

CASE NOTE

Exclusion of evidence: *DPP (Walsh) v Cash*

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In January 2010, the Irish Supreme Court handed down its much-anticipated decision in *DPP (Walsh) v Cash*.¹ This case centred on fingerprint evidence which had been obtained from the appellant following his arrest in relation to a burglary. The arrest was based on a match between fingerprints taken at the scene of the crime and fingerprints held on a Garda Síochána (police) database. The retained fingerprints had been taken in relation to another incident several years previously and it was unclear whether or not they had been properly retained. Defence counsel argued that if the prosecution could not prove the lawfulness of the retained fingerprints, then the arrest could not be seen as lawful and the taking of fingerprints following the arrest was not lawful either. In fact, it was argued, the fingerprint evidence ought to be excluded at trial as it had been obtained in breach of the constitutional rights of the accused.

Charleton J, giving the High Court judgment in *Cash*, was highly critical of the strict exclusionary rule which has operated in Ireland for many years in the context of unconstitutionally obtained evidence. While he ultimately held that the rule was inapplicable on the facts, it was thought that the Supreme Court might take the opportunity to address the exclusionary rule and either to support

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¹ [2007] IEHC 108 (28 March 2007), [2010] IESC 1 (18 January 2010).

its ongoing strict application or row back on its inflexible terms and allow greater discretion for trial judges.²

In the event, the Supreme Court did neither, preferring, it seems, to side-step any in-depth discussion of the exclusionary rule. Nonetheless, or indeed because of the view that the exclusionary rule was inapplicable, this case is of much significance to the law on exclusion and to the judicial oversight of police investigations in Ireland.

The Irish exclusionary rule

The Irish courts have, for some time, operated one of the strictest exclusionary rules (if not *the* strictest one) in the common law world. Through an interesting and intricate series of cases beginning in the mid-1960s with *People (A-G) v O'Brien*,³ on to *People (DPP) v Kenny*,⁴ and beyond,⁵ the legal basis for exclusion was established, considered and reconsidered. The result of these cases and the discussions therein was the construction and application of a two-tiered rule: a mandatory exclusionary rule in relation to evidence obtained in breach of constitutional rights, and a discretionary exclusionary rule in relation to evidence obtained in breach of mere legal rights.

Armed with a strong written constitution and an expansive array of unenumerated constitutional rights, the Irish courts made the above-outlined distinction between breaches of differing rights, allowing for greater protection for constitutional rights as compared with mere legal rights.

Where legal rights only have been interfered with in the gathering of evidence, the trial judge holds a discretion to admit or exclude the impugned items of evidence, taking into account all the circumstances of the case. Where constitutional rights have been interfered with in the gathering of evidence, the trial judge has no

2 See Y. M. Daly, 'Unconstitutionally Obtained Evidence in Ireland: Protectionism, Deterrence and the Winds of Change' (2009) 19(2) *Irish Criminal Law Journal* 40. See also *Final Report of the Balance in the Criminal Law Review Group* (Stationery Office: Dublin, 2007), available at <http://www.inis.gov.ie/en/JELR/Pages/Balance_in_criminal_law_report>, accessed 3 November 2010, which suggested that the Supreme Court might be able to reinterpret the law on unconstitutionally obtained evidence in an appropriate case (at 161–6).

3 [1965] IR 142.

4 [1990] 2 IR 110.

5 See, e.g., *People (DPP) v Balfe* [1998] 4 IR 50; *People (DPP) v Buck* [2002] 2 IR 269; *People (DPP) v Laide and Ryan* [2005] 1 IR 209; *People (DPP) v O'Brien* [2005] 2 IR 206.

discretion; the evidence is automatically excluded, unless there are extraordinary excusing circumstances which justify its admission.⁶

Some confusion initially surrounded the circumstances in which exclusion of unconstitutionally obtained evidence would occur, as the original formulation of the rule in *People (A-G) v O'Brien* referred to a 'deliberate and conscious' breach of rights. This seemed to require knowledge on the part of the garda (police officer) who obtained the evidence that he was doing so in violation of constitutional rights, and a related rationale of deterrence. However, through a series of cases culminating in *People (DPP) v Kenny*, it was established that the basis for the Irish operation of the rule was the protection of constitutional rights. The rationale of deterrence (as applied in the courts of the United States⁷) was expressly rejected by the Irish Supreme Court. The then Chief Justice, Finlay CJ, held that although a strong protectionist stance could create problems in criminal trials given its propensity to exclude from evidence items of immense probative value, the Supreme Court's constitutional duty to protect the personal rights of the citizen outweighs the social need to detect crime and convict guilty persons.⁸ He then set out the exclusionary rule in the following terms:

... evidence obtained by invasion of the constitutional personal rights of a citizen must be excluded unless a court is satisfied that ... the act constituting the breach of constitutional rights was committed unintentionally or accidentally...⁹

Therefore, no question arises as to the knowledge of the violator of rights; all that is required is that the *action* which resulted in the breach of rights was willed or intended.

The strict, protectionist, exclusionary rule in relation to unconstitutionally obtained evidence in Ireland has persisted ever since *Kenny*, and it has been used to exclude both primary and derivative evidence (i.e. 'fruit of the poisoned tree'). In

6 An inexhaustive list of potential extraordinary excusing circumstances was provided by Walsh J in *People (A-G) v O'Brien* and included the need to rescue a victim in peril, the imminent destruction of vital evidence, and a search without warrant which was incidental to and contemporaneous with a lawful arrest: [1965] IR 142 at 170. However, this proviso has rarely been implemented.

7 See, e.g., *US v Calandra* 414 US 338 (1974); *Wolf v Colorado* 338 US 25 (1949); *US v Leon* 468 US 897 (1983). See also Y. Kamisar, 'In Defense of the Search and Seizure Exclusionary Rule' (2003) 26 *Harvard Journal of Law and Public Policy* 119; D. Dripps, 'The Case for the Contingent Exclusionary Rule' (2001) 38 *American Criminal Law Review* 1.

8 [1990] 2 IR 110 at 134.

9 *Ibid.*

relation to the latter, if a causative link can be shown between an item of evidence and a breach of constitutional rights, then the evidence must be excluded.¹⁰

Despite the ongoing application of the strict exclusionary rule, it has been criticised both on and off the judicial benches and calls for change have emerged in recent times. The most significant of these calls for change came, in 2007, from the ad hoc Balance in the Criminal Law Review Group, which advocated a change to the exclusionary rule allowing for the exercise of judicial discretion in relation to unconstitutionally obtained evidence in all cases, taking into account the totality of the circumstances, including the rights of the victim.¹¹ Such change, it was proposed, could come about by way of ordinary legislation (though this seems unlikely due to the rule's constitutional underpinnings), constitutional referendum, or reinterpretation by the Supreme Court.¹² The *Cash* case seemed potentially to offer the Supreme Court an opportunity to revisit and/or reinterpret the rule.

DPP (Walsh) v Cash

As outlined above, defence counsel in *Cash* sought to have a set of fingerprints taken from the appellant following his arrest on a burglary charge excluded from evidence at trial. He had been arrested on the basis of a match between fingerprints taken from the scene and prints that had been taken from him in relation to another matter some years previously which were held on file in the Garda Technical Bureau. The prosecution had been unable to state clearly the legal position of the retained prints; whether they had been taken with consent or under the statutory regime,¹³ and whether or not they ought to have been destroyed following the passage of time and the fact that no proceedings had been instituted in relation to the earlier matter.¹⁴

The main issue for consideration by the courts was whether the strict exclusionary rule laid down in *Kenny* should be extended to cover facts not being offered as part

10 For more on the concept of a causative link, see *People (DPP) v Buck* [2002] 2 IR 269 and *People (DPP) v O'Brien* [2005] 2 IR 206.

11 *Final Report of the Balance in the Criminal Law Review Group*, above n. 2 at 166.

12 *Ibid.* at 161–6.

13 Criminal Justice Act 1984, s. 6.

14 Criminal Justice Act 1984, s. 8, as amended by the Criminal Justice Act 2006, provides that fingerprints taken from suspects who have been arrested and detained under the Criminal Justice Act 1984 and any copies thereof must be destroyed at the expiration of 12 months from the taking of such prints if proceedings are not instituted against the relevant suspect and the failure to institute the proceedings within that period is not due to the fact that he has absconded or cannot be found.

of the evidence at a criminal trial but giving rise to the suspicion which led to the arrest. Both the High Court and the Supreme Court held that the exclusionary rule is applicable only to evidence sought to be presented in a criminal trial, and has no role in relation to evidence used to ground a reasonable suspicion for an arrest. In the High Court Charleton J, dismissing the appeal, held that:

evidence resulting from a detention based upon a suspicion that cannot be proved as being founded entirely upon evidence lawfully obtained is not, for that reason, made unlawful.¹⁵

As he recognised no unlawfulness, the learned judge rejected the contention that the exclusionary rule was applicable on the facts of this case. However, he took the opportunity to express his negative view of that rule in quite forceful terms:

[a] rule which remorselessly excludes evidence obtained through an illegality occurring by a mistake does not commend itself to the proper ordering of society which is the purpose of the criminal law.¹⁶

Charleton J considered that the decision whether or not to exclude evidence at trial should be based on a balancing of the interests of society as against the interests of the accused, taking into account the rights of the victim.

The Supreme Court followed the views of Charleton J in relation to the inapplicability of the exclusionary rule on the facts of *Cash* and, accordingly, dismissed the appeal. Despite not substantively addressing the content or operation of the exclusionary rule, the decision of the seven-judge Supreme Court in *Cash* is of much significance to the law in this area. While aiming, perhaps, to avoid the thorny issue of exclusion, the court may have caused more harm than good.

Giving the decision of the court, Fennelly J held that the exclusionary rule is only relevant to evidence proffered at a criminal trial and is not concerned with ‘the lawful provenance of evidence used to ground a suspicion’.¹⁷ He suggested that the appellant was seeking to extend the exclusionary rule beyond its correct boundaries and that doing so would ‘blur the distinction between the arrest and the trial’.¹⁸

15 [2007] IEHC 108 at [68].

16 *Ibid.* at [65].

17 [2010] IESC 1 at [30].

18 *Ibid.* at [33].

The majority of the Supreme Court¹⁹ viewed the central issue then as the lawfulness of the accused's arrest, rather than any argument centred on the application of the exclusionary rule to derivative evidence. Quoting from the High Court decision, Fennelly J, in the Supreme Court, observed that, in relation to the requirements of a lawful arrest, it has never been held that:

what would found a reasonable suspicion in law, requires to be based on the kind of evidence that would be admissible under the rules of evidence during the hearing of a criminal trial.²⁰

He further stated that '[t]he lawfulness of an arrest and the admissibility of evidence at trial are different matters which will normally be considered in distinct contexts'.²¹

While this may be true in certain situations, there is an important distinction between unconstitutionally obtained evidence and evidence which would not be acceptable in the courts for other reasons; a distinction which the Supreme Court failed to note. One example of material which might ground a lawful arrest but would not be admissible as evidence at trial, which was mentioned by Charleton J in the High Court, is hearsay evidence. The rationale for the exclusion of hearsay evidence from a criminal trial relates to fears of unreliability and the dangers inherent in not being able adequately to test such evidence in the courtroom.²² However, the rationale for the exclusion of unconstitutionally obtained evidence from trials in Ireland is based on the protection of constitutional rights, and this was expressly noted by Fennelly J in the Supreme Court in *Cash*.²³

One would have thought that, in order to give effect to the protectionist stance adopted in *Kenny*, evidence obtained (or retained) in violation of constitutional rights ought not to be allowed as the basis for a lawful arrest or, if relied upon to ground an arrest, should render that arrest unconstitutional, and any evidence subsequently obtained ought to be excluded accordingly. This would not only give

19 Murray CJ, Denham, Geoghegan, Macken and Finnegan JJ concurring in the judgment delivered by Fennelly J. Hardiman J dissented from the majority holding that there was insufficient evidence in relation to any unconstitutionality in the retention of the first set of fingerprints to enable questions which appeared to be raised before the court to be answered.

20 Ibid. at [32], quoting [2007] IEHC 108 at [12], *per* Charleton J.

21 Ibid. at [41].

22 See, e.g., *Teper v R* [1952] AC 480 at 486, *per* Lord Normand: 'It [hearsay] is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination, and the light which his demeanour would throw on his testimony is lost.'

23 [2010] IESC 1 at [20]–[21].

effect to the protectionist rationale of the *Kenny* rule, but it would also be in line with Irish jurisprudence on derivative evidence. If the retained set of fingerprints in *Cash* ought to have been destroyed, then their retention would breach the appellant's right to privacy (both under the Constitution²⁴ and under the European Convention on Human Rights²⁵) and their use to ground an arrest could be seen as a breach of the right to liberty.²⁶ The set of fingerprints thereafter obtained when the appellant was in Garda detention following arrest ought then to have been excluded from trial due to the earlier, causatively linked breach of rights.

While the content of the exclusionary rule from *Kenny* may not have been disturbed by the decision in *Cash*, the Supreme Court's view that the rule is not relevant to pre-arrest matters seems at variance with the general tenor of previous Irish case law and provides a very weak basis for the protection of suspects' rights. A worrying question arises as to the power of the courts to exclude evidence obtained post-arrest which is causatively linked to evidence *purposefully* obtained in breach of constitutional rights pre-arrest. What power do the courts have following *Cash* to defend and vindicate the rights of the accused in the pre-arrest period of the criminal process? None it would seem, unless a distinction was drawn between *purposeful* breach of rights and unknowing breach of rights. Such a distinction, however, would alter the rationale of the exclusionary rule from protectionism to deterrence as the central question would be one of Garda intention rather than protection of rights.

Cases similar to *Cash* have been dealt with quite differently in other jurisdictions. In England and Wales, for example, in *Attorney-General's Reference (No. 3 of 1999)*²⁷ (which involved a DNA sample rather than a fingerprint, but was largely similar otherwise), the House of Lords considered a 'triangulation of interests' involving the accused, the victim and the public, and held in favour of admitting the relevant evidence. Although the ultimate decision then was the same as that in *Cash*, at least the House of Lords left open the possibility that in an appropriate case the balance might lie otherwise. The Irish Supreme Court, by contrast, seems to have placed pre-arrest garda behaviour and breaches of constitutional rights entirely beyond the reach of the exclusionary rule.²⁸

24 The right to privacy has been recognised as a constitutionally protected right in a number of cases including: *McGee v A-G* [1974] IR 284; *Norris v A-G* [1984] IR 36; *Kennedy v Ireland* [1987] IR 587.

25 See *S and Marper v United Kingdom* 30562/04 [2008] ECHR 1581 (4 December 2008).

26 Expressly protected under Art. 40.4.1 of the Constitution.

27 [2001] 2 AC 91, [2001] 1 All ER 577.

28 See also the New Zealand case of *R v Shaheed* [2002] 2 NZLR 377.

While the continuing application of a strict exclusionary rule in relation to unconstitutionally obtained evidence in Ireland seems desirable, the *Cash* case suggests a danger that it may give rise to obscure jurisprudence in efforts to avoid discussion or reinterpretation. This is not desirable. Neither is the position created by *Cash* whereby pre-arrest constitutional rights are left out in the cold.