

Periodic Research

Search and Seizure – Does Illegality in the Procedure Vitiates the Results- A Comparative Study of The Laws In India, U.K. and U.S.A

Abstract

While we talk about the issue of producing evidence for any offence committed, there lies a certain amount of confusion regarding what could be considered to be admissible and what methods could be seen as appropriate to collect the evidence, in order to expedite the process and ensure the delivery of justice. But in the process of delivery of justice, to what extent do we prioritize the fairness of the procedure? This remains an entailing question in the context of justice systems throughout the world.

Keywords: Investigation, Evidence, Search and Seizure, Reasonable, Inadmissible, Unjustified, Admissibility.

Introduction

An important stage of investigation is the collection of evidence by the law enforcement authorities in order to establish the crime of the accused beyond reasonable doubt. Search and seizure can be considered as a legal procedure in which the police force and other law enforcement authorities which suspect or were informed about a crime being committed or about to get committed, conduct a search of the accused or any other person's property and can seize any document which can be considered as an evidence to the crime.¹

To conduct such search operations, the government lay down certain stipulated guidelines which need to be followed by the concerned law enforcement agencies during these search operations. When the law enforcement agencies fail to comply with any of these stipulated rules amidst their search operation, then the conducted search is known as illegal. It is quite obvious to state that if the prescribed measures are not followed then the conducted search would lose the intended credibility which is expected out of it. However, it would be too extreme if the search and seizure conducted with the non-compliance of the rules would be considered void.

The research question that this paper is presenting is that whether the evidence obtained through illegal search and seizure can be admissible in a court of law. The author would like to answer this question through a comparative analysis Indian, American and British position of law.

Aim of the Study

The aim of this paper would be to compare the different positions of the state regarding the fairness of the procedure opted upon during the search and seizure, in order to understand the extent of the legality of the evidences that are procured through these. This would help in better appreciation of the evidence. Also subsequent knowledge creation would also be an aim.

Review of Literature

Richard Stone, *The Law of Entry Search and Seizure* (2013) Through this book the author tries to portray the evolution of the principles that relate to the search and seizures. It traces it back to the common law system and how this system grew over the years and the jurisprudential aspect behind this.

Ramlal Gupta, *Law of Arrest Bail Search and Seizure* (2012) This book provides for the bridge between the common law practice and how this system got transferred into the legal system in India. Along with that it discusses that issue in the light of arrest as well.



Ankit Raghuvanshi

LL.M. (Comparative and International Law)

National University of Juridical Sciences, Kolkata
West Bengal

Durga Das Basu, Criminal Procedure Code, 1973 (2014) This book is used to have a basic understanding of the provisions relating to the search and seizure as present in the criminal procedure code prevailing in India. Other than that, the requisite cases were also be found in this book.

Shrinivas Gupta, Commentary on The Criminal Procedure Code (2014) The Author through this publication makes a commentary on the functioning of the criminal procedure code as well as makes a critique about the prevailing limitations as well as shortcomings of this procedural law.

Current Position of Law Position of law in India

The police search operations in India are generally governed by sections 99-103 and 165 of the Code of Criminal Procedure, 1973 (hereinafter referred to as CrPC). As per section 165² of CrPC, the concerned Investigating Officer during a search operation needs to fulfill the following conditions³:

- a) Search is necessary for investigation.
- b) The concerned offence for which the search is to be conducted needs to be cognizable in nature.
- c) Police officer must have a reasonable ground to believe that the search operation needs to be performed without any delay for the purpose of investigation of a crime.
- d) The officer should record in writing the grounds of his belief and specify in writing the things for which the search is conducted.
- e) If it is practicable, then he must conduct the search in person.
- f) If it is not practicable for him to conduct the search, then he must record in writing the reasons for not himself making the search and shall authorize a subordinate to conduct the search after specifying in writing the place to be searched and as far as possible the things for which the search is to be made.⁴

It is important to formulate laws governing search and seizure as this process is intrinsically very arbitrary in nature. It was held in *Mangat Rai's*⁵ case that a power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power needs to be regulated by law.

The author would like to further elaborate the position of law, developed over the period of time, on this matter with the help of relevant case laws.

In *Radha Krishan vs. State of U.P.*⁶, it was held that if the search conducted was not in accordance with the provisions of sections 103 and 165 of CrPC and the seizure of the documents was not legally justified then the search could be resisted by the person whose premise was being searched. However, it is not justified for the person to commit any other crime against the investigating officer conducting the search after the completion of the search and seizure operation.

Further, in *Pooran Mal vs. Director of Inspection*⁷, the Apex Court held that the Indian laws of evidence are based on the rules of evidence which are prevalent in English law. The British as well as Indian courts follow the practice of accepting relevant

evidences even though if they are obtained by illegal search and seizure. So, in India the position of law is quite similar as in England, where the principal test of accepting evidence is its relevancy. Unless there is an express or implied prohibition in the Constitution or any other prevalent law, evidence obtained from illegal search and seizure cannot be excluded by court.

Furthermore, in *Dr. Pratap Singh vs. Director of Enforcement*⁸, it was held that the provisions given in CrPC relating to search and seizure are safeguards to check the secretive use of powers conferred on the law enforcement agencies. These provisions are interpreted by the courts in various ways. One school of thought is that if the search conducted is contravening the provisions of CrPC relating to search and seizure then the act would amount to a default in doing what is stated by law and to avoid the non-compliance of legal provisions, the courts should declare the evidence obtained through illegal search as void. However, this approach would make it very difficult to establish the crime of the accused. The court stated that it has settled the position by following the English decision, *Kuruma v. The Queen*⁹, in this regard.

In this case, the Privy Council decided that in a criminal case it is the discretionary power of the judge to disallow evidence if the admissibility of it would result in unfair conviction of the accused. In general, in judicial practice, the evidences which are obtained through illegal mechanisms are not per se inadmissible. If there is a gross breach of law by the investigating team and this imparity is causing serious injustice to the accused, then such evidence would not be considered in a court of law.

The position of the law was settled by this time but in *State of Punjab v Balbir Singh*¹⁰, the judgment was not in compliance with the settled position. In this case, it was held that a search conducted which contravenes the provisions of law and is conducted between sunset and sunrise would be considered illegal and the evidence accrued through it would be considered inadmissible. However, in *State of H.P. v. Pirthi Chand*¹¹, an appeal was filed against the decision of the Balbir Singh case. In this case, the Supreme Court overruled the Balbir Singh case and the previous position of law was again enacted.

Position of Law in USA

One of the principal reasons for the American independence movement was the prevalence of excessive British laws that permitted illegal confessions and confiscations.¹² That is why, the US Constitution provides strong protection for the rights of the individuals against the State, as far as search and seizure is concerned.

The 4th Amendment to the US Constitution¹³ prescribes a minimum protection that must be given by both State and Federal governments in searches and seizures. The Supreme Court has also ruled out that if the state wants to provide more protection, than that prescribed in the Amendment, to their citizens, then they can certainly do so. However, they can certainly not pass rules to

E: ISSN No. 2349-9435

provide less protection than that prescribed in the Amendment.

Since, the process of search and seizure is very arbitrary in nature, it is imperative for the government to formulate certain rules to govern these search operations, so that the investigating officers do not have exclusive power to conduct search operations as per their discretion. To achieve the same, the US law enforcement agencies have laid down certain principles or doctrines to govern the search and seizure operations conducted by the police. These principles are coined to make sure that the evidences which are used to establish a crime should be obtained through legally conducted search operations, so that the credibility of these evidences remain enacted. The author would like to discuss these principles with relevant case laws.

Exclusionary Principle

This principle was enunciated by the Supreme Court in *Weeks v United States*¹⁴. It states that a person, against whom evidence has been produced, has the right to contend before the court at the pre-trial stage that such evidence has been illegally procured.¹⁵ This principle was further extended by the Supreme Court in *Mapp v Ohio*¹⁶ where it stated that this principle would also be applied to states.

In *Mapp v Ohio*¹⁷, the police cops wanted to enter in the house of Dolly Mapp without a search warrant as they believed that a person who was suspected to be involved in the recent bombing was hiding in that house and large amount of raw material for the preparation for bomb is also stored in that house. The cops later forcefully entered in the house and conducted their search operation without the permission of Mapp. They did not found the intended search item but found a trunk containing obscene materials. Mapp was tried and convicted of possessing obscene materials.

The issue raised before the Supreme Court was that whether the evidence obtained, in violation of the Fourth Amendment protection against unreasonable search and seizure, was admissible in a court of law. The court held that, all evidences obtained by search and seizure which contravene the provisions of the Constitution are considered inadmissible in a court of law. Justice Clark while writing the majority opinion quoted an extract from the judgment of *Boyd v United States*¹⁸, that is:

*"The doctrines of the Fourth and Fifth Amendments apply to all invasions on the part of the government and its employees of the sanctity of a man's home and privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offence but the invasion of his indefeasible right of personal security, personal liberty and private property."*¹⁹

The court also stated that it is the duty of the court to protect its citizens from such encroachments by the government authorities. Justice Clark also cleared the dispute regarding the fact that whether the exclusionary rule is derived from Constitution or is a rule of evidence. He stated that the rule derive its roots from Constitution. However, if a conviction is

Periodic Research

averted on the basis of such evidence, the defendant has right to appeal against the decision. The Supreme Court has stated that this principle does not exclusively set aside the conviction. It is discretionary to the court to decide the case again, without considering the evidence obtained from illegal search, and upheld the conviction.²⁰

"Fruit of the Poisonous Tree" doctrine

It is a natural extension of the Exclusionary Principle. This doctrine was enunciated in *Silverthorne Lumber Co. v United States*²¹. This doctrine is based on the principle that the government should not benefit from the information derived from evidence obtained from illegal search.²² As per this doctrine, not only the evidence that is obtained directly from illegal search but also the evidences which are derived indirectly from illegal search is liable to be struck down as being against a citizen's Fourth Amendment rights.²³ The position of this doctrine was further elaborated and strengthened by the landmark judgment of *Wong Sun v United States*²⁴

In *Wong Sun v United States*²⁵, Wong Sun involved a federal narcotics investigation that resulted in the unlawful arrest of Hom Way. Based on the information obtained during the investigation, the officer also arrested Toy. The main issue raised before the court was that whether the evidence obtained by Federal cops against Toy, Yee and Wong in pursuance of an illegal arrest are admissible in a court of law. The Court held that the "fruit of the poisonous tree" doctrine not only bars the admission of any evidence obtained by illegal search and seizure but also disregard the admissibility of any derivative information or evidence obtained or inferred by that illegal evidence.

So, as per the application of this doctrine, the statement of Toy and the heroin confiscated from Yee were inadmissible in a court of law. However, the statement made by Wong Sun was admitted. Even though the arrest of Wong Sun was unlawful as the officers lacked probable cause, his statement "was not the fruit of that arrest." However, none of the aforementioned principles can close the case forever against the defendant. These principles can only govern the admissibility of certain evidence. The application of this principle cannot declare the entire case against the defendant void. The defendant still has the right to produce other evidences (which are obtained through legal search and seizure) to avert his conviction.

Position of Law in UK

The laws regarding procedure to conduct search operations in England are quite similar to that of US. In England, the search and seizure operations of police are governed by the Police and Criminal Evidence Act, 1984.

Till the independence of United States, the courts in England do not recognize evidences obtained by applying unjustified force or through compulsion, regardless of their reliability.²⁶ However, in *King v Warickshall*²⁷, the English courts for the first time accepted evidence obtained by the adoption illegal measures. In this case evidence was obtained by an illegal confession (the accused confessed under

E: ISSN No. 2349-9435

Periodic Research

the influence of a false promise). The court held that the evidence obtained by the confession can be admitted as the confession was free and voluntary but the confession itself cannot be admitted as it was obtained by brewing false hope in the mind of the accused. This judgment eventually cined the doctrine of "voluntariness test" which became the standard for admitting evidences obtained by confessions.

To one's surprise, there is an unusual paucity of cases in England dealing with illegal search operations. The leading English case on this issue is *Elias v Pasmore*²⁸. In this case, the ambit of the power conferred upon the police to search premises was widened and now they can search the premise even if the occupier was not present there at that particular time. It also stated that if the police have conducted the search and seizure operation reasonably and in good faith, then minor deviance from the laid down legal position would not render the evidence obtained from that search inadmissible.

Overall, the prevalent laws in England on the issue of admissibility of evidence obtained from illegal search and seizure have developed more or less in a similar manner to that of the laws in India. In England, the evidence gathered from illegal searches can be validly used in a court of law, unless that illegality in procedure is expressly or necessarily prohibited under the Constitution or any other local law.

Author's Analysis

From the aforementioned discussion, the current legal position of India, US and UK on the matter of admissibility of evidence obtained by illegal search and seizure is quite clear. In India, if the evidence collected from search and seizure is in violation of law then it does not become inadmissible per se and even if it is found in gross violation of law then also the court observes the weight that evidence bear to establish the case of prosecution. In US, preference is given to the rights of the citizen over the State. If the evidence is obtained, directly or indirectly, through illegal search and seizure, then it cannot be produced before the court to establish the crime of the accused. The position of law in England is quite similar to that of India. There also if the evidence is obtained by illegal search, it can be used in a court unless it is obtained by a gross violation of the Constitution. However, the search and seizure laws in India are comparatively more liberal than in England.

Illegality v. Irregularity

After analyzing the position of law in various countries, the author would like to bring the attention to the fact that there has not been any express provision which states the difference between violation of the procedure established by law and irregularity in following the procedure established by law.

On this issue, only the English law has a settled position. In *King v Warickshall*²⁹, the court held that if the evidence is obtained by an irregular search operation, then it would be admissible in a court of law but if the evidence is obtained by search and seizure which completely contravenes the provisions of law then that evidence cannot be admitted by a court.

The US law measures both these cases with the same yardstick. As per the fourth Amendment of the US Constitution, if a search is conducted which do not comply with the provisions of the Constitution, then any evidence obtained through it would be considered void. In the author's view the position of the US law is not appropriate. Evidence obtained through a small irregularity should not be treated as evidence obtained through gross violation of law. It is one matter to reduce the credibility of evidence obtained through a small irregularity and another to completely disregard it. The author believes that disregarding such evidence shows an approach more severe than required.

Indian law is very arbitrary in dealing with such cases and does not appreciate the bifurcation between violation and irregularity of procedure. There are no such provisions or precedents which state the difference between violation of the procedure laid down by law and slight deviance from the procedure laid down by law and so there is not any settled position to decide the fate of the evidence obtained by such procedures. It is upon the discretion of the court to reject evidence obtained from such irregular search operations on the ground that they grossly violated the law.

Rights of the people v Power of the State

Analyzing the above stated legal position, it can be safely deduced that the entire debate on the illegality of the search and seizure procedure is about rights of the accused versus the power of the state. The fate of evidence, obtained by illegal search and seizure, can only be decided in two ways. Either that evidence would be admitted in court or it would be rendered inadmissible. If that evidence is admissible then it means that the rights of the accused have superseded the rights of the State. Else, the supremacy of the State is enacted.

India and UK, in general practice, prefer to enact the supremacy of the state by admitting the evidences obtained by illegal searches. The legislative bodies in these countries believe in the fact that a person who has committed a crime should not be acquitted only because the evidence that is used to prove his guilt is obtained through vitiated processes. However, the legal position in US differs from that of India and UK as they prefer protecting the individual rights over the State. They believe in the fact that an accused is entitled to a fair trial. So, a conviction resulting from evidence obtained through vitiated processes is contrary to the concept of justice.

Current Scenario

While we attempt to understand the implication of these finding in the light of the current scenario which is marred by incidences of extra judicial killings as well as encounter killing by the police forces, the credibility of the same institution on issues relating to search and seizure seems to evidently shaky. Despite this, the judiciary has limited powers to ensure the fairness in the procedure but it should not act blindly without considering the persisting shortcomings of the system. Thus should take the evidences procured with a pinch of salt.

Conclusion

In the end, the author would like to conclude this essay by stating that there needs to be a balance of rights of the people and the powers conferred to the law making agencies. It is important that the position of law pertaining to the admissibility of evidence collected during illegal search should be just, fair and compatible with their system of jurisprudence. The position adopted by courts in different countries is in order to find a correct balance, in context of that country, such that powers of the state can be maximized while rights of the people remain protected.

References

1. "Illegal Search and Use of Evidence", available at <http://www.lawteacher.net/free-law-essays/constitutional-law/illegal-search-and-use-of-evidence-constitutional-law-essay.php> (last accessed 28/1/2016).
2. 165. Search by police officer.
 - (1) Whenever an officer in charge of a police station or a police officer making an investigation has reasonable grounds for believing that anything necessary for the purposes of an investigation into any offence which he is authorized to investigate may be found in any place with the limits of the police station of which he is in charge, or to which he is attached, and that such thing cannot in his opinion be otherwise obtained without undue delay, such officer may, after recording in writing the grounds of his belief and specifying in such writing, so far as possible, the thing for which search is to be made, search, or cause search to be made, for such thing in any place within the limits of such station.
 - (2) A police officer proceeding under sub-section (1), shall, if practicable, conduct the search in person.
 - (3) If he is unable to conduct the search in person, and there is no other person competent to make the search present at the time, he may, after recording in writing his reasons for so doing, require any officer subordinate to him to make the search, and he shall deliver to such subordinate officer an order in writing, specifying the place to be searched, and so far as possible, the thing for which search is to be made; and such subordinate officer may thereupon search for such thing in such place.
 - (4) The provisions of this Code as to search-warrants and the general provisions as to searches contained in section 100 shall, so far as may be, apply to a search made under this section.
3. MR MALLICK, DURGA DAS BASU CRIMINAL PROCEDURE CODE, 1973 VOLUME 1 (4TH EDN, BUTTERWORTHS WADHWA 2010) 901.
4. *Ibid.*
5. (1970) 2 SCR 151.
6. AIR 1963 SC 822.
7. (1974) 1 SCC 354.
8. (1985) 3 SCC 72.
9. (1955) A.C. 197.
10. (1994) 3 SCC 299.
11. (1996) 2 SCC 37.
12. 'Does Illegality in Procedure Vitiates the End Result', available at <http://b-essay.com/law/does-illegality-in-procedure-vitiates-the-end-result-law-essay.html> (last accessed 27/1/2016).
13. The fourth amendment to the United States Constitution provides: The right of the people to be secure in their persons, houses, papers, and effects, 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.
14. 232 U.S. 383 (1914).
15. *Ibid.*
16. 367 U.S. 643 [1961].
17. *Ibid.*
18. 116 U.S. 616 (1886).
19. *Ibid.*
20. *Supra* note 12
21. 251 U.S. 385 (1920).
22. ROLANDO V. DEL CARMEN, CRIMINAL PROCEDURE AND THE SUPREME COURT (ROWMAN AND LITTLEFIELD 2010) 47.
23. *Supra* note 12.
24. 371 U.S. 471 (1963).
25. *Ibid.*
26. *Supra* note 12.
27. 1 Leach C.C. 263 (1783).
28. [1934] 2 K.B. 164.
29. *Supra* note 27.