12 The Exclusionary Rule of Illegally-Obtained Evidence – An Anglo-Saxon Perspective

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Introduction

Cicero's famous words *Omnes legum servi sumus ut liberi esse possimus* have stood the test of time. Jean-Jacques Rousseau however writes that *Man is born free but everywhere he is in chains,* implying that man is constrained both by legal and social forces. This paradox is reflected in the balance between criminal substantive and procedural law on the one hand and the rights of the citizen, including human rights, on the other. The latter can indeed only be enforced and ensured by a derogation therefrom in certain circumstances. The right to liberty, for instance, can only be ensured by restricting the liberty of others, whether in ordinary behaviour or as a punishment for previous conduct.

This paradoxical situation is also reflected in rules governing illegally obtained evidence. Should the accused be convicted on the grounds of evidence obtained illegally, against his rights; or should his rights be given precedence, excluding the evidence, and in so doing detract from the protection of the rights of others in general?

The examples drawn from various jurisdictions vary greatly owing to historical, social and political reasons.

Discretion to Exclude Improper / Illegal Evidence – A Comparative Analysis

Under English law, the general rule is that all relevant evidence is admissible and the fact that it was obtained improperly is immaterial as far as the case before the court is concerned. These improper methods of obtaining evidence might trigger off remedial action.

Reasons for Arrest

In *Mapp v. Ohio*[1] the US Supreme Court held that an automatically exclusionary rule applied to evidence acquired in breach of the Fourth Amendment of the US Constitution concerned with the right of the citizen not to be subjected to an unlawful search or seizure. With the advent of *Miranda v. Arizona*,[2] a further requirement was added, namely that investigating officers were required to inform the suspect of certain rights which he enjoyed and which they were to respect scrupulously. Even though today, case law has watered down this principle, a prima-facie reading is striking in that the rule is far more stringent than that applied in English common law.[3] It is interesting to point out that Miranda was inspired by the inadequacy of common law to deal with the predicament of the suspect interrogated in the coercive environment of police stations – a headache for any criminal court. It was concerned with the psychological pressures which might be placed on the accused and the fact that custodial interrogation placed a heavy toll on individual liberty and traded on weaknesses of individuals. The Court therefore established a new exclusionary rule, the principle feature of which was that the police would be required, before questioning the suspect, to inform him of his rights of silence and right to have a lawyer' s advice. This, it held, followed from the privilege against self-incrimination granted in the Fourth Amendment.

This is a convincing argument but how does it adhere with the English model? Lord Diplock in Sang[4] indeed upheld the *nemo debet* principle. The caution is also a must for the police officer under the Codes of Practice. The Police and Criminal Evidence Act5 ('PACE') however, introduced the possibility of drawing inferences from silence, such that the form of the caution had to be altered. Can it be said that this does not violate the right to compelled non-self incrimination? It is argued that the inferences which are permitted are those which are reasonable and dictated by common sense. In *Murray v. UK*,[6] it was held that the right to silence and privilege against self-incrimination protected one from 'improper

(1961) US Supreme Court.
[2] 384 US 436, 86 S Ct 1602 (1966).
[3] Also Statute law – which now is deemed to import the same discretionary rights as available under common law.
[4] [1980] AC 402, [1979] 2All ER 1222, 3 WLR 263.
[5] 1984.
[6] (1996) 22 EHRR 29.

compulsion' not from the drawing of inferences. However, in effect, this provision is compelling the accused to speak to prove his innocence. Although it is reasonable and logical it cannot however be argued, in the writer's view, that it is not a form of permissible self-incrimination justified by the circumstances and bolstered by the need to protect society at large. This consideration has forced States, on the Continent to reject such inferences as they are deemed to violate their constitutional provisions on human rights.

Fruit of the Poisonous Tree

It is an established principle under English law dating as far back as in Warickshall,[7] that evidence obtained from otherwise inadmissible evidence, for example forced confession, was admissible. The rule governing evidence so obtained is different. However the US adopted the doctrine of the 'fruit of the poisonous tree'. Consequently evidence deriving from original evidence declared inadmissible as it was obtained by a breach of a constitutional right, is equally inadmissible. The element of causation is implicit in the doctrine, in that the 'derivative' must result from the original piece of evidence. It is only where the taint becomes so attenuated that it is not properly considered as still operative, (but merely as a background material) that the doctrine is inapplicable. A genuine exception is the inevitable discovery rule.

Disparity Between Jurisdictions

Why is there such disparity between laws? US law considered breaches of the Fourth Amendment of their Constitution to be very grave. It is the supreme law of the land and anything tainted with such violation is inadmissible – implying the *maxim fraus omnia corrumpit*. The question being why is it allowed in England? If real evidence is discovered only by virtue of such tainted evidence, oral or otherwise, surely, that real evidence has a taint of illegality (although it can speak for itself once discovered) and this because were it not for the illegally obtained evidence, that subsequent real evidence would not have been discovered. Further, breaches of human rights, are not violations of the supreme law of the land as held in US or Canadian case-law. In such jurisdictions human rights laws are given a higher status than ordinary legislation such that anything inconsistent with such law is void. Further in the US it is entrenched in the Constitution, and the same US adopts the principle of constitutional supremacy. In England human rights are only judicially acknowledged. It was in 1998 that a Human Rights Act was drawn up in England and it is not clear whether such Act enjoys superior status. Is it to be read in conjunction with – as a means of interpretation – or as binding rules rendering void inconsistent provisions? Parliamentary Sovereignty and Supremacy in England mean that all the statutes are given force by the fact that they emanate from Parliament. It may be argued that the Human Rights Act being a *lex specialis* and a *lex posteriori*, has precedence over earlier statutes. But this is hardly a proper way of ensuring human rights, especially with the latter argument, in respect of subsequently enacted legislation.

The application of the European Convention of Human Rights in fact has had an interpretative function so far. In *R. v. Home Secretary ex p. Brind*[8] it was held that if a statute has more than one interpretation, the Courts will presume that Parliament intended it to legislate in conformity with the Convention. And not in conflict with it. But there is no hierarchy. It is a tool of interpretation in cases of ambiguity.

In Scotland, *Lawrie v. Muir*[9] established the rule requiring exclusion of improperly obtained evidence unless the unlawfulness or irregularity could properly be excused. *Chalmers*[10] then held that

> statements by a suspect in answer to police questioning were not admissible as evidence, at any rate if given in a police station, a venue which is a sinister one in the eyes of every ordinary citizen.

The Scottish police were therefore subject to a *sui generis* rule denying them the power in law to question suspects in custody. This is more restrictive than *Miranda* and English obligations by far. Although this rule has been watered down by subsequent cases, it remains a strong proposition.

A Discretion

Corroboration and Supporting Evidence

An interesting aspect is the requirement of supporting corroborating evidence in the case of improperly obtained evidence to render it more reliable, in the light of the court's discretion, to exclude prejudicial evidence in the case of section 82(3) of PACE. The Court here would exercise its discretion to determine whether it is more probable than prejudicial and determine whether exclusion is the best option. Scottish law imposes a general requirement of corroboration in respect of all evidence, and consequently an accused cannot be convicted solely on the basis of his own confession, however freely or voluntarily made.

[7] *R. v. Warickshall* (1793) 1 Leach 263.
[8] [1991] 1 AC 696; [1991] 2 WLR 588; [1991] 1 All ER 720, HL(E).
[9] 1950 JC 19, 1950 SLT 37.
[10] *Chalmers v. HM Advocate* 1954 JC 66, 1954 SLT 177.

Vulnerability of Suspects

In English law discretion in section 78 of PACE can be used against evidence obtained improperly from vulnerable suspects. These would include juveniles, the mentally handicapped and mentally disordered. Special rules apply both in PACE and the Code of Practice to ensure the propriety and reliability of evidence so obtained.

Discretion in Cases of Improperly Obtained Evidence

Reference again must be made to the conflict which arises within this context:

1. The impropriety of acquitting A, who is guilty, on account of the illegal conduct of B – Cardozo, J. in *The People v. Defoe*[11] – on the one hand;
   and
2. view held in *Olmstead v. the US*[12] – "I think it is a less evil that some criminals should escape than that the government should play an ignoble part" (Holmes J), on the other.

a. *Facts Discovered in Consequences of Inadmissible Confessions*

Reference is to be made to section 76(4), (5) and (6) of PACE 1984. It is held that subsection (4) preserves the proposition in *Warickshall*, which after excluding the confession in that its credit was doubtful, allowed the production of evidence discovered as a result of confession:

> this principle... has no application whatsoever as to the admission or rejection of facts, whether the knowledge of them to be obtained in consequences of an extorted confession whether it arises from any other source; for a fact, if it exists at all, must exist invariably in the same manner whether the confession from which it derives be in other respects true of false. Facts thus obtained, however must be fully and satisfactorily proved without calling in the aid of any part of the confession of any part of the confession from which they may have been derived.

Therefore in the case of *Voisin*,[13] the Criminal Law Reform Commission in England held, as reflected in sub-paragraph (4), that although a confession is inadmissible, a statement whether oral or written may be tendered as evidence to prove that the accused writes or speaks or expresses himself in a particular way. This however needs qualification to my mind: it must be so only where the writing or manner of speaking is the same whatever the circumstances, so that, just as the case with real evidence it can speak for itself. Where the manner of speech, for example a stammer which is inculpatory given the circumstances, is induced by mental/psychological coercion by the police, this might trigger the discretion of the judge under section 78(1) and 82(3), although it is doubtful whether it would be excluded under s.76, it not being a statement of any sort.

Another argument of interest is that confessions obtained unfairly but which fall out of the exclusionary rule of s.76, will be corroborated by the fact that the evidence mentioned in the confession was in fact found as per the confession. Therefore in determining whether or not to exclude evidence, the judge will take into account the fact that the confession was more probably reliable than not as it is corroborated by the fact that the evidence was found. A problem with this is where the confession is excluded on the basis of unfairness, not cogency – and this notwithstanding evidence obtained from that very confession is allowed. In this situation, section 78 provides little safeguard for unfairness in trial.

Further, what if the police are questioned as to the manner in which evidence was found? Can they refer to the statements made by the accused? *Warickshall* allowed this as the confession was less indicative of the accused's guilt. No provision was made in PACE. This is a grey area of the law.

b. *Evidence Procured by Improper Means*

Modern law stems from *Kuruma v. R.*[14] where the accused was charged with being in possession of ammunition after a search by an officer lower in rank than that permitted by law. It was held that the evidence was relevant no matter how it was obtained; although the judge could exclude the evidence on the basis of his common-law discretion (preserved by PACE in s.78(1) and 82(3)).

Sang subsequently restricted the discretion, making it applicable to evidence obtained from the accused after the commission of an offence. Trickery meant that the accused's will was engaged such that he was induced to give up evidence contrary to the privilege against self-incrimination. However the discretion to exclude on the grounds of unfairness remained.

Exclusion for Unfairness

In *Kuruma* it was held that English law recognized a judicial discretion to exclude both confessional and non-confessional evidence for unfairness, even though after *Sang*, the whole aspect of fairness with which that discretion was concerned

[11] (1926), US.
[12] 277 US 438, 72 L Ed 944, 48 S Ct 564.
[13] *R. v. Voisin* [1918] 1KB 531, 13 Cr App Rep 89, 82 JP 96, 87 LJKB 574, [1918-1919] All ER Rep 491.
[14] Kuruma, Son of *Kaniu v. R.* [1955] AC 197, [1955] 1 All ER 236, [1955] 2WLR 223.

was the one encapsulated in the *maxim nemo debet prodere se ipsum*.

In Scotland, *Muir* upheld the rule requiring exclusion of unlawfully / irregularly obtained non-confessional evidence which is not excused, imposing a reverse onus exclusionary rule burdening the prosecution to prove that it is fair and ought not to be excluded. Exceptions to the rule have been developed (similar to those in *Bunning v. Cross*[15]).

In Ireland, a constitutional breach brings about a reverse onus rule (similar to that in Scotland); while in the case of otherwise unlawful action, there exists a discretion to exclude evidence.

In Australia, *Ireland*[16] departed from English common law by laying emphasis on unlawfulness of police conduct, rather than unfairness. In *Bunning v. Cross*, Barwick J again made unfairness no less than unlawfulness central for the exercise of the discretion. The High Court had held that the unlawful conduct had resulted from a mistake not a deliberate breach. For this reason the nature of the illegality did not effect the cogency of the evidence which determines its admissibility. Subsequently in *Ridgeway v. R.*[17] it was held that the discretion applied only where the evidence was obtained improperly / unlawfully or where obtained in consequence of improper / unlawful conduct. Further the discretion extends to cases involving official conduct that is not unlawful but merely improper. The Justices saw this as a means of reconciling the references in *Ireland* to unfairness with the predominance given to unlawfulness in *Bunning v. Cross*. *Ireland*, indeed fuses together public policy and fairness issues. There was considerable support for the view that *Bunning v. Cross* applies to mere improprieties. The Justices wanted to confine narrowly the idea of impropriety short of unlawfulness. In the English case of *Williams v. DPP*,[18] where the police left an open unattended van full of cigarettes, the Court allowed the evidence even though the conduct was improper under *Ridgeway*. It was held that the accused was not harassed although possibly 'manipulated'.

In Canada, the issue is governed by section 24(2) of the Charter of Rights and Freedoms ruling for exclusion where the evidence brings the administration of justice in disrepute. In *Therens*[19] Le Dain J, held that this principle of autonomy for trial judge seems to be regarded as consistent with the idea that section 24 imports a rule of exclusion (however the judge has a discretion to determine whether or not the evidence brings the administration of justice in disrepute and consequently within the letter of section24(2)).

Forms of Improprieties

1. Improper Searches

The English view was stated in *R. v. Leatham*[20] as

> it matters not how you get it if you steal it even, it would be admissible in evidence.

This was followed in *Kuruma* and *Khan*,[21] even though the impropriety envisaged trespass and violation of privacy. There is a wide range of cases dealing with the admissibility of samples of urine and breath even though obtained by impropriety. It will be difficult for the court to exclude real evidence on the basis of section 78, as was shown in *R. v. Fox*,[22] *R. v. Apicella*[23] (intimate samples), *Cooke*[24] (non-intimate samples), *Hughes*[25] (forcible intrusion with breathing), *Nathaniel*[26] (deliberate breach of promise). It was therefore not surprising that a breach of diplomatic immunity would not suffice to exclude evidence.[27]

2. Preparation of Illegal Acts

Sometimes impropriety arises in inducing or participating in the commission of the crime charged. In *Sang* the main issue was whether there existed a defence of entrapment in English law. The House of Lords held that there is no such defence[28] and that it followed that there is no discretion to exclude evidence of the commission of a crime on the ground that the defendant was trapped into committing it. To allow such a discretion would be to admit the defence by an alternative route. The House distinguished between trickery to cause an offence to be committed and trickery to obtain evidence of an offence after its commission. The latter, but not the former might, in some circumstances, be a ground for the exclusion of evidence in the exercise of judicial discretion.

[15] (1978) 19 ALR 641 at 660;141 CLR 54, at 74.
[16] *R. v. Ireland* (1970) 126 CLR 321.
[17] (1995) 184 CLR 19.
[18] [1993] 3 All ER 365, [1994] RTR 61, 98 Cr App Rep 209, [1993] Crim LR 775.
[19] [1985] 1 SCR 613, 18 DLR (4th) 655.
[20] (1861) 25 JP 468, [1861-73] App ER Rep Ext 1646.
[21] [1997] Crim LR 584, CA.
[22] [1986] Crim LR 69.
[23] [1986] Crim LR 238, CA.
[24] [1995] 1 Cr App Rep 286, CA.
[25] [1994] 1 WLR 876, 99 Cr App Rep 160.
[26] [1995] 2 Cr App R 565.
[27] *R. v. Khan* [1996] 3 All ER 289.
[28] *R. v. Mealey* (1974) 60 Cr App ReP 59.

Although in the meantime section 78 of PACE was enacted, this preserved the common law discretion. However in *Edwards*[29] the court seemed to be confused. Undercover officers approached D, offered and subsequently agreed to buy from him a quantity of prohibited drugs. D and E were charged with conspiracy to supply persons unknown. The defence argument was the converse of *Sang* – that the evidence should be excluded under section 78 because the officers were *agents provocateurs*. It was held that D and E were not *agents provocateurs* of the offence charged – a conspiracy existing before D and E's approach to supply any suitable customers who might present themselves – and therefore the question of section 78 did not arise. The opinion of the Court seemed to be that there was no discretion unless the officers were *agent provocateurs* – standing Lord Diplock's statement of the law in *Sang* on its head. There would apparently, in the court's view have been a discretion if the charge had been conspiracy to supply the officers because they incited D and E to make the particular agreement – a particular conspiracy to supply any suitable customers who presented themselves. It is not easy to see that there is any difference in fairness or unfairness according to which conspiracy is charged. In either case the defendants had been induced to incriminate themselves by a trick.

Later cases seemed to ignore *Edwards*, as was shown in *Smurthwaite and Gill*,[30] D was charged with soliciting O to murder D's spouse. O was a police officer, who was introduced to D by a third party and pretended to be a contract killer. It was held that evidence of the subsequent solicitation of O by D to commit murder was admissible. O was not an *agent provocateur* because there was no evidence that D had been persuaded or cajoled into an agreement to murder he would not otherwise have entered. The fact that O was not an *agent provocateur* seems to have been a factor in favour of admission. In those cases it seems clear that D must have had the particular crime in mind before O came on the scene. This is not true of *Williams and Another v. DPP*[31] – the court said that the police were not *agents provocateurs* because they had not incited, procured or counselled the commission of the crime. Yet surely they procured its commission. They intended to bring about, and brought about, the commission of a crime which would not otherwise have been committed. If no one had attempted to steal the cartons, they would have regarded the enterprise as a failure. The defendants may perhaps have had a general disposition to commit the crime, but it is impossible to say that they intended to commit this particular crime until the temptation was deliberately put in their way. In *Smurthwaite*, the trap was set for a particular person who was believed to have in mind the commission of a particular crime. In *Williams*, the bait was there for any dishonest opportunist who happened to come along. These may be necessary to keep crime in check.

Valuable guidance as to the application of section 78 was given in Christou.[32] First of all the court stated that the discretion under section 78 and common law were the same. Further, the argument that the evidence obtained should have been excluded under Sang was rejected. In so deciding the Court took account of the following:

i. the whole interview was recorded on tape and film, so there was no doubt about what was said (no reliance on memory);
ii. the question about resale was necessary to maintain cover;
iii. 'the trick was not applied to the appellants; they voluntarily applied themselves to the trick';
iv. if the shop had not attracted the defendants, they would have sold the property to someone else;
v. unlike some cases where evidence was excluded, the defendants were not in custody;
vi. because the parties were on equal terms, PACE, Code C, governing the questioning of persons by police officers, was not applicable.

In Bryce[33] evidence was excluded because the conversation was not recorded and challenged and the question was not necessary to maintain cover.

Discretion and Staying of Proceedings

In the Australian case of *Ridgeway v. R.*,[34] it was held that entrapment is not a substantive defence to a criminal charge. The law recognizes a discretion to exclude, on public policy grounds, evidence of an offence or of an element of an offence, in circumstances where its commission has been brought about by unlawful conduct on the part of law enforcement. This can extend to circumstances where a criminal offence has been induced by improper, though unlawful, conduct on the part of the authorities. The appropriate remedy in an entrapment case is not a stay of proceedings on the ground that the proceedings are an abuse of process. If a stay is ultimately granted, it will be because the exclusion of the

[29] *R. v. Edwards* [1991] Crim LR 45.
[30] *R. v. Smurthwaite* [1994] 1 All ER 898; R v. Gill [1994] 1 All ER 898.
[31] [1993] 3 All ER 365.
[32] [1992] 4 ALL ER 599.
[33] [1992] 4 ALL ER 567.
[34] (1995)184 CLR 19.

charged offence or of an element of it, means that the proceedings will necessarily fail with the consequence that a continuance of them would be oppressive and vexatious.

In the English case of *R. v. Latif and Shahzad*,[35] it was held that where a defendant had been trapped by the deception of the police or customs officers into committing an offence which he would not otherwise have committed, the trial judge had to weigh in the balance the public interest in ensuring that those who were charged with grave crimes should be tried, and the competing public interest in not giving the impression that the court would adopt the approach that the end justified any means when exercising his discretion to decide whether there had been an abuse of process which amounted to an affront to the public conscience and required the criminal proceedings to be stayed. On the facts, the judge had not erred in refusing a stay, since he had taken account of the relevant considerations in performing the balancing exercise and was entitled to take the view that the accused was an organizer in the heroin trade who had taken the initiative in proposing the importation, and that the conduct of the customs officer was not so unworthy or shameful that it was an affront to the public conscience to allow the prosecution to proceed.

c. *Improper Interception/Recording of Communications*

Evidence of communication encouraged by the police and then intercepted was not automatically inadmissible as such at common-law. False statement that the accused was not being recorded or that the phone from which he was told to phone from was bugged, are irrelevant. In Maqsud Ali[36] (1996), it was irrelevant that there was a recording device in a public place. Only in the case of telephone calls made from police premises is there a provision in the Code of Practice for warning the suspect that the call may be overheard.

Interception of phone calls, declared by the European Court of Human Rights to require guarantees against abuse, was subjected to the statutory control of the UK Interception of Communications Act 1985. Under section 2 the Home Secretary may issue a warrant authorizing the interception of communications in the course of transmission by post or by means of a public telecommunications system, for the purpose, *inter alia* 'of preventing or detecting serious crime'. These do not extend to the prosecution of offenders. (*Preston*)[37] These intercepted communications are inadmissible, notwithstanding their relevance to the issues in a criminal trial.

Where a cordless telephone is used, the radio signals assigned between the handset and the base unit are not in the course of transmission by means of a public telecommunications system. The interception of this does not require warrant and is not unlawful under the 1985 Act. (*Effik*).[38] The same applies to a private system which is connected by wire to the public system.

In Khan, the police attached an aural surveillance device to B's home without his consent or knowledge and so obtained a recording of a conversation which confirmed that K was involved in the importation of drugs. The attachment of the device was an unlawful act, involving civil trespass and criminal damage. Yet the evidence was admissible in law.

Although not conclusive, it is taken in consideration, in exercising discretion in section 78, that the interception took place overseas, in breach of foreign or international law, since breach of such law should not be more weighty in the English Courts than a breach of English law. Where a telephone call is recorded by one of the parties to secure evidence, then one of the considerations relating to the operation of section 78 is the extent to which this method has been employed to evade the restrictions of the Code of Practice on Police Questioning.

3 Deception

This category is designed to generate evidence of offences which had already been committed, otherwise than by improper searches or the use of electronic interception of communications. Deception can either be express, as in Mason[39] where the police lied to the accused and his solicitor by telling them that the suspects fingerprints where found on the scene of the crime. They could be implied as in *DPP v. Marshall*,[40] where policemen dressed as civilians and did not say they were policemen. The Court in this case held that the impact was not like that of express deception. Complex stratagems such as Christou would also fall under this head. It was considered in that case that there were no specific targets.

Where the undercover agent plays too active a role in eliciting the evidence it is more likely to be excluded.[41]

[35] [1996] 1 Cr App Rep 270; *R. v. Shahzad* [1996] 1 All ER 353.
[36] *R. v. Masqud Ali* [1965] 2 All ER 464.
[37] *R. v. Preston* [1993] 4 All ER 638.
[38] *R. v. Effik* [1995] 1 AC 309.
[39] *R. v. Mason* [1987] 3 All ER 481.
[40] [1988] 3 All ER 683.
[41] *R. v. Stagg* Central Criminal Court, 14 September, 1994.

Conclusion

The experience derived from different jurisdictions is varied. Reconciling the needs of the administration of justice with the rights of citizens is by no means an easy task. The obligation of police officers to investigate, detect and prosecute crimes must be limited to ensure that the means used by police officers will not themselves spark off or induce further crime. Nor should their duty in any way justify violations of citizens' rights to ensure convictions at all costs. Justice ought to be done but not at any cost. Respect for the rule of law is essential in any just and equitable society.