

ADMISSIBILITY OF ILLEGALLY OBTAINED EVIDENCE

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I Introduction

AT TIMES the functionaries of the state may indulge in illegal methods for obtaining evidence in their zeal to bring the culprits to book. The 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 section 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 section 27 will apply even though the information may have been 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 shock the human conscience.

II Indian judicial decisions

The general approach of the judiciary has been not to exclude the illegally obtained evidence on the ground that the method of collection adopted by the authorities does not affect its reliability and hence it is admissible on account of its relevance at the trial, with a few exceptions.

We may begin with the latest case on the subject, namely, *State of Maharashtra v. Natwarlal Damodardas Soni*.¹ Here the premises of the accused were searched and gold was seized by the authorities. He was as a consequence charged with certain offences. His contention was that as the search was illegal the seizure was inadmissible in evidence. It was held, assuming that the search was illegal, it did not affect the validity of the seizure and its admissibility in evidence. At the most the court may be inclined to examine carefully the evidence relating to the seizure.

In *Bai Radha v. State of Gujarat*,² it was held that non-compliance with some of the provisions relating to search would not affect the admissi-

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1. A.I.R. 1980 S.C. 593. See also *Radhkishan v. State of U.P.*, (1963) Supp. 1 S.C.R. 408.

2. A.I.R. 1970 S.C. 1396.

bility of the evidence so collected unless a prejudice was caused to the accused.

The question of admissibility of illegally obtained evidence has also occurred in the context of illegal searches by the tax authorities. There has 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 Court³ held that such an evidence could not be used but the Allahabad,⁴ Madras,⁵ and Delhi High Courts⁶ took a contrary view. In *Pooran Mal v. Director of Inspection*,⁷ the Supreme Court held that there was no constitutional or statutory bar in using such evidence.

In *R.M. Malkani v. State of Maharashtra*,⁸ the police had used an eavesdropping device to tape record conversation between the accused and a third person about the demand of bribe by the former. The accused contended that he could not be convicted of the charges of corruption on the basis of the evidence of tape recordings illegally obtained. The court held the evidence to be admissible, and said that there was warrant for the proposition that even if evidence is illegally obtained it is admissible. However, the court made the significant observation that "the Police Officer is more likely to behave properly if improperly obtained evidence is liable to be viewed with care and caution by the Judge."⁹

Finally, in *Ukha Kolhe v. State of Maharashtra*,¹⁰ the blood of the accused was taken to determine whether he had committed an offence under the Bombay Prohibition Act. The procedure prescribed in section 129A of the statute was, however, not followed in that matter. There was a provision in the statute which said that nothing in section 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." Relying on this provision the majority, four to one, held that the evidence collected in the case was admissible. But the dissenting judge held that in proving the alcoholic content of the blood the specific procedure prescribed in section 129A must be followed. Since this was not done, the result of the blood examination *could not* be admissible in evidence.

The overwhelming judicial view is thus that illegally obtained evidence is admissible except where a prejudice is caused to the accused. Further, such an evidence is to be viewed with care and caution.

3. *Harikisandas Gulabdas & Sons v. State of Mysore*, 27 S.T.C. 434 (1971).

4. *Agrawal Engineering Stores v. State of U.P.*, 29 S.T.C. 446 (1972).

5. *S. Natarajan v. Joint Commercial Tax Officer*, 28 S.T.C. 319 (1971).

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

7. 93 I.T.R. 505 (1974). The case was followed by the Kerala High Court in *Verghese Verghese v. Commissioner of Agricultural Income-Tax*, 105 I.T.R. 732 (1976).

8. A.I.R. 1973 S.C. 157.

9. *Id.* at 163.

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

III Arguments for and against excluding evidence

There are arguments both in favour and against using such evidence.¹¹ These may be briefly mentioned. The arguments for excluding such evidence are:

(1) that, in the absence of other remedies, the rules are necessary to deter the illegal methods of obtaining evidence, (2) that, by eliminating the apparent condonation of illegal police practices, they contribute towards respect for the legal system, and (3) that they free judges from what is felt by some of them to be repugnant complicity in the "dirty business."¹²

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.

IV Comparative position and evaluation

In the United States, the problem has mainly arisen in connection with the unlawful search and seizure by the police. The approach of the U.S. Supreme Court has been that so far as federal crimes are concerned, the search and seizure clause of the Fourth Amendment¹³ bars the admissibility of evidence obtained through illegal means.¹⁴ In recent years there has been an extension of this principle. Till 1961 the U.S. Supreme Court had not imported any bar to the admissibility of illegally obtained evidence in the "due process" clause of the American Constitution.¹⁵ 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*

11. See a note by S.N. Jain on admissibility of illegally obtained evidence, *Blood taken by a Doctor : Whether the Result of Test Admissible in Evidence*—*Ukha Kolhe v. State of Maharashtra*, 5 *J.I.L.I.* 295 (1963).

12. 8 *Wigmore On Evidence*, s. 2184a, p. 15 (1961).

13. 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 . . ."

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

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

v. *State of Colorado*¹⁶ held in *Mapp v. Ohio*,¹⁷ a five to four 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 U.S. Supreme Court in excluding such evidence were that the purpose of exclusion was "to deter—to compel respect for the constitutional guarantee is 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 seventeen 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 and other non-criminal proceedings. Thus, it was held in *United States v. Janis*¹⁸ 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, and, as is nearly always the case with the rule, concededly relevant, and reliable evidence would be rendered unavailable.¹⁹

In *United States v. Calandra*,²⁰ it was held that a witness summoned to appear and testify before a grand jury may not refuse to answer questions on the ground that they are based on evidence obtained from unlawful search and seizure.

In the United Kingdom the position is the same as in India as held by the courts. The English law is very well summarised in the following extract:

Provided the evidence is relevant, it will be admitted, though this is subject to a discretion of the judge to exclude evidence obtained unlawfully of its admission would operate unfairly against the accused. Relevant factors in this regard will include the position of the accused, the nature of the investigation, and the seriousness of the charge. In almost all cases where evidence is obtained unlawfully, it appears that this discretion will not be exercised, and it is submitted that the evidence will not be excluded for

16. *Ibid.*

17. 367 U.S. 643 (1961).

18. 428 U.S. 433 (1976).

19. *Id.* at 447.

20. 414 U.S. 338 (1974).

possible unlawfulness of the relatively unserious type discussed previously.²¹

The law is the same in Canada²² and New Zealand.²³

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.²⁴ 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 trial judge found that the violation was less than flagrant, and (2) that excluding the evidence would 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 'wilful'."²⁵

Even in the United Kingdom there are adverse comments on the English inclusionary rule. It has been stated by a legal scholar:

But even if *Mapp v. Ohio* excludes too much the English rule is too inclusive. As Professor John Rear suggested (*The Times*, 7 August, 1977) rather than the discretion to exclude being used "very exceptionally" it should be exercised in all cases except where the unlawfulness of the seizure was technical and/or the offence disclosed by the seizure was really serious. The notion that lip service to fundamental principles permits their rejection in practice should be firmly rejected.²⁶

In India, there are additional reasons why the exclusionary rule should be followed. The basis of the exclusionary rule is that other available

21. C.P. Walker, *Police Surveillance by Technical Devices*, 1980 *Public Law* 134 at 190-91.

22. *Hogan v. The Queen*, (1975)2 S.C.R. 547; *The Queen v. Wray*, (1971) S.C.R. 272.

23. See Orchard, *A Rejection of Unfairly Obtained Evidence: A Commentary on Hall v. Police*, 1976 *N.Z.L.J.* 434. For a survey of the legal position in various countries, see *The Exclusionary Rule Regarding Illegally Seized Evidence: An International Symposium*, 52 *J. of Cr. Law, Crim. and Police Science* 245-292 (1961).

24. Gardner and Manian, *Principles and Cases of the Law of Arrest, Search and Seizure*, 84-85 (1974).

25. *Id.* at 85.

26. Warwick McKean, *Searches and Sandwiches* 37 *Camb. L.J.* 200, 202 (1978).

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 co-operation from other institutional agencies, these traditional safeguards do not seem to be of any utility, and therefore, there seems to be necessity of adopting the American exclusionary rule. Or in any case instead of obtusely holding that illegally obtained evidence could be used by the 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 discretion on the lines suggested by the American Law Institute. This would act as a restraint on the department the 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.