

Admissibility and Relevancy of Evidence Collected Through Illicit Means

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– Apurv Shaurya, Advocate

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” – These are the words of the 4th Amendment of the Constitution of USA from where the exclusionary rule of evidence is derived in US.

According to the Exclusionary rule of evidence, an evidence collected through illegal means, is not admissible in the court. In the case *Silverthorne Lumber Company v. United States* it was held that the evidence collected by the government authorities after sweeping the office of the accused, without any permission or authority, cannot be used in the court. The phrase of ‘Fruit of a Poisonous Tree’ was coined by Justice Felix Frankfurter in the Case of *Nardone v. United States*, where it was held that any such evidence collected through an unlawful means is inadmissible as it is a fruit of a Poisonous tree I.e. When its origin is corrupt, it also taints any evidence that came out of it and hence is not valid in the eyes of law. Further, it was held in the case of *Weeks v. United States* that if such material is allowed to be

used in the court, it would end up incapacitating the constitution. However, in the case of *Burdeau v. Maxwell*, an incriminatory material was stolen from the house of private individual who later delivered it to the government authorities. The court held that no official of the federal government had to do anything in obtaining it from the house of the accused, and hence there is no constitutional provision under which the government can be asked to surrender the documents.

The validity of such evidence collection has been challenged in the United Kingdom too, though opposite to the US legal position, in the case of *R v. Leatham*, it has been held that no matter how you get the evidence, even if the officer steals it, it is still admissible if it is relevant. However, in *Kuruma v. Queen*, it has been held that if the admission of the evidence proves to be contrary to the principle of fair trial, it would not be admissible.

The exclusionary rule finds itself in the criminal jurisprudence due to the strict right to privacy that exists in the USA Constitution. However, no such Right was present in India as a fundamental right till in the case of *K.S. Puttaswamy v. Union of India*, where it was held that Right to Privacy is a fundamental right.

In India, the Exclusionary Principle does not work like it does in USA and rather, in India in the case of *Radhakrishan v. State of UP* it was very clearly held by Justice Mudholkar that there are two consequence of an illegal search, that is that the person whose premise is being illegally searched, can resist such search, and that the court would be more careful while analyzing the evidence, apart from it, it shall have no consequence. In *Bai Radha v. State of Gujarat*, it has been held that not only the evidence is admissible, but also, any trial or conviction held on the basis on evidence gathered through illegal means is also valid in nature and unless a prejudice towards the accused is shown in the matter due to

it, there is no illegality in the decision given.

Even in matters that relate to grave privacy invasions like Telephone tapping, the evidence is still admissible. In the case of *S. Pratap Singh v. State of Punjab*, a tape recording of a telephonic conversation between two individuals was admitted as a corroborative evidence in the court. Further, in the case of *R.M. Malkani v. State of Maharashtra*, it was a question in front of the court as to whether a telephonic conversation tapped out by the police can become a ground for prosecution. It was held by the court that talking on call was a very voluntary process and tapping it is a mechanical process which involves no coercion. Hence the said tapped phone call can be used the evidence on which the trial begins. Hence, in India, it can be easily concluded that an evidence is admissible on only one ground that it is relevant, save, when it is a statement given to a police officer.

Section 26 of the Evidence Act states that "*No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person*". However, this principle is against giving testimonial statements under coercion, however, documentary evidence taken through coercion is not covered under it. Hence, it is in principle that any documentary evidence taken through any means, if relevant, is admissible.

Collection of evidence despite the breach of privacy has been a position in the Indian Jurisprudence for long. For a brief period when the Prevention of Terrorism Act, 2002 was in force, the Section 38 of it stated that "*A police officer not below the rank of Superintendent of Police supervising the investigation of any terrorist act under this Act may submit an application in writing to the Competent Authority for an order authorising or approving the interception of wire,*

electronic or oral communication by the investigating officer when he believes that such interception may provide, or has provided evidence of any offence involving a terrorist act." and hence, the police was legally authorised to interfere in the private lives of individuals for the purpose of national security. However, later POTA 2002 was repealed.

However, with time the legal position has changed. In the case of *Pooran Mal v. Director of Inspection*, the court held that there is nothing in the Constitution of India that can prevent the admissibility of evidence obtained unlawfully. In that case it was observed that the observance of the Privy Council in *Kuruma v. The Queen* was correct that in both, civil and criminal cases, the real test of admissibility of evidence is that whether it was relevant or not. The court however in the same case observed that the inadmissibility of the evidence in USA roots from their constitution and held that *"It would thus be seen that in India, as in England, where the test of admissibility of evidence lies in relevancy, unless there is an express or necessarily implied prohibition in the Constitution or other law evidence obtained as a result of illegal search or seizure is not liable to be shut out."* Thereby, it is admitted by the court that such admissibility of evidence taken through illegal means can be limited through the Constitution. When the judgement of *Pooran Mal* came in the year 1973, there indeed, was nothing that in the Constitution that prevented the state from encroaching into the privacy of Individuals.

The recent judgement of *Justice K.S.Puttaswamy(Retd) vs Union Of India* has given something that can be read in the constitution to prevent the encroachment of the state into the private life of the individuals. As right to privacy has been declared as a fundamental right, things such as Phone taping, unauthorised search of houses and premises and evidences acquired through these can be restricted. But as Privacy is a fundamental right, it is subject to reasonable restrictions

too. In the Judgment of KS Puttaswamy, it was held that it would be reasonable to restrict right to privacy for criminal offenses and *"The need of the competent authorities for prevention investigation, prosecution of criminal offences including safeguards against threat to public security"*.

Till now the accused had no recourse if evidences were taken from him through trick, force or through any other illicit means. In *PUCL v. Union of India* it was identified that Telephone taping is a serious invasion of privacy but it was permitted with regulation. Keeping in mind the above given judgement, it would correct to state that the present stand of the court needs to be revisited. Not only it is unfair on the part of the state that it allows illegitimate actions of the police, admitting such evidence would also mean that court legitimises such acts. When the Evidence Act was drafted by Sir James Fitzjames Stephen, he saw the possibility that if confession to a police officer is allowed, the police will use more torture and less actual work. Had confession to a police officer not been held inadmissible in the English jurisprudence, it would have simply meant that the court would have admitted confessions through torture too, but with a more cautious approach. But due to the presence of Section 26 in the Evidence Act, and the Protection against self incrimination in the Constitution, the confessions to a police officer is not admissible, hence the state does not legitimise the use of torture. With the newly interpreted Right to Privacy, the courts now need to see that unless there isn't a major criminal offense in question, the state does not get the right to record calls, invade messages, in the name of investigation. If the said accused is later found innocent, such methods in investigation would do nothing but breach his privacy, which is a damage that cannot be undone.

Even if the 'Fruit of a poisonous tree' doctrine is not adopted from the United States, Courts in India need to adopt 'The Unfair Operation Rule' that was propounded in the case of

Kuruma v. Queen. According to the rule, if the evidence has been obtained by a method that breaches accused's right to fairness, the said evidence can be excluded.

In the case of *P. Gopalakrishnan @Dileep v. State of Kerala* 7 Anrs. An actor was alleged of sexually assaulting a woman and the whole act was caught on tape to blackmail her. Later, the police searched his premises and found a pendrive that was taken by the court as evidence. The accused demanded the pendrive to produce substantial evidence from his side, though was denied from getting the same. If in a case the document extracted in such that the accused cannot give it as a supporting evidence, it is a breach of the Individual's right to fair trial and he should allowed to do so. Andrew Ashworth also propounds a Qualified Protective Principle, according to which when the evidence collection method departs from the regular and standard method of collection of evidence, it should be discarded unless and until it is proved that the accused suffered no harm from it.

Without going much into foreign jurisdiction, with the identification of Right to Privacy, it is important to note the 94th Report of Law Commission of India. The 94th Report of the Law Commission recommended the insertion of Section 166A in the Indian Evidence Act, 1872 that allowed the court to reject an evidence if it was obtained through illicit means, after considering a few factors like, the rights and the dignity that were violated due to the gathering of the evidence, Seriousness of the Evidence, Whether harm has been done to the accused or not, whether there were circumstances that justified the action etc.

Thus, the exclusionary principle that has till now been discarded in India, should be given more focus with the recent recognition of right to privacy and the current standards cannot maintain the Accused's right to a fair trial, which

gets breached with the invasion of Privacy. If Right to privacy exists but the state has a free hand to breach it whenever they suspect anything, admitting evidence collected by breaching a fundamental right would necessarily render the right meaningless as Rights are protection against state encroachment only. The court needs a more precautionary approach to balance the rights of the prosecution and the accused and discard the evidence collected through grave breaches of rights and illicit means, to maintain a balance.

This was admissibility and relevancy of evidence collected through illicit means, and their balance with the rights of the parties.