

# Common law system – foundations for excluding evidence obtained illegally or unfairly and the relevant case law

Keywords: improperly, unfairly, illegally obtained evidence, admissibility, common – law, case – law, fairness, discretion, Police and Criminal Evidence Act 1984

## 1. Introduction. An overriding objective of any trial. Difference between evidence and proof

The trial is a principal method for resolving legal disputes. An overriding purpose of any trial is to ascertain the truth. This happens in civil proceedings when the party legally entitled to a remedy succeeds, whereas in criminal proceedings, the justice means that the innocent is acquitted and the guilty is convicted.

The significant and major role of evidence in a trial is undeniable. Without a sufficient one, a case can get dismissed. That is exactly why it is important, what kind of evidence is presented during a trial, and also how.

## 2. What does it mean than an evidence has been obtained illegally or unfairly?

Evidence may be obtained illegally, for example by a breach of contract, tort, crime or in contravention of statutory or other provisions governing the duties and powers of the police or any others involved in the investigation<sup>1</sup>.

Evidence may also be obtained unfairly or improperly, for example by bribes, a deception, trickery, inducements or threats.

## 3. Should an evidence obtained illegally or unfairly be excluded or not? Two extreme views.

A vast majority of commentary in the area of the law of evidence centres on the issue whether such an evidence, that had been obtained by improperly or unfairly practises, or illegally, should be admitted or not, and why. There has been two extremely different views presented.

One view is that an evidence which is relevant and necessary to enable the justice, should not be excluded, regardless of the means by which it was obtained. On this view, all those responsible for the impropriety or illegality could be variously sued, prosecuted or disciplined.

Admission of such evidence supports the overriding objective of a trial, whereas may encourage obtaining evidence improperly in absence of effective sanctions on those responsible for that. It also, in some way, undermines the moral legitimacy of a judgment.

The view at the other extreme would be that improperly, unfairly or illegally obtained evidence should always be excluded. This would support the moral legitimacy of a judgment, however undermine the overriding objective of a trial. This would also sometimes result in injustice, for example in the guilty going free.

---

<sup>1</sup> A. Keane, P. McKeown, *The Modern Law of Evidence*, 9th edition, Oxford 2012, p. 54.

## 4. Different cases, different views?

The traditional English view – supported by a rarely exercised judicial discretion, a long-standing rule of law that relevant evidence (other than confessions), however obtained, is admissible – was laconically presented by Crompton J in *R v. Leatham*<sup>2</sup>, when he said: ‘It matters not how you get it if you steal it even, it would be admissible in evidence’ and in *Jones v. Owen*<sup>3</sup>, where Mellor J remarked:

It would be a dangerous obstacle to the administration of justice if we were to hold, because evidence was obtained by illegal means, it could not be used against a party charged with an offence.

These views have persisted.

In *Kuruma, Son of Kaniu v. R*<sup>4</sup> in which the Judicial Committee of the Privy Council held that if the evidence was relevant, it did not matter how it had been obtained. Lord Goddard C.J. said then, that if evidence was admissible ‘the court is not concerned with how the evidence was obtained’. However, he added:

No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against the accused (...). If, for instance, some admission of some piece of evidence, e.g. a document, had been obtained from a defendant by a trick, no doubt the judge might properly rule it out.

The existence of the discretion to exclude improperly obtained evidence was repeated by the Divisional Court in *Jeffrey v. Black*<sup>5</sup>. Lord Widgery, the Lord Chief Justice then said:

(...) the justices sitting in this case, like any other criminal tribunal in England sitting under the English law, have a general discretion to decline to allow any evidence to be called by the prosecution if they think it would be unfair or oppressive to allow that to be done... It is a discretion which every

---

2 [1861] 8 Cox CC 498 at 501.

3 [1870] 34 JP 759.

4 [1955] A.C. 197.

5 [1978] 1 Q.B. 490.

criminal judge has all the time in respect of all the evidence which is tendered by the prosecution.

He added that the discretion is rather rarely exercised,

but if the case is exceptional, if the case is such that not only have the police officers entered without authority, but they have been guilty of trickery or they have misled someone, or they have been oppressive or they have been unfair, or in other respects they have behaved in a manner which is morally reprehensible, then it is open to the justices to apply their discretion and decline to allow the particular evidence to be let in as part of the trial.

However, in *R. v. Sang*<sup>6</sup> House of Lords, in a very disappointing decision, drastically reduced the scope of this common law discretion. Lord Diplock pointed that there were dicta suggesting that the courts had a general discretion to exclude evidence, but in fact, there were no decisions that would support such dicta. The common law discretion was very narrow, not wide. The courts were concerned with how the evidence was used by the prosecution at the trial, not how it was obtained.

## 5. Any changes? Section 78 Police and Criminal Evidence Act 1984

The modern law of evidence in England represents a compromise between two, mentioned at the beginning, extreme views. In civil cases, the Civil Procedure Rules (CPR) introduced the discretion to exclude. In criminal cases, such provision is ensured both by the common law and statutory provisions.

A new statutory formulation in section 78 of the Police and Criminal Evidence Act (PACE) 1984 provides as follows:

In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

---

<sup>6</sup> [1980] A.C. 402; [1979] 2 All E.R. 1222.

The court ought to have a regard to the provisions set out in Article 6 of the European Convention of Human Rights<sup>7</sup> – right to a fair trial.

Even though, the police has acted *mala fide*<sup>8</sup> to obtain an evidence, the discretion should not be used to discipline it. Such actions should be a subject to another cases, as Lord Lane CJ said in *R v. Delaney*<sup>9</sup>: ‘It is no part of the duty of the court to rule a statement inadmissible simply in order to punish the police for failure to observe the Codes of Practise’.

The nature of the courts discretion was explained by Lord Lane C.J. in the case of *R v. Quinn*<sup>10</sup>:

The function of the judge is therefore to protect the fairness of the proceedings, and normally proceedings are fair if all relevant evidence [is heard] which either side wishes to place before [the court], but proceedings may become unfair if, for example, one side is allowed to adduce relevant evidence which, for one reason or another, the other side cannot properly challenge or meet... or where there has been an abuse of process, e.g. because evidence has been obtained in deliberate breach of procedures laid down in an official code of practice (...).

Auld J. in *Jelen*<sup>11</sup> explicated:

(..) the decision of a judge whether or not to exclude evidence under section 78 of the 1984 Act is made as a result of the exercise by him of a discretion based upon the particular circumstances of the case and upon his assessment of the adverse effect, if any, it would have on the fairness of the proceedings. The circumstances of each case are almost always different, and judges may well take different views in the proper exercise of their discretion even when the circumstances are similar. This is not an apt field for hard case law and well-founded distinctions between cases.

Since it was enacted, section 78 and its relation to common law, has caused many inaccuracies for the courts.

---

<sup>7</sup> See at: European Convention of Human Rights, [http://www.echr.coe.int/documents/convention\\_eng.pdf](http://www.echr.coe.int/documents/convention_eng.pdf) [access: 20.08.2014].

<sup>8</sup> From Latin: in bad faith.

<sup>9</sup> [1988] 88 Cr App R 338 at 341, CA.

<sup>10</sup> [1990] Crim L.R. 581.

<sup>11</sup> [1989] 90 Cr.App.R. 456, pp. 464–5; *Samuel* [1988] Q.B. 615, CA.

In Mason<sup>12</sup>, Watkins L.J. said: ‘it does no more than to restate the power which judges had at common law before the 1984 Act was passed’. After that, in *Matto v. Wolverhampton Crown Court*<sup>13</sup>, Woolf L.J. added:

whatever is the right interpretation of s. 78, I am quite satisfied that it certainly does not reduce the discretion of the court to exclude unfair evidence which existed at common law. Indeed, in my view in any case where the evidence could properly be excluded at common law, it can certainly be excluded under s. 78.

What was still unclear was whether the courts would apply the new statutory formulation in section 78 more often than at common law and if so, whether they would be more willing to exclude evidence than before. The answer came surprisingly quickly, since the courts realized that section 78 refers to a very wide scope of evidences obtained improperly. It allows its application in a variety of situations that could not be anticipated. There is no definitive case law defining or explaining its scope.

It can be any evidence on which the prosecution proposes to rely, such as: confessions, breaches of Police and Criminal Evidence (PACE) codes, alibi notices, identification evidence, real evidence, hearsay or those obtained by an illegal search. Thus, section 78 has been applicable to a broad extent.

In one of the first cases under the Act, *R v. Mason*<sup>14</sup>, there was a clear example of bad faith of police. M. was arrested on suspicion of committing the offence of arson. The police had no direct evidence, nevertheless they told M., and his solicitor that they had his fingerprints linking him with the crime. M. confessed in the face of this allegation and the judge allowed the evidence of the confession to be convicted. M appealed. The Court of Appeal held that deceit practised on M and his solicitor was reprehensible. It also affected M’s chance of getting a fair trial. The conviction based on this confession had to be invalidated, since it was the only prosecution evidence.

In *Matto v. DPP*<sup>15</sup>, M., who was in his car, was followed home by police officers who suspected that he had been drinking. The officers per-

---

12 [1988] 1 W.L.R. 13.

13 [1987] R.T.R. 337, at 346.

14 [1987] 3 All ER 481.

15 [1987] Crim LR 641.

sued the defendant to undergo a breath, which proved positive. The second breath test was retaken at the police station. He was charged with and convicted of driving with excess alcohol. Later appealed.

The conviction was quashed because of the bad faith of the officers in carrying out the test when they were aware at the time of the first breath test that they were acting beyond their powers. The unfairness of the procedures at M's house meant that the evidence obtained thereafter should have been excluded.

Not every breach of rules or trick, however, will be regarded as justifying exclusion.

In *R v. Alladice*<sup>16</sup>, the defendant had been convicted of robbery. He made a confession after being refused access to a solicitor and later appealed.

The Court of Appeal accepted that there had been a breach of section 58 – access to legal advice. Nevertheless held that the confession was admissible, as there was no reason to suppose that if the access had been granted, the confession would not have occurred.

In *R v. Christou*<sup>17</sup> police undercover officers set up a shop called Stardust Jewellers where they purported to buy and sell jewellery. The defendant was recorded dealing with stolen goods and making incriminating statements as all transactions were secretly recorded on the video by the police.

It was held by the Court of Appeal that the evidence was admissible, because there was no unfairness in the police actions, and had not acted as agents provocateurs.

In *R v. Khan*<sup>18</sup>, it was argued that the placing of the equipment on the premises amounted to trespass by the police. The court, however, allowed the evidence to be admitted and the defendant was convicted. The House of Lords concluded 'as a matter of English law, evidence which is obtained improperly or even unlawfully remains admissible'.

Most cases where there has been exclusion of evidence, as Michael Zander rightly noticed<sup>19</sup>, have involved breaches of the Act or the Codes by the police. This would be a failure to comply with the rules regarding access to solicitors or the rules for keeping proper records of interviews with suspects.

---

<sup>16</sup> [1988] Crim LR 608.

<sup>17</sup> [1992] 3 WLR 228.

<sup>18</sup> [1994] 4 All ER 426.

<sup>19</sup> M. Zander, *The Police and Criminal Evidence Act 1984*, 5<sup>th</sup> edition, London 2000.

## 6. Section 78's defects

Section 78 has been criticized for its inherent defects from the very beginning. Ormerod and Birch pointed in their article<sup>20</sup>:

(...) s. 78 [Police and Criminal Evidence Act 1984] lacks definition and any clear theoretical foundation. It is more obvious what it is not (...) the purpose it is designed to serve is, perhaps deliberately, obscure.

One of the dangers is that it remains possible for the discretion to be exercised on the basis, which in fact does not reflect to the trial fairness, such as protecting the accused or disciplining the police.

Section 78 covers few misleading phrases. It is ambiguous as to the meaning of 'fairness'. This term can be used in other contexts, for example in art. 6 of the European Convention on Human Rights. In this context, section 78 seems way too flexible.

As far as the 'fairness of the proceedings' is concerned, the question is whether the judge should consider only the interests of the defendant, or prosecution's as well. The problem is, to which parties the fairness must relate. Lord Steyn explained:

The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public<sup>21</sup>.

It seems that, when considering the issue of fairness, the court must strike a balance between what is fair to the prosecution and what is fair to the defence.

Some phrases in section 78 remain undefined, the discretion is too flexible and too open, as to fulfil its role, it is important that its purpose

<sup>20</sup> D. Ormerod, D. Birch, *The Evolution of the Discretionary Exclusion of Evidence*, "Criminal Law Review" 2004, access via City Hub at <http://city.lawbore.net/> [access: 20.08.2014].

<sup>21</sup> [1980] A.C. 402, at 452. *Attorney General's Reference No.3 of 1999* [2001] 2 A.C. 91, 118.



is clear, both in terms and conditions and circumstances, on which it can be applicable.

## 7. Conclusion

The rules regarding the use of illegally, improperly or unfairly obtained evidence are not uniformly applied. In some instances the court will exclude such evidence, whereas in other cases the evidence will be admitted. Beyond all doubts, under section 78 of Police and Criminal Evidence Act, evidence that has been illegally, improperly or unfairly obtained, can still be submitted to the court. It must be proven to be reliable and, of course, relevant.

The most famous and most frequently cited, as above-mentioned, provision of Police and Criminal Evidence Act, has few misleading phrases and defects. This could be remedied by adopting a more structured format, as it seems safe to predict that in the criminal trial over the next 50 years, discretions may have even a bigger significance. Undeniably, English law needs a satisfactory process for the development of the law of evidence, one of the most important aspects of the criminal justice system.

## Bibliography

### Cases

Jeffrey v. Black  
Jelen  
Jones v. Owen  
Kuruma, Son of Kaniu v. R  
Matto v. DPP  
Matto v. Wolverhampton Crown Court  
R v. Alladice  
R v. Christou  
R v. Delaney  
R v. Khan  
R v. Leatham

R v. Mason  
R v. Quinn  
R. v. Sang

### Secondary sources:

- A. Keane, P. McKeown, *The Modern Law of Evidence*, 9th edition, Oxford 2012  
C. Tapper, Cross and Tapper on Evidence, 12<sup>th</sup> edition, Oxford 2010.  
European Convention of Human Rights, [http://www.echr.coe.int/documents/convention\\_eng.pdf](http://www.echr.coe.int/documents/convention_eng.pdf) [access: 20.08.2014].  
M. Zander, *The Police and Criminal Evidence Act 1984*, 5th edition, London 2000  
D. Ormerod, D. Birch, *The Evolution of the Discretionary Exclusion of Evidence*, "Criminal Law Review" 2004, access via City Hub at <http://city.lawbore.net/>.

### ABSTRACT

KATARZYNA PIĄTKOWSKA

## Common law system – foundations for excluding evidence obtained illegally or unfairly and the relevant case law

A vast majority of commentary in the area of the law of evidence centres on the issue whether an evidence obtained by improperly or unfairly practises, or illegally, should be admitted or not, and why. There has been two extremely different views presented. This article focuses on the problem of admissibility of such evidence supported by the case – law of England.