EXCLUDING UNLAWFULLY OBTAINED EVIDENCE

An article by Aziz Rahman, Solicitor and Jonathan Lennon, Barrister

A short article with a title like this can only ever hope to touch upon this vast topic. Many remand prisoners will have a considerable amount of time to ponder the evidence against them and conclude that some aspect of the evidence has been obtained illegally; e.g. by improper police questioning, over enthusiastic use of a participating informant or some other breach of the rules. The question is, 'so what if there is a breach of the rules?'

That might seem a basic question but in this country criminal litigation is never black and white. We do not have what Americans call 'due process'. That is where if the police or the District Attorney infringes a citizen's constitutional rights then the trial Judge will, almost automatically halt the case. In this country Judge's have to perform 'balancing exercises' and address notions such as 'the interests of justice' and whether a Defendant can have a 'fair trial' or not. A failure to perform 'due process' may be alleviated by a judicial direction to the jury or, as we will discover, by the exclusion of certain evidence.

SECTION 78 PACE

There are, essentially, two main devices for having evidence excluded from the jury. The first is s78 of the Police and Criminal Evidence Act 1984. This simply allows the Court to "refuse to allow evidence on which the prosecution proposes to rely…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."

It was thought that there was no discretion to exclude evidence unless the quality of the evidence might have been affected by the way it was obtained (see Lord Diplock in R v Sang [1980] 2 AC 402, HL). However, it is now well established that the Courts can use their discretionary power to exclude evidence which, on the face of it, appears reliable – the question is one of fairness and s78 is merely the statutory manifestation of that power. The Judge has to perform a balancing act; he has to strike a balance of fairness between the parties. Often there will be little that the defence team can do to influence the outcome aside keep their fingers crossed. However, in other cases the Judge may be persuaded that the balance falls in the Defendant's favour because the defence have been able to demonstrate some problem with a particular piece of evidence and more, that that problem creates a difficulty for the defence or creates such an in-balance that it would not be fair for the prosecution to be able to rely upon it. In blatant cases of police misconduct or corruption then a different application could be made; to stop the prosecution as an 'abuse of process'. But that is a markedly different application, and rarely successful – that topic will be covered in another article.

An example of a s78 application might be where the police have breached their own Codes of Practice in obtaining the evidence. For example, exceeding the authority for the use of a bugging device, illegal searches or simply not following the correct procedure for a suspect interview at the police station. The evidence sought to be excluded would in those cases be, respectively, the transcript of the bugging material, the exclusion of the seized exhibits and the transcript of the taped interview. But, as stated, there is no 'due process' rule. The greater the breach the more likely the evidence is to be excluded; the Court of Appeal has used the expression 'significant and substantial' breach in considering what types of breaches lead to a successful s78 application. The reason for the breach too is relevant, for instance if 'bad faith' is shown; i.e. the officers breached the rules deliberately, then the chances of a successful application increase. So a detailed examination of the how, why and where there was a breach is necessary – e.g. of a police Code of practice and then a follow on of its cause, the effect of the evidence, the reason why the defence are handicapped by the inclusion of it and so on.

COMMON-LAW

The other main tool in the defence armoury is the 'common law' – i.e. Judge made law created over the years from judicial precedent and not by Act of Parliament. The same logic applies – it is not enough to scour the papers and find that a police officer has missed out on some procedural step or has broken the rules somehow. With this tool though the Court can throw out evidence even on a slight breach of the rules, or even no breach because arguably the main thrust of this jurisdiction is the relevance of the disputed evidence.

There is no magic formula or test here – the Judge simply has a discretion "to exclude evidence if it is necessary in order to secure a fair trial for the accused" (Scott v R [1989] AC 1242) – this is often expressed as the test that

evidence ought to be excluded if its prejudicial effect exceeds its probative value. In other words if the evidence lightly assists the prosecution in helping to establish the offence but greatly damages the credibility of the Defendant then the evidence should be excluded. So if someone is charged with laundering tens of millions of pounds of drugs money the Crown will no doubt wish to include in the evidence a lavish lifestyle of sports cars and luxury yachts. But if that evidence is included in a murder trial where lifestyle is of some marginal relevance, e.g. because it is a gangland shooting, then the Judge may exclude it from the jury if the real issue for is the Defendant's case of alibi. So if the evidence of the lavish lifestyle was gathered by breaching the suspect's Article 8 rights (i.e. his right under the European Convention to privacy) then that evidence would almost certainly be excluded from the murder trial but a cogent argument addressing the inherent prejudice etc would be needed to exclude the same evidence from the money-laundering trial. However even if the evidence is not tainted by any unlawfulness a trial Judge will exclude it if it is of marginal relevance and could act only to prejudice the Defendant. As can be imagined the range of situations is enormous and the Judge has a very wide discretion to ascertain what is fair and what is unfair in his Court room.

HUMAN RIGHTS

We have just mentioned Article 8 of the European Convention on Human Rights. Overlaying both the s78 and the common law rules is the Human Rights Act 1998 and the right to a fair trial under Article 6 of the Convention. There is no doubt that the Convention has made the police and Customs etc more accountable and it has served to remind the authorities of the rule of law. Indeed to some extent the Act has reduced a Judge's scope for discretion as the Judge is now under a statutory duty to protect Defendants' human rights. Indeed s8 of the Human Rights Act provides, in effect, a standalone remedy for police breaches of the law/rules which amount to a breach of the Convention. Section 8 provides, in essence, that the Court may provide a remedy for any violation of the Convention – this can be, in a criminal trial, the exclusion of the offending evidence. In fact, in practice the 1998 Act works is as an over-lay to the existing law. A Judge is duty bound to prevent an unfair trial taking place – as that would be a breach of Article 6 of the Convention which is unlawful by s6 of the Act. But the Judge does so by considering his statutory and common-law duties and s8 is rarely needed by the Judge. However it remains the case that the Human Rights Act has opened up opportunities for challenges to the inclusion of otherwise damming evidence, as well as applications to stop proceedings as an abuse of the Court's process. These human rights arguments as well as disclosure of evidence, exclusion of evidence and abuse of process arguments are areas of procedure that interlock and in practice are often considered together. Fine judgements must sometime be made as to whether an apparent breach of the rules will lead to a disclosure argument, an exclusion argument, an abuse argument, or sometimes a mixture of all three.

As is often the way much will depend not so much on the alleged conduct of the police but on the basic preparation of the defence case; have the prosecution been put on notice of the concerns; has a certain issue been raised in the Defence Statement; is the matter on the Court record, etc? The answer to the question 'so what if there is a breach of the rules' will very often depend then on how well the defence have considered the issues and whether the groundwork has been laid for your day in Court. In criminal litigation there are few guarantees except that preparation is everything.

AUTHORS

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