

CHALLENGING THE EVIDENCE

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 spend part of their time pondering the evidence against them and wondering whether their lawyers can exclude any particularly troublesome part. It maybe that the prisoner in question is convinced that some aspect of the evidence has been obtained illegally; for example. By telephone intercept, the improper use of a participating informant or by putting improper pressure on a witness. At this point it is time to ask the question that the trial Judge will ask when faced with a submission that the evidence has been obtained unlawfully; 'so what?'

In this article we look at the some of the situations where challenges to the admission of evidence can be raised by the defence on the basis that the police or the prosecution have broken the rules.

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. That is not to say that failure to follow the rules will not lead to the Judge intervening and perhaps excluding the offending evidence - all is dependent on the facts of the case

SECTION 78 POLICE & CRIMINAL EVIDENCE ACT 1984

There are, a limited number of tools available to the defence lawyer who is interested in attempting to exclude evidence. The main tool overlays all other devices; s78 of the Police and Criminal Evidence Act 1984 ('PACE'). 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, by 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 procedures for both of these are set out fully in regulations under the Regulation of Investigatory Powers Act 2000 and the PACE Codes of Practice respectively.

As already stated, there is no 'due process' rule. The greater the breach of the rules 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.

The extent to which a breach or breaches of the proper procedure 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. In that case 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 es-

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.

ARTICLE 6

The Human Rights Act 1998 incorporated the European Convention of Human Rights into English law and this includes the right to a fair trial under Article 6 of the Convention. There is no doubt that the Convention has made the police, SOCA and Customs etc more accountable and it has served to remind the authorities of the rule of law. The Act 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 three areas of litigation 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.

It is in fact more often Article 8 of the Convention that has led to successful exclusion arguments. Article 8 preserves the right to a private and family life. Thus the use of covert surveillance of any type is prima facie an infringement of that right. Of course such infringements may be justified under Article 8(2) - e.g. for law enforcement purposes. But this is only if it can be demonstrated that the interference is proportionate, lawful and necessary. In cases involving covert surveillance it is always worth considering whether the surveillance is lawful (i.e. properly authorised) and proportionate - i.e. not over the top having regard to the evidence/seriousness of the alleged offence. An argument to exclude such evidence would essentially be along the lines that the Defendant could not have a fair trial (Article 6) if the Court were to allow evidence that has been gathered in breach of his, or another's, Article 8 rights. There is an abundance of case law in this area, the Court will look to the fairness of the trial as a whole rather than just the one breach of the rules - that said a serious breach or a deliberate breach may be enough for the Court to stop the case altogether, never mind exclude part of the evidence; see last month's article on abuse of process.

SECTION 74 OF THE SERIOUS AND ORGANISED CRIME AND POLICE ACT 2005

This legislation is just starting to bite, the authors are both involved in cases where defendants are affected by s74.

Section 74 of the new Act essentially puts super-grass's on a statutory footing. Those who are convicted and sentenced of offences can have their sentences significantly reduced by a Crown Court review by entering into a written agreement with the prosecution - which of course will usually involve giving evidence against others.

This is a relatively untested area and there will undoubtedly be applications to exclude such evidence. The only way this can be done will be to examine closely the procedure by which the super-grass's gave their statement and what the agreement is with the police/SOCA. It is expected that this new law will produce much in the way of disclosure arguments, for example pro-active defenders will want to know if the informant has given 'texts' in the past, or whether he has been a registered informer in the past - and if so how reliable was he then? This may provide ammunition for a s78 exclusion argument or it may go towards providing useful cross-examination points to help reduce the informant's credibility before the jury.

CONCLUSION

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 of any exclusion argument; 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 preparation has been done 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

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