

## THE EXCLUSION OF UNLAWFULLY OBTAINED EVIDENCE

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When a breach of the rules leads to evidence being excluded - An article by Aziz Rahman, Solicitor and Jonathan Lennon, Barrister

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 telephone intercept or by use of a participating informant. At this point it is time to ask the question that the trial Judge will ask, 'so what?'

### DUE PROCESS

We do not have in this country what Americans call 'due process'. That is where the police or the District Attorney infringe a citizen's constitutional rights the trial Judge will, almost automatically, protect the citizen's rights by excluding the evidence or halting the case. In this Country the approach is different. 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, more hopefully for Defendants, the exclusion of certain evidence.

### SECTION 78 POLICE & CRIMINAL EVIDENCE ACT 1984

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."

One of the classic types of s78 applications is 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, 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 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. If 'bad faith' is shown; i.e. the officers breached the rules deliberately, then the chances of a successful application increase.

### BAD FAITH

The extent to which a breach or breaches of the Act or the codes of practice will trigger the exercise of the trial judge's discretion to exclude evidence under s78 all depends on the facts of the case. The expression "significant and substantial" has been favoured by the Court of Appeal, e.g. in *R. v. Walsh*, 91 Cr.App.R. 161 case, see ante the Court found that significant and substantial breaches of proper procedure meant that "prima facie at least the standards of fairness set by Parliament have not been met". Section 78 did not mean that a police officer fabricating evidence, or deliberately fouling up the identification parade procedure would automatically lead to that evidence being excluded - but the Court gave a strong indication that it would usually do so.

However, it does not follow that good faith by the police will excuse serious breaches of proper procedure. In *R. v. Walsh*, the Court felt that bad faith may make "substantial or significant" that which might not otherwise be so, but the contrary does not follow: breaches which are in themselves "substantial or significant" are not rendered otherwise by the good faith of the officers concerned.

### COMMON-LAW/FAIRNESS

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. 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 is the Defendant's case of alibi.

## **THE HUMAN RIGHTS ACT :ARTICLE 6**

Overlaying the s78 and the common law rules is the Human Rights Act 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. This has opened up opportunities for challenges to the inclusion of otherwise damning evidence as well as applications to stop proceedings as an abuse of the Court's process.

Disclosure of evidence, exclusion of evidence and abuse of process are 3 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 on the alleged conduct of the police but in the preparation of the defence case - have the prosecution been put on notice; has a certain issue been raised in the Defence Statement; is the matter on the Court record? The answer to the question 'so what if there is a breach of the rules' will very often depend on how well the issue has been considered and whether you have laid the groundwork for your day in Court - in criminal litigation there are few guarantees except that preparation is everything.

### **AUTHORS**

Jonathan Lennon is a Barrister specialising in serious and complex criminal defence cases and Prison Law at 23 Essex Street Chambers in London. He is former co-editor of the Prison Law Reports.

Aziz Rahman is a Solicitor - Advocate and Partner at the leading Criminal Defence firm Rahman Ravelli Solicitors, specialising in Human Rights, Financial Crime and Large Scale Conspiracies/Serious crime. Rahman Ravelli are members of the Specialist Fraud Panel.

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## **CONTACT US**

Rahman Ravelli Solicitors  
Saracen House, 10 Pellon Lane, Halifax, HX1 5SP  
DX 16001 Hx1  
Tel: 01422 346666 (24HR)  
Fax: 01422 430526

[enquiries@rahmanravelli.co.uk](mailto:enquiries@rahmanravelli.co.uk)

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