
ADMISSIBILITY OF ILLEGALLY OBTAINED EVIDENCE IN INDIA

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ABSTRACT

This article concerns the admissibility of Illegally obtained evidence in India. Illegally obtained evidence means that due process of law was not followed in obtaining such a piece of evidence. This article will primarily focus towards the position in India and how can laws regarding India can be made in this context. The author's aim in writing this article is to first analyse the legal position and then critique it along with giving some suggestions.

INTRODUCTION

The evidence obtained through Sting Operations or through other illegal means is according to me an illegal evidence in itself and poses a lot of questions about the infringement of other rights of the accused. For example, in the case of sting operation an accused is made or in fact induced to commit a particular offence which he might would not have committed otherwise.¹ Generally, the position of illegally obtained evidence in India is according to its relevance to the facts of the case and it is admitted if it is relevant or it helps in reaching the final conclusion of the case but at the end the reliability placed on such an evidence is decreased.² In this paper, I first aim to analyze the position in India through a set of judicial decisions and then aim to critique it through the changing judicial perspective and comparative view with countries like U.S.A. and U.K. and finally give the conclusion which would be my take on the issue.

¹ Sundaram, R. (2015). Publicity, transparency, and the circulation engine: the media sting in India. *Current Anthropology*, 56(S12), S297-S305.

² Jain, S. N. (1980). Admissibility of Illegally Obtained Evidence. *Journal of the Indian Law Institute*, 22(3), 322-327.

POSITION IN INDIA

1. Analysis of relevant legal provisions: -

In India, the judicial trend towards admissibility of evidence has been centered around Section 5 of the Indian Evidence Act, 1872 and the following sections the crux of which is 'relevance'. The relevancy of any kind of an evidence in India is primarily gauged through the rules mentioned in the Evidence Act³. The most important provision in the act related to relevancy is Section 5 which lays down the emphasis on all the events forming part of the transaction in which the main act happened which lead to the legal case or dissension.⁴ The sections following Section 5 in the act elucidate upon the discrete and particular situations some of which might relate to facts relating to the motive or preparation of offence, facts relating to the other related events which might help in resolving the controversy at hand etc. In addition to the provisions accentuating the relevant facts, there are some provisions which place a bar on some particular set of facts, for an example a privileged communication between a client and an attorney won't be admissible as a piece of evidence, similarly unpublished documents of the state won't be admissible in evidence etc. Amongst these general bars, it is important for the purpose of this paper to look into specific bars in operation regarding the admissibility of an evidence which is obtained through illegal means. Article 20(3) of the Constitution⁵ is one such example which protects a person from being a witness against himself or herself. This is an important right as most of the cases involving illegally obtained evidences are the ones in which an individual is forced to self-incriminate. Apart from these general bars, there is no particular mention in the act⁶ about the admissibility of illegally obtained evidence which makes it pivotal to analyse the position through the case law method.⁷

2. Analysis through a set of case laws: -

The case laws in history of evidence law in India place a particular focus on the important bit on the relevancy and then move towards considering other factors like method of obtaining the evidence etc. In the case of *Y. S. Nagree v. State of Maharashtra*⁸, a trap was laid down for the accused whose conversations were recorded through a tape recorder and the accused gave some

³ The Indian Evidence Act, 1872

⁴ Jain, S. N. (1980). Admissibility of Illegally Obtained Evidence. *Journal of the Indian Law Institute*, 22(3), 322-327.

⁵ The Constitution of India, 1950

⁶ Ibid.

⁷ Ray, R. R. (1955). Restrictions on the Use of Illegally Obtained Evidence. *Sw. LJ*, 9, 434.

⁸ AIR 1968 SC 147 (India)

bribe to an official and wasn't aware of the fact that his conversations are being recorded through a tape recorder. The tape recorder was set by a police official who was informed that a person is going to bribe. Now, here in this case the Supreme court only looked into the fact that the concerned evidence is relevant to the factual matrix and also apprised the fact that the conversation was not made to police and was just made in normal course and was recorded. Due to these reasons, the court laid down that the accused wasn't forced to self-incriminate himself and therefore did not give him protection under Article 20 and held him guilty for the offence of bribing. In another case⁹ related to tape recording conversations only, the supreme court centered the discussion around relevancy of the evidence only and laid down that it is the sole criteria regardless of the fact regarding how the particular evidence was obtained. An English case of *Jones v. Owen* was also cited to reach this conclusion. However, in this case the court also carved out an exception which was not to admit the evidence in the case if it would lead to operate unfairly against the accused. Regarding that, the court in the present case looked into the facts regarding genuineness of the tape recording and other factors which might harm its authenticity. Finally, after considering all the relevant evidence, the court concluded that since tape recording is genuine and is relevant for the evidence, it won't account for any kind of self-incriminating case and hence the recording was admitted as an evidence.

There are further two most crucial precedents in the history of evidence law which directly address upon the question of admissibility of illegally obtained evidence. First is the case of *Pooran Mal v. Director of Inspection*¹⁰ in which the challenge was on the method of search and seizure which was conducted by the Income tax authorities and in such a search various articles such as gold, jewelry, money etc. were found and they were confiscated. The ground which the appellants relied on was that the search is in contravention to the provisions of the Income Tax Act and hence this makes the whole search illegal and further inadmissible as a piece of evidence. Here also, the court emphasized upon the fact that it is primarily the relevancy of the evidence which will be of paramount consideration and mere irregularities in the method will not make the whole search inconsistent with the constitutional guarantee. In the light of all these considerations, unlawfully obtained evidence was held to be admissible. There were similar observations which were made in the case of *State of Maharashtra v. Natwarlal Damodardas Soni*¹¹ where certain gold items were confiscated through an illegal

⁹ R.M. Malkani v. Maharashtra, (1973) 1 SCC 471 (India).

¹⁰ AIR 1974 SC 348

¹¹ A.I.R. 1980 S.C. 59

search and the court there held that the results of the search would be admissible and its illegality will not affect the result through which another illegal act has come into light. However, an important point made in the case of *Pooran Mal*¹² was with regards to excluding some evidence which would go against the accused in a highly prejudicial manner which was left to be decided entirely upon the discretion of the judge. In a case following this case¹³, an exception with regards to the admissibility of an evidence was actually made. In this case also, a search was made to find some drugs which were in the possession of an accused. The search which was made was in contravention with Section 50 of the NDPS Act¹⁴. Here in this case, the court did consider the findings in the previous case of *Pooran Mal*¹⁵ but made an exception in this case because evidence if received in this case would go highly against the interests of the accused because according to the NDPS Act, the accused should have the opportunity to go and explain his case before the nearest magistrate, such an option would have been denied to the accused. Moreover, the evidence if admitted would also have lead on to the negative presumptions to be made against the accused which again would have been unfair. This case particularly gives us a hint of the exclusion in the admissibility to be made when it operates unfairly against the accused. In the similar analysis in the case of *Bai Radha v. State of Gujarat*¹⁶, the court carved out the exception regarding prejudice to the accused which was exactly similar to the case of *Baldev Singh*.

3. Sting Operations as a relevant piece of evidence: -

Sting Operation is an example of an evidence collected through illegal means and its admissibility as a relevant piece of evidence raises questions about violation of rights of the person upon whom it is committed like violation of Right to Privacy guaranteed under Article 21 of the Constitution of India.¹⁷ It becomes yet another most popular method of gathering evidence through illegal means in which a trap is laid down and the concerned person is induced to commit a particular offence for example by intentionally bribing a person and recording him or her on the camera. Sting operations are sometimes done by a law enforcement agency like police, investigation bureaus or sometimes through an act of activism by NGOs, News Reporting agencies or even individuals. The question of illegality arises in sting operations

¹² Ibid 8

¹³ State of Punjab vs Baldev Singh, Appeal (crl.) 396 of 1990

¹⁴ THE NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES, ACT, 1985

¹⁵ Ibid. 6

¹⁶ A.I.R. 1970 S.C. 1396

¹⁷ Hay, B. L. (2003). *Sting Operations, Undercover Agents and Entrapment*. Harvard Law and Economics Discussion Paper, (441).

because in these kind of operations, the accused doesn't take the first step and rather he or she is induced to commit an offence. This raises questions about alternative situations like had a trap not been set up for the accused, he or she would not have committed the offence otherwise. Another most important consideration in the case of Sting operations becomes the consideration on the question of it affecting the privacy of the individual upon whom such an operation has been committed. The Indian position on maintaining privacy of the individuals has been covered in the case of *K.S. Puttuswamy v. Union of India*¹⁸ in which Article 21 of the Constitution was expanded and it was held that it includes within itself the right to privacy. Apart from these issues associated with the sting operations, facts like increase in transparency, right to freedom of speech etc. give legitimacy to the action of Sting Operations. In the case of *State of U.P. vs Raj Narain*¹⁹, Justice Mathews stated that '*The people of this country have a right to know every public act, everything that is done in a public way by their public functionaries. Their right to know is derived from the concept of freedom of speech*'. Further, it was stated that how for the successful implementation of full freedom of speech and expression in the country activities like sting operations, entrapments etc. are necessary. In the case of *S P Gupta vs Union of India*²⁰, the court held that . '*No democratic Government can survive without accountability and the basic postulate of accountability is that people should have the information about the working of the Government.*' Similarly, in the case of *Indian Express and ors. Vs Union of India*²¹, the Supreme Court talked about importance of freedom of press and in it also talked about how sting operations serve the purpose of ensuring justice and are carried on in public interest.

*Keeping all the relevant considerations regarding the importance as well as the rights which sting operations might possibly harm, the courts in India have taken a midway path regarding the admissibility of such an evidence obtained through sting operations. While recognizing its importance for keeping transparency and ensuring justice in cases like Sri. Bhardwaj Media Pvt. Ltd. v. State*²², the courts have in other set of cases like ***State of Haryana v. Ved Prakash***²³, ***Rajat Prasad vs. CBI***²⁴ have straightforward dismissed the evidence obtained through such operations. The decisions were completely based on the particular factual matrix of each and

¹⁸ 2017 S.C.C. OnLine 996

¹⁹ 1975 AIR 865

²⁰ A.I.R. 1982 S.C. 149.

²¹ 1986 AIR 515

²² W.P. (CrI.) Nos. 1125 and 1126/2007

²³ 1994 Cr LJ 140 (SC).

²⁴ (2014) 6 S.C.C. 495.

every case. Some of the major factors which increased or decreased the value of such evidence were the fact is such operation was conducted in consonance with any investigative agency or alone, what was the actual interest of the individual who was conducting such an operation, what was the method followed, whether a reasonable suspicion could have been made against such a person or not etc.

Conclusion on the Indian position: -

Having done a broad overview of the major cases related to the admissibility of illegally obtained evidence, we can conclude that position regarding admissibility in India primarily revolves around the relevancy part and it is given precedence over the illegality part of the evidence. In any of the matter where an illegal evidence can be excluded by the court, then it can be done only through the discretion of the judge who is presiding over that particular case and not through any other means.²⁵ There is no particular provision which excludes such evidence, nor are there any kind of statutory guidelines provided. This makes the entire process in India wholly contingent upon the whims and fancies of the particular judge who is presiding over the particular case.²⁶ The whole process further becomes complex when the evidence once admitted has to be the sole ground for conviction or any other sentence served to the accused, here also it must be seen that if that particular evidence can become the sole ground or not etc. There are no statutory guidelines regarding this as well.²⁷

POSITION IN UNITED STATES OF AMERICA

In U.S.A., exclusionary principle is the principle governing the admissibility of the illegally obtained evidence and the focus is thereby first placed on excluding the illegal evidence before jumping on to the relevancy.²⁸ A very important case of U.S.A. on the point of admissibility of illegally obtained evidence is the case of *Boyd v. United States*.²⁹ In this case, the accused was forced to give certain set of documentary evidence against himself, the evidence comprised of certain record keeping books like journals, accounts book etc. and the statute provided that if the accused would not provide the required evidence then it would lead to a negative

²⁵ Perlman, T. S. L. (1950). Due Process and the Admissibility of Evidence. *Harv. L. Rev.*, 64, 1304.

²⁶ Skeen, A. (1988). The admissibility of improperly obtained evidence in criminal trials. *S. Afr. J. Crim. Just.*, 1, 389.

²⁷ Grove, D. G. (1968). Suppression of Illegally Obtained Evidence: The Standing Requirement on Its Last Leg. *Cath. UL Rev.*, 18, 150.

²⁸ Kaczynski, S. J. (1983). The Admissibility of Illegally Obtained Evidence: American and Foreign Approaches Compared. *Mil. L. Rev.*, 101, 83.

²⁹ 116 U.S. 616 (1885)

presumption to be made against him. It was more like of forceful confession for the accused which would operate against him without his consent. The question of admissibility arose here and the court answered it in negative and laid down that it was a case of forced and compelled production to be made by a person against himself and if such a thing were to be done, it would be unconstitutional and void. This case resembles a bit with the facts of the case of Baldev Singh³⁰ where also the court found out that if such an evidence were to be allowed against the accused then it would lead to a negative presumption to be made against the accused and henceforth would operate unfairly against him. The court in the present case also referred to an English precedent of the case named *Entick* where it was explained how unlawfully compelling someone to be a witness against himself makes such a piece of evidence completely unreliable and illegal. Lastly, the court gave true interpretation of the Fourth and Fifth Amendment to the U.S. Constitution and held that being a witness against oneself and producing documents against oneself are not fundamentally different as a concept and both are illegal.

In another case of *Weeks v. United States*,³¹ the accused transported certain lottery tickets which was illegal. In order to find about his actions, the investigative agencies broke into the house of the accused and thereupon found the documents which were proving the case against him. This case was also contested on the basis of the Fourth Amendment and the court in this case held that admittance of this illegal evidence will bring a big question mark on the fairness of the whole judicial process itself and hence such an evidence should not be admitted. Such remark about the legitimacy of the judicial process was also made by Chief Justice Anand in the case of Baldev Singh³² only. Another U.S. Supreme Court decision in the case of *Mapp v. Ohio*³³ extended the protections which were given under the fourth amendment and therefore another fourteenth amendment was passed. In this case, there was blatant injustice done in terms of all the methods which were put into place by the officials for the purpose of gathering the evidence. The person who was accused was not even given the right to meet her advocate for the purpose of proceedings which directly violated various provisions of the constitution of the U.S.A. Here the court was stuck in a dilemma with regards to the fact that whether the mistake of a police official should result in letting go of a criminal free but then the court here observed that it is important for constitution to be respected and for government also to not break its own laws and hence here also in this case, the evidence was not admitted. From the

³⁰ Ibid. 7

³¹ 1914 case

³² Ibid. 7

³³ *Mapp v. Ohio*, 367 U.S. at 643 (1961)

above analysis, it can be concluded that in U.S.A., there are clear statutory principles like fourth amendment which govern the exclusions to be made regarding the admissibility of such an evidence and it is not solely left upon the judicial discretion unlike India.³⁴

POSITION IN UNITED KINGDOM

In United Kingdom, the restrictions on the admissibility of illegally obtained evidence are primarily contained in the European Convention on the Human Rights³⁵. Precisely like India, in U.K. as well the paramount consideration is firstly given to the relevance of the evidence and then the other exceptions kick in. Article 3 and Article 8 of the convention³⁶ are most relevant and they mainly ensure that there is no intrusion into the private life of the individual and along with that there was no torture or other harmful act of that sort for the purpose of obtaining the evidence. In addition to this, it is also looked that the process of obtaining the evidence is not in breach of the Police and Criminal Evidence Act³⁷ which lays down all the primary rules for obtaining evidence in U.K. In the same act, Section 76 provides for an exception to be made and that exception is also centered around the fact that evidence wasn't relevant or its methodology becomes irrelevant because of it being illegal. This reflects the pivotal consideration in U.K. which is that anything which helps to reach the outcome of the case is important regardless of the means reached to use that and exception is to be made in cases of gross injustice to the accused.³⁸

FINAL TAKE ON THE ISSUE

Indian position on the issue of admissibility of illegally obtained evidence as already seen has been vague and thus there is an urgent need of clear cut guidelines in the form of passing of a statute or an amendment. The final take on the admissibility of illegal evidence can be to first follow a strict exclusionary rule and dismiss such an evidence on the face of it without even going into it, second take can be to admit such an evidence if it is relevant to reach to the final conclusion of the matter in hand, third take can be to admit such an evidence and for the illegality part of it, punish the person who obtained such an illegal evidence separately.³⁹ With

³⁴ Schwartz, L. B. (1966). Excluding Evidence Illegally Obtained: American Idiosyncrasy and Rational Response to Social Conditions. *The Modern Law Review*, 29(6), 635-638

³⁵ Convention for the Protection of Human Rights and Fundamental Freedoms Rome, 4.XI.1950

³⁶ *Ibid.*

³⁷ Police and Criminal Evidence Act, 1984

³⁸ Cowen, Z. (1951). The Admissibility of Evidence Procured Through Illegal Searches and Seizures in British Commonwealth Jurisdictions. *Vand. L. Rev.*, 5, 523.

³⁹ Peiris, G. L. (1981). The Admissibility of Evidence Obtained Illegally: A Comparative Analysis. *Ottawa L. Rev.*, 13, 309.

regards to the position in India, the courts have followed a mixed approach till now depending upon their discretion and facts and circumstances of each and every case. The comparative look with countries like U.S.A., U.K., Canada would suggest that Indian position is much vague in the sense that there is absence of any statutory guidelines. In U.S.A., there is a clear cut fourth amendment which exhaustively lays out the exclusionary principle as is followed there. Similarly, In Canada also there exists a charter which lays out exceptions to be made in each and every circumstance.⁴⁰ On a contrary, Indian position is not clearly stated anywhere and jurisprudence on the subject matter is developed only through the judicial decisions.

Further, it is important to appreciate the time and context in which the Indian Evidence Act was passed which was back in the year 1872. There were not too many procedural violations back then and jurisprudence over other conflicting areas of law such as the Human Rights Law, Criminal justice system has only evolved later on.⁴¹ Keeping the context of time in mind and lack of a clear guideline in India, time has come to solidify the exclusionary principle in India and backing for it comes from the case of Baldev Singh⁴² where such an exclusion was actually made. It must also be noted here that as seen in the case laws above, the traditional safeguards in context of India have not worked out in terms of avoiding any collection of evidence through illegal means and rather it is police which is the prime investigative agency itself that has numerous times involved itself in terms of taking a part in actively gathering evidence by using illegal means. So, all these reasons point towards an urgent need to codify the principles or the exclusionary rule developed through case laws so as to have a clear position of law which can be applied in the further cases concerning such illegal evidence and it will also go on to ensure that courts do not commit fallacies while giving judgments on such cases and further there is not too much inconsistency or controversial judgments on the same issue concerning the admissibility of illegally obtained evidence.⁴³

⁴⁰ Lamer, A. (1997). Protecting the Administration of Justice from Disrepute: The Admissibility of Unconstitutionally Obtained Evidence in Canada. *Louis ULJ*, 42, 345.

⁴¹ 94th report of the Law Commission of India

⁴² *Ibid.* 11

⁴³ Tullis, R., & Ludlow, L. (1975). Admissibility of evidence seized in another jurisdiction: Choice of law and the exclusionary rule. *USFL Rev.*, 10, 67.