with human liberty when a person has committed an offence are defined by the Criminal Procedure Code. The right extends only to arresting a person who in the view of the person (i.e., in his presence) making the arrest "commits a non-bailable and cognizable offence"[5] and not of taking blood. If in the case in point the doctor collected the blood solely to obtain evidence against the accused and not for the purpose of any treatment, then certainly he interfered with the human body without lawful justification, and committed the tort of battery[6]

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5. S. 59 of the Criminal Procedure Code.

6. Battery is defined as follows: "The application of force to the person of another without lawful justification amount to the wrong of battery. This is so, however trivial the amount or nature of the force may be, and even though it neither does nor is intended nor is likely or able to do any manner of harm." Salmond, The Law of Torts, p. 302 (1961).

7

on the accused. From the facts of the case, it appears that the accused had gone to the hospital for treatment. On examination he was found "smelling of alcohol". Thereupon his blood was collected in a phial which was sealed. But before treatment could be given to him, he was discharged from the hospital on the request of some persons who accompanied him. The facts that the doctor suspected the accused of having consumed liquor, that thereupon his blood was collected, and that the phial was sealed and kept in the hospital for a period of nine days (the blood was taken in the hospital on 3rd April and was given to the police officer on 12th April) after the accused was discharged, appear to suggest that the blood was collected solely with a view to collect evidence against the accused. This may not be taken to suggest that it was really so. May be the blood was taken to decide upon the line of treatment, but the facts as recorded in the judgment do not appear to show evidence to that effect. Probably the attention of the court was not drawn to this matter.

Assuming that the blood was taken solely to use it as evidence against the accused, there is no doubt that the doctor committed the tort of battery on him. This raises a fundamental question whether the evidence obtained illegally should be admissible in the courts.

It has been held in several Indian decisions that the police cannot interfere with the human body more than what has been authorised by the statutory

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7. It is debatable whether the action of the doctor in taking blood amounts to criminal force under s. 350 of the Indian Penal Code which reads: "Whoever intentionally uses force to any person, without that person's consent, in order to the committing of any offence, or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other."

provisions. In Bhondar v. Emperor [8] it was alleged that the accused had raped a girl. On medical examination against his will it was discovered that there were abrasions on his penis which showed that he had committed the rape. The court held the evidence so obtained to be inadmissible. William, J., stated:

> "Any such examination without the consent of the accused would amount to an assault and I am quite satisfied that the police are not entitled without statutory authority to commit assaults upon prisoners for the purpose of procuring evidence against them. If the legislature desires that evidence of this kind should be given, it will be quite simple to add a short section to the Code of Criminal Procedure expressly giving power to order such a medical examination." [9]

In Deoman v. State [10] the accused resisted the police from taking him for medical examination to determine whether he had consumed liquor. The Bombay High Court held that the resistance was justified as there was no statutory provision authorising the police to do what it did. [11]

These cases establish that merely because certain evidence relating to the body of the accused is relevant to the facts in issue, it does not become admissible if the investigating officer obtained it illegally. The question whether certain evidence would be admissible on account of its relevancy is different from whether there is statutory authorisation to obtain that evidence. Sub-section (8) of s. 129A of the Bombay Prohibition Act deals with the former but say nothing regarding the right of a third person to obtain blood from the accused against his will.

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8. A.I.R. 1931 Cal. 601.

9. Ibid. at 602.

10. A.I.R. 1959 Bom. 284.

11. It was as a result of this decision, that s. 129A was introduced in the Bombay Prohibition Act, State v. Balwant Ganpati (1961) Bom. L.R. 38.

The question of admissibility of illegally obtained evidence has also occurred in the context of illegal searches by the tax authorities. There have been a conflict of opinion amongst the High Courts whether evidence collected through an illegal search can be used by the department. The Mysore High Court[12] held that such an evidence could not be used but the Allahabad,[13] Madras,[14] and Delhi High Courts[15] took a contrary view.[16] In Pooran Mal v. Director of Inspection, the Supreme Court held that there was no constitutional or statutory bar in using such evidence.

There are arguments for and against using such evidence.[17] The arguments for excluding illegally obtained evidence are:

(1) that, in the absence of other remedies, such a rule is necessary to deter the illegal methods of obtaining evidence, (2) that, by eliminating the apparent condonation of illegal practices, they contribute towards respect for the legal system, and (3) that they free judges from what is felt by some of them to

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12. Harikisandas Gulabdas & Sons v. Mysore, (1971) 27 S.T.C. 434.

13. Agarwal Engineering Stores v. State of U.P. (1972) 29 S.T.C. 446.

14. S. Natrajan v. Commercial Tax Officer (1971) 28 S.T.C. 319.

15. Balwant Singh v. R.D. Shah, (1969)71 I.T.R. 550.

16. (1974)93 I.T.R. 505. The case was followed by the Kerala High Court in Varghese Varghese v. Commissioner of Agricultural Income Tax (1976) 105 I.T.R. 732.

17. See a Note by S.N. Jain on admissibility of illegally obtained evidence in 5 Journal of Indian Law Institute, 295 (1963).

18
be repugnant complicity in the dirty business.

There are also arguments for not excluding such evidence. They are: (1) the evidence illegally obtained is true and reliable and what the courts need is reliable evidence to decide issues before them, (2) Exclusion of such evidence does not give any remedy against the illegality because the illegality has already taken place. The exclusion has the effect of acquitting the accused against whom the society is entitled to protection. The effect of exclusion is that both the accused and the person who committed illegality in obtaining evidence escape. (3) For obtaining the evidence illegally, the offending person should be punished. 19

In the United States, the problem has mainly arisen in connection with the unlawful search and seizure by the police. The approach of the United States Supreme Court has been that so far as federal crimes are concerned, the search and seizure clause of the Fourth Amendment[20] bars the admissibility of evidence obtained through illegal means.[21] In recent years there has been an extension of this principle. Till 1961 the Supreme Court had not imported any bar to the admissibility of illegally obtained evidence in the "due process" clause of the American Constitution.[22] The result was that in case of a state prosecution for a state crime, the court permitted illegally obtained evidence to be admitted in evidence, since search and seizure clause did not apply to the states. In the year 1961, however, the court overruling its earlier decision in Wolf v. Colorado[23] held in Mapp v. Ohio,[24] a five to four

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18. Ibid. at 299.

19. Ibid. at 299-300.

20. The Fourth Amendment reads: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated...."

21. Weeks v. United States, 232 U.S.383 (1914).

22. This was the holding of Wolf v. Colorado, 338 U.S. 25 (1949).

23. Ibid.

24. 367 U.S. 643 (1961).

decision, that under the "due process" clause, evidence obtained by a search and seizure in violation of the Fourth Amendment is inadmissible in a state prosecution for a state crime.

Some of the arguments of the Supreme Court in excluding such evidence were that the purpose of exclusion was "to deter - to compel respect for the constitutional guaranty in the only effectively available way - by removing the incentive to disregard it" and "nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." It may be mentioned that by 1949 only 17 States of the United States had adopted the exclusionary rule but by 1961, when the Mapp case was decided, approximately half of the States had adopted the rule. The Mapp ruling has not been extended by the court to exclusion of evidence in civil proceedings. Thus it was held in United States v. Janis[25] that the exclusionary rule did not apply to an Internal Revenue Service proceeding (a civil action) where the illegal search had been conducted by local police. The Court stated: "Clearly, the enforcement of admittedly valid laws would be hampered by so extending the exclusionary rule, concededly relevant and reliable evidence would be rendered unavailable."[26] Since the adoption of the exclusionary rule in the United States, there has been controversy going on whether it is a sound rule. Some of the safeguards suggested, in place of the exclusionary rule, for ensuring compliance of the law by the functionaries of the State are: (1) Criminal sanctions against law enforcement officers if they violate federal or state criminal laws. (2) Civil suits against transgressing officers brought in state or federal courts by parties who allege that their rights have been violated. (3) Departmental assistance that proper procedures be used by officers and departmental discipline against offending officers.[27] In May 1971, the American Law Institute recommended that the present exclusionary rules in the United States be modified. "Instead of automatically suppressing evidence when there is a violation, as is now required under the present exclusionary rule, the trial judge could admit the evidence (1) if the

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25. 428 U.S. 433 (1976).
26. Ibid. at 477.
27. Gardner and Manian, Principles and Cases of the Law of Arrest, Search and Seizure 84-85 (1974).

trial judge found that the violation was less than flagrant, and (2) that excluding the evidence would not deter police from similar invasions of privacy in the future (3) unless the defendant could prove that the police violation of the constitutional or legal rights of the defendant was 'willful'. 28

It is, no doubt, true that in England and probably in the other common law countries, the exclusionary rule is not followed. But the situation in India appears to be different. The basis of the exclusionary rule is that other available safeguards are not enough to deter officials from taking recourse to illegal means in obtaining evidence. In India either because of the lack of vigilance on the part of the individual or because of the psychological feeling of not annoying the officials or the department with whom his case is pending, or because of the lack of cooperation from other institutional agencies, these traditional safeguards do not seem to be hardly of any utility, and therefore, there seems to be necessity of adopting the American exclusionary rule. Or in any case, instead of obtusely holding (as the Supreme Court did in the Pooran Mal case.) that illegally evidence could by used by a government or police, it may be left to the discretion of the courts whether to permit the use of such evidence by the department or not, and the courts may exercise their discretions on the lines suggested by the American Law Institute. This would act as a restraint on the department in committing illegalities during search and seizure and at the same time the court may decide about the admissibility of evidence collected through illegal means in individual cases on the facts and circumstances of each case.

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