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Admissibility of Illegally Obtained Evidence

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ABSTRACT

Often authorities indulge in illegal means for collecting evidence, and in certain situations this evidence is sufficient for the culprit to be held guilty. 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 as well as one's fundamental rights.

Under the Indian Law there is no statutory prohibition against illegally obtained evidence under either the Indian Evidence Act of1872 or the Code of Criminal Procedure of 1973. Therefore, the Indian judicial system follows the traditional approach according to which the means of obtaining evidence does not affect the admissibility within the court.

The Law Commission of India in its Ninety Fourth report stated that there are four models in the Common law countries with regards to the admissibility of an Evidence, which are as follows-

1) Strict Approach – the strict approach is followed in nations like India wherein the illegality or the illicit means of procuring the evidence does not render the evidence obtained as inadmissible in the court.

2) Moderate approach – these situations arise in in nations like Australia and Scotland wherein the admissibility of the illegal evidence or the improper means of evidence is determined at the time of each trial and rests on the discretion of the judges.

3) In the third category the evidence is excluded from admissibility by some specific statutory provision and such admissibility is in violation of some substantive norm of conduct

4) In the fourth category where countries like USA are included a constitutional guarantee or a judicial construction of a constitutional guarantee, excludes certain evidence from use at the trial, where the evidence has been obtained in the violation of such constitutional guarantee. In the United States the Fourth Amendment and the Fourteenth Amendment provides for such protection.[2]

Keywords: *Evidence, Illegal.*

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[2] *Law Commission of India, Ninety Fourth Report on Evidence obtained illegally or improperly, 1983.*

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I. INTRODUCTION

Often authorities indulge in illegal means for collecting evidence, and in certain situations this evidence is sufficient for the culprit to be held guilty. 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 as well as one's fundamental rights.

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2. **Moderate approach –** these situations arise in in nations like Australia and Scotland wherein the admissibility of the illegal evidence or the improper means of evidence is determined at the time of each trial and rests on the discretion of the judges.
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4. In the fourth category where countries like USA are included a constitutional guarantee or a judicial construction of a constitutional guarantee, excludes certain evidence from use at the trial, where the evidence has been obtained in the violation of such constitutional guarantee. In the United States the Fourth Amendment and the Fourteenth Amendment provides for such protection.[3]

As the Law Commission has acknowledged that India comes under those few countries that follow strict approach, there are various case laws which prove the same. The Indian Supreme court in the case of Pooran Mal v. Director of Inspection[4] stated that "It will be wrong to invoke the supposed spirit of our Constitution for excluding such evidence. It, therefore follows that

[3] *Law Commission of India, Ninety Fourth Report on Evidence obtained illegally or improperly, 1983.*
[4] *(1974) 1 SCC 345, 364*

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neither by invoking the spirit of our Constitution nor by a strained construction of any of the fundamental rights can we spell out the exclusion of evidence obtained on an illegal search". Therefore while Article 20 of the Indian Constitution provides for several protections to the accused in a criminal trial, yet as per our Supreme Court's interpretation our Constitution doesn't provide for exclusion of illegally obtained evidence. Hence while many attempts have been made over time to read protections under Article 20 similar to the Fourth Amendment of the United States and thus create an Indian 'Exclusionary rule' however as seen in the above case, the Supreme court has refused to expand the scope of Article 20. Further in the case of State of Maharashtra v. Natwarlal Damodaras Soni[5] the court was of the opinion that in spite the evidence which was collected was through illegal means, it does not affect the validity and admissibility of the evidence. Also in the case of Bai Radha v. State of Gujrat[6] it was held that mere non-compliance with some of the provisions relating to search would not affect that the admissibility of the evidence so collected unless a prejudice was caused to the accused.

It is important to recognize that since virtually Indian has inherited the Evidence act from it colonial predecessors itself, the Indian Judicial Opinion is extremely close to the British opinion, which allows admissibility of illegally obtained evidence as long as evidence is relevant to the facts in issue at the trial.

The same can be evident from the famous case of Karuma v R where the Privy Council went to the extent of saying "It matters not how you get it; if you steal it even, it would be admissible in evidence."[7]

While without an express legal or constitutional prohibition against its admissibility, illegally obtained evidence remains admissible in trials in India much like Britain. However, a review of reported Indian Supreme Court opinions on the point discloses the existence of a judge made doctrine, which to a large extent has been derived our of British common law, whereby illegally obtained evidence can be excluded at the discretion of the trial judge if the admission of the same would operate unfairly against the accused. This rule is known as the Unfair Operation Principle.

This Unfair Operation Principle was seen in the case of R. M. Malkani v. Maharashtra[8] where the court stated that "the Judge may in his discretion disallow the admission of such illegally obtained evidence", However in Pooran mal case[9] this principle was impliedly overruled as

[5] *1980 SCR (2) 340*
[6] *1970 AIR 1396*
[7] *Kuruma v. R. (1995) 1 All E.R. 236 (P.C.).*
[8] *1973 SCR (2) 417*
[9] *Supra note 3.*

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the five judge bench was of the opinion that prosecution should be allowed to take advantage of the illegally obtained evidence if admission of such evidence is not unfair to the accused.

However in the case of State of Punjab v. Baldev Singh the court held that "If after careful consideration of the material on record, it is found by the court that the admission of evidence collected in search conducted in violation of section 5o would render the trial unfair, then that evidence must be excluded."[10]

Therefore to conclude in India with regards to the *admissibility of illegally obtained evidence there are three rules i.e.*

1. Subject to all express or implied constitutional and legal prohibitions, all relevant evidence is admissible.
2. If evidence has been obtained by violating a procedural granted to the accused, the Court may exclude the use of such evidence if the Court in its discretion is of the opinion that admission of such evidence would render the trial unfair.
3. If the conviction of the accused is secured only on the basis of evidence that has been obtained in violation of a procedural statutory right granted to the accused, then such a conviction cannot be upheld. [11]

II. ADMISSIBILITY AND EVIDENTIARY VALUE OF DYING DECLARATION IN INDIA WITH RELEVANT CASES

In India the concept of dying declaration is embodied in Section 32 sub section 1 of the Indian Evidence Act, 1872. As per this section, Dying Declaration is the declaration of a dying person as to cause of his death or as to any of the circumstances of the transaction which has resulted in his death. The second Para of the sub section makes it abundantly clear that the statement is admissible in civil as well as criminal proceedings and it is not necessary that the Person making the statement should be apprehending death at the time of making the statement. The Concept of Dying Declaration is based on the Maxim "*nemo morture praesumntur mentiri*" which means that the person who is about to die will not lie.

While as per Section 60 of the Indian Evidence Act, 1872 oral evidence has to be direct, and "Hearsay Evidence" which is not direct is not admissible. In spite of Dying Declaration being kind of a hearsay evidence yet it is admissible in court and runs as an exception to the general

[10] *(1999) 6 S.C.C. 172, 182*
[11] *Khagesh Gautam, "The Unfair Operation Principle and the Exclusionary Rule: On the Admissibility of Illegally Obtained Evidence in Criminal Trials in India" (2017)*

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rule that hearsay evidence is not admissible.

In the case of Ram Nath v. State of Madhya Pradesh[12] the Supreme Court held that while it is not safe to convict an accused merely on the evidence of a dying declaration without further corroboration as the statement is not made either on oath nor is it subject to cross examination.

However few years later Supreme court in the case of Kushal Rao v. State of Bombay[13] held that the previous observation was obiter dicta and stated that "it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of the conviction unless it is corroborated."

Further in the case of State of Uttar Pradesh v. Ram Sagar Yadhav[14] the supreme court was of the opinion that the primary effort of the court has to be to find out whether the dying declaration is true. If it is, no question of corroboration arises. It is only if the circumstances surrounding the dying declaration are not clear or convincing that the court may, for its assurance, look for corroboration to the dying declaration.

Also it is important to note that in India, the weight attached to a dying declaration depends upon the circumstances and the situation under which the declaration was made and not upon the expectation of death that is presumed to guarantee the truth of the statement.[15] Also, in the case of Padmaben Shamalbhai Patel v. State of Gujarat[16] the court stated that "a dying declaration is an independent piece of evidence which is neither extra strong nor weak and can be acted upon with-out corroboration if it is found to be other-wise true and reliable."

However the most important case with regards to dying declaration is Smt. Paniben v. State of Gujarat[17] where the Supreme court laid down the following principles which govern dying declaration.

- There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration.
- If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration.
- The Court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an

[12] *AIR 1953 SC 420*
[13] *1958 SCR 552*
[14] *1985 AIR 416*
[15] *Gulab Singh v. State, 1995 Cr. L. J. 3180 (Del)*
[16] *1991 SCC (1) 744*
[17] *1992 AIR 1817*

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opportunity to observe and identify the assailants and was in a fit state to make the declaration.

- Where dying declaration is suspicious, it should not be acted upon without corroborative evidence.
- Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected.
- A dying declaration which suffers from infirmity cannot form the basis of conviction.
- Merely because a dying declaration does contain the details as to the occurrence, it is not to be rejected.
- Merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth.
- Normally the Court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail.
- Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon.
- Where there are more than one statement in the nature of dying declaration, one first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be trustworthy and reliable, it has to be accepted.

While India has essentially inherited its Evidence act from England, however laws relating to Dying declaration in both the countries differ heavily. In England a dying declaration has to be made under the sense of impending death whereas in India a dying declaration is relevant whether the person who made it was or was not, at the time it was made under the expectation of death. Thus, in India it is immaterial whether there existed any expectation of death at the time of the declaration.

In the case of R v. Jenkins[18] it was held that the declaration could not be received in evidence since, at the time of making it the deceased I was not under settled hopeless expectation of death and her dying declaration suggested that at the time of making it she entertained a faint hope of recovery. However if Indian judiciary would've decided the case it would have been admitted in evidence since in India any statement made by a person as to the cause of death circumstances of the transaction resulting in death of that person is admitted in evidence. The

[18] *(1869) LR 1 CCR 187.*

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problem with English position is that of ascertaining the existence of knowledge of approaching death. Since, this ascertainment is to be done by the Judges depending upon the circumstances of each case; it al-ways leaves the possibility of subjectivity creeping in.

Also in England the admissibility of a dying declaration is confined only to the cases of homicide whereas in India a dying declaration will be admissible in any case in which the cause of death of a person comes into question. In the case of R v. Mead[19] the Court held that the dying declarations are only admissible where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the declaration. For example, in India in a charge of rape, a woman's dying declaration is admissible even if the death of the deceased is not the subject-matter of the charge, provided that the question of her death comes in charge of rape. But, in England such dying declaration is not admissible to prove rape.[20]

Also in In India a dying declaration is admissible even in civil suits also But in England a dying declaration is admitted in evidence only for the criminal cases and that too it is restricted only to those cases where the death is the subject-matter of the charge.

III. RELEVANCY & ADMISSIBILITY OF TAPE RECORDED CONVERSATION

The Indian Evidence Act, 1872 primarily deals only with the Oral and Documentary evidences as when the Act was formulated, the legislators simply didn't foresee that with advancement of Technology there will be a time when we would be able to record conversations and these conversations would play a huge role in providing evidences in courts. For the same reason there is no explicit provision in the act which talks about relevance and admissibility of these conversations.

One of the earliest case which dealt with the topic of recorded conversations and its admissibility was the case of Rup Chand v. Mahabir Prasad[21] where the court was of the opinion that tape recorded conversations cannot be used as an evidence under Section 145 of the Indian Evidence Act, 1872 however the court allowed the use of these tape recorded conversations as previous statement under Section 155(3) to shake the credibility of the witness.

Various Jurists who were against the admission of these tape recorded conversations argued that the same should not be admissible in court as it is against the Article 20(3) of the Constitution of India, 1950 according to which no individual can become a witness against

[19] *(1824) 2 B*
[20] *Avatar Singh "Principles of the Law of Evidence,16th ed.2007,Central Law Publication.*
[21] *AIR 1956 P H 173*

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himself. However in the case of Yusufalli Esamil Nagree v. State of Maharashtra[22] the Supreme court made it clear that no accused can claim protection under article 20(3) of the Constitution of India, 1950 as to whether talk or not to talk is one's personal and voluntary choice as long as he is not being compelled or coerced to do the same. Therefore from the above two cases which are of late 1950's and 60's it is evident that as per court which the tape recorded conversations were not independent evidence, however they were relevant and admissible evidence sufficient to launch prosecution as question the credibility of a witness provided that the tapes corroborate the conversation and deposition available otherwise.[23]

However in the landmark case of R. M. Malkani v. State of Maharashtra[24] the Supreme court gave immense importance to tape recorded conversations and went on to hold that the Tape recorded conversations are admissible provided that first the conversation is relevant to the matters in issue, secondly that there is identification of the voice and lastly the accuracy of the tape recorded conversation is proved by eliminating the possibility of erasing the tape record. According to the Apex court a contemporaneous tape record of a relevant conversation is a relevant fact and is admissible under section 8 of the Indian Evidence act, 1872. The court further stated that a tape recorded is res gestae and is comparable to a photograph of a relevant incident. Two years later in another landmark case of Ziyauddin Burhanudin Bukhari v. Brijmohan Ramdas Mehta went on to say that tape recorded conversations if they are not tampered with, are indeed the best form of evidence available with respect to the statements recorded. However the most important case with regards to tape recorded conversations is the case of Ram Singh & Ors. v. Ram Singh[25] where the apex court clearly laid down certain conditions which have to be fulfilled in order to make a tape recorded statement admissible which are-

- The Voice of the speaker must be duly identified by the maker of the record and others who recognize his voice.
- The accuracy of the tape-recorded conversation must be proved by the maker of the records by satisfactory evidence which may either by direct or circumstantial.
- Every possibility of tampering with or erasure of a part of a tape-recorded statement must be ruled out otherwise it may render the said statement out of context and, therefore, inadmissible.

[22] *1968 AIR 147*
[23] *Supra note 20.*
[24] *Supra note 7.*
[25] *1985 SCR (2) 399*

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- The statement must be relevant according to the rules of Evidence Act.
- The recorded cassette must be carefully sealed and kept safe or official custody.
- The voice of the speaker should be clearly audible and not lost or distorted by other sounds or disturbances.

This acceptance of the tape recorded conversations were not solely by Judiciary, rather legislature too played its role in recognizing and making tape recorded conversation admissible and relevant. In 2000 the legislature amended Section 3 of the Indian Evidence Act, 1872 making it more inclusive and by adding "all documents including electronic records produced for the inspection of the Court; such documents are called documentary evidence." Sub clause 2. Further Section 65B was also added by the amendment of 2000 which specifically deals with admissibility of the tape recorded conversations. It states that any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be also a document, if the conditions mentioned in the section are satisfied. Therefore with course of time and advancement of technology both the judiciary as well as legislature with time have become more and more accepting of tape recorded conversations and there relevancy as well as admissibility as an important evidence.

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