

PROCEDURAL ABRASIONS IN SEARCH AND SEIZURE OF PROPERTY

Written by Isha Goel

3rd Year BBA LLB Student, National Law University Delhi

ABSTRACT

For the maintenance of law and order in the society, there is a need to curtail the crimes and apprehend the offenders. Search and Seizure of person or place plays an important role in achieving the said objective. Criminal Procedure Code (CrPC) 1973 in chapter VII lays down the procedure to be followed by the police while searching and seizing the property for evidences related to the case. Various provisions of CrPC dealing with search and seizure point towards a clear objective that there should be a nexus between search or seizure and the offence, it cannot be done arbitrarily. The attitude of the police while conducting search seems to have varied with the political temper of the country. Questions like when a search is to be conducted, whose interest is to be invaded, whose rights are to be safeguarded are answered differently in different jurisdictions and at different points of time. This article is aimed at analysing the deviations from provisions of search and seizure given in the text of the code and how has judiciary responded to such abrasions. Focus is also placed on the response of the judicial system in other countries. This analysis is done in the framework of fundamental rights and doctrines like ‘principle of exclusion’, ‘unfair operation principle’.

PROVISIONS AND THEIR OBJECTIVES

Criminal Procedure Code, 1973 deals with the procedural criminal law in India. It lays down the detailed procedure to be followed during search and seizure of property. Search by the police officer during the investigation is dealt under Section 165 of the code which provides that the investigation officer for conducting search should have reasonable grounds for believing that the place to be searched has anything necessary for the purposes of the investigation. Further, that place should be within the jurisdiction and powers of the police officer.¹ The said police officer can authorise a junior officer but the latter cannot do it on his

own. The given search should be recorded in the diary. Under Section 166 of the code, the police officer may request a person from another limit to conduct any search but it has to be done in accordance with Section 165.ⁱⁱ The police officer now conducting search is required to prepare a report and submit it to the original police officer. However, in case of emergency a police officer may conduct the search in another jurisdiction but in such a case there is a need to send the notice and the list of search to the nearest magistrate and the police station.

Section 100 of the code lays down the procedure to be followed by the police officer and also the duties of the police officer and the occupants of the premises. The object of this section is two-fold, first it given the investigating agencies the right of free ingress in case of closed premises on the production of warrant of search. Second, it ensures that the search is conducted fairly and there is no 'planting' of evidence by the police. If the occupant refuses to allow the police officer then the remedy is laid down in Section 47 of the code- the police officer has been given the right to break in or forcefully get out of the premises in such a case. However, if the search is of the place of a woman who does not show herself in public then a notice is given to her asking her to vacate the premises unless there is an arrest warrant as well. In either case, the woman police officer has to be mandatorily present at the site.ⁱⁱⁱ Further, strict regard has to be paid to the decency of the woman and she can be touched only by another woman.^{iv}

In order to retain the faith of the public in the police and to ensure a check on the exercise of the powers of the police, the code provides that the search must be conducted in the presence of two independent and respectable persons of the locality.^v Only if no two persons are available or willing to be the witness, the police officer can call for two such persons from another locality. Further, they also have to sign the list of items seized. Also, the occupant of the place searched or any of his representative is allowed to be present during the search and is given a copy of the list of items seized free of cost.

Supreme Court has define independent witness as any person who is disinterested in the outcome of the case.^{vi} Respectable has been defined by the court as any person whose integrity is of higher scale in the eyes of common people of the society.^{vii} Locality is a very subjective criteria and depends on the geographical area. There was some confusion regarding the locality prior to the 1973 code due to the words 'the locality'. In 1970, joint committee submitted a report which led to the addition of the words 'or any other locality' in the 1973 code.^{viii} However, practically the police tends to use the stock witnesses and pays them regularly.

Seizure in simple terms means getting the actual physical possession of the moveable property. Section 102 in specific, deals with the powers of the police officer to seize certain property. If anything related to the case at hand or the offence is recovered during the search, police officer can take possession of such a thing and has to prepare a memo of recovery where he has to provide the list of recovered or seized items. He also has to specify the nature and characteristics of the items like perishable nature, brand, size, quantity, etc. Only the suspected property can be seized and nothing can be mixed with it. Non-perishable items can be stored at the 'malkhana' of the police station. In case of perishable items magistrate has to decide under Section 457 of the code if the items can be restored to the person and at what specific time. Magistrate has the discretion regarding the same.

JUDICIAL INTERPRETATION OF THE PROVISIONS

Section 100 leaves scope for the discretion of the police. However, there have been repeated incidents of misuse of such discretion by the police, for example, the practice of using stock witnesses so as to support the case of the prosecution. To deal with this, the apex court of India has adopted a stricter interpretation of the terms like, 'independent and respectable inhabitants of the locality', 'or any other locality', etc. The court has said that only when no witness is available or willing from the (same) locality, the police officer can secure the presence of independent witnesses from distant places.^{ix} The court has explicitly said that when all witnesses are from the police department conviction is not sustainable in most cases.^x However, it needs to be proven that prejudice was done against the accused and grave injustice has been caused to him.

Generally, if the independent witnesses who are colloquially called the 'panch witnesses' are not from the same locality, it is considered only as an irregularity. In simple words, non-compliance of Section 100(4) of the code in most circumstances does not affect the legality of the proceedings. Such an evidence is not inadmissible and the conviction based on such evidence may be said aside for the reasons mentioned above alone.^{xi} The burden is always on the prosecution to establish why a certain procedure provided under section 100 of the code was not complied.

The aim of this section is to create trust in the minds of the people that whatever incriminating property is recovered from the process of search and seizure is actually recovered and not

planted by the police officers. Further, in case of illegal search the person being search or his property getting seized has the right to resist such illegal search or seizure.^{xii} Under Section 100 Clause 5, it is clear that the independent witnesses can be called during the trial but it is not mandatory and the court has the discretion to secure the presence of the witness. This implies that non-examination of search witness does not by default render the search or seizure illegal.

The original Section 102 had only two clauses and suffered from severe lacunae. It created practical difficulties for the police in approaching the magistrate having the jurisdiction.^{xiii} Therefore amendment was made in the year 1978 which added a third clause. To further remove the gaps and make the section stricter, another amendment was made in the year 2005.^{xiv} This section is now wide enough to cover all offences. It not only encapsulates offences mentioned under the IPC but also those under any other special statute. The bank account or the postal account are included within the meaning of 'property' under the section.^{xv} However it must be seized only if the conditions laid down in section 102 are satisfied.

When on an inquiry, it is clear that no offence has been committed with regard to the property seized under Section 102, then such a property must be returned to the person from whose possession it was seized under Section 457 of the code. Immovable property cannot be seized under Section 102 nor can the magistrate pass any order in respect of such property for seizure. When the property is seized by the police officer in exercise of their powers under Section 51 of the code, that is, during the search of the person then it shall be reported forthwith to the magistrate.^{xvi} Section 103 allows the magistrate to direct a search in his presence if he is competent to issue the search warrant in that case.^{xvii}

The duty of police officer while preparing the search list is rather strict, that is, if a police officer makes any error while making the search list then the evidence justifying the seizure cannot be relied upon.^{xviii} Separate search list should be made for each person and each place. Oral evidence regarding what took place at the time of search and seizure is not excluded under Section 91 of the Indian Evidence Act.^{xix}

IRREGULAR OR ILLEGAL SEARCH IN INDIA

In India, neither the Indian Evidence Act 1872 nor the Criminal Procedure Code 1973 deal with the illegally obtained evidence. The development in such area has been only through the judicial decisions and scholarly writings which draw inspiration from other jurisdictions. Generally, the legality, illegality or the irregularity of the search is determined on the basis of four factors- power of the court, police officer acting in good faith, procedure prescribed under the code and justice or injustice done to the accused. If the court has the power to issue the search warrant, police officer has acted in good faith, the procedure prescribed under the code has been complied with and no gross injustice has been caused to the accused then in such a case, the search is held to be absolutely legal and valid.^{xx} If any of the first three conditions of a valid search are not complied then such a search is only said to be an irregular search. Irregular search is valid even if the act of police is punishable. It is valid to the extent it is not void. However, if gross injustice has been caused to the accused then it is clearly an illegal search.^{xxi}

The effect of the irregularities in search in India is very minimal and limited to the stricter scrutiny of the evidence and has no other effect.^{xxii} It does not vitiate the trial as the general rule in India is that the pre-trial irregularities do not affect the trial. In India, even an illegal search does not make the evidence inadmissible, only its veracity needs to be established and the person facing the illegal search gets the right to resist it.^{xxiii} The principle applicable in India is that the admissibility of evidence is not affected by the illegality of the means by which it is obtained.^{xxiv}

THE UNFAIR OPERATION PRINCIPLE IN INDIA

In India to some extent we have the Unfair Operation Principle which is created mostly through judicial case law and provides that the illegally obtained evidence can be excluded by the trial judge by using his discretion.^{xxv} Again, it is not mandatory and can be done only if it causes gross injustice to the accused. One of the most cited cases in India regarding the admissibility of the illegal evidence is the *Y.S. Nagree v. State of Maharashtra* 1967 where the evidence collected was illegally obtained as well as it was irrelevant to the case.^{xxvi} The person was

accused of bribing the government official. Police collected the evidence by placing the microphone in the inner room where the person was giving the bribe and had a recording machine in some other room. First the Bombay High Court and later the Supreme Court accepted the evidence as the accused was not compelled to give this incriminating evidence.

As compared to this, United States has absolutely secured the right of people against unreasonable search or seizure through its fourth and fifth amendments to the Constitution.^{xxvii} In this regard, the eight judge's bench of Supreme Court in India has held that "*India cannot rely on the fourth and fifth Amendment jurisprudence as developed in USA because of textual differences*".^{xxviii} Further in the Pooran Mal Case it was held that in India only relevancy is used as a test to determine the admissibility of the evidence and no other test can be used.^{xxix} However, it has also been held that a judge can use his discretion to disallow the illegally obtained evidence so as to ensure that the prosecution does not take advantage of it.^{xxx} Pooran Mal case has refined the above mentioned Uniform Operation Principle by stating that if the illegally obtained evidence operates unfairly against the accused then it cannot be admitted.

THE PRINCIPLE OF EXCLUSION IN THE UNITED STATES

Jurisprudence following the fourth Constitutional Amendment in the United States led to the conclusion that the illegally obtained evidence is inadmissible in the court of law, this is known as the principle of exclusion worldwide.^{xxxii} The most cited Case in United States regarding the same is the case of *Boyd v. United States*^{xxxiii} where the question before the Supreme Court was regarding search and seizure. The court after referring to several cases from the English Law argued that the use of private papers obtained from the accused person through a subpoena violated the fifth Amendment to the US Constitution.^{xxxiii}

Later in the case of *Weeks v. United States*, the court argued that the government must return any illegally seized property over which the accused had the property rights.^{xxxiv} One of the leading cases regarding this principle is *Mapp v. Ohio*. Here, a person was suspected of manufacturing explosives.^{xxxv} Police did not have sufficient evidence against him so they were unable to arrest him. The other day, he was residing at his girlfriend's house, Mapp. The police somehow got a search warrant and conducted the search in the latter's house. This search warrant was not a valid warrant. The police found no explosives but found some obscene

material from her premises. She was arrested and convicted by the court. In appeal, her conviction was set aside on the grounds- the search warrant was not in her name but her boyfriend's name and hence, it was not a valid search warrant and constituted an illegal search and seizure.^{xxxvi} Police claimed good faith but this plea was rejected. However, the rule created in *Mapp* has been severely diluted over the course of years.

In another case of *Evans v. Arizona*, the court drifted from this principle wrongly.^{xxxvii} The court had issued an outstanding search warrant against the suspect. The police, one day, found in the traffic a person with same name and searched him. This person was found in the possession of some psychotropic substances and was arrested for the same. He later argued that this search was illegal as he was not the same person against whom the outstanding search warrant had been issued. Here, the court drifted significantly from the principle of exclusion and his conviction was not set aside by the appellate court.

Generally, in USA six exceptions have been recognised to the exclusionary principle which dilute the effect of the principle originally stated.^{xxxviii} First, the exclusion of illegally seized evidence is not required when the evidence is introduced in the court for the sole purpose of impeachment of the defendant.^{xxxix} Second, is based on good faith of the police that the exclusion is not necessary when the police has reasonably relied on an assertion by a legal authority that a given search or seizure is allowed.^{xl} Third, when the connection between the evidence and the illegal search or seizure is so attenuated that the illegality did not perpetrate down in obtaining the given evidence.^{xli}

Fourth, if the search or seizure done illegally has not infringed the defendant's own interests created in the fourth amendment. Fifth, even if the police acted in bad faith, exclusion may not be necessary if it can be established that the same evidence could have been discovered/obtained through legal means as well. Sixth, exclusion is not necessary if it is not serving any interest protected by the constitution even if the police has acted in bad faith. In spite of these exceptions, the prevalent exclusionary rule has succeeded in suppressing probative evidence if it has been obtained through procedural abrasions arising due to the misconduct of the police or other agencies.

ADMISSIBILITY OR INADMISSIBILITY OF ILLEGALLY OBTAINED EVIDENCE IN UNITED KINGDOM

In UK, the principle of exclusion has been to some extent incorporated in the Police and Criminal Evidence Act 1984 where the admissibility of such evidence is in the hands of the trial judge. This Act provides that the court may exclude evidence if “*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*”^{xlii}. With regard to the same, the trend is to consider the legality of the police action, the nature and seriousness of the offence, whether the police officers acted in good faith or not, the type of evidence and its general reliability, the other corroborating or contradictory evidence, the type of infringement of the interests.^{xliii}

Indian courts have often relied on the English cases like *Jones v. Owens*^{xliv} and *Kuruma v. R*^{xlv}. In the latter case, the evidence was held admissible by the Judicial Committee of the Privy Council (JCPC) though it had been obtained by the police through flagrant violation of the procedural law. The search was conducted by a police officer who by law was not authorised to conduct the search of the said person. The court held that “*the evidence was admissible and it did not matter how it was obtained*”^{xlvi}. It also said that the judge may disallow the evidence if its admissibility would operate very unfairly against the accused. This has become the golden rule in Indian jurisprudence and has essentially evolved from the English cases.

For serious offences, the illegality must be particularly egregious to warrant the suppression of evidence. However, in none of the European countries including the United Kingdom, the evidence is excluded if it is indirect or derivative.^{xlvii} The European Court of Human Rights (ECtHR) which though is an ardent protector of human rights has managed to support in more than one instance the flawed inclusion of illegally obtained evidence thereby violating the human rights of the accused.^{xlviii}

CONCLUSION

The Code of Criminal Procedure in India (CrPC) provides in detail the procedure which should be followed while conduction of search and seizure. It seeks to ensure that the rights of the accused person are protected and that justice is not only done but also seems to be done. The sections also try to continue the faith of the general public in the investigation agencies by

making it mandatory that search and seizure is conducted in the presence of two independent and respectable witnesses. However, abrasions from these procedures lead to illegal or irregular search.

In India, the admissibility of illegally obtained evidence has been questioned on the basis of Article 20(3) of the Constitution which provides the accused person, right against self-incrimination. Other clauses of the article also protect the accused from double jeopardy and ex post facto laws, however, none of them deal with the illegally obtained evidence. In short, the equivalent of fourth Amendment of United States' Constitution is not present in India. Supreme Court has also failed to read the same into Article 20 or 22 of the Constitution. Moreover, even the procedural law and the evidence law do not deal with it explicitly that how the procedural abrasions in search and seizure of property should be addressed or how should the attempts be made to protect the rights of the accused.

However, to some extent, the jurisprudence in India suggests the acceptance of Uniform Operation Principle in India to deal with the illegally obtained evidence. In United States, as seen the principle of exclusion works well and confirms to the traditional norm of excluding the illegally obtained evidence with a few exceptions. India has accepted the Unfair Operation Principle whereby the illegally obtained evidence may not be admissible based on the discretion of the trial judge. However, if the illegally obtained evidence causes gross injustice against the accused so as to give unfair advantage to the accused then it is not admissible in the court of law. Indian principle is mostly adopted from the English cases and fails to meet the standard of Principle of Exclusion.

Further, there have repeated instances where the courts have failed to follow the above mentioned principle as well and the case has reached the Supreme Court. Thereafter the conviction was not set aside as in India the pre-trial irregularities do not vitiate the trial. The Uniform Operation Principle adopted in India is a much stronger legal basis for excluding illegally obtained evidence than the claim based on the fundamental rights under the Indian Constitution. As for the latter, a clear violation of the rights has to be established which leads to a very string burden on the defence while in case of the former the illegally obtained evidence can be excluded on the basis of the discretion of the trial judge. Thus, there is a great need for judicial development in the field of illegally obtained evidence in India.

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