



Himachal Pradesh National Law University, Shimla (India)

*HPNLU*  
Law Journal

Journal Articles

ISSN:2582-8533

*HPNLU Law Journal*

Volume II (2021)

**POWER OF POLICE – USE, MISUSE, & ABUSE: Critical Analysis of Provisions  
Related Powers of the Police in The Indian Evidence Act, 1872**

*Manan Daga*

DOI: <https://doi.org/10.70556/hpnlulj-v2-2021-07>

This article can be downloaded from: <https://www.hpnlulj.ac.in/journal-level-3.aspx?ref-id=14>.

---

Recommended Citation:

Manan Daga, *POWER OF POLICE – USE, MISUSE, & ABUSE: Critical Analysis of Provisions Related Powers of the Police in The Indian Evidence Act, 1872* II HPNLU. L. J. 136 (2021). <https://doi.org/10.70556/hpnlulj-v2-2021-07>

This Article is published and brought to you for free and open access by Himachal Pradesh National Law University, Shimla. For more information, please contact [lawjournal.editor@hpnlulj.ac.in](mailto:lawjournal.editor@hpnlulj.ac.in)

## Contents

Volume II	ISSN: 2582-8533	April 2021-March 2022
-----------	-----------------	-----------------------

<i>Articles</i>	<i>Page</i>
1. ACCESS TO JUSTICE IN PRE-COLONIAL INDIA: Revisiting Possibilities and Challenges for Legal Pluralism in 21st Century <i>Chanchal Kumar Singh, Mritunjay Kumar &amp; Aayush Raj</i>	1
2. ELECTRONIC EVIDENCE AND CYBER FORENSICS IN INDIA <i>Shubham Singh Bagla</i>	33
3. DATA PROTECTION, PRIVACY AND PROPOSED LAW IN INDIA: Tracing the Previous Challenges and Transition to the Bill of 2021 <i>Aana Sharma</i>	55
4. KIRTI V. ORIENTAL INSURANCE LIMITED: Juxtaposing Household Labour into Economic Equivalents <i>Vanshika Maan &amp; Varin Sharma</i>	80
5. ONE WORK, MANY CONTRIBUTORS: Solving the Copyright Conundrum in The Indian Copyright Regime <i>Vasishtan P.</i>	99
 <i>Notes and Comments</i>	
6. JURISPRUDENCE OF SEDITION IN INDIA: Weighing the Balance of Fundamental Rights and Administrative Control <i>Rushali</i>	115
7. POWER OF POLICE – USE, MISUSE, & ABUSE: Critical Analysis of Provisions Related Powers of the Police in The Indian Evidence Act, 1872 <i>Manan Daga</i>	136
8. INCARCERATED UNTIL PROVEN INNOCENT: The State’s Penchant for Imprisonment vis-à-vis the Right to Liberty of an Accused <i>Akashdeep Pandey &amp; Sanskriti Prakash</i>	162
9. TRANSGENDER PERSONS’ PROPERTY RIGHTS: India & Beyond <i>Jubal Raj Stephen, Siva Mahadevan &amp; Tamoghna Chattopadhyay</i>	177

10. STATE OF TRIBAL RIGHTS IN MODERN INDIA: A Study of Tribal  
Laws and Issues  
*Vasundhara Sharan & Kushagra Jain* 190
11. COMPARATIVE INVESTIGATION OF EPIDEMIC LAWS: United  
Kingdom, United States of America and India  
*Kartikey Mishra* 209

# **POWER OF POLICE – USE, MISUSE, & ABUSE: Critical Analysis of Provisions Related Powers of the Police in The Indian Evidence Act, 1872**

*Manan Daga\**

*[Abstract: The police have always been a vital part of the justice system in India. They have been conferred different kinds of powers under various statutes to ensure the smooth functioning of the justice system. Indian Evidence Act, 1872 is a statute where the powers of the police are crucial because it impacts the evidence in a court of law, which further determines the guilt in the court of law. There are multiple provisions in the Indian Evidence Act, 1872 relating to the power of the police. Some of these provisions have been critically analysed in this paper, namely, Sections 27, 25, 26, 9, 32(1), 35, 124, 125 and 76 of the Indian Evidence Act, 1872. This paper attempted to distinguish the powers of police in theory and practice. It is done through a qualitative and analytical research methodology where the various provisions of the powers of police in the Indian Evidence Act, 1872 have been analysed critically and practically. It aims at understanding whether the police powers are abused, if yes, then the ways in which they are abused. Further, the powers of police have been analysed from a foreign jurisprudence to discern the powers of police holistically. It includes the analysis of the powers of police in the United States of America and Kenya. Furthermore, the foreign jurisprudence analysis is also supplemented with the Stanford Prison Experiment. It aims at understanding the reason behind the abuse of powers by the police. Therefore, this paper answers the questions of 'what' is police power, 'how' it is abused, and 'why' it is abused. Lastly, the paper is concluded with a few recommendations to overcome the challenges mentioned in the paper and to control the abuse of power.]*

## **I**

### **Introduction**

Police is that branch of the legal system which is approached when any criminal wrong befalls the people. Their role is indispensable in the functioning of the legal system of a nation. Powers are conferred on police in multiple procedural statutes like the Indian

---

\* The author is Fifth Year student of Five Years Integrated Programme in Law at the West Bengal National University of Juridical Sciences, Kolkata. Email: manan218041@nujs.edu.

Evidence Act, 1872 ('IEA'),<sup>1</sup> Code of Criminal Procedure, 1973 ('CrPC'),<sup>2</sup> and other general and specific statutes. The drafters of these legislations had conferred such powers to the police with the intent of securing the ends of justice. However, they were sceptical of such powers given to police and have tried to reduce them to a minimum. In many instances, the police tend to abuse such powers bestowed upon them. The courts encounter such powers of police in statutes like IEA, CrPC, etc.

Therefore, this paper will analyse the powers of the police critically. The primary focus of this paper is on police power under the IEA. This will be supplemented with a passing reference to the powers of the police under CrPC, the Terrorist and Disruptive Activities (Prevention) Act, 1987 ('TADA'),<sup>3</sup> and the Prevention of Terrorism Act, 2002 ('POTA').<sup>4</sup> These additional statutes will be analysed along with IEA for a wholesome understanding of the powers of police in the legal system. There are other statutes that govern the administration and functions of the police, like The Police Act of 1861, the Model Police Act of 2006 ('MPA'), etc. These statutes lay down the role and function of the police in general<sup>5</sup> and the social responsibility of the police in general.<sup>6</sup> Most papers address 'what' are the powers of the police. However, this paper will highlight 'why' the abuse of police powers exist and 'how' are they abused by the police. The powers of police have the potential of being misused, but it does not mean that every police officer misuses them. Most police officers stick to the rules and work to their fullest abilities, and it is very much appreciated. However, a potential for such misuse exists, and this paper aims to restrict this potential of misuse to a minimum.

In this paper, firstly, the general power of police is addressed across different statutes. After that, the powers of police in the IEA are analysed. Under the IEA, the following sections are critically analysed; Section 27, Section 25, Section 26, Section 9, Section 32(1), Section 35, Section 124, Section 125 and Section 76. The necessary provisions of the CrPC, TADA, POTA, Constitution of India, The Police Act of 1860 and, MPA are also used for analysing the given sections. Thereafter, the analysis of each of these sections is done from a practical perspective. Under this, the scope and potential of abuse of police power in each of these sections are advanced. Subsequently, some powers of the police are analysed from a foreign jurisprudence. Lastly, this paper is concluded with novel recommendations for the Criminal Law Reforms Committee for overcoming the abuse of these powers of the police.

---

<sup>1</sup> Act No. 1 of 1872.

<sup>2</sup> Act No. 2 of 1973.

<sup>3</sup> Act No. 28 of 1987.

<sup>4</sup> Act No. 15 of 2002.

<sup>5</sup> Model Police Act, S. 57 (2006).

<sup>6</sup> Model Police Act, S. 58 (2006).

## II

### Overview of Statutory Powers Conferred on Police

The police play an essential role in the legal system, and hence, have significant powers. The MPA elaborate on the duties and roles of the police rather than the power. The powers of the police under the IEA are elaborate. Primarily, they have power under Section 27.<sup>7</sup> It holds a fact relevant if it is discovered as a consequence of information given in the custody of the police, whether it amounts to a confession or not.<sup>8</sup> Section 25 says that a confession given to a police officer will not be relevant, and the police have the potential to abuse this power.<sup>9</sup> How the police abuse this power is addressed later. Section 26 says that a confession given in custody of the police officer will not be relevant unless it is given to a judicial magistrate.<sup>10</sup> It also has the potential to be abused, which is addressed later.

The police have some discretionary powers under Section 9<sup>11</sup> of the IEA for the Test Identification Parade ('TI Parade'). They also have some powers under Section 32(1),<sup>12</sup> which can be abused for making a statement relevant as a dying declaration. These powers are not specified but can be implied upon interpreting the statute. Subsequently, Section 35 of the IEA also confers the power on police to hold an entry made in a public register to be relevant.<sup>13</sup> Section 124 of IEA confers on the police the power to not disclose any communication made to them in an official capacity.<sup>14</sup> Further, Section 125 grants the police the power not to reveal the source of his/her information regarding the commission of the offence.<sup>15</sup> Lastly, Section 76 grants the police officers the power to give a certified copy of a public document.<sup>16</sup> There are more provisions regarding the powers of police in the IEA, like Section 21 and 24. However, these provisions are not analysed in this paper because the scope of these powers would be similar to Section 25, 26 and 27, and it would become repetitive. Thus, these provisions are not analysed but merely mentioned.

The powers of the police are found extensively in the CrPC. The primary and paramount power of a policeman is to file the chargesheet or the final report.<sup>17</sup> The

---

<sup>7</sup> Indian Evidence Act, S. 27 (1872).

<sup>8</sup> *Id.*

<sup>9</sup> Indian Evidence Act, S. 25 (1872).

<sup>10</sup> Indian Evidence Act, S. 26 (1872).

<sup>11</sup> Indian Evidence Act, S. 9 (1872).

<sup>12</sup> Indian Evidence Act, S. 32(1) (1872).

<sup>13</sup> Indian Evidence Act, S. 35 (1872).

<sup>14</sup> Indian Evidence Act, S. 124 (1872).

<sup>15</sup> Indian Evidence Act, S. 125 (1872).

<sup>16</sup> Indian Evidence Act, S. 76 (1872).

<sup>17</sup> Code of Criminal Procedure, S. 173 (1973).

police also have the power to register the First Information Report ('FIR').<sup>18</sup> Then the police have the power to investigate,<sup>19</sup> seize property<sup>20</sup> and require the attendance of witnesses.<sup>21</sup> The police also have the power to arrest<sup>22</sup> and the power of preventive arrest.<sup>23</sup> These are some of the powers of the police under the CrPC. Section 164<sup>24</sup> of CrPC is not a power of the police officer, but it has to be read along with Section 25 and 26 of the IEA. Section 162<sup>25</sup> of CrPC has to be read along with Sections 27 and 32(1) of the IEA. There are many other provisions, but this paper address the limited provisions.

Finally, TADA and POTA provide wider powers to police compared to IEA and CrPC. It is because the terrorists are usually trained to not break down during the police interrogation. Section 15 of TADA allows a confession given to a police officer (not lower in rank than a Superintendent of police) to be relevant.<sup>26</sup> They also have some powers of seizure.<sup>27</sup> Moreover, Section 32 of POTA admits a confession given to a police officer (not lower in rank than a Superintendent of police) as relevant.<sup>28</sup> It also grants them some powers of seizure.<sup>29</sup>

This is a basic overview of some of the powers of police across multiple statutes, which will be dealt with in this paper. The main problem is not that police have so much power. Instead, the main problem is that the police tend to abuse this power granted to them. Therefore, it is imperative to address 'why' and 'how' the police abuse the power granted to them, along with 'what' are the powers abused.

### III

#### Critical Analysis of the Powers Conferred

The powers of the police under the Indian Evidence Act is critically analysed in this part. The aforesaid sections will be critically analysed, along with the supplementary provisions of other statutes. The said provisions will be explored along with their

---

<sup>18</sup> Code of Criminal Procedure, S. 154 (1973).

<sup>19</sup> Code of Criminal Procedure, S. 156 (1973).

<sup>20</sup> Code of Criminal Procedure, S. 102 (1973).

<sup>21</sup> Code of Criminal Procedure, S. 160(1) (1973).

<sup>22</sup> Code of Criminal Procedure, S. 41 (1973).

<sup>23</sup> Code of Criminal Procedure, S. 151 (1973).

<sup>24</sup> Code of Criminal Procedure, S. 164 (1973).

<sup>25</sup> Code of Criminal Procedure, S. 162 (1973).

<sup>26</sup> Terrorist and Disruptive Activities (Prevention) Act, S. 15 (1987).

<sup>27</sup> Terrorist and Disruptive Activities (Prevention) Act, S. 7A (1987).

<sup>28</sup> Prevention of Terrorism Act, S. 32 (2002).

<sup>29</sup> Prevention of Terrorism Act, S. 7(1) (2002).

interpretation. This part aims to lay down the basic understanding of each provision. They will also be analysed along with the interpretation of each of these provisions.

### ***Section 27 of the Indian Evidence Act***

Section 27 is one of the most vital sections on the powers of police in the IEA. It can even be considered as one of the most used provisions of the IEA in a criminal case. Section 27 enables the statements of an accused given in the custody of police as admissible if those statements lead to the discovery of a new fact and are distinctly related to the fact discovered.<sup>30</sup> There are certain necessary conditions for invoking this provision. The landmark case of *Pulukuri Kottaya v. The King Emperor*<sup>31</sup> had laid down these conditions, which are followed even today. Firstly, the discovery of a fact should happen.<sup>32</sup> Secondly, the person giving information to the police must be accused of any offence.<sup>33</sup> Thirdly, this discovery should arise out of the information provided by the accused to the police.<sup>34</sup> Fourthly, the accused must give this information when he/she is in the custody of the police officer.<sup>35</sup> Lastly, the information received from the accused must distinctly relate to the discovered fact.<sup>36</sup>

The importance of this provision can be understood upon recognising the principle and scope of this provision. Section 27 is founded on the principle that the confession given to a police officer or in the custody of a police officer is tainted and inadmissible.<sup>37</sup> However, if a statement leads to a discovery of a fact which is distinctly related to the statement given, then this very statement can be presumed to be accurate and untainted.<sup>38</sup> Therefore, Section 27 is presumed to be an exception/proviso to Sections 25 and 26 of the IEA since it starts with the words 'Provided that'.<sup>39</sup> It is treated as an exception to Sections 25 and 26 because these two sections prohibit the admissibility of a confession given to the police or in police custody. In contrast, Section 27 holds a statement admissible, which is given in police custody.

'Fact discovered' is a vital term in this section. The *Kottaya case*<sup>40</sup> had defined the ambit of 'fact discovered'. This definition has been extensively followed in multiple cases. It can be safe to say that the *Pulukuri Kottaya case*<sup>41</sup> is the locus classicus on Section 27. It

---

<sup>30</sup> Indian Evidence Act, S. 27 (1872).

<sup>31</sup> *Pulukuri Kottaya v. The King Emperor*, AIR 1947 PC 67.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Indian Evidence Act, S. 25-26 (1872).

<sup>38</sup> *State of Uttar Pradesh v. Deoman Upadhyaya*, AIR 1960 SC 1125.

<sup>39</sup> *Indra Dalal v. State of Haryana*, (2015) 11 SCC 31.

<sup>40</sup> *Supra* note 31, *Pulukuri Kottaya case*.

<sup>41</sup> *Id.*



held that the 'fact discovered' does not just mean 'object produced' but also includes the place from where the object was produced and the knowledge of the accused regarding this.<sup>42</sup> It was explained with the classic example of the knife. If an accused says, 'I will produce a knife concealed in the roof of my house', then the accused is not leading to the discovery of the knife itself, but the accused is leading to the discovery of a fact, that a knife was concealed in his house.<sup>43</sup> If this knife is proved to have been used for committing the crime, then this fact discovered becomes relevant.<sup>44</sup>

This definition has further been clarified in subsequent cases. In *Pandurang Kalu Patil*,<sup>45</sup> the apex court explained that in some instances, an object might be a fact.<sup>46</sup> However, the discovery of a fact cannot be equivalent to an object recovered.<sup>47</sup> Instead, an object recovered may help in supporting the fact discovered at the end, but it cannot be equivalent to the fact discovered.<sup>48</sup> Hence, upon considering the above example of the knife, then the fact discovered is not the knife per se, but the fact that he had concealed the knife. The recovery of this knife is not in itself of an incriminating nature. Hence, when they are proved to be connected to the offence, then they become relevant. It is not hit by Article 20(3)<sup>49</sup> because the actual discovery does not come under Section 27, but the statement about the knife is a fact discovered.

Since the fact discovered also includes the knowledge of the accused, a prominent question had emerged in subsequent cases like the *Parliament Attack case*.<sup>50</sup> The issue was whether 'fact discovered' could be confined to a mix of physical and mental objects or only mental facts.<sup>51</sup> The apex court opined that the fact discovered may include a combination of both physical and mental objects but cannot contain only mental facts.<sup>52</sup> This restricted the scope of 'fact discovered'; otherwise, it could have been widely used. This fact discovered does not include the past user and the history of the fact since it is not related to the discovery of this fact.<sup>53</sup>

Moreover, in cases of joint-disclosure by co-accused, the courts earlier used a restrictive approach because if one accused discovered a fact, then another cannot rediscover it. However, in the *Parliament Attack case*,<sup>54</sup> the court used a lenient approach. It held that

---

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Pandurang Kalu Patil & Another v. State of Maharashtra*, (2002) 2 SCC 490.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Constitution of India, art. 20(3).

<sup>50</sup> *State (NCT of Delhi) v. Navjot Sandhu*, (2005) 11 SCC 600.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Supra* note 31, *Pulukuri Kottaya case*.

<sup>54</sup> *Supra* note 50, *Navjot Sandhu case*.

the joint disclosures might be applicable if they are made in the same period of time.<sup>55</sup> Lastly, the 'fact discovered' in all cases must not be any fact but only a relevant fact.<sup>56</sup>

A person has to be an 'accused' of 'any offence' to fall under Section 27. The courts have interpreted the term 'accused' quite liberally. An accused also includes a person who may not be formally charged with an offence when he made the statement.<sup>57</sup> Hence, the 'accused' means that a person who is an accused at the time of trial and does not need to be an accused at the time of giving the statement.<sup>58</sup> Moreover, the condition requires the person to be accused of 'any offence'. It means that the information provided by the accused can be of any offence and need not be connected to the same crime.<sup>59</sup> Therefore, when an accused gives a statement, it is not necessary that he should have been arrested for the same offence. For instance, he could be arrested for offence A, and he gave a statement about offence B which led to the discovery of a fact. If this statement satisfies other conditions of Section 27, then this statement could be applicable for offence B even when he said it when he was arrested for offence A. This is the meaning of 'an accused of any offence'.

'Custody' of the police officer is another essential requirement for applying Section 27. The term 'custody' has also been interpreted liberally. When a person who is not in the custody of the police officer approaches them and makes a statement that leads to the discovery of a fact, then such a person is deemed to have surrendered himself to the custody of the police.<sup>60</sup> This liberal interpretation of the term 'custody' along with the liberal interpretation of the term 'accused of any offence' underlines that the police have a lot of power in bringing a statement within this section. This power of police is further strengthened by the terms 'whether it amounts to a confession or not'. If a statement was given by the accused and it results in the discovery of a fact, then such a statement will become admissible irrespective of whether the statement was confessional or non-inculpatory.<sup>61</sup> Hence, even a confessional FIR may fall under the ambit of Section 27.<sup>62</sup>

Lastly, the statement of the accused must relate 'distinctly' to the fact discovered for holding it admissible under Section 27. The apex court in *Mohd. Inayatullah*<sup>63</sup> held that "a 'distinctly' means 'directly', 'indubitably', 'strictly', 'unmistakably'."<sup>64</sup> It means that out of the statement given by the accused, only that portion which is the direct and immediate cause of discovery will be admissible under this provision, and the rest of the statement

---

<sup>55</sup> *Id.*

<sup>56</sup> *Digamber Vaishnav v. State of Chhattisgarh*, (2019) 4 SCC 522.

<sup>57</sup> *Supra* note 34, *Deoman Upadhyaya* case.

<sup>58</sup> *Id.*

<sup>59</sup> *State of Rajasthan v. Bhup Singh*, (1997) 10 SCC 675.

<sup>60</sup> *Supra* note 34, *Deoman Upadhyaya* case.

<sup>61</sup> *Bodhraj v. State of Jammu & Kashmir*, (2002) 8 SCC 45.

<sup>62</sup> *Khatri Hemraj Amulakh v. State of Gujarat*, (1972) 3 SCC 671.

<sup>63</sup> *Mohd. Inayatullah v. State of Maharashtra*, (1976) 1 SCC 828.

<sup>64</sup> *Id.*

will be inadmissible. Therefore, this principle of Section 27 is also known as the doctrine of confirmation by subsequent events because the fact discovered confirms the statement given by the accused.<sup>65</sup>

Upon reading this provision as a whole, it is easy to comprehend that a fact which is already discovered cannot be discovered again. If the police are already aware of the information provided by the accused, then a discovery resulting from such information will not fall under Section 27.<sup>66</sup> It is imperative to understand Section 27 along with Article 20(3) of the Constitution and Section 162 of CrPC for a wholesome understanding of this provision.

Article 20(3) prohibits any person from being a witness against himself upon compulsion.<sup>67</sup> The apex court tried to reconcile this provision with Section 27 in the celebrated case of *Kathi Kalu*.<sup>68</sup> The court opined that a person producing a document that further elaborates on the issue of the case would not fall under self-incrimination under Article 20(3).<sup>69</sup> The court also held that statement under Section 27 is not hit by Article 20(3) if it is not made under compulsion.<sup>70</sup> If it is made under compulsion, then such a statement will be hit by Article 20(3) and will not be admissible. In a nutshell, it meant that the document itself is not proof of guilt, so it is not self-incriminatory. Hence, a statement under Section 27 does not prove the guilt because the fact is not yet discovered. This discovery of fact elaborates on the issues of the case, but if the fact is not discovered, then the statement will not be relevant. Therefore, a statement under Section 27 will not be hit by Article 20(3) as long as it is not made under compulsion. A statement given under Section 27 need not be signed as per Section 162 of CrPC, but if it is signed, then it does not lead to contamination of the statement of the accused.<sup>71</sup>

### ***Section 25 of the Indian Evidence Act***

Section 25 says that a confession made to a police officer will not be admissible. It looks straightforward, but it has some disputed elements in it. A confession means an express acknowledgement of the truth of the guilt facts or some essential parts of it charged to the accused in a criminal case.<sup>72</sup> This provision consists of two vital elements. Firstly, the confession must be made to a police officer. Secondly, the person confessing must be accused of any offence. Hence, only the confessional statements made to a police officer is inadmissible. Section 25 owes its origin to the possibility of abuse of powers of the

---

<sup>65</sup> *Supra* note 57, *Bodhraj* case.

<sup>66</sup> *State of Karnataka v. M.V. Mahesh*, (2003) 3 SCC 353.

<sup>67</sup> Constitution of India, 1950 art. 20(3).

<sup>68</sup> *State of Bombay v. Kathi Kalu Oghad*, (1962) 3 SCR 10.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Code of Criminal Procedure, 1873 S. 162(2) (1973).

<sup>72</sup> S.G. Goudappanavar, *Critical Analysis of Confession under TADA and POTA*, *Bharati L. Rev.* (2014) 111.

police. The object of this provision is to hold confessions made to police officers as inadmissible because earlier police had a reputation for extracting confessions forcibly.<sup>73</sup> Therefore, this section serves a twofold purpose; firstly, protecting the accused from third-degree treatment and secondly, ensuring a scientific and proper investigation leading to the actual culprit.<sup>74</sup>

The most controversial part of this provision is the scope of the definition of a police officer. This debate of 'who is a police officer' is still not conclusively settled. In the case of *Barkat Ram*,<sup>75</sup> the Supreme Court held that a police officer is someone with investigating powers, which is used for detecting and preventing crime.<sup>76</sup> Moreover, a confession given to the said police officer at any time (even when he/she is not discharging his/her official duty) will be inadmissible.<sup>77</sup> Hence, it held that a customs officer is not a police officer.<sup>78</sup> Subsequently, the apex court in the *Badaku Joti Savant case*<sup>79</sup> laid down the most widely used test for determining who is a police officer. The Constitutional Bench opined that police officers are those officers who have the power to file chargesheet under Section 173 of the CrPC.<sup>80</sup> Hence, it held that a central excise officer was not a police officer even when they had the power of investigation because they did not have the power to file chargesheet under Section 173 of CrPC.<sup>81</sup> Thereafter, it was held that a Railway Protection Force officer is also not a police officer because he/she does not have all the powers under Chapter XIV of CrPC, including the power to file a chargesheet.<sup>82</sup> Subsequently, it was held that the Department of Revenue Intelligence officers were not police officers because they do not have the power to file chargesheet under Section 173 of CrPC.<sup>83</sup>

Further, the court decided on the issue of customs officers being police officers in the *Noor Aga case*.<sup>84</sup> However, in this case, the custom officers derived their power from the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act').<sup>85</sup> Since Section 53 of the NDPS Act confers the custom officers with the same powers as an officer-in-charge of police, the court held that the said custom officers under the NDPS Act are police officers.<sup>86</sup> A custom officer under the NDPS Act works towards detection of crime

---

<sup>73</sup> *State of Punjab v. Barkat Ram*, (1962) 3 SCR 338.

<sup>74</sup> *Raj Kumar Karwal v. Union of India*, (1990) 2 SCC 409.

<sup>75</sup> *Supra* note 73, *Barkat Ram case*.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Badaku Joti Savant v. State of Mysore*, (1966) 3 SCR 698.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Balkishan A. Devidayal v. State of Maharashtra*, (1980) 4 SCC 600.

<sup>83</sup> *Supra* note 74, *Raj Kumar Karwal case*.

<sup>84</sup> *Noor Aga v. State of Punjab*, (2008) 16 SCC 417.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

and charging the accused; hence, they were held to be police officers.<sup>87</sup> Moreover, the apex court changed its position again in the *Ram Singh case*.<sup>88</sup> The apex court opined that Section 53 of the NDPS Act does not explicitly confer the power to file chargesheet on the customs officers.<sup>89</sup> Hence, they are not considered police officers under Section 25.<sup>90</sup> There have been some conflicting positions; nevertheless, the most used test is the test of filing chargesheet under Section 173 of CrPC. It has also been laid down by a higher bench, which was not overruled. Therefore, the test of filing chargesheet is widely used, but the debate is not conclusively proven.

The second element is that the person must be an 'accused of any offence'. This term is interpreted similarly to its interpretation under Section 27 of the IEA. It includes a person who is accused of any offence at the stage of the trial and need not be an accused when confessing to the police officer.<sup>91</sup> Therefore, if a person confesses when he is a free man, then also he will become an accused under Section 25. The term 'any offence' implies that a confession made to a police officer about an offence B, at the time of investigation of offence A will also be inadmissible under Section 25. This liberal interpretation is for the safety of the accused and for achieving the object and purpose of Section 25. Lastly, in the case of confessional FIR, it was earlier held that such a statement is not made during the course of the investigation.<sup>92</sup> The court held that this statement in FIR is not his confession, and hence, Section 25 will not apply.<sup>93</sup> The apex court soon shifted from this position and held that a confession given in FIR is a confessional statement and is covered under Section 25.<sup>94</sup> Hence, such a confessional FIR is inadmissible, and the apex court has followed this position in several cases like *Bheru Singh v. State of Rajasthan*, (1994) 2 SCC 467.

Some provisions in the TADA and POTA conflict with Section 25. Section 15 of TADA made a confession given to a police officer (not lower in rank than a Superintendent of Police) admissible.<sup>95</sup> The legality and the veracity of this provision were put to the court several times. In the end, it was held that Section 15 excludes the provisions of IEA and CrPC while holding such confessions admissible.<sup>96</sup> Such a confession would only be valid if it followed Rule 15 of TADA Rules, 1987, which included rules like, the police have to inform the accused that any statement may be admissible in the court of law, or the confession may be taken voluntarily, etc.<sup>97</sup> It further held that the confession could

---

<sup>87</sup> *Id.*

<sup>88</sup> *Ram Singh v. Central Bureau of Narcotics*, (2011) 11 SCC 347.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Aghnoo Nagesia v. State of Bihar*, (1966) 1 SCR 134.

<sup>92</sup> *Faddi v. State of Madhya Pradesh*, (1964) 6 SCR 312.

<sup>93</sup> *Id.*

<sup>94</sup> *Supra* note 91, *Aghnoo Nagesia case*.

<sup>95</sup> Terrorist and Disruptive Activities (Prevention) Act, 1987 S. 15.

<sup>96</sup> *Prakash Kumar v. State of Gujarat*, (2005) 2 SCC 409.

<sup>97</sup> *Id.*

also be used against the same accused of any other offence regardless of the fact that the accused was convicted or acquitted in this case.<sup>98</sup> Additionally, the confession could also be used against the co-accused, but as a rule of prudence, it is used for corroboration, but it depends on the facts of the case.<sup>99</sup> Section 15 of TADA could override IEA and CrPC but had to be read with Article 20(3) of the Constitution. In cases where the court inferred that the confession was not made voluntarily, they held the confession to be inadmissible.<sup>100</sup>

Section 32 of POTA was almost similar to Section 15 of TADA, except that in POTA, such a confession cannot be admissible for the co-accused.<sup>101</sup> The legality of this section was questioned in the *Parliament Attack Case*.<sup>102</sup> The apex court held that this provision of POTA is valid, but the provision cannot be held to be admissible against the co-accused.<sup>103</sup>

This is a wholesome analysis of Section 25 of the IEA, which was essentially supposed to be read with the said provision of TADA and POTA.

### ***Section 26 of the Indian Evidence Act***

Section 26 of the IEA states that a confession made in the custody of a police officer will be inadmissible unless it is made before a magistrate. The meaning of confession is the same as the one given in Sections 25 and 27 of the IEA. This provision has two essential elements. Firstly, the accused should be in the 'custody' of the police officer. Secondly, a confession made in the custody of a police officer to a 'magistrate' will be admissible. The object and purpose of this provision are similar to the purpose of Section 25, i.e. protection from third-degree torture and ensuring proper investigation leading to the actual culprit.<sup>104</sup>

The term 'custody' has been interpreted pragmatically and liberally by the courts.<sup>105</sup> A person does not have to be in the physical custody of the police officer, but there must be some control over the person confessing.<sup>106</sup> This control may amount to surveillance too. The police should have control over the movement of the person for it to be regarded as custodial control or custodial surveillance.<sup>107</sup> Hence, the police custody could be ascertained on a factual basis since, in certain facts and circumstances, the control may lead to custody, and in certain cases, it may not. It can be generally tested

---

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Ayyub v. State of Uttar Pradesh*, (2002) 3 SCC 510.

<sup>101</sup> Prevention of Terrorism Act, 2002 S. 32.

<sup>102</sup> *Supra* note 50, *Navjot Sandhu* case.

<sup>103</sup> *Id.*

<sup>104</sup> *Supra* note 74, *Raj Kumar Karwal* case.

<sup>105</sup> *State of A.P. v. Gangula Satya Murthy*, (1997) 1 SCC 272.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

by ensuring whether the person has freedom of movement or the police control his movement.<sup>108</sup> However, in cases of surveillance through digital means, the movements may not be controlled by the police, but it is still surveillance. Therefore, this test may not be conclusive in the contemporary world, but it can be suggestive or a guiding test.

A confession given by a person in the custody of a police officer can be admissible only if it is made before a magistrate. This confession has to be made only before a judicial magistrate and not before an executive magistrate.<sup>109</sup> The magistrate has to be a judicial magistrate and not an executive magistrate because such a confession may expose the person to a punishment.<sup>110</sup> Therefore, it is imperative for a judicial magistrate to record such a confession. Lastly, in a pre-independence case, the Madras High Court held that a magistrate could include even the magistrates of a foreign country.<sup>111</sup> However, in the modern world, this interpretation of the term magistrate would be stretching it too far.

### ***Section 9 of the Indian Evidence Act***

Certain facts are necessary to establish the identity of any person or thing whose identity is relevant. These facts are considered relevant facts under Section 9 of the IEA.<sup>112</sup> This part of the section facilitates TI Parade. In a TI Parade, the accused is placed in a line along with some dummies, and the witness has to identify the accused out of this group. The object of the TI Parade is two-fold. Firstly, it satisfies the witness that the person whom they suspect to be the accused is actually the person whom they saw during the crime.<sup>113</sup> Secondly, it even satisfies the investigating authorities that the suspect is the person whom the witness had seen.<sup>114</sup>

TI Parade has an essential purpose of strengthening the trustworthiness and credibility of the other existing evidence.<sup>115</sup> The TI Parade is a part of the investigation process. It is mostly considered as evidence that corroborates the testimony of that witness in the court and other pieces of evidence.<sup>116</sup> Hence, as a rule of prudence, the TI Parade is considered corroborative. However, in certain exceptional cases where the witness has elaborated efficiently and the court is impressed with him, then the court may be inclined to attach a higher probative value to that TI Parade.<sup>117</sup>

---

<sup>108</sup> Batuklal, THE LAW OF EVIDENCE (2018) 248.

<sup>109</sup> *Kartik Chakraborty v. State of Assam*, 2017 SCC OnLine Gau 1239.

<sup>110</sup> *Id.*

<sup>111</sup> *Panchanatham Pillai, In re*, 1929 SCC OnLine Mad 3.

<sup>112</sup> Indian Evidence Act, 1872 S. 9.

<sup>113</sup> *State of Maharashtra v. Suresh*, (2000) 1 SCC 471.

<sup>114</sup> *Id.*

<sup>115</sup> *Heera and Another v. State of Rajasthan*, (2007) 10 SCC 175.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

A TI Parade has to be conducted in the presence of a magistrate, who can further give testimony regarding the credibility of the TI Parade.<sup>118</sup> The TI Parade can only be conducted when the identity of the accused is unknown; otherwise, there will be no point in a TI Parade. Hence, a TI Parade may not be necessary in cases where an accused is caught red-handed, or in cases where the witness is an acquaintance of the accused, or when the accused could be recognised through other means like CCTV.

TI Parade becomes essential for discussing police powers because it is conducted at the investigation stage.<sup>119</sup> The police have control over the accused, and the police can also interact with the witness. It opens up vast opportunities for the police to frame an innocent person by staging a concocted TI Parade. Moreover, this power of police may be looked at critically by the courts in cases where the TI Parade is conducted after an inordinate delay.

### ***Section 32(1) of the Indian Evidence Act***

A dying declaration is one of the broad provisions of the IEA. In this paper, a brief overview of this provision is advanced, and the specific power police may have is addressed. The dying declaration includes facts that relate to either the cause of death or the circumstances of the transaction, which resulted in the death of that person.<sup>120</sup> The aspect of the cause of death is simple and straightforward. However, the element of circumstances of the transaction which resulted in the death need clarification. The term 'circumstances of transaction' is not as broad as the term 'circumstantial evidence', which may include evidence of almost all relevant facts.<sup>121</sup> Further, the 'circumstances of transaction' is narrower than 'res gestae' too.<sup>122</sup> Upon analysing this case of *Narayan Swami*,<sup>123</sup> it is deduced that circumstances of the transaction need not be known, and mere fear or suspicion may not be included in it.<sup>124</sup> Lastly, this court opined that the circumstances of the transaction must have some proximate relation to the occurrence, and under this, the proximity of event is more important than the proximity of time.<sup>125</sup>

The dying declaration has one of the highest probative values in the IEA and can be mostly used without further corroboration. However, there is a debate regarding whether it should be corroborated or not. In practice, it is still unsettled. In theory, the courts have said that corroboration is not required if the court is convinced regarding its validity, but the court 'may' corroborate for assurance when the circumstances

---

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> Indian Evidence Act, 1872 S. 32(1).

<sup>121</sup> *Pakala Narayan Swami v. Emperor*, AIR 1939 PC 47.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*



surrounding it are not clear.<sup>126</sup> The court further held that a dying declaration need not necessarily be given to a magistrate and can be given to police, or doctor, or any other person.<sup>127</sup> It is not necessary that the dying declaration has to be in a question-answer format, but it can be in narrative form.<sup>128</sup> Instead, it can be in any form, like oral, written or through gestures.<sup>129</sup> Lastly, a dying declaration is valid if the medical professional holds that he/she is in a fit state of mind.<sup>130</sup>

The dying declaration is admitted because of the rationale that a dying person will not tell lies or implicate an innocent person.<sup>131</sup> However, this rationale does not apply when a dying declaration is admitted relying on the circumstances of the transaction. Hence, this is a controversial debate. However, in this paper, this debate is not addressed, but this provision regarding police powers is focused. The powers of police become pertinent in this provision because the policemen can record a dying declaration too. The concerns which exist in a confessional statement, some of it can be applicable in this section too. The police can frame a person for the sake of a stronger investigation and a stronger case. There is a reason why the magistrate is allowed to record confessions, and that reason should apply to this provision too, but it is not applied. Therefore, the police have a wide range of power under this provision because this section is interpreted broadly.

### ***Section 35 of the Indian Evidence Act***

Section 35 of the IEA is one of the provisions which gives trivial powers to police. Nevertheless, power is conferred to the police, even if it is trivial. This provision states that any entry made in a public or official book referring to a fact in issue or a relevant fact by a public servant would be a relevant fact.<sup>132</sup> As per Section 21(8) of the Indian Penal Code, 1860 ('IPC'), a policeman may fall under the ambit of a public servant.<sup>133</sup>

Police officers have power under this section because any entry made by them in the death and birth registers kept at the police station may be considered a relevant fact.<sup>134</sup> Further, Rajasthan High Court had held that a site inspection map and a site inspection memo made by a police officer in the discharge of his duties were held relevant under Section 35 of the IEA.<sup>135</sup> This case was regarding a motor vehicle accident under Section

---

<sup>126</sup> *State of Karnataka v. Shariff*, (2003) 2 SCC 473.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Queen-Empress v. Abdullah*, 1885 SCC OnLine All 55.

<sup>130</sup> *Supra* note 126, *Shariff* case.

<sup>131</sup> *Id.*

<sup>132</sup> Indian Evidence Act, 1872 S. 35.

<sup>133</sup> Indian Penal Code, 1860 S. 21.

<sup>134</sup> Batuklal, *THE LAW OF EVIDENCE* (2018) 360.

<sup>135</sup> *Rajasthan State Road Transport Corporation v. Nand Kishore and Others*, AIR 2001 Raj 334.

166 of the Motor Vehicles Act, 1988.<sup>136</sup> Hence, this section can be used by the police to make certain documents a relevant fact for one party. This power of the police is undoubtedly limited and incidental, but such incidental evidence end up supporting major evidence in a case. Therefore, it is exigent to address this power of police under the IEA.

### ***Section 124 of the Indian Evidence Act***

Section 124 of the IEA is mostly read with Section 123 of the IEA. This paper is not covering Section 123 since it is a general provision. Section 124 states that a public officer cannot be compelled to disclose communications made to him in confidence if such disclosure would endure public interests.<sup>137</sup> It has two vital elements; first, communication is made in confidence, and second is suffering from public interests.<sup>138</sup> The term 'public officer' means a person who has public duties.<sup>139</sup> Hence, a policeman falls under this definition. The term 'disclose' means the disclosure at first instance and not disclosure at the court which has already been disclosed outside that circle.<sup>140</sup>

The court has to decide whether the communication was made in official confidence, and there is no definite rule regarding the same.<sup>141</sup> Hence, it has to be ascertained on a factual basis. The critical part of this provision that grants powers to the police is the second half. The public officer has the discretion to decide whether the disclosure may harm public interests or not.<sup>142</sup> Therefore, the policemen have the power to determine whether such disclosure may affect public interests and have the discretion to withhold the information given to them in confidence. This provision may be abused due to the discretionary power of the police by withholding that information that was not meant to be withheld.

### ***Section 125 of the Indian Evidence Act***

Section 125 of the IEA does not have a lot of cases since it is a straightforward provision. It means that a police officer or magistrate should not be compelled to tell the source from whom they got the information about the commission of an offence.<sup>143</sup> This provision is enacted for a simple principle of safeguarding the informant.<sup>144</sup> An informant can be a normal person who was in the vicinity or any police-informers. In any case, they may need protection from the accused. If the informant is not given

---

<sup>136</sup> Motor Vehicles Act, 1988 S. 166.

<sup>137</sup> Indian Evidence Act, 1872 S. 124.

<sup>138</sup> Ratanlal & Dhirajlal, LAW OF EVIDENCE (PB) (2019) 775.

<sup>139</sup> *Id.* at page 776.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> Indian Evidence Act, 1872 S. 125.

<sup>144</sup> Batuklal, THE LAW OF EVIDENCE (2018) 625.

protection from the accused, then they may be scared to come forward and inform about the crime. Hence, this provision was enacted.

This provision has two conflicting interests. One is the interest of the accused to unconditionally cross-examine a witness (who is a police officer, magistrate or a revenue officer) in this case.<sup>145</sup> Other is the interest of the informant, who should not be scared of coming forward to inform about the crime.<sup>146</sup> If the informants are not given this protection, then they may not even come forward to inform about the crimes. Hence, there has to be a balance between these two interests. The policemen have the power of withholding the source of their information. Many times the policemen may actually withhold it because there is a genuine informant who would be at risk. However, the policemen still have the power to concoct a story to frame a person for ease in the investigation. Hence, this provision grants a discretionary power in the hands of a policeman.

### ***Section 76 of the Indian Evidence Act***

Section 76 of the IEA holds that when a public officer has custody of a public document, then any person can demand a copy of the same if they have a right to inspect it.<sup>147</sup> Section 2(17) of the Code of Civil Procedure, 1908 defines who is a public officer, and a police officer may fall under the ambit of a public officer. Therefore, when a police officer has the custody of a public document and a person has a right to inspect this document, then the police officer has to give such a person a copy of the same. Along with this, the police officer has to provide a certificate written at the foot of such a copy, which says that the copy is a true copy of the document.<sup>148</sup> This certificate has to be dated and signed by such a police officer with his name and his title, and it may be sealed if the same is permitted.<sup>149</sup> Such a copy will be given upon the payment of legal fees. Therefore, the police officer has the power to provide a certified copy of a document whenever the requisite conditions under Section 76 of the IEA are fulfilled. The potential of misuse of such power is not a lot, but proper usage of this power is crucial.

---

<sup>145</sup> Ratanlal & Dhirajlal, LAW OF EVIDENCE (PB) (2019) 780.

<sup>146</sup> *Id.*

<sup>147</sup> Indian Evidence Act, 1872 S. 76.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

## IV

### Pragmatic Analysis of the Powers Conferred

#### *Practical analysis of powers of the police under the Indian Evidence Act, 1872*

The powers of police have been analysed from a theoretical perspective in the preceding part of this paper. In this part, the same powers are analysed from a practical perspective. Without a practical analysis, the entire discussion on the powers of police is incomplete. In this section, the answer to 'how' does the police use or misuse their power is addressed.

#### *Section 27 of the Indian Evidence Act*

Section 27 of the IEA grants a wide range of powers to the police, which can be abused. The most basic way of abusing this power is to plant the fact discovered. It is possible because of a couple of reasons. Firstly, the presence of a witness is not necessary when the accused makes the disclosure statement.<sup>150</sup> Such a disclosure statement can be made during the interrogation, so the presence of witnesses may not be possible at that time. Hence, it gives the police some considerable powers. Secondly, the non-examination of the independent *panch* witnesses may not discredit the evidence of police officials.<sup>151</sup> Thirdly, when the fact discovered are some of the everyday items which are readily available in the market, then the police may have an opportunity to plant the same. Hence, the court needs to be vigilant in such cases. For instance, in the case of *Mahabir Biswas*,<sup>152</sup> the apex court did not draw the inference of theft or participation in a murder against the accused because the ring was discovered after six months.<sup>153</sup> The police could have easily planted the ring since a ring can be duplicated in a market, and six months is a sufficiently long time for a ring to be discovered. In another case of *Pawan Kumar*,<sup>154</sup> the court did not place reliance on the discovery of a ring since it is a common marketable item, and the family members of the deceased did not identify the same.<sup>155</sup>

There are other miscellaneous reasons which lead to the inference that the police may have abused their power. The police may call a person who has enmity with the accused to be a *panch* witness. The courts have proceeded with caution in such cases as, in the

---

<sup>150</sup> *State of Himachal Pradesh v. Jeet Singh*, (1999) 4 SCC 370.

<sup>151</sup> *Kripal Singh v. State of Rajasthan*, (2019) 5 SCC 646.

<sup>152</sup> *Mahabir Biswas v. State of West Bengal*, (1995) 2 SCC 25.

<sup>153</sup> *Id.*

<sup>154</sup> *Pawan Kumar v. State of Haryana*, (2003) 11 SCC 241.

<sup>155</sup> *Id.*

case of *Gambhir*,<sup>156</sup> the court did not rely on such discovery due to such enmity.<sup>157</sup> The fact discovered may be tampered with or planted, and such a witness may not pay any attention to it due to their enmity. Moreover, sometimes the reasons are apparent, which may lead to the inference of abuse of police power. For instance, in the case of *Shambhu Dayal*,<sup>158</sup> the court found it unreasonable that while committing dacoity, the accused would take away clothes along with the ring.<sup>159</sup>

When the police have recovered the fact even before the statement is given by the accused under Section 27, then this fact discovered cannot be relevant under Section 27. However, if the police officials try to hold it under Section 27 like in the case of *Kashi Ram*,<sup>160</sup> then the court gives the benefit of the doubt to the accused since it highlights the power abused by the police. Furthermore, the independent *panch* witnesses need to see the discovery of the fact and not merely be informed while they wait outside.<sup>161</sup> It gives an opportunity to the police to go inside the place where fact is discovered and plant anything since the witness is waiting outside. Therefore, a lot of judgements have emphasised the possibility of the alleged frequent misuse of power by the police and have asked the courts to be vigilant.<sup>162</sup>

The facts discovered from places that are neither open nor accessible to all are often interpreted as a circumstance for the authenticity of the discovery, which is in favour of holding it relevant.<sup>163</sup> However, in such cases, the possibility of misuse of the power of police should not be looked at from a perspective of planting evidence but from the possibility of torturing. If the accused has hidden the facts or items in such a place where he does not want anyone to find them, then why would such an accused suddenly tell the police where to find them? If he took so much effort in concealing it at a place where it may not be found, then why would he suddenly give up his efforts? There has to be a reason behind the same. This reason may include a lot of possibilities, and one of them may be torture. Therefore, the courts should scrutinise such cases more strictly rather than considering them to be authentic with a lenient approach. If doubt persists, then the accused would be entitled to the benefit of the doubt, considering other evidence in the case.

### ***Section 25 of the Indian Evidence Act***

Section 25 of the IEA is a provision for the protection of the accused. A confession given to a police officer cannot be proved against the accused. The scope for misuse of this

---

<sup>156</sup> *Gambhir v. State of Maharashtra*, (1982) 2 SCC 351.

<sup>157</sup> *Id.*

<sup>158</sup> *Shambhu Dayal v. Subhash Chandra*, AIR 1998 SC 1732.

<sup>159</sup> *Id.*

<sup>160</sup> *State of Rajasthan v. Kashi Ram*, (2006) 12 SCC 254.

<sup>161</sup> *Mousam Singha Roy v. State of West Bengal*, (2003) 12 SCC 377.

<sup>162</sup> *Sanjay v. State (NCT of Delhi)*, (2001) 3 SCC 190.

<sup>163</sup> *Nirpal Singh and Others v. State of Haryana*, (1977) 2 SCC 131.

power arises upon considering the ambit of the term 'police officer'. As previously addressed, the most used test of determining a police officer is the power to file a chargesheet. However, when an officer under the special legislation like a Customs Officer who may have all the powers of the investigation except the power to file a chargesheet may not be a police officer. Such an officer may not be included under the ambit of Section 25 of the IEA.

This section has the object of protecting the accused from potential abuse by the police. In cases of such an officer who may not be a police officer but have the power to investigate, an accused may still have a potential of abuse. Section 25 is not safeguarding the accused's right against any potential torture in cases of officers who are not falling under the scope of a police officer under Section 25 of the IEA. An accused can rely on Section 24 of the IEA for protection against any torture while giving a confession. However, the accused would have to prove the requirements under Section 24, whereas in the case of a police officer, the accused would only have had to prove that the person was a police officer, and he was an accused.

Therefore, this provision has the potential of being misused by some officers who may have powers of police but not of filing chargesheet. The object of the provision is to prevent abuse of power. If there is a possibility of abuse of power happening from any other officer who is not a police officer, then also the provision is not fulfilling its object. Hence, there is a possibility of such misuse of power.

### ***Section 26 of the Indian Evidence Act***

Section 26 poses just one issue for its practical analysis. The issue is how to construe custody under Section 26 of the IEA? It has been addressed under the theoretical analysis. However, the practical analysis of the same has different implications. Custody may be misinterpreted with arrest. If the accused confesses to someone else after being arrested, then will such a confession fall under Section 26? Since the provision talks only about custody and not arrest, this question arises.

There is a difference between arrest and custody. An arrest is a method of formally taking a person in custody and ensuring complete restraint of the person arrested.<sup>164</sup> Custody is the surveillance or partial restriction on the movement of a person.<sup>165</sup> Hence, every arrest may be custody, but every custody may not be an arrest. Therefore, in cases of arrest, they may be construed as 'custody' for the sake of convenience under Section 26 of the IEA. However, at times, it is difficult to find out when a person is under the

---

<sup>164</sup> Our Legal World, *Difference/Distinction between Arrest and Custody?* (Jan. 21, 2019) available at – <https://www.ourlegalworld.com/difference-between-arrest-and-custody/#:~:text=Arrest%20is%20a%20mode%20of,custody%20completely%20or%20even%20partially.>

<sup>165</sup> *Id.*

custody of the police. In such cases of uncertainty, the police may try to misuse their power by proving some sort of surveillance to be not custody.

For instance, hypothetically, if a policeman is tapping one person's phone. Based on the case of *R.M. Malkani*,<sup>166</sup> the tape recording of a call was a relevant piece of evidence since it was *res gestae*.<sup>167</sup> However, such a tapping of the phone could be regarded as surveillance. Hence, the question arises whether such surveillance can be regarded as custody. Since the tape recording of a phone tapped was allowed in the case of *R.M. Malkani*,<sup>168</sup> maybe it can be allowed. If it is allowed, then it must mean that the recording is not barred under Section 26. Then it must mean that the surveillance, in this case, may not be custody. However, if the tape recording is not allowed, then there can be a possibility that the same was not allowed since it was barred under Section 26. In that case, this surveillance may be custody.

Therefore, the object of this hypothetical is to establish that the terms surveillance and custody may be subjective. It may depend on case-to-case on a factual basis. Hence, the police may misuse their power by holding the confession relevant and admissible by claiming that their surveillance was not custody under Section 26.

### ***Sections 9 and 32(1) of the Indian Evidence Act***

Section 9 of the IEA has vast power, and Section 32(1) has one of the high probative values in the IEA. There is a possibility of misuse of power under both these provisions. For instance, in a TI Parade, the witness cannot see the accused before the parade. However, there is a possibility of misuse of power by allowing the witness to see the accused before or showing a picture of the accused. In case of a dying declaration, the police may misuse the power if the statement is not given to anyone else and given only to the policeman. Hence, there is a possibility of misuse of power. However, it is challenging to ascertain whether the power is being used or misused.

Hypothetically, a TI Parade has to be conducted, and the accused has some animosity with the police officer. Prior to the TI Parade, if the police officer accidentally showed the accused to the witness or his picture, then the authenticity of the TI Parade would reduce. In another hypothetical, if a man who is dying gave a dying declaration against a person M. He gave the dying declaration only to the police officer and no one else. But, if a police officer had animosity with a person named N, and there were other pieces of evidence against N too. In such a case, even if the police officer writes N's name in his dying declaration statement, then it may not be disputed since no one else may be aware of the same. Therefore, there is a possibility of misuse, but it is difficult to ascertain the same.

---

<sup>166</sup> *R.M. Malkani v. State of Maharashtra*, AIR 1973 SC 157.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

### ***Section 35 of the Indian Evidence Act***

Section 35 of the IEA allows an entry public record made by a public officer in the performance of duty to be relevant. The nuances and implications of this section may be incidental to the powers of the police, but sometimes numerous incidental pieces of evidence may be sufficient to rebut one strong evidence. Therefore, the power of police exists under this provision. However, this power is mostly not misused but is used for the benefit of the people. It is assumed that when an entry is made into a public record, then it becomes relevant because it affects the public and their interests too.

### ***Sections 124 and 125 of the Indian Evidence Act***

Theoretically, these provisions may be discussed separately. However, practically, these provisions can be discussed together. They have one commonality, which is that under both these provisions, the police officer cannot be compelled to disclose certain communications. Section 124 of the IEA can be used not to compel a public officer (a police officer may fall under it) for disclosing any information made to him in official confidence where the public interests may be affected by the said disclosure. The discretion because when he considers the public interests may suffer, then he may not be compelled. Section 125 of the IEA can be used for not compelling the police officer to declare his source of information regarding the commission of an offence.

These provisions exist for the benefit of the people since one is there for safeguarding the public interests and the other is there for safeguarding the informer of an offence. A person who informed about the commission of the offence may be threatened by the accused. Therefore, these provisions are essential, and the power of the police under this is for the benefit of the people. However, there is a possibility of misusing the powers under these provisions. Police may not have actually gotten the information regarding the commission of offence from an informer but from some other way. Regardless, the officer may not be compelled to reveal his source, and his word would have to be considered. Even if he would have exaggerated, he could not be compelled to disclose his source for verification. Therefore, these provisions have their pros, but they may also have the possibility of cons.

### ***Section 76 of the Indian Evidence Act***

Section 76 is the provision governing the certified copy of a public document. A public document is generally proved through secondary evidence like a certified copy. Hence, the police have the power to grant a certified copy if the person asking for it has the right to inspect the same and has paid the legal fees. The police officer has to comply with the requirements under Section 76, like signing his name and title, writing the date, etc. This power of the police is used for the benefit of the people because it helps them in getting access to a certified copy of the public document. The scope of misusing this power is significantly less, and even if it is misused, the practical application of the same may be trivial.



## V

### Analysis of Powers of Police in Foreign Jurisdiction

#### *United States of America*

In the USA, the case of *Miranda*<sup>169</sup> is one of the landmark cases on custodial confession. This case made the Fifth Amendment Right in the US Constitution preeminent.<sup>170</sup> The two essential aspects in cases of custodial confession are (i) custody and (ii) interrogation.<sup>171</sup> The meaning of custody and interrogation has been clarified in this and several other cases after this case. The prosecution could use inculpatory or exculpatory statements if the procedural safeguards were used to secure their privilege against self-incrimination.<sup>172</sup>

The safeguard requires informing the accused of his/her two rights, and such information should be given prior to questioning.<sup>173</sup> These rights are the right to remain silent, and any statement made by such a person may be used against him/her, and the right to the presence of an attorney.<sup>174</sup> These rights can be waived off if they are voluntarily, knowingly and intelligently consented to by the person.<sup>175</sup> Several exceptions have been evolved after this case, like the 'inevitable discovery' exception in the case of *Nix v. Williams*.<sup>176</sup> In this case, if *Miranda* guidelines were not followed, but it appears that the police would ultimately discover the evidence gained from the confession if they continued investigation, then also the confession would be admissible despite not following *Miranda* guidelines.<sup>177</sup>

It is based on the principle of preventing self-incrimination, and the two rights are based on the idea of preventing any misuse of powers by the police. The provisions in India regarding confession are also based on the same principles. However, there is a significant difference in the execution of the provisions of both countries. In the USA, after taking the precautions, if the person confesses his guilt to the police, then it will be relevant, whereas, in India, after taking any precautions, if a person voluntarily confesses to the police, then such a confession will not be relevant because of Section 25 of the IEA. A possible explanation for the same can be twofold. Firstly, in India, there is no necessary precaution of a lawyer being present. Above this, in India, there is no

---

<sup>169</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966) (USA case).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Nix v. Williams*, 467 U.S. 431 (1984) (USA case).

<sup>177</sup> *Id.*

necessary provision or rule for the presence of an independent witness when the disclosure statement is made.<sup>178</sup> Therefore, the possibility of misuse of power is more due to lesser supervision. Secondly, in India, many people are not aware of the law or are not educated enough to be aware. So even if the police told them that they had the right to remain silent, they may not understand its implications. Hence, in practical application, this precaution might lose its essence. These might be the two possible explanations for the non-relevancy of confessions to police in India which gives them more power to misuse the same.

### **Kenya**

The law of confession in Kenya is analysed because it is a hybrid of the Indian model and the USA model. The law of confession in Kenya is governed by the Evidence Act of Kenya, the Evidence (Out of Court Confession) Rules, 2009 and the case laws.<sup>179</sup> The Evidence Act of Kenya concerns this analysis of the powers of the police. Section 25A to Section 32 of the Evidence Act of Kenya govern confessions, and some of the provisions under it are similar to the Indian provisions. For instance, Section 26 of the Evidence Act of Kenya is identical to Section 24 of the IEA. Section 27 of the Evidence Act of Kenya is identical to Section 28 of the IEA. Therefore, these provisions in both the Evidence Acts of Kenya and India are similar.

However, as per Section 29 of the Evidence Act of Kenya, a confession given to a police officer is relevant if the police officer is equivalent to or above the rank of inspector.<sup>180</sup> As per Section 25A of the Evidence Act of Kenya, a confession of guilt made in court to such a police officer (other than the investigating officer) is admissible.<sup>181</sup> However, in India, a confession of guilt made to any police officer under the IEA is not relevant. In India, a statement to the police officer which only facilitates the discovery of a fact is relevant, but any statement incriminating the accused made to the police officer is not relevant. Therefore, in Kenya, a confession of guilt given to a police officer of a certain rank is relevant. Still, in India, a confession of guilt made to any police officer under the IEA is not relevant.

It is similar to the model of the USA, where the confession given to a police officer is relevant. However, it is different from the model of the USA on the point that such a confession of guilt under Section 25A of the Evidence Act of Kenya should be given in court. On the contrary, a confession given to a police officer need not necessarily be made in court. Therefore, Kenya has some features of both the Indian and USA model

---

<sup>178</sup> *Supra* note 150, *Jeet Singh* case.

<sup>179</sup> Administrator of the Legal Scholar Site, *Confessions: The Law in Kenya*, LEGAL SCHOLAR SITE (Jun. 9, 2018), available at – <https://legalscholarsite.com/confessions-the-law-in-kenya/#:~:text=In%20Kenya%20confessions%20are%20generally,facts%20which%20constitute%20the%20offence.>

<sup>180</sup> The Evidence Act of Kenya, CAP. 80, S. 29.

<sup>181</sup> The Evidence Act of Kenya, CAP. 80, S. 25A.

but has some distinguishing features from both the models. Hence, Kenya's powers of police concerning confession can be regarded as a hybrid model of the Indian and USA model.

### ***Stanford Prison Experiment***

The Stanford Prison Experiment was conducted in August 1971 at the basement of Stanford University.<sup>182</sup> In this experiment, 24 college students (who were judged as physically and mentally healthy) applied and were selected and were randomly divided into an equal number of guards and prisoners.<sup>183</sup> The aim was to see how the role-playing and labelling would pan out over a period of two weeks, but the experiment had to be shut down after just six days.<sup>184</sup> The prisoners had to wear a dress and ankles, and the guards wore mirrored glasses to prevent eye-contact.<sup>185</sup> The prisoners staged a rebellion on the second day, and within the first four days, three prisoners were so traumatised that they had to be released.<sup>186</sup> After a period of six days, Philip Zimbardo (principal investigator) shut down the experiment because the guards became cruel, and the prisoners became depressed.<sup>187</sup>

The significance of this experiment is in helping us evaluate how power can change a person's behaviour into doing positive or negative things.<sup>188</sup> In this experiment, the guards had the power, but the prisoners were powerless. In just six days, things got so out of control that the experiment had to be stopped, and many prisoners were emotionally traumatised. This is what power can potentially lead to as a result. The aforesaid behaviour, combined with the perception of misusing power, may lead to an actual misuse of power. Therefore, it is one of the answers to the question 'why' do the police misuse their power.

---

<sup>182</sup> Editors of Encyclopaedia Britannica, *Stanford Prison Experiment*, BRITANNICA (Oct. 5, 2016), <https://www.britannica.com/event/Stanford-Prison-Experiment>.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> American Psychological Association, *Demonstrating the Power of Social Situations via a Simulated Prison Experiment* (Jun. 8, 2004), <https://www.apa.org/research/action/prison>.

## VI

### Conclusion

#### *Conclusion & Afterword*

Police have a wide range of powers under the IEA. However, most of these powers have the potential of being misused. Therefore, the following recommendations are advanced for the Criminal Law Reforms Committee, which may incorporate the same for a better application of the IEA. Primarily, Section 27 has the potential of planting the fact discovered. The courts usually take a cautious approach when evaluating the evidence under Section 27. The potential of misuse of power can be curtailed if the presence of a lawyer or a witness is mandated when the accused makes the disclosure statement. Thereafter, the presence of the witness should be enforced strictly when the fact discovered is being retrieved by the police. Along with this, the individual assessment of the witness and the lawyer should be done to ensure no enmity or affinity towards the accused.

Secondly, the words 'police officers' under Section 25 should be substituted by the words 'officers' or 'public officers'. It may help in applying Section 25 to those officers who do not have the power to file chargesheet but have the power to investigate. The objective of this provision is to prevent any forceful confession, which may happen due to the torture or threat of torture by the officers. Hence, applying it to officers who have the power to investigate will broaden the scope of Section 25, which will help in achieving the objective of this provision.

Thirdly, Section 26 should clarify the difference between custody and surveillance. A liberal interpretation may lead to misuse of this power since whichever meaning is suitable, that meaning may be applied. Therefore, a clarification is needed to curtail the potential of misuse of this power. Fourthly, in the case of a TI Parade under Section 9, a dying declaration under Section 32(1) or the public record under Section 35, a prior enmity may result in the potential misuse of power. There is no recommendation that may help in curtailing this misuse since it is a factual misuse that can be discovered at the trial stage.

Fifthly, Section 124 and 125 give discretion to the police officers. This discretion has its pros and cons. It may be used for the protection of public interest or of the informer. However, this protection gives discretion to police officers. This discretion is a necessity for the protection of the people. Therefore, the courts should scrutinise these provisions to ensure if the police officer is misusing these powers, and the police officers should voluntarily refrain from misusing them because the pros of these provisions outweigh their cons. Hence, the police officers should ensure that they do not add to the cons and do not misuse the same in the name of public interest or the protection of the informer.

Lastly, Section 76 is for the people's convenience in getting an ordinary copy. Hence, the scope of its misuse is limited, and even if it is misused, its impact may be trivial.

There are more incidental powers of the police under the IEA that are not addressed, like Section 24 and 21, to name a few. These powers are incidental and may become repetitive since the scope and rationale of these powers is similar to Section 25, 26 and 27. Hence, these provisions are not addressed for the sake of repetition. However, the concept of powers of the police will always be contemporary since these powers are invoked every day for numerous cases. These provisions which govern the various powers of police may have a tangible impact on any case. If these provisions are considered in isolation, then they may not seem such impactful. Nevertheless, if these provisions are considered along with other pieces of evidence, a slight misuse of these powers may snatch away the benefit of the doubt to which the accused was entitled. Thus, such provisions and their powers need to be analysed, and the potential of their misuse needs to be restricted. Some officers may misuse the powers of police, but that does not mean that every officer will misuse these powers. Most police officers will work to their best abilities and stick to the rules. However, the potential for misuse exists, and this paper tries to diminish this potential to a minimum.