LOOK, BUT DON'T TOUCH

A critique of the Indian situation on evidence - illegally-obtained-through tape recording

*Venkatesh Vijayaraghavan**
*Sameer Singh**

Introduction

Among all legislations in India, the Indian Evidence Act, 1872 takes pride of place as the one with perhaps the least number of amendments. It is comprehensive as well as concise, and engineered with the utmost care by Sir James Stephen.

But some others have come under a lot of criticism for their antiquated principles and lack of relevance in the contemporary era. One of these is the Telegraph Act, 1885, and one of the objectives of this paper will be to examine the interplay and the consequent confusion between these two laws, in the area of illegally obtained evidence by tape-recording. The roster of Indian legislation lacks the ability to tackle the situation, which is borne out of this area. This problem has been dealt with in other countries by enacting specific laws dealing with tape-recorded evidence, which juxtapose the rights of the individual who is accused, and the duty to the society at large, and make a compromise.[1]

Although illegally obtained evidence has generally been given a high platform in spite of its inherent flawed nature, this paper will attempt to critique the somewhat casual adaptation of this principle into the Indian legal script.[2] The principle may be traced back to Thayer's exclusionary rule of evidence.[3]

Per se, admitting evidence obtained illegally does not seem to be in keeping with the evidentiary system. But the judiciary has made a trade-off between legality and fairness, and seems to have had little hesitation in accepting illegally obtained evidence. Trepidation has been mainly restricted to checks on authentication, not to the circumstances under which the evidence was obtained. If there is a doubt as

* III Year, B.A., LL.B. (Hons.), National Law School of India University, Bangalore.

1 Some examples are the Wiretapping and Eavesdropping Act, sections 16-15-101 through 16-15-104, 6 C.R.S. (1998), and the Criminal Eavesdropping Statute, sections 18-9-303 and 18-9-304, 6 C.R.S. (1998), which are both laws in the State of Colorado, USA.

2 "It matters not how you get it if you steal it even, it would be admissible in evidence." *R.* v. *Leatham*, (1861) 8 Cox. C.C. 198, *cited from R. M. Malkani* v. *State of Maharashtra*, AIR 1973 SC 157 at 163.

3 "That nothing is to be received which is not logically probative of some matter requiring to be proved. It is not so much a rule of evidence, as a presupposition involved in the very conception of a rational system of evidence." William Twining, *Rethinking Evidence*, 190.

to the relevancy of a fact, a Judge can raise questions about it under Section 165 of the Indian Evidence Act, 1872.[4] The law in other countries allows the admission of evidence obtained through fraud or by the use of force by private parties.[5] The Supreme Court has held that a new trial shall not be allowed on the ground of the improper admission or rejection of evidence, unless the Court is of the opinion that some substantial wrong or miscarriage has been thereby occasioned in the trial.[6] If the evidence is *per se* inadmissible, and cannot possibly be admitted under any provision of the Indian Evidence Act, the failure to object to its admission in the trial Court would not make it admissible, and would not bar the party objecting to admission from raising the point in the Appellate Court. It is true that the acceptance or rejection of a piece of evidence is entirely within the competence of the Court. It has full discretion in the matter, but such discretion is to be exercised properly.

An innovative position was taken by a Scottish Court, which held that evidence obtained by "unfair" methods was not admissible.[7] This leaves a lot of room for judicial interpretation on the word "fairness", and therefore, making it subjective and case-specific. It also clarifies that the illegality of the evidence would not matter so much as, whether it was fair in the circumstances to obtain the evidence in that manner.

There are certain factors to be considered before deciding on admissibility[8]:

- Fairness
- Acceptability of police methods[9]
- Reliability of the statement or document or material evidence

In this sphere, one area that has gone relatively unnoticed is the admission of evidence illegally obtained through tape recordings. This is extremely important, as it is a method commonly used by the police, to collect evidence. This may be for various purposes - to contradict a witness, or at its most extreme, to prove the offence, i.e., to prove the fact in issue in a case. It may also be part of what is generally perceived as "wiretapping" or "eavesdropping". In the Indian context, there does not seem to be a different treatment for these two methods. The principal problem associated with such evidence is its admissibility. However, there are different laws to deal with these two methods of collecting evidence in other countries. This has been mentioned to provide clarification.

4 Sir John Woodroffe and Syed Amir Ali, 4 *Law of Evidence*, 3805 (1996).

5 *See*, William J. Stuntz, *The American Exclusionary Rule and Defendant's Changing Rights*, Criminal Law Review 117 (1989).

6 Order XXXIX, R.6, Supreme Court Rules.

7 *Brown* v. *H. M. Advocate*, 1966 S.L.T. 107, *cited from*, David H. Sheldon, *Evidence: Cases and Materials*, 330 (1996).

8 David H. Sheldon, *Evidence: Cases and Materials*, 333 (1996).

9 This raises the question of whether the judiciary can change police procedure.

Admissibility of Tape-recorded Evidence

One of the first cases after Independence, to raise the question of whether the record of a conversation which has appeared on a tape recorder can be admitted under the Indian Evidence Act, was *Rup Chand* v. *Mahabir Parshad* [10]. A single Judge of the Punjab High Court left little doubt that the tape could not be considered as a piece of writing.[11] But that did not mean that tapes could not be included under documentary evidence. In fact, the same judgment suggested that a tape record of a statement could be produced in Court and admitted in evidence under S.5 to contradict a witness. This was of course subject to authentication checks.[12]

One extremely important observation made in *Malkani* with regard to this is that the Court must be satisfied that the tape has not been tampered with, *beyond reasonable doubt.* This is notable because it is an evidentiary principle that has been enunciated in this judgment – there does not seem to be any basis in the Indian Evidence Act for such a requirement. In addition, this would complicate matters for the party seeking to rely on such evidence, by putting them under a very severe burden of proof, since the standard and degree of proof is highest for proof beyond reasonable doubt.

A tape record can be included under S.3, even from a plain reading of the definition of the word "document" contained therein.[13] It does consist of matter described upon the tape by means of marks intended to be used for the purpose of recording. This interpretation is used in common law, and has come to be accepted by Indian courts.

Issues of Content and Genuineness

The twin concepts have been regrettably confused in some of the rulings on illegally obtained evidence. An excellent case in point is the judgment in *Magraj Patodia* v. *R.K.Birla* [14]. Consider the following statements made by the Division Bench:

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10 AIR 1956 Punj 173.

11 "The record of a conversation appearing on a tape recorder can by no stretch of meaning [be considered] as a statement "in writing or reduced into writing". Per Bhandari, C.J. in *Rup Chand* v. *Mahabir Parshad*, AIR 1956 Punj 173. The reasoning given was that it was not included within S.3(65) of the General Clauses Act, 1897.

12 In *S. Partap Singh* v. *State of Punjab*, AIR 1964 SC 72, the Court ruled that the possibility that a piece of evidence could be tampered with, was not by itself a ground for the court to reject the evidence as inadmissible. This shows that the standard of proof to show that the tape has been tampered with is considerably higher than that advocated in *Malkani.*

13 "Document" means any matter expressed or described upon any substance, by means of letters, figures, or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter. – S.3, Indian Evidence Act, 1872.

14 AIR 1971 SC 1297.

> "But the fact that a document was procured by improper or even illegal means will not be a bar to its admissibility if it is relevant and its genuineness proved...But while examining the proof given as to its genuineness, the circumstances under which it came to be produced into court have to be taken into consideration."

It is argued that genuineness has more to do with admissibility, and content has more to do with appreciation. But in this case, the question of weight and competence has not been addressed at all. Instead, what has been effectively stated is that proof of genuineness should be used to make the evidence admissible, and proof of genuineness has to be determined by the principles of admissibility. These are contradicting statements.

When a tape is played to the court, it is played to test the genuineness as well as the content. When the court is satisfied with the genuineness of the tape, the content is looked into. This seems to be against the principles of hearsay, for the argument most often given when hearsay evidence is introduced, is that it is not being introduced for the truth of its contents.

This is a very important consideration, because the intonation of the voices could inform the Court of two things:

- The genuineness, by identifying the voices properly.
- The intention behind the voices, which could lead to an establishment of *mens rea* for the offence.[15]

Another extremely important distinction to be made with respect to tape recordings, is the issue of value and competency. This was addressed by the Apex Court in *N. Sri Rama Reddy* v. *V.V.Giri* [16] The Constitution Bench stated that the technology used to record the conversation would make a difference to the value, or the weight attached to that evidence, and not to the competency, or the admissibility. In this case, the tape-recorded evidence was used to cross-examine a witness. The little remaining confusion, about whether it could be used to contradict the witness, was resolved when the court explicitly stated that the tape could be

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15 This was especially important in the case of *Jagir Singh* v. *Jasdev Singh*, AIR 1975 SC 1627. In this case, the argument advanced by the prosecution was that the accused tried to show false surprise that his signature was on a document which would incriminate him of offences under S.123(3), S.123(3A) and S.127 A of the Representation of the People Act. But the tape-recorded evidence of a telephonic conversation was rejected, because the other participant in the conversation was not examined as a witness. This shows that the courts have been more conducive to admitting tape-recorded conversations as corroborative evidence than primary evidence.

16 AIR 1971 SC 1162.

used for the purposes of both corroboration and contradiction. The case endorsed a previous ruling, which had the same effect.[17] However, this issue is as yet not fully resolved, as a later judgment, albeit by a Division Bench, of the Supreme Court has declared that a tape can only be corroborative, and not proper evidence in the absence of any other evidence of the conversation.[18]

One method that has been generally used to avoid any problem with admissibility is the use of the tape only for refreshing the memory of the witness, rather than corroborating the evidence.[19]

In *R.M.Malkani* v. *State of Maharashtra*[20], the Supreme Court stated that :

> "Tape recorded conversation is admissible provided that the conversation is relevant to the matters in issue, that there is identification of the voice and that the accuracy of the conversation is proved by eliminating the possibility of erasing the tape record. A contemporaneous tape record of a relevant conversation is a relevant fact and is admissible under S.8. It is res gestae. It is also comparable to a photograph[21] of a relevant incident. The conversation is therefore a relevant fact and is admissible under S.7."

We see here a restatement of the *res gestae* theory, which has been evaluated earlier. There are some other problems with this statement. There is an introduction of the term "relevant incident", which does not seem to find place in the Indian Evidence Act. It seems to imply a set of relevant facts, or that the photograph, or the tape record would be a relevant fact, since it relates to the incident. It is after all, a representation of the incident, and not a fact on its own. Therefore, its place in the *res gestae* exception is contested.

Furthermore, in *Malkani*[22], the Court held:

> "When a court permits a tape recording to be played over, it is acting on real evidence if it treats the intonation of the words to be relevant and genuine. The fact that tape recorded conversation can be altered is also borne in mind by the Court while admitting it in evidence."[23]

This statement has far reaching repercussions. There are two questions to be addressed at this point:

17 *Manindra Nath* v. *Biswanath*, (1963) 67 Cal WN 191, *cited from*, *supra*., n. 55 at p.1168.

18 *Mahabir Prasad Verma* v. *Dr. Surinder Kaur*, AIR 1982 SC 1043.

19 *R.* v. *Mills*, [1962] 3 All ER 298.

20 AIR 1973 SC 157.

21 This was the same principle agreed on in *R.* v. *Maqsud Ali*, [1962] 2 All ER 464.

22 *R. M. Malkani* v. *State of Maharashtra*, AIR 1973 SC 157.

23 *Ibid.* at p.163.

- What is the status of the tape recording as real evidence as opposed to documentary evidence?
- What is the consequence of dealing with the genuineness of the intonations on the tape recording?

The answer to the first question will considerably influence the second, for documentary evidence is given sanctity by section 91 of the Indian Evidence Act. If the tape is admitted as real evidence, then the exclusionary principle of documentary evidence will not apply. Furthermore, the hearsay rule is somewhat bypassed, if it is neither oral nor documentary evidence. Moreover, if the tape is to be appreciated for the intonation, as part of the content of the tape, then the content-genuineness impasse will have to be tackled first. It might be easier to admit as real evidence, rather than as a document. The catch 22 in this situation is that to be admitted as real evidence, it has to qualify as *res gestae*, which is not very easy.[24]

A defence commonly taken in cases where tape-recorded evidence is used, is that of self-incrimination. This has been refused in almost every case[25] for varying reasons.[26] A learned commentator has asked the following question: "Clearly a person should not have to be cautioned to refrain from committing an offence; but having committed one, is a person in all cases entitled to be cautioned not to incriminate herself?"[27]

The Indian judiciary has replied, almost universally, in the negative. Instances of this can be seen in *Yusufalli* and *Malkani*. Both judgments also stated that there was no deleterious effect on the appreciation of the evidence due to this, in addition to the admissibility.

Another statement that deserves closer examination is that of the Supreme Court in *Malkani*, wherein it said, of the defence under Article 21:

> "The telephonic conversation of an innocent citizen will be protected by Courts against wrongful or high handed interference by tapping the conversation. The protection is not for the guilty citizen against the efforts of the police to vindicate the law and prevent the corruption of public servants."

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24 The courts have, however, liberally interpreted this principle.

25 There has, however, been judicial acceptance of the principle that self-incriminating statements, in this context, should be voluntarily made, in *Codona* v. *H. M. Advocate*, 1996 S.C.C.R 300, *cited from*, *supra.*, n. 8 at p.334.

26 In *R.* v. *Mills*, [1962] 3 All ER 298, an English case, this was done because it had been postulated in the Judge's Rules that it was not necessary that a man cautioned and placed in jail had to kept free of using any of his statements there, against him.

27 *Supra.*, n. 8 at p.332.

It may be argued that this statement is case specific, or at the most, specific to the category of offences that were pertinent in this case. But the startling revelation by the Court is that it has stated that the *guilty* citizen is not entitled to protection under Article 21. That is no doubt true, but how is the court entitled to deny rights based on whether a person is guilty or not, when the court has not yet pronounced on that very issue? In fact, the court has used this peculiar reasoning to deny him the right, and proceeded to convict him. That no right may be due to him, because no such right is envisaged under the said Article of the Constitution, is an entirely different issue.

The Indian position on this topic seems to be dictated by *Yusufalli Ismail Nagree* v. *State of Maharashtra.*[28] This case referred to the corroboration of oral testimony by a tape record.[29] This was accompanied by an endorsement of the process of recording[30] and is quite similar to the view held by some common law judges.[31] This would obviously mean that tape recordings could only be used for their corroborative value. This has however, not been the only interpretation given by the courts. Tape recordings have also been made admissible for their probative, rather than corroborative value. Another significant statement made in the above mentioned case is as follows: "If a statement is relevant, an accurate tape record of the statement is also relevant and admissible."

There seems to be one glaring defect in this line of reasoning. The doctrine of hearsay is entirely unaccounted for. It is important to recognise that the quality of evidence remains the same for a person who overheard the conversation and a tape record of the same conversation. The evidence given by such a person is clearly hearsay. Therefore, it has to be excluded. If that is so, the tape cannot be admissible in evidence either. It is possible to admit it only if it is made an exception to the hearsay principle, as has been done for dying declarations and matters that

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28 AIR 1968 SC 147.

29 It is to be noted that the tape record in this context was that of a normal conversation, not telephonic.

30 "The tape record of the dialogue corroborates his testimony. The process of the tape recording offers an accurate method of storing and later reproducing sounds. The imprint on the magnetic tape is the direct effect of the relevant sounds. Like a photograph of a relevant incident, a contemporaneous tape record of a relevant conversation is a relevant fact and is admissible under S.7 of the Indian Evidence Act." Per Hidayatullah, J. in *Yusufalli Ismail Nagree* v. *State of Maharashtra*, AIR 1968 SC 147.

31 "The photograph was admissible because it is only a visible interpretation of the image or impression made upon the minds of the witnesses by the sight of the person or the object it represents; and it is therefore in reality only another species of the evidence which persons give of identity when they speak merely from memory" Per Willes, J. in *R.* v. *Tolson*, [1864] 4 F. and F.103, *cited from*, Phipson on Evidence. The same approach has been adopted in relation to tape recordings, as held in *R.* v. *Ali and Hussain*, [1966] 1 QB 688 (CCA).

are *res gestae*. However, this has not been the point of view expressed by the judiciary.

The only caution expressed by the judiciary in admitting evidence in the form of tape recordings of conversations can be seen in the precautions that have been placed as checks on the probative value of the recordings.[32] The yardsticks with which the value is measured are usually in the form of a verification of the time, place and accuracy of the recording, prior to adducing it as evidence.[33] All these qualities have to be proved by a competent witness[34] and the voices must be properly identified.[35]

It was noted by the Supreme Court in *Yusufalli*, that the High Court of Bombay, from which the case was appealed by special leave, had stated that the evidence adduced in the form of the tape-recorded conversation constituted a contemporaneous dialogue between the appellant and the person to whom the bribe was offered. Therefore, it was made admissible under S.8 of the Indian Evidence Act as *res gestae*. This further complicates the issue at hand. The reasoning is as follows: if the evidence is adduced as *res gestae*, then it is as an exception to the hearsay rule. If that is so, it will apply as far as the conversation goes, or surrounding events, such as preparation for the conversation (which was in reality a trap set by the police) – not to a tape recording of the conversation. This is because the recording is only a representation of the conversation – it will not qualify as a contemporaneous event under the *res gestae* because the recording, by itself, did not affect the conversation, during which the bribe was offered.

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32 This was due to the possibilities of erasure and re-recording of the tape-record.

33 In *Ram Singh* v. *Col. Ram Singh*, AIR 1986 SC 3, the Court went further, and the majority judgment per S. Murtaza Fazal Ali and Sabyasachi Mukharji, JJ. provided a set of requirements to be fulfilled for the tape recorded statement to be admitted into evidence. They were as follows:

(1) The voice of the speaker must be duly identified by the maker of the record or by others who recognise his voice. In other words, it manifestly follows as a logical corollary that the first condition for the admissibility of such a statement is to identify the voice of the speaker.
(2) The accuracy of the tape-recorded statement has to be proved by the maker of the record by satisfactory evidence, direct or unusual.
(3) 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.
(4) The statement must be relevant according to the rules of the Evidence Act.
(5) The recorded cassette must be carefully sealed and kept in safe or official custody.
(6) The voice of the speaker should be clearly audible and not lost or distorted by other sounds or disturbances.

34 It is not clear as to whether a competent witness would be an expert in the field of tape recording, or a witness of the conversation – ideally, both should be insisted on.

35 These are specifications laid down in *Yusufalli*.

At the same time, the Court in *Yusufalli* stated that it did not approve of the police practice of tapping telephone wires and setting up hidden microphones for purposes of tape recording. This does not seem to be concordant with the ready admission, in most cases, of evidence obtained by these means and methods. The only inference that can be drawn is that the court does not want these practices to be used extensively. But there does not seem to be any reason given by the courts, for this recommendation, for the evidence has been admitted nonetheless, and there is no indication that the courts will not continue to do so.

In *Malkani*, the Court admitted that detection by deception is a form of police procedure.[36] It also stated that this method was "to be directed and used sparingly and with circumspection." This does not indicate that the court would not admit evidence if it were used even repeatedly. In fact, it did not rule on the validity of such a rule in police procedure – just that it should not be used extensively. In view of the advantages to the investigation by virtue of the method, the use is highly improper. In effect, this means that the police can continue to use this method to obtain evidence.

Legislation

It is quite unfortunate that the only legislation dealing with tape recordings is a law made in the last century - the Telegraph Act of 1885. In the present context, it would be at best an unsatisfactory treatment of the situation. Even the Telegraph Act only mentions tape recordings of telephonic conversations.

S.25 of the Telegraph Act is as follows:

"Intentionally damaging or tampering with telegraphs: If any person, intending–

(a) to prevent or obstruct the transmission or delivery of any message, or
(b) to intercept or to acquaint himself with the contents of any message, or
(c) to commit mischief,

damages, removes, tampers with or touches any battery, machinery, telegraph line post or other thing whatsoever, being part of or used in or about any telegraph or in the working thereof, he shall be punished with imprisonment for a term which may extend to three years, or with fine, or both."

By no stretch of imagination can this be considered as a bar to tape recordings that are made independent of telephones. In addition, "any person" has been, without the help of legislative backup, interpreted to exclude policemen in the exercise of their duties.[37] Another method used to bypass this section is declaring that the actions of the police did not qualify for this offence, since they did not damage, remove, tamper, etc. Even the exception under S.5(2) of the Act is sometimes used to protect the actions of the police.

36 *Supra.*, n. 22 at p.163.

37 *Ibid.*

It is interesting to note that in *Malkani*, the High Court from where the case was appealed ruled that the evidence was admissible in spite of the violation under S.25 of the Telegraph Act. This was because only Telegraph Authority personnel are permitted to operate the telephone device in the manner described under S.25. Therefore, it does not seem to be possible to rationalise the admission of that evidence. There has been no attempt to exclude police officers from the rule in S.25, nor have they been included within "telegraph authority". The Supreme Court even partially accepted this line of reasoning when it said, "there is warrant for the proposition that even if the evidence is illegally obtained it is admissible".

Therefore, it is clear that the current legislation is grossly inadequate for the purpose of settling cases dealing with illegally obtained tape-recorded evidence.

Overseas Law

The American position in this regard is given by *Andrews* v. *United States.*[38] Evidence based on telephonic conversation was made admissible, if the voices were properly authenticated. This was, in fact, one of a list of cases referred to in *Rup Chand.* Another unique case, *Boyne City, Cr and A.R.Co.* v. *Anderson* [39] permitted evidence in the form of a phonograph (which has almost the same nature as a tape recording) even for purposes other than the recording of a conversation.[40] In yet another ruling, dictaphone recordings were made admissible by the court.[41] These three rulings must be recognised as having three different consequences:

- Evidence based on telephonic conversations is admissible (it does not mention tape recording specifically)
- Tape recordings, other than those of conversations, are also permitted.
- Tape recordings of conversations are admissible.

Effectively, almost the entire ambit of tape recordings is made admissible.

It would be in order to discuss the Canadian law on the point as well. The law differentiates between wiretapping with and without the aid of electronic aids, and consequently, the law to be applied, is different. The meaning of "wiretapping" must be distinguished from two practices that are often confused with it:

- eavesdropping – listening in on conversations with the aid of electronic devices, usually concealed microphones operating in connection with amplifying or recording equipment located in some other place, and

38 105 Am. L. R. 322 (A), *cited from, supra.*, n. 15.

39 117 Am. S. R. 642 (B), *cited from, supra.*, n. 15.

40 In this case, a person who objected to a rail road company laying its track upon a certain street was permitted to operate a phonograph in presence of the jury to produce sounds claimed to have been made by the operation of trains in proximity to his hotel.

41 *Brindley* v. *State*, 193 Ala 43 (c), *cited from, supra.*, n. 15.

- listening in on telephone conversations without the aid of such additional equipment[42] – for example, through an extension telephone.[43]

Wiretapping is usually considered to be the practice of listening in on or recording the telephone conversation of two parties through the use of electronic equipment attached directly to the telephone or its wire, which in turn activates amplifying or recording equipment, through which the conversation can be overheard, or a record of it obtained. Therefore, it is different from eavesdropping in that the latter has nothing to do with "bugging" the telephone. The equipment used is independent of the instrument.

The question of the admissibility of evidence obtained by actual wiretapping has not yet been explicitly ruled upon, but it has been stated[44] that evidence procured by means of a concealed microphone and tape recorder is admissible if relevant.[45]

The controversy as to the ease with which tapes, such as those contemplated in these situations[46], can be tampered with, has led to some objections. An attempt is made to solve this sort of objection by affording an opportunity to the accused to test the accuracy of the recording. This approach has some inherent flaws. Firstly, there is no legal benchmark to test the veracity of such a recording. It again comes down to the appreciation by the judge. The objection has been countered by saying that this is a ground for scrutinising evidence, not for excluding it.[47]

To resolve the conflict between using wiretapping equipment and protecting the rights of the accused against illegal procurement of this type of evidence, one approach has been to attempt to prove that the equipment was not wiretapping equipment under the respective statutes.

The agency making the recording is also important, for it is only the law enforcement officers who are given authorisation to wiretap. Even then, it is possible to bypass this by using methods that fall just short of "wiretapping" as defined in the statute.[48] One problem that requires to be solved in this context is the loss of privacy, and the absence of remedy for the same.

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42 N.M.Chorney, *Wiretapping and Electronic Eavesdropping*, 7 Criminal Law Quarterly 434 (1964).

43 This is important in this context, because the United States Supreme Court has held that listening in on a conversation through an extension telephone (not installed for that express purpose) does constitute interception. *See, Rathburn* v. *U.S.*, 355 US 107 (1957), *cited from, supra.*, n. 13 at p.435.

44 *R* v. *Foll*, 117 CCC 19 (1956), *cited from, supra.*, n. 13 at p.452.

45 In fact, it was also stated that it would be admissible even if it were obtained by illegal wiretapping in the *obiter dicta* of the same case.

46 This would limit the use of tapes to record conversations surreptitiously, either through telephone or otherwise, i.e., to wiretap or eavesdrop.

47 *Supra.*, n. 30 at p.455.

48 This is in spite of safeguards in the form of provisions which make the interception of messages an offence in the Ontario Telephone Act, etc.

It appears that in the majority of cases, the evidence is admitted, and therefore, that there is a consensus towards the non-exclusion of such evidence, even when under a substantial stamp of illegality in the manner of procurement.[49]

In *R.* v. *Finlay and Grellette*, counsel for the Attorney-General of Canada and counsel for the intervenant, the Attorney-General of Ontario, both conceded that the interception of private communications, constituted a search or seizure within the meaning of S.8 of the Charter of Rights and Freedoms and that legislation authorising such interception would have to meet the constitutional standard of reasonableness.[50] Martin J.A. agreed that private communications were protected by S.8 of the Charter. He also recommended that authorising judges *should* impose minimisation requirements when the circumstances of the proposed interception warrant the imposition of such a condition. He held, however, that the absence of an express minimisation requirement did not render Part IV.1 unconstitutional. It should be noted in this context, that the provisions were not unconstitutional because the provisions did not authorise an unreasonable search and seizure.[51] This also provides the strongest line of defence for the other party wishing to have the evidence excluded, *viz.*, to show that the search (or the wiretap in this case) was highly unreasonable. Furthermore, some conditions were laid down, for the judge to see whether it is satisfactory to grant authorisation. These were:

- that it would be in the best interests of the administration of justice to do so[52], and
- other investigative procedures have been tried and have failed, and other investigative procedures are unlikely to succeed or the urgency of the matter is such, that it would be impractical to carry out the investigation of the offence using only other investigative procedures.

Another issue to be discussed is the matter of the *confidential packet* which contains the material upon the basis of which an authorisation to intercept private communications and a renewal thereof were given by a judge. This seems to throw open the opportunity for judicial review of the decision to permit wiretapping and intercepting private communications. In the same breath, however, the trial judge

49 *See, R.* v. *Papalia*, 13 CCC (3d) 449 (1984), *cited from*, Alan D. Gold, *Wire-taps – Surreptitious Entries*, 27 Criminal Law Quarterly 19(1984).

50 23 CCC (3d) 48 (1986), at p.61, *cited from*, M. Naeem Rauf, *Recent Developments in Wire-tap Law*, 31 Criminal Law Quarterly 208 (1988).

51 Therefore, this is not to be confused with the Indian situation, wherein the illegal, and therefore unreasonable, search or seizure would not result in the evidence being inadmissible.

52 This was seen to have two components – the first being that the authorisation will further the objectives of justice, and the second involves the balancing of the interests of law enforcement and the individual's interest in privacy.

is precluded from substituting his discretion for that of the authorising judge.[53] The trial judge is entitled to find that such statutory presumptions were not met only if there was no basis upon which the authorising judge could have found, on the materials before him, that the statutory pre-conditions were fulfilled.[54] There is a broad consensus that the contents of the packet shall be made available to the accused, to maintain the constitutional guarantees mentioned in the Charter of Rights and Freedoms[55] so that the accused can make out a complete defence for themselves.[56] This has been stated in cases such as *R.* v. *Parmar*.[57] However, there seems to be a fundamental flaw in the reasoning employed by the Ontario Supreme Court. Instead of fulfilling both requirements of the individual's privacy and law enforcement, they have both been compromised to some extent. How this is accepted as conforming to constitutional guarantees is not yet clear.

Problem Associated with Playing the Tape Partially

Most of the time, in practice, it is not possible to play the entire tape that has been recorded, as evidence to the court. This might be due to defects in that part of the tape, or due to the exclusion of some portion of the tape due to the rules in the Indian Evidence Act, in S.25, etc. This produces a new problem – that of interpretation of the tape. Since the tape has been adduced into evidence as a document, it is necessary to accordingly follow the rules of interpretation. The General Rule of Interpretation formulated is "The meaning of the document or of a particular part of it is therefore to be sought for in the document itself."[58] If the whole document is to be read, then tape recordings would present a unique problem – since they have to be played, not read, thus making it extremely difficult for the prosecution to prove their case, without using the tape as a whole.[59] In addition to that, the other bigger hurdle to be crossed is that interpretation may not be possible without listening to the tape as a whole – which would effectively mean that the tape has to be excluded from evidence. Needless to say, this has not been considered

53 *James Steven Wilson* v. *The Queen*, 9 CCC (3d) 97 (SCC) (1983), *cited from*, Alan D. Gold, *Reviewability of authorisations*, 26 Criminal Law Quarterly 175 (1983).

54 *Supra.*, n. 22 at p.239.

55 Specifically, s.7, which guarantees fundamental justice.

56 Of course, if the evidence can be excluded, that would be a much stronger defence.

57 (March 1, 1987, Ont.S.C.) *cited from*, Alan D. Gold, *Wiretaps – Access to confidential packet*", 29 Criminal Law Quarterly 292 (1986).

58 Odger's *Construction of Deeds and Statutes*, 28 (1967), *cited from, Delhi Development Authority* v. *Durga Chand Kaushish*, (1973) 2 SCC 825 at 832. K. K. Mathew, J. also stated, in this Division Bench ruling, that ""the document" means "the document" read as a whole and not piecemeal."

59 This is a practical problem which has to be contended with – the tape has to be played carefully, so that it does not include those portions which have to be excluded according to the provisions of the Indian Evidence Act.

by the courts. They have both provided strict requirements, and admitted evidence that does not fulfil all of them. Thus, evidentiary principles have been compromised.

Problem of Transcripts

This was properly dealt with in a celebrated English case.[60] If the tape record is transcripted, can the transcript be produced as evidence to support it? If so, the question of admitting tape records is further complicated, because the transcript would constitute hearsay evidence of hearsay evidence. This is especially relevant where the tape is not clear and peripheral noises are present. Another issue to be settled is that of who can prepare the transcript – an expert in the language in which the conversation took place[61], or a witness to the conversation. If it is a witness preparing the transcript, how is it distinct from the evidence given by him? If it were an expert, would that not be an unfair substitute for the reasonable man[62] ? These are questions as yet left unanswered. What has been effectively done, is that the courts have admitted transcripts on the ground that it was an obvious convenience.

Conclusion

The present level of understanding of the situation surrounding the adducing of illegally obtained evidence, especially that through tape recording, is not adequate. It is recommended that one of two approaches be used to rectify the situation.

- Evidentiary principles can be strictly followed. This would mean that a lot of the evidence obtained illegally would be excluded. It is a consequence that will have to inevitably follow. The existing principles of hearsay are theoretically rigid, and they cannot be bypassed in an attempt to admit evidence. Either the exception to hearsay should be used properly[63], or the evidence must be excluded. But it is impossible to accept such wide connotations of admissibility in the context of the doctrine in *Maneka Gandhi*[64]. If the method of obtaining the evidence was illegal, it is surely not just, fair or reasonable. Therefore, the guarantee of procedure established by

60 *R.* v. *Maqsud Ali*, [1965] 2 All ER 464.

61 This was the case in *Maqsud Ali*.

62 The argument advanced by the defence could be that the words in the tape should be those as understood by a reasonable man's listening of the tape. This would be especially relevant in legal systems which still employ the jury system.

63 One way to bypass the hearsay obstacle is to include the tape record as a document. In fact, this has been the argument that the courts have accepted with least resistance in cases of this type. Tape records have been held to be documents within the rule of proof through primary evidence, in *R.* v. *Stevenson*, [1971] 1 WLR 1, and *R.* v. *Robson*, [1972] 1 WLR 651, *cited from*, Phipson on Evidence, p.964.

64 *Maneka Gandhi* v. *Union of India*, AIR 1978 SC 597.

law does not seem to be met by the prevailing law. If the presumption of innocence of the accused until proven guilty can be justified, so can the exclusion of illegally obtained evidence.[65] This assumes more importance, because the specific laws regarding certain types of illegal procurement of evidence are not be found in law, i.e., there are no anti-wiretapping laws or privacy laws, which are cognisable and can be considered.

- The situation can adjust to the present technological situation, and the need of the hour to restrict crime, by permitting the use of tape records. But this permission would have to be explicit, in the form of appropriate legislation. An alternative would be to introduce more exceptions to the hearsay rule in the Indian Evidence Act itself, which would accommodate the situation within the legal framework.

It is perhaps better to choose the second option. The reason submitted is that it is technology should be utilised, albeit judiciously, to arrest crime, rather than block it out completely, thus making law enforcement that much more difficult. There has to be some sort of give and take, and an ideal situation is quite impossible.

65 The presumption of innocence is essentially a safeguard for the rights of the accused. A natural extension would be to prevent illegal eviden