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Doctine of Fruit of the Poisonous Tree: A Comparative Study with Us Legal System

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Abstract

The doctrine of "Fruits of a Poisonous Tree" is an extension of the exclusionary rule of evidence. The doctrine implies that any evidence that is obtained from an illegal arrest, seizure or search during investigation shall not be admissible in court during trial. During the course of an enquiry the investigation agency would normally go to greatlengths to collect all possible evidence in order to establish the truth concerning the case athand. Sometimes, in order to collect evidence, the police and other investigators would have toattempt various means to collect evidentiary material. However, not all means to collectevidence can be justified in a court of law. For instance, if a police officer illegally breaks intoa property belonging to the suspect and stumbles upon a crucial piece of evidence, it wouldmean not just that the officer has committed the crime of housebreaking or trespass but it wouldalso imply that the evidence he had discovered during such trespass will be deemedinadmissible in the court of law, going by the doctrine of 'fruits of a poisonous tree'. As per Sec. 24 of the Indian Evidence Act, evidence (confession) obtained from the accused or any other person on the basis of threat, promise and inducement is not admissible in court. However,by virtue of Sec. 28 of the IE Act, it can be safely use as evidence if the threat promise or inducement is removed before obtaining the evidence. This paperlooks at the application of this doctrine of evidence in India and U S legal system and other parts of the world.

Keywords: Doctrine of Poisonous Tree –Means of collection of Evidence- Search & Seizure – Unauthorized arrest – confession obtained by illegal means – Due process clause – Dissipate the taint –Wiretapping cases – Fruit of involuntary confession –Attenuation –

Introduction

According to the beliefs of Jews, God called his people to bring the first yield—the first fruits—from their harvest to him as an offering. This was to demonstrate the Israelites' obedience and reverence for God. It also showed that they trusted God to provide enough crops to feed their family.The phrase "Fruits of a Poisonous Tree" is an Anglo-American common law principle. It refers to the illegal and improper procurement of evidence during an investigation by investigating agencies and whether such neutral information based on evidence gathered illegally is admissible before the court.

The doctrine of the "fruits of the poisonous tree" holds that the evidence (fruit) from an illegal search or seizure which is a tainted source (the tree), would also be tainted and hence, inadmissible.The exclusionary rule provides that evidence that is illegally obtained should be excluded from admission in a criminal trial. The fruit of the poisonous tree takes the assessment one step further by providing for the exclusion of evidence that stemmed from the illegal act, which is known as the poisonous tree.The legislative intent behind this doctrine is if the source (tree) of evidence or the evidence itself is tainted anything gained (fruit) from it is also tainted. It was postulated that illegally procured evidence becomes inadmissible in the court of law.

InU K, there is no such rule. If the defence can prove that the fact that the evidence was obtained unlawfully, means that the evidence is unreliable, and it would have such an impact on the fairness of the proceedings that the court ought not to admit it then it can be excluded. The term "fruits of the poisonous tree" was first used by Frankfurter, J. in Nardone v. United States, wherein it was held that, in a prosecution in a federal court, evidence procured by tapping wires in violation of the Communications Act of 1934 is inadmissible. This was applied not only to the intercepted conversations but also to evidence procured through the use of knowledge gained from such conversations. Eventually, there was a difference of opinion and contradictory judgments with regard to the exclusionary rule until 1961, when, in Mapp v. Ohio, the US Supreme Court held that under the "due process" clause, evidence obtained by a search and seizure in violation of the Fourth Amendment is inadmissible in a State prosecution for a State crime. Though this initially applied to criminal cases only,

in recent times, the US courts have also applied this to civil cases.

The approach of the Indian judiciary has been not to exclude evidence on the ground of it being procured through illegal means. Evidence is weighed in a court based on its relevancy/probative value, and irregularity or impropriety in the method of procuring said evidence does not, by itself, make the evidence inadmissible.

Position in USA

In the United States, before 1914, warrantless and illegal searches were common andevidence procured from these searches was admissible in court. However, in 1914, the UnitedStates Supreme Court had to deal with the question of a warrantless search of a house whereinthe evidence collected was used to convict the owner of the house for illegal gambling. Thiswas the case of ***Fremont Weeks v. United State***, where the Court overturned Week'sconviction based on the Fourth Amendment of the Constitution of the US, which bars the useof evidence secured through a warrantless search and seizure. Thus, was born the exclusionaryrule, which is a judicially created remedy used to check police misconduct in obtainingevidence. As per the exclusionary rule, a Judge may exclude incriminating evidence from acriminal trial if there was police misconduct in obtaining the evidence. The exclusionary rulewas the predecessor of the doctrine of "fruits of the poisonous tree".

The doctrine of the "fruits of the poisonous tree" holds that the evidence (fruit) from anillegal search or seizure which is a tainted source (the tree), would also be tainted and hence,holding that evidence seized during a search illegal under the Fourth Amendment maynot be used against the victim of the search where a timely challenge to its use has been interposed in a motion to suppress inadmissible.

The term's first use was by Justice Felix Frankfurter in ***Nardone v. United State***, wherein it was held that, in a prosecution in a federal court, evidence procured bytapping wires in violation of the Communications Act of 1934 is inadmissible. The "fruit ofthe poisonous tree" doctrine is an extension of the exclusionary rule, which, subject to someexceptions, prevents evidence obtained in violation of the Fourth Amendment from beingadmitted in a criminal trial. Like the exclusionary rule, the fruit of the poisonous tree doctrineis intended to deter police from using illegal means to obtain evidence. This was applied notonly to intercepted conversations but also to evidence procured through the use of knowledgegained from such conversations.

The doctrine underlying the name was first described in ***Silverthorne Lumber Co. v.United States***. Such evidence is not generally admissible in court. The testimony of a witnesswho is discovered through illegal means would not necessarily be excluded, however, due tothe "attenuation doctrine", which allows certain evidence or testimony to be admitted in courtif the link between the illegal police conduct and the resulting evidence or testimony is minimal.For example, a witness who freely and voluntarily testifies is enough of an independentintervening factor to sufficiently minimalize the connection between the government's illegaldiscovery of the witness and the witness's voluntary testimony itself

Searches & Seizures

The fruit of the poisonous tree doctrine, as applied in cases involving searches andseizures, excludes evidence obtained from or as a consequence of conduct of officers violativeof the Fourth Amendment of the United States Constitution. The fourth amendment originallyenforced the notion that "*each man's home is his castle*", secure from unreasonable searchesand seizures of property by the government. It protects against arbitrary arrests, and is the basisof the law regarding search warrants, stop-and-frisk, safety inspections, wiretaps, and otherforms of surveillance, as well as being central to many other criminal law and privacy lawaspects.

As stated in the foregoing paragraphs the exclusionary rule enforced by the doctrine hadits origin in ***Fremont Weeks v. United States (supra)*** holding that evidence seized during asearch illegal under the Fourth Amendment may not be used against the victim of the searchwhere a timely challenge to its use has been interposed in a motion to suppress. This rule wasthen made obligatory in ***Silverthorne Lumber Co. v. United States (supra)*** and thereafter in***Mapp v. Ohio***it was made obligatory on the States. In ***Mapp v. Ohio***, the US Supreme Courtheld that under the "***due process"*** clause, evidence obtained by a search and seizure in violationof the Fourth Amendment is inadmissible in a State prosecution for a State crime. Though thisinitially applied to criminal cases only, in recent times, the US courts have also applied this tocivil cases. This was done by the US Supreme Court as part of its decision in that case holdingthat the provisions of the Fourth Amendment now apply to the States by reason of the DueProcess Clause of the Fourteenth Amendment.

The applicability of this exclusionary rule in a particular case as basis for excludingevidence poses two basic questions.

- Did the officers engage in conduct violative of the Fourth Amendment?
- If so, was the evidence acquired by reason of an exploitation of that conduct and henceinadmissible as fruit of a poisonous tree?

The case of ***Wong Sun v. United States,*** illustrates how questions of this kind are dealtwith

in practice. The Court held therein ***"… verbal evidence which derives so immediatelyfrom an unlawful entry and an unauthorized arrest as the officers' action in the present caseis no less the 'fruit' of official illegality than the more common tangible fruits of theunwarranted intrusion".*** In that case, federal officers broke into defendant Toy's bedroomwithout a warrant and arrested him without having probable cause for so doing. The SupremeCourt held that this conduct was violative of his right of privacy guaranteed by the FourthAmendment. While this conduct was occurring he made incriminating admissions to theofficers. The Supreme Court held that these admissions were the fruit of official illegality andoverruled the trial court's ruling that had admitted them into evidence. Part of the proof againstdefendant Toy was testimony of officers as to narcotics discovered by them in possession ofone Yee. The information which led the officers to make this discovery came from theincriminating admissions defendant Toy made to the officers when they were in his bedroom.Indeed, the prosecutor admitted that the narcotics would not have been found except "that Mr.Toy helped us to." The Supreme Court concluded that in these circumstances there was no basisfor a view that the Government had learned of the narcotics from an "independent source". Onthe basis of that conclusion the Supreme Court held that testimony as to discovery of thenarcotics was inadmissible against defendant Toy because it resulted from an "exploitation" bythe Government of the conduct of its officers in subjecting defendant Toy to an illegal arrest inviolation of the Fourth Amendment. It was held clearly, "***We need not hold that all evidenceis 'fruit of the poisonous tree' simply because it would not have come to light but for theillegal actions of the police. Rather, the more apt question in such a case is 'whether,granting establishment of the primary illegality, the evidence to which instant objection ismade has been come at by exploitation of that illegality or instead by means sufficientlydistinguishable to be purged of the primary taint'. We think it clear that the narcotics were'come at by exploitation of that illegality' and hence that they may not be used against Toy."***

The officers who arrested Toy in violation of his Fourth Amendment rights also illegallyarrested defendant Wong Sun in violation of his Fourth Amendment rights. The latter wasreleased on bail but returned in a few days and made a confession. However, the Supreme Courtconcluded in the case of Wong Sun that this confession was not the fruit of the illegal arrest ofWong Sun, holding that the connection between the arrest and the statement had '***become soattenuated as to dissipate the taint'.***

Aside from Wong Sun, there are many other federal cases that may be studied for determiningthe extent to which the fruit of the poisonous tree doctrine may be used for excluding materialdamaging evidence sought to be introduced against the defendant. Some of the types oftestimony held by those cases to be subject to exclusion because of fruit of a poisonous treeinclude the following:

a) Testimony of officers as to objects observed during an illegal search - ***Mc Ginnis v.United States***,"We find no basis in the cases or in logic for distinguishing betweenthe introduction into evidence of physical objects illegally taken and the introduction oftestimony concerning objects illegally observed". ***Williams v. United States***, held thatobservations made by police during illegal search may not be testified to at trial.

b) Testimony of officers as to evidence seized under a warrant issued on the basis ofobservations made during a previous illegal entry - ***Hair v. United States***, – Officerin course of illegal entry into defendant's home observed evidence which fit descriptionof goods stolen in robbery and these items were thereafter seized under search warrant.Held that evidence seized under warrant issued on basis of observations made during anillegal entry should have been suppressed.

c) Testimony of a witness discovered as result of an illegal search - ***Mc.Lindon v. UnitedStates***, held that witness discovered as result of illegal search may be barred fromtestifying against the defendant. In ***Accord, People v. Albea***, the testimony of a witnessdiscovered by police on defendant's premises during illegal search of such premises wasbarred.

d) Testimony as to fingerprints made by defendant immediately after he was arrestedwithout probable cause in violation of the Fourth Amendment – In **Bynum v. UnitedStates**, the Court held, "Here it becomes important to determine the rationale of thosedecisions of the Supreme Court which, in other circumstances, have excluded evidenceas the product of unlawful arrest and detention. It is well settled that an article takenfrom the person of an individual on the occasion of an illegal arrest is not admissible inevidence against him although it is relevant and entirely trustworthy as an item ofproof…. Again, if the police have obtained a statement from an accused person duringhis illegal detention, no showing that the statement has been obtained without coercionand accurately recorded can make it admissible, although it may seem to be a trustworthyand patently relevant voluntary statement. The Fourth Amendment makes protection ofthe individual against illegal seizure or arrest a constitutional imperative.Judicial authority over the manner in which justice shall be administered isexercised in a way calculated to implement the

constitutional guarantee. True,fingerprints can be distinguished from statements given during detention. They can alsobe distinguished from articles taken from a prisoner's possession. Both similarities anddifferences of each type of evidence to and from the others are apparent. But all threehave the decisive common characteristic of being something of evidentiary value whichthe public authorities have caused an arrested person to yield to them during illegaldetention. If one such product of illegal detention is proscribed, by the same token allshould be proscribed. ….. Therefore, we conclude that the court below erred in admittingthe fingerprints in evidence."

e) **Testimony as to confession made by defendant during period when his detentionwas without probable cause and hence in violation of the Fourth Amendment. –** TheCourt in ***United States v. Meachum*** observed, "The import of the Fourth Amendmentis that an individual may not be arrested and retained in custody without probable cause.

. . . And where the Fourth Amendment is violated, any evidence procured through suchviolation is to be suppressed . . . Defendant's Fourth Amendment rights were violatedbecause he confessed at a time when no probable cause existed to justify his continuedarrest status. . . . There having been no legal basis for defendant's continued arrest anddetention after his first line up, he should have been released. Since he was not,effectuation of the constitutional guarantee requires that his subsequent confession besuppressed."

Wiretapping Cases

The Federal Communications Act of 1934 contained provisions which made it a federalcrime for any person not authorized by the sender to "intercept any communication and divulgesuch intercepted communication to any person." The US Supreme Court has barred use by theGovernment of information obtained indirectly from leads furnished in conversations ontelephones tapped by federal agents. As basis for that holding the Supreme Court applied thefruit of the poisonous tree doctrine that had been originated in search and seizure cases. Itdescribed the procedure to be followed in deciding the issue whether evidence should beexcluded based on the doctrine of fruit of a poisonous tree, saying: "The burden is, of course,on the accused in the first instance to prove to the trial court's satisfaction that wiretappingwas unlawfully employed. Once that is established the trial judge must give opportunity tothe accused to prove that a substantial portion of the case against him was a fruit of thepoisonous tree. This leaves ample opportunity to the Government to convince the trial courtthat its proof had an independent origin.'"

Thus, the burden is put on the defendant of proving not only occurrence of the claimedofficial illegality but also that a substantial part of the case against him was fruit of thatillegality. Other courts, however, have taken a different view of defendant's burden. Theirposition is that once he sustains the burden of showing that illegal wiretapping has indeedoccurred it then becomes the burden of the Government to establish how far its proof had anindependent origin. Whenever there is indication that wiretapping has occurred a fullinvestigation should be made to determine whether, either before or during trial, there was anyillegal interception by officers of private conversations between defendant and his counsel. Aninterception of that kind inevitably operates to frustrate the defendant's Sixth Amendmentright to assistance of counsel and, without more, requires a new trial.

Fruit of Involuntary Confession

As per the Texas Code of Criminal Procedure, there is a provision that the issue ofvoluntariness of a confession shall be submitted to the jury under instructions showing themthat if they find the confession involuntary they may not consider it for any purpose nor anyevidence obtained as "a result thereof.". That provision bars the State from using as proofagainst defendant any stolen property, weapon, or other evidence obtained as a result ofinformation gained from a defendant's involuntary confession. A similar doctrine was earlierestablished by the Court of Criminal Appeals in consecutive-confession cases. Those casesestablish that any undue influence which induces a first confession, rendering it inadmissible,is presumed to continue until affirmatively shown to have been removed, and that unless theState sustains the burden of rebuttal no subsequent confession is admissible.

Methods of Challenging Admissibility of Poisoned Fruit

The conventional method of challenging admissibility of evidence constituting fruit of apoisonous tree is by a pre-trial motion to suppress. In the federal system an omission to use this method timely may operate to waive defendant's objections. Whether a similar rule isapplicable in the State courts is yet to be decided. Where feasible, careful defense counsel will,by interrogation of officers at the examining trial or at the taking of depositions, undertake toelicit admissions showing precisely the extent to which illegality may have infected variousitems of evidence acquired for use against the defendant, all to the end that basis will exist forthe preparation and urging of a pre-trial motion to suppress complaining of any items that mayconstitute fruit of a poisonous tree. When an officer commences to testify as to evidenceobtained by him and there is any possibility he may have acquired it as a result of a violationof some constitutional or statutory provision the defense counsel should request that he beallowed, by means of a voir dire examination, out of the presence of the

jury, to explore fullythe extent to which the evidence may be the product of official illegality. It was held in ***UnitedStates v. Giglio***

"*Upon the trial itself if evidence derived from tainted sources had been offered, counselby voir-dire examination could have learned from the witness, revenue agent orotherwise, from what source he had become aware of the facts about which he proposedto testify. . . . If a revenue agent testifies that the subject matter of his testimony cameonly from a record obtained in violation of a defendant's constitutional rights it can besuppressed or stricken by the trial judge. If on the other hand he testifies that the factswere developed from records lawfully obtained a jury question may result if there beconflicting testimony*."

If the court refuses to allow voir-dire examination, then the defendant has the right to crossexaminewitness to see if the source of evidence is tainted. Where evidence obtained by anofficer is infected by conduct violative of the Fourth Amendment or any other provision of theUnited States Constitution, it would seem clear, on principle, that at the time the evidence isoffered during trial by the prosecution the defendant should be entitled to have the trial judgeconduct, out of the presence of the jury, a preliminary hearing of the type required by ***Jackson v. Denno***, whenever the issue of voluntariness of a confession is raised.

Exceptions to the Doctrine

The doctrine of "fruit of the poisonous tree" is subject to four main exceptions. Thiswould mean that even the tainted evidence would be admissible in the event of:

1. ***Impeaching credibility:***Use of illegally obtained evidence not for the purpose of proving guilt but to impeach the credibility of the accused should he/she choose to depose;

2. Independent source: Evidence procured by illegal means by an independent source orthird person which in part at least is not obtained from a tainted source. An independentsource must be someone absolutely unconnected to the illegality of the arrest, search,and/or seizure (People ***v. Arnau***), thus, when the evidence was discovered in part as aresult of an independent, untainted source; or

3. Inevitable discovery: it would inevitably have been discovered despite the tainted source; or

4. Attenuation: If the link between an illegal search and legally admissible evidence is thin,the evidence is admissible, even if the illegal search may have set in motion the chain ofevents that led to evidence being revealed. In other words, unless it can be proven thatthe evidence resulted directly from some illegal action taken by law enforcementofficials, it can be admitted. In ***People v. Martinez***, a three-part test was establishedfor this exception:

"(1) the time period between the illegal arrest and the ensuing confession or consensual search;
(2) the presence of intervening factors or event; and
(3) the purpose and flagrancy of the official misconduct"

In other words, when the chain of causation between the illegal action and the taintedevidence is too minimal, the evidence may be admitted; or

5. Good faith: An officer acting under the impression of being permitted by law, forinstance, conducts a search believing a warrant to be authorised but later revoked, isbelieved to have acted in good faith and any discovery is held admissible in law. Thisexception was created by the Supreme Court in United States v. Leon, because,according to the majority opinion, the rule was designed to deter police misconduct, andexcluding evidence when the police did not actually misbehave would not deter policemisconduct and only lead to vital evidence being eschewed without any redeeming value.In other words, when the search warrant was not found to be valid based on probablecause, but was executed by government agents in good faith, this would be calledthe good-faith exception).

Independent evidence

An exception to the poisonous tree doctrine applies when facts the poisoned fruit wouldtend to prove are sought to be proved by other evidence of independent origin not infected byofficial illegality. ***Silverthorne Lumber Company v. United States***, held that whereknowledge of facts sought to be used against the defendant is gained from an "independentsource" they may be proved like any others but that the knowledge is gained by theGovernment's own wrong many not be used derivatively against defendant. In ***McGuire v.United States***, it was held that where the officers' knowledge of contraband whiskey wasobtained lawfully prior to and independently of illegal search, their testimony was not taintedby their illegal seizure of such whiskey. In the case of ***Zap v. United States***, the Court heldthat the officers' knowledge of incriminating document was obtained lawfully prior to andindependently of their action in seizing the document in violation of the Fourth Amendmentand therefore they could testify concerning facts as to such document known to them by reasonof such knowledge. In ***Warren v. Hawaii*** it was held that the "knowledge of facts gainedfrom a proper independent source… may be used, though it also may be obtained from anillegal act."

However, in ***United States v. Paroutian,*** it was observed that A showing that theGovernment had sufficient independent information available so that in the normal course ofevents it might have discovered the questioned evidence without an

illegal search cannotexcuse the illegality or cure tainted matter……. The test must be one of actualities, notpossibilities …. As the government failed to show any source for its information other than theillegal search…. We hold that the failure to suppress this evidence was prejudicial error.

Position in India

The law of evidence in India does not preclude any evidence based on the means ofacquiring it. The Indian Evidence Act, 1872 does not forbid the courts of law from taking intoconsideration evidence that might have been illicitly obtained, if it is seen that it is relevant tothe matter or it contributes to establishing the guilt or proves the innocence of a suspect. TheCourts in India have time and again held that illegally or improperly obtained evidence is notper se admissible. There are various methods used by investigating agencies to obtain evidenceillegally, some of the common means being:

- ***Phone Tapping/Recording, except in accordance with law;***
- ***Illegal Search and Seizure***
- ***Forced Narcoanalysis***
- ***Secret recordings using cameras***

The attitude of disregard of procedures and due process, the deplorable quality of ourinvestigation as well as the apparent reluctance of the Courts to exclude illegally obtainedevidence are the main reasons that illicit obtaining of evidence goes on unchecked in India.The Courts generally accept any evidence based on the criteria of relevance and irrespective ofhow it was obtained. This is also done for the fear of letting a guilty person go on what isperceived to be a mere technicality. The perils of accepting the fruits of a poisonous tree are,therefore, very real. Other jurisdictions have moved away from the principle, either totally or,at any rate, substantially diluted it. Throwing out 'illegally obtained evidence' wouldundoubtedly compel the police to improve their methods and investigate in accordance withthe law. It would also protect due process rights, personal liberty and check police arbitrariness.However, in India there is a serious need to rethink the courts' view on 'admissibility ofillegally obtained evidence'. The approach presently taken by the courts is 'ends justify themeans' whereas this is capable of grave prejudice and is largely responsible for the abysmalquality of investigations in the country and a serious reconsideration of this is needed.

Law Commission Recommendation

The Law Commission of India, in its 94th Report, suggested the incorporation of aprovision Section 166-A in Chapter 10 of the Evidence Act which, if enacted, would have readas "In a criminal proceeding, where it is shown that anything in evidence was obtained byillegal or improper means, the court, after considering the nature of the illegality orimpropriety and all the circumstances under which the thing tendered was obtained, may refuseto admit it in evidence, if the court is of the opinion that because of the nature of the illegal orimproper means by which it was obtained its admission would tend to bring the administrationof justice into disrepute."

The Law Commission also suggested that a court, while making the above assessment,may consider all the circumstances surrounding the proceedings and the manner in which theevidence was obtained, including but not limited to:

1. The extent to which human dignity and social values were violated in obtaining the evidence
2. The seriousness of the case;
3. The importance of the evidence;
4. The question whether any harm to an accused or others was inflicted willfully or not.

5. The question of whether circumstances were justifying the action, such as a situationof urgency requiring action to prevent the destruction or loss of evidence.

However, none of the above was ever implemented and the courts, in India, except ahandful of decisions to the contrary (not capable of general application), continue to go by thedictum of 'even if it's stolen, it is admissible in evidence'.

Suggestions

The countries which originally incorporated this principle have moved away from it andso must India. On the judiciary's side, the Supreme Court's judgment in Puttaswamy, followedby the Bombay High Court's judgment, is definitely a step in the right direction and a step wewelcome. Having said that, an amendment in the law is imperative to clearly lay down a rulewhere the court is given the discretion to exclude illegally obtained evidence; which discretionmay be exercised – keeping in mind a variety of circumstances as detailed above. If the changedoesn't come-in from the legislature, the judiciary must clearly lay down exclusionaryprinciples (as in US) or put the 'unfair operation principle' (inspired from UK) on firmer legalground. It is high time that the law, instead of looking the other way, must dis-incentivise illegalinvestigations and protect due process by refusing to receive illegally obtained evidence.

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