

Case Comment

D.P.P. v. J.C.

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What is the exclusionary rule?

The exclusionary rule defines the circumstances in which a court will exclude evidence on the grounds that it has been obtained in violation of an accused's constitutional rights. The rule was first developed in *The People (A.G.) v. O'Brien* ("O'Brien")¹ and it was further developed by the Supreme Court in *The People (D.P.P.) v. Kenny* ("Kenny")². Traditionally, evidence obtained as a direct and conscious breach of constitutional rights was automatically excluded in the absence of extraordinary excusing circumstances. Recently, this rule was revised in *D.P.P. v. J.C.* ("J.C.")³ such that unconstitutionally obtained evidence will no longer be excluded at trial if it was obtained in circumstances in which the breach of constitutional rights was due to inadvertence and there was no deliberate or conscious breach.

The meaning of "deliberate and conscious"

In *O'Brien*, the main issue before the Supreme Court was the admissibility of evidence that had been obtained on foot of an invalid search warrant. The warrant incorrectly described the premises and the applicants submitted that the main body of the evidence was obtained in direct violation of Article 40.5 of the Constitution.⁴ The Supreme Court dismissed the appeal. Kingsmill Moore J., with whom Lavery and Budd JJ. agreed, held that where there has been a deliberate and conscious violation of constitutional rights by the State or its agents, any evidence obtained should be excluded unless there are extraordinary excusing circumstances that warrant their admission.⁵ Walsh J., with whom Ó Dálaigh C.J. agreed, held that evidence obtained in deliberate and conscious breach of the constitutional rights of an accused should, save in certain excusable circumstances, be inadmissible.⁶

The ambit and the effect of the exclusionary rule was resolved by a five judge Supreme Court in *Kenny*.⁷ Finlay C.J., with whom Walsh and Hederman JJ. concurred, favoured an absolute exclusionary rule. Although Finlay C.J. recognised that an absolute exclusionary rule could limit the capacity of the courts to arrive at the truth, he held that this did not outweigh the constitutional obligation placed on the courts to defend and vindicate, as far as practicable, the personal rights of the citizen.⁸ Thus, the correct principle was that:-

¹ [1965] I.R. 142

² [1990] 2 I.R. 110.

³ [2015] IESC 31, (Unreported, Supreme Court, 15th April, 2015).

⁴ Article 40.5 provides: "The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law."

⁵ [1965] I.R. 142, p. 162.

⁶ Walsh J. outlined the following as extraordinary excusing circumstances: "...the imminent destruction of vital evidence or the need to rescue a victim in peril... I would also place in the excusable category evidence obtained by a search incidental to and contemporaneous with a lawful arrest although made without a valid search warrant."; p. 170.

⁷ [1990] 2 I.R. 110.

⁸ *The People (D.P.P.) v Kenny* [1990] 2 I.R. 110, p. 134.

“... [E]vidence obtained by invasion of the constitutional personal rights of a citizen must be excluded unless a court is satisfied that either the act constituting the breach of constitutional rights was committed unintentionally or accidentally, or is satisfied that there are extraordinary excusing circumstances which justify the admission of the evidence in its (the court’s) discretion.”⁹

Dissenting judgments were delivered by Griffin and Lynch JJ. to the effect that unless there was an actual intention to violate a particular constitutional right, the acts complained of would not be unconstitutional.

A new exclusionary rule: *D.P.P. v. J.C.*

On the 15th April, 2015, the Supreme Court delivered a landmark ruling on the exclusionary rule with a 4:3 majority verdict which overruled the absolute exclusionary rule in *Kenny*.¹⁰ The case centred around two issues. First, whether the procedure for “with prejudice” appeals in s.23 of the Criminal Procedure Act 2010 permitted the appeal. This involved a consideration of whether the trial judge could be said to have “erred” in law within the meaning of section 23. Second, the Court had to consider whether the rule in *Kenny* was incorrect.

Clarke J. articulated a new test providing that unconstitutionally obtained evidence will not be excluded at trial if it was obtained in circumstances in which any breach of rights was due to inadvertence and there was no deliberate or conscious breach of constitutional rights. In considering how an appropriate balance of the competing constitutional rights and values engaged in cases of unconstitutionally obtained evidence should be struck, Clarke J. articulated the following test:-

- (i) The onus rests on the prosecution to establish the admissibility of all evidence. The test which follows is concerned with objections to the admissibility of evidence where the objection relates solely to the circumstances in which the evidence was gathered and does not concern the integrity or probative value of the evidence concerned.*
- (ii) Where objection is taken to the admissibility of evidence on the grounds that it was taken in circumstances of unconstitutionality, the onus remains on the prosecution to establish either:-
(a) that the evidence was not gathered in circumstances of unconstitutionality; or
(b) that, if it was, it remains appropriate for the Court to nonetheless admit the evidence.
The onus in seeking to justify the admission of evidence taken in unconstitutional circumstances places on the prosecution an obligation to explain the basis on which it is said that the evidence should, nonetheless, be admitted AND ALSO to establish any facts necessary to justify such basis.*
- (iii) Any facts relied on by the prosecution to establish any of the matters referred to at (ii) must be established beyond reasonable doubt.*
- (iv) Where evidence is taken in deliberate and conscious violation of constitutional rights then the evidence should be excluded save in those exceptional circumstances considered in the existing jurisprudence. In this context deliberate and conscious refers to knowledge of the*

⁹ *The People (D.P.P.) v Kenny* [1990] 2 I.R. 110, p. 134.

¹⁰ Denham C.J., O’Donnell, Clarke and MacMenamin JJ. in the majority; Murray, Hardiman and McKechnie JJ. dissenting.

unconstitutionality of the taking of the relevant evidence rather than applying to the acts concerned. The assessment as to whether evidence was taken in deliberate and conscious violation of constitutional rights requires an analysis of the conduct or state of mind not only of the individual who actually gathered the evidence concerned but also any other senior official or officials within the investigating or enforcement authority concerned who is involved either in that decision or in decisions of that type generally or in putting in place policies concerning evidence gathering of the type concerned.

- (v) *Where evidence is taken in circumstances of unconstitutionality but where the prosecution establishes that same was not conscious and deliberate in the sense previously appearing, then a presumption against the admission of the relevant evidence arises. Such evidence should be admitted where the prosecution establishes that the evidence was obtained in circumstances where any breach of rights was due to inadvertence or derives from subsequent legal developments.*
- (vi) *Evidence which is obtained or gathered in circumstances where same could not have been constitutionally obtained or gathered should not be admitted even if those involved in the relevant evidence gathering were unaware due to inadvertence of the absence of authority.*¹¹
(Emphasis added)

Clarke J. noted that the precise application of the principles would need to be developed on a case-by-case basis.

O'Donnell and MacMenamin JJ. agreed with the test proposed by Clarke J. O'Donnell J. recognised that the judgment could be applicable in cases involving unlawful arrest or detention, though he preferred "to withhold definitive determination of that issue" until a relevant case was before the Supreme Court. He inquired whether the Constitution requires an absolute rule of exclusion. He regarded the essential question as being at what point a trial falls short of being a trial "in due course of law" because of the manner in which the evidence was obtained. O'Donnell J. preferred a more nuanced position which would allow for evidence to be admitted in cases of a technical and excusable breach, but which would exclude such evidence where it was obtained as a result of a deliberate breach of the Constitution. MacMenamin J. noted that the test adopted by the majority was "significantly higher than that to be found elsewhere in the common law world" and that it "redresses the balance so as to encompass community interests, while ensuring that egregious breaches of a suspect's rights and police misconduct are checked."

Murray, Hardiman and McKechnie JJ. each delivered dissenting judgments. Murray J. did not express any opinion on the relative merits of the exclusionary rule as espoused in *Kenny*; rather he focused on s.23 of the Criminal Procedure Act 2010. He held that an appeal did not lie under s.23 because the ruling of the trial judge was not an erroneous ruling.

Hardiman J. expressed grave apprehension at the majority decision, describing the test espoused by the majority as undermining "the rights-based and rights-respecting *Kenny* test." The fundamental basis of the rule in *Kenny*, in his opinion, was the constitutional obligation expressed in Article 40.3.1°. Thus, the duty to exclude evidence obtained by a deliberate and conscious breach of the Constitution arose directly from the terms of this duty.

¹¹ D.P.P. v. J.C. (per Clarke J.) [2015] IESC 31, (Unreported, Supreme Court, 15th April, 2015), para 7.2.

Hardiman J. stated that the state of mind of the violator does not matter; it is the objective assessment of the conscious acts or omissions that matters. He stated that it would not be “just, fair, or constitutional, to permit a public servant’s ignorance, or incorrect application, of the law of the land... to allow him to breach an ordinary citizen’s constitutional rights”. He emphasised that the question of whether a particular unconstitutional action is “deliberate and conscious” cannot be decided in the light of the state of mind of the lowest ranking State official involved. Rather, it must be determined by the state of knowledge of the “high official, the Garda Commissioner, a Garda Chief Superintendent, a high departmental official, the Attorney General, the D.P.P. or even a government minister”.

McKechnie J. stated that the D.P.P. had failed to reach the threshold for review of a previous decision of the Supreme Court and that there had been a failure to identify “in any concrete context” the problems that exist with *Kenny*. He pointed to the fact that the D.P.P. had provided no empirical evidence as to how the rule in *Kenny* “frustrates prosecutions”. He further noted that even if examples of “lost prosecutions” could be given, it would still be necessary to show how this outcome was attributable to the exclusionary rule. McKechnie J. felt that there had been no shift in underlying consideration to justify a review. At best, he said, there was an “alternative view”, but this was not sufficient to engage the review jurisdiction of the Court.

The application of *D.P.P. v. J.C.*

While the new test has replaced the traditional exclusionary rule in *Kenny*, it is, as of yet, unclear how the test will be applied in cases of unlawful detention and arrest. O’Donnell J. explicitly confined himself to the area of search warrants, preferring to withhold definite determination of issues related to unlawful arrest and detention “until an appropriate case reaches [the Supreme] Court”. However, it would appear that these comments relate to the precise application of the new test in the context of non-search warrant cases rather than the question of whether the test applies *ab initio* to non-search warrant cases. The operation of the new exclusionary rule in the context of unlawful arrest and detention has yet to be considered by the Superior Courts. Thus, it remains to be seen whether the ideological divide between the majority and the minority in *J.C.* will be further entrenched in cases of unlawful arrest and detention.

J.C. signifies a shift away from the absolute exclusionary rule in Irish law. However, it does not make evidence obtained in circumstances involving inadvertence admissible *per se*; rather, the onus is on the prosecution to establish why evidence obtained in breach of constitutional rights should be admitted. Although this represents a higher threshold than that imposed in other common law countries, the jurisprudence from other jurisdictions may be of guidance to the courts in the application of the Clarke test. For example, in *R v. Grant*, the Supreme Court of Canada held that when faced with an application to exclude evidence, a court must assess and balance the effect of admitting such evidence and society’s confidence in the justice system. The Court referred to a number of factors that are relevant including: the seriousness of the State conduct; the impact of the breach on the interests of the accused; and society’s interest in an adjudication of the case on its merits.