Fruits of the Poisoned Tree: Should illegally obtained evidence be admissible?

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By Talha Abdul Rahman *

Cite as: (2011) PL April S-38 While there is a virtue in the justice being blind, this definitely should not extend to admitting evidence that have been gathered by mechanisms deployed in egregious breaches of the law and human rights. In this article, I have argued basing on certain principled justifications that there is a need also in India to revisit the proposition that allows admissibility of illegally obtained evidence, and thereby attempt to enhance fairness of the trial, civil or criminal, by exclusion of illegally obtained evidence. While stay of trial could be considered as an alternative in extreme cases, it has only been incidentally discussed in this article where focus is on exclusion of illegally obtained evidence. I argue that exclusion of illegally obtained evidence is only proper because mere reduction in probative value of evidence does not sufficiently vindicate the violation involved. The phrases â€œillegally obtained evidenceâ€• and â€œimprop obtained evidenceâ€• have been interchangeably used and refer to those evidence which have been obtained broadly by employing methods in breach of privacy, personal security, violence, torture and entrapment.

I will first set out the legal position in India followed by principles on the basis of which the courts should keep their eyes open and also the circumstances of collection of evidence. Thereafter, subsequent to discussion on approaches by common law courts in England, Canada and Australia, I conclude by submitting that Indian courts must now develop appropriate method for exercise of discretion to exclude illegally obtained evidence, preferably supported by legislative change.

Judicial approach under the Indian law Presently, the situation under the Indian law is that under the Evidence Act, 1872 which is a law â€œconsolidatingâ€•, defining and amending the law of evidence permits relevance of a piece of evidence as the only test of admissibility of evidence.1 The courts have taken the view that there is no law in force that excludes relevant evidence on the ground that it was obtained under an illegal search or seizure, or was otherwise illegally obtained.2 The Supreme Court, which is otherwise reputed for its activist approach, has gone to the extent of holding that:

23. â€¦ It will be wrong to invoke the supposed spirit of our Constitution for excluding such evidence. â€¦
It, therefore, follows that 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.3

It is rather ironic that while Indian courts continue to rely on certain judgments of the English courts, the English courts themselves have distanced from the jurisprudence of those judgments.

Therefore, as would follow from the assessment set out in the section below, it is only appropriate that in the absence of immediate legislative assistance Indian courts develop mechanisms to avoid indirectly aiding and abetting police and investigative excesses.

Reasons for exclusion of illegally obtained evidence There are at least four accepted principles on the basis of which improperly obtained evidence must not receive favour from courts.4 The first, reliability principle is based on the premise that determining the truth of the criminal charges is the sole purpose of the criminal trial, and evidence should be admitted or excluded solely on grounds of reliability. It is argued that evidence obtained by improper means including torture, violence, or under a promise may not be reliable.

The second, disciplinary principle requires that improperly obtained evidence should generally be excluded, even when its reliability is not in doubt, since the court should use its position to discourage improper practices in the investigation of crime. It is argued that if judges routinely exclude improperly obtained evidence, the prosecutorial system would stop resorting to improper techniques as they would cease to be useful.

The third, and which I believe to be very critical is the protective principle, which is based on the premise that evidence obtained by infringing individualâ€™s right provides a prima facie justification, for the exclusion of such evidence is one of the methods by which infringement of the right can be remedied or vindicated. There is some support to this principle from the judgment of Dragan Nikolic5 by International Criminal Tribunal for Yugoslavia as well6.

The fourth principle is the judicial integrity principle, which operates on the basis that unless the courts refuse to admit improperly obtained evidence, they are endorsing the improper conduct by which such tainted evidence was procured. Therefore, to maintain their integrity and respect of administration of justice, the courts must be cautious of admitting such evidence.7 The thrust of the judicial integrity principle is not on morality but on public confidence in integrity of the system. This is because judicial integrity is at risk not only in the guilty escaping the conviction, but also in the manner in which the conviction is achieved.

Reference to the above discussed principles is important in that not only do they provide a clear rational for exclusion of improperly obtained evidence, but also tend to serve as guiding principles with reference to which the discretion of excluding evidence may be exercised by courts on a case by case basis. Arguably, therefore, it may be necessary for a legislative change to be supported by appropriate policy statement.

Judicial approach under the English law While the jurisprudence of human rights under the European Convention on Human Rights (ECHR) gradually developed an aversion towards police and prosecutorial excesses8 resulting in suitable legislative changes and common law responses, the enactment of the Human Rights Act, 1998 crystallised a discernable aversion of English courts to admit illegally and improperly obtained evidence that requires courts to ensure compliance with ECHR.

In Kuruma, Son of Kaniu v. R.9, decided in 1955, the Judicial Committee had set the precedent that the test to be applied in considering whether evidence is admissible or not, is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained. Later, in R. v. Sang10, while acknowledging that there had developed a general discretion to exclude unduly prejudicial material if its prejudicial effect exceeds its probative value, the Court of Appeal did not lay down a coherent theoretical foundation capable of cogently guiding the lower courts towards exclusion of evidence in appropriate case. Because of multiple speeches of the Judges, it became further difficult to ascertain the scope of the discretionary power identified in R. v. Sang11.

In R. v. Warwickshall12 it was held that â€œalthough confessions improperly obtained cannot be received in evidence â€¦ any acts done afterwards might be given in evidence, notwithstanding that they were done in consequence of such a confessionâ€•. In this respect, the Criminal Law Revision Committee was of the view that â€œit would be too great an interference with justice to prevent the police from using any â€˜leadsâ€™ obtained from an inadmissible confessionâ€•. Accordingly, while inserting general safety valves in the Police and Criminal Evidence Act, 1984 (PACE), Section 76(4) of PACE retains the ratio of R. v. Warwickshall13. Accordingly, Section 76(4) of PACE provides while confessions may be wholly or partly excluded in pursuance of Section 76, facts discovered as a result of such confession or where such confession is relevant as showing that the accused speaks, writes or expresses himself in a particular way may still be put to use in a criminal trial.

Given that law does not disregard wholly such improperly obtained evidence, especially confession, and permits its use for limited purpose, defeats the rationales for exclusion of such evidence. It defeats the disciplinary principle, as such reliance on evidence discovered after taking a lead from illegally obtained evidence is admissible, and does not itself discourage the investigative authorities from insisting on complete propriety. However, one must not lose sight of the fact that the English courts have been empowered by Section 78(1) of PACE14 to exclude improperly obtained evidence in appropriate circumstances. Section 78(1) of PACE provides:

In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. (emphasis supplied)

Under Section 78(1) while a wide judicial discretion may be considered as a blessing to deal with myriad situations, it does come embedded with equally vast sphere of uncertainty. Further, Section 82(3) of PACE which provides, â€œNothing in this part of this Act shall prejudice any power of a court to exclude evidence (whether by preventing questions from being put or otherwise) at its discretionâ€•, arguably retains the power of the courts under common law to exclude evidence15. A judicial decision identifying a definite relationship between the scope of Section 78 and Section 82(3) that expressly preserved common law discretion is still awaited16. Read together, while both Sections 78 and 82(3) give discretionary power to the courts to exclude improperly obtained evidence relying on principles of â€œfairnessâ€• and â€œcommon lawâ€•, s neither is defined.

In R. v. Christou17 the Court of Appeal observed the concept of fairness inheres equally in common law as it does in Section 78. Further, and a stronger remedy, as noted in R. v. Latif18, is the discretion of the court to stay criminal proceedings19, which is different from discretion under Section 78 [and arguably flows from Section 82(3) of PACE], but overlaps with Section 78.

Despite the enactment of Section 78 of PACE, there remains no identified basis, principle, or rationale on the basis of which such discretion can be exercised. This is arguably because Section 78 of PACE is not supported by a firm policy statement. As stated above, in appropriate cases, one can expect courts to even stay the trial20.

Judicial approach under the Canadian law Article 24(2) of the Canadian Charter of Rights and Freedom21 has a clearly identified rationale to exclude that evidence collected in violation of rights or freedom under the Charter, i.e. admission of evidence which would bring administration of justice into disrepute in the eyes of the reasonable man, dispassionate and fully apprised of the circumstances of the case. This was relied upon and applied in R. v. Collins22 and in R. v. Stillman23 with the Supreme Court of Canada propounding some refinement. Recently, in R. v. Grant24, the Canadian Supreme Court has further refined the legal position setting out the factors relevant for applying the criteria under Article 24(2) of the Charter of Rights and Freedoms. It held that to apply Article 24(2) to a specific case, it is necessary to consider (a) severity of the conduct complained and its assessment as to whether it would bring administration of justice into disrepute; (b) the societal interest in protecting constitutional rights and therefore judging the extent of interference with the individualâ€™s right; and (c) the societal interest in the adjudication of the case on the merits. Clearly, the test as

applicable in Canada would require the courts to apply the test of proportionality and perform a balancing exercise which has its own difficulties25.

Judicial approach under the Australian law It appears from R. v. Swaffield26 that the admissibility of evidence at common law in Australia is subject to exercise of discretion by the court on three counts: (a) voluntariness of the accused; (b) reliability of evidence; and (c) overall consideration taking into account all the circumstances of the case to determine whether the admission of the evidence or the obtaining of a conviction on the basis of the evidence is bought at a price which is unacceptable, having regard to contemporary community standards.

Earlier, the High Court of Australia, in Bunning v. Cross27, admitted evidence collected after impropriety on the ground that the unlawful conduct of the patrolman had resulted from a mistake, not from deliberate or reckless disregard of the law. Further, the nature of the illegality had not affected the cogency of the evidence, cogency being a factor in determining the admissibility of evidence obtained illegally where the illegality arises only from mistake. The Court further identified that broader questions of high public policy and fairness to the accused was a relevant factor to be taken into account. Following guidelines were also laid down for the benefit of trial courts: (a) was the illegality intentional or reckless, rather than negligent; (b) how cogent is the evidence in question; (c) how easy would it have been for the police to comply with the law; (d) the more serious the offence, the more tolerant of unlawfulness the court should be; and (e) where it is legislation which has not been complied with, is that legislation drafted in a way which demonstrates a desire to narrowly to restrict the police in the exercise of their power? While each of these cases, and tests come with their own difficulties but it is apparent that courts do not always countenance collection of evidence in breach of rights of individuals.

Conclusion I have argued that it is time that Indian courts should be coherent in adopting an inclusive rights approach and must attempt to distance themselves from receiving the evidence that has been collected in violation of individual freedom. While it may not be effective to automatically exclude such evidence, it is important for Indian courts in appropriate cases to develop a structure for exercise of their common law discretion to exclude evidence, something to which the Indian courts seem to have been oblivious. However, the job of a Judge is a difficult one, and even if assisted by a legislative change, a Judge would be required to grant â€œappropriate remedyâ€• in the facts of the case before it. The above discussed case laws, which by no means are exhaustive, show the difficulties that the Judge faces in attempting to find a comfortable way to achieving conviction without overstepping the individual rights and at the same time keeping the reputation of a fine administrator of justice.

In this respect, it may be efficient to have a statute like the Police and Criminal Evidence Act, 1984 in India, perhaps in the larger context of police reform, to ensure that the courts are able to draw from the text and objectives of the reason for exercise of such discretion to exclude illegally obtained evidence. However, in a country where accused persons are openly lynched by mobs, one has to be careful of public reaction to a political reaction to such proposal. At the same time, the necessary balancing act which would be required to be performed by Judges if not supported by necessary legislative backing is likely to leave too much scope for incongruous precedents open to mischief. On a parting note, a legislative change would prove more effective because common law Judges are known to exercise their discretion much more frequently if it emanates from a statutory source.

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- The Evidence Act, 1872, Section 5.
- Shyni Varghese v. State (Govt. of NCT of Delhi), (2008) 147 DLT 691 (Del); M.P. Sharma v. Satish Chandra, AIR 1954 SC 300 : 1954 Cri LJ 865; State of M.P. v. Ramesh C. Sharma, (2005) 12 SCC 628 : (2006) 1 SCC (Cri) 683; R.M. Malkani v. State of Maharashtra, (1973) 1 SCC 471 : 1973 SCC (Cri) 399; State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715.
- Pooran Mal v. Director of Inspection (Investigation), (1974) 1 SCC 345, 364, para 23 : 1974 SCC (Tax) 114.
- See, Peter Duff, â€œAdmissibility of Improperly Obtained Physical Evidence in the Scottish Criminal Trial: The Search for Principleâ€• (2004) 8 Edin LR 152.
- IT-94-2-S, 18-12-2003.
- See, Cedric Ryngaert, â€œThe Doctrine of Abuse of Process: A Comment on the Cambodia Tribunalâ€™s Decisions in the Case against Duch (2007)â€• (2008) 21 Leiden Journal of International Law 719.
- Origin of this principle appears to be in the American case of People v. Cahan, 44 Cal 2d 434 (1955) where the Californian Supreme Court observed that â€œout of regard for its own dignity as an agency of justice and custodian of liberty the court should not have a hand in such a â€œdirty businessâ€•. It is morally incongruous for the State to flout constitutional rights and at the same time demand that its citizens observe the lawâ€•. See also, Mapp v. Ohio, 6 L Ed 2d 1081 : 367 US 643 (1961).
- It is however settled by the European Court of Human Rights that the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for national courts to asses evidence before them. ECtHR is only going to examine whether trial as a whole was fair or not.
- 1955 AC 197 : (1955) 2 WLR 223 : (1955) 1 All ER 236 (PC).
- 1980 AC 402 : (1979) 3 WLR 263 : (1979) 2 All ER 1222 (HL).
- Ibid.
- (1783) 1 Leach 263.
- Ibid.

- Judicial discretion provided under Section 78 was introduced as a bargain to Lord Scarmanâ€™s proposal to have presumptive exclusion of all improperly obtained evidence unless its inclusion is required in the interest of justice.
- Note that while there is an implied assertion that courts at common law have the inherent power to exclude illegally obtained evidence, the courts in India have held otherwise arguably because the Evidence Act, 1872 is a â€œconsolidatingâ€• statute.
- See also, R. v. Mason (Carl), (1988) 1 WLR 139 : (1987) 3 All ER 481 (CA).
- 1992 QB 979, 988 : (1992) 3 WLR 228 : (1992) 4 All ER 559 (CA).
- (1996) 1 WLR 104, 112 : (1996) 1 All ER 353 (HL).
- See, Andrew L-T Choo, â€œHalting Criminal Prosecutions: The Abuse of Process Doctrine Revisitedâ€• 1995 Crim LR 864.
- In R. v. Looseley, (2001) 1 WLR 2060 : (2001) 4 All ER 897 (HL), the grant of a stay, rather than the exclusion of evidence at the trial, should normally be regarded as the appropriate response in a case of entrapment. In this respect, the court also held that the degree of intrusiveness of investigatory technique, nature of offence, reasons for police operation, nature and extent of police participation, and the defendantâ€™s criminal record are all relevant factors.
- The Canadian Charter of Rights and Freedom, Article 24(1):

â€œAnyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.â€•

Further Article 24(2) provides that:

â€œWhere, in proceedings under sub-section (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.â€•

- (1987) 1 SCR 265 (Can SC).
- (1997) 1 SCR 607 (Can SC).
- 2009 SCC 32 (Can SC).
- See, Aharon Barak, â€œProportionality and Principled Balancingâ€•, Law & Ethics of Human Rights: (2010) Vol. 4 : Iss. 1, Article 1 http://www.bepress.com/lehr/vol4/iss1/art1.
- (1998) 192 CLR 159 (Aust).
- (1978) HCA 22.