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Criminal Law -- Evidence -- Defence of Entrapment -- Discretion to Exclude Evidence

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CRIMINAL LAW—EVIDENCE—DEFENCE OF ENTRAPMENT—DISCRETION TO EXCLUDE EVIDENCE.—The enforcement of the criminal law is entrusted to the criminal courts and to the police. In seeking to fulfill this undertaking both have distinct, yet complementary roles to play. However, there are occasions when the courts are called upon to investigate certain activities of the police which appear to transgress the very laws that they are entrusted to enforce. In resolving this dilemma, the courts have attempted to strike a delicate balance between the right of society to be protected from criminal activity and the right of the individual to be free from unwarranted and intrusive police behaviour. In other words, while furthering the ends of social justice by facilitating the truth-seeking process, the courts must ensure that an individual accused receives a fair trial. Canadian courts, like all other courts, have found such a task to be extremely troublesome. In particular, the courts have wrestled with the problems of a defence of entrapment, the doctrine of abuse of process and the discretion to exclude illegally obtained evidence. In the recent decision of *Regina* v. *Sang*,[1] the House of Lords and the Court of Appeal addressed all of these problems and handed down opinions which are of considerable interest to the Canadian lawyer. Furthermore, the House offers some interesting insights into the general philosophy underlying the Anglo-Canadian law of evidence.

The appellant, Sang, was indicted on two counts of conspiracy with others to utter counterfeit United States banknotes, knowing them to be forged and with intent to defraud, and of unlawful possession of such forged banknotes.[2] After arraignment, but before the Crown had opened its case, counsel for Sang requested that a voir dire be held. He asserted that, if his claims were successful, the trial judge would be obliged to rule that the Crown could adduce no evidence against the accused and that the jury would have to be directed to enter a verdict of not guilty. The court was told that,

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[1] [1979] 2 All E.R. 1222 (H.L.); [1979] 2 All E.R. 46 (C.A.).

[2] The facts are taken substantially from the judgment of Lord Salmon, *ibid.*, at p. 1235.

while the accused had been in prison, he had been approached by a fellow prisoner who, unbeknown to the accused, was alleged to be a police informer and an agent provocateur. It was alleged[3] that this prisoner told Sang that he knew of a safe buyer of forged banknotes and that he would arrange for this buyer to contact Sang after his release. A meeting was arranged where a deal was to be completed for the purchase of the banknotes. The rendezvous was kept but it turned out to be a police trap. The forged currency was confiscated and the accused and his comrades were arrested.

Counsel claimed that these facts, if proved, would establish that the accused had been induced by an agent provocateur to commit a crime which, but for the inducement, he would never have committed and that the law required the judge to disallow any evidence of the accused's guilt to be called by the Crown. Alternatively, he argued that the trial judge had a discretion to reject any evidence of the offence because it had been unfairly obtained and he was bound by authority to exercise that discretion in the accused's favour. The trial judge, His Honour Judge Buzzard, expressed doubts as to whether he possessed such a discretion and listened to argument as to its existence in point of law.[4] The result was a ruling that he did not possess a discretion to exclude the prosecution's evidence. Sang then altered his plea to one of guilty and was sentenced to eighteen months imprisonment. He appealed from this decision.[5]

The Defence of Entrapment

Both the Court of Appeal and the House of Lords decided unanimously and unequivocally that the defence of entrapment has no place in English law. In reaching this conclusion, the appellate courts did not break new ground, but simply confirmed a line of recent decisions.[6] However, a majority of the House of Lords did concede that evidence of entrapment might be of considerable

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[3] The House of Lords was careful to point out that the voir dire was never held and that no evidence of improper conduct was called to support the allegations. See the observations of Lord Diplock, *ibid.*, at p. 1225 and of Lord Salmon, at p. 1236.

[4] Argument proceeded on the assumption, agreed to by both counsel, that the necessary facts had been established (*i.e.*, that Sang's offences would not have been committed but for police incitement through an informer to commit them). For comments as to this course of action, having regard to "the exceptional circumstances of this case", see Roskill L.J., *ibid.*, at p. 49.

[5] Mangan, an associate, received a suspended sentence at trial and had lost touch with his solicitors by the time the appeal was heard. He was not represented on the hearing of Sang's appeal.

[6] See *Regina* v. *McEvilly*, *Regina* v. *Lee* (1973), 60 Cr. App. R. 150; *Regina* v. *Mealey*, *Regina* v. *Sheridan* (1973), 60 Cr. App. R. 59.

significance in mitigation of the punishment for the offence.[7] The reasoning of the House in support of this stance is succinctly articulated by Lord Diplock:[8]

> Many crimes are committed by one person at the instigation of others. From earliest times at common law those who counsel and procure the commission of the offence by the person by whom the *actus reus* itself is done have been guilty themselves of an offence, and since the abolition by the Criminal Law Act 1967 of the distinction between felonies and misdemeanours can be tried, indicted and punished as principal offenders. The fact that the counsellor and procurer is a policeman or a police informer, although it may be of relevance in mitigation of penalty for the offence, cannot affect the guilt of the principal offender; both the physical element (*actus reus*) and the mental element (*mens rea*) of the offence with which he is charged are present in his case.

In Canada, a lively debate, both inside and outside the courts, is still conducted as to the possible existence and character of a defence of entrapment.[9] In the recent case of *Kirzner* v. *The Queen,*[10] although a majority of the Supreme Court of Canada declined to address the issue,[11] Laskin C.J.C., in a judgment concurred in by Spence, Dickson and Beetz JJ.,[12] disapproved of judicial rejections of the existence of such a defence,[13] but refused to lay down any guidelines for the introduction and application of a defence of entrapment. However, he did provide a useful review of the solutions adopted by other Commonwealth countries and by the United States.[14] In the United States, a substantive defence of entrapment does exist, but is limited to those situations "when the Government's deception actually implants the criminal design in the mind of the defendant" and not when "the Government merely afford opportunities or facilities for the commission of the offense".[15] A similar solution has also been adopted in a modified

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[7] See *supra*, footnote 1, at p. 1226, per Lord Diplock, at p. 1236, per Lord Salmon, at p. 1238, per Lord Fraser, and at p. 1243, per Lord Scarman.

[8] *Ibid.*, at p. 1226, per Lord Diplock.

[9] See Shafer and Sheridan, The Defence of Entrapment (1970), 8 Osgoode H.L.J. 277; Watt, The Defence of Entrapment (1971), 13 Cr. L.Q. 313; Sneidman, A Judicial Test for Entrapment: The Glimmerings of a Canadian Policy of Police-Instigated Crime (1973), 16 Cr. L.Q. 81; and Paterson, Towards A Defence of Entrapment (1979), 17 Osgoode H.L.J. 261.

[10] [1978] 2 S.C.R. 487. See also *Lemieux* v. *The Queen*, [1967] S.C.R. 492; *Regina* v. *Ormerod*, [1969] 2 O.R. 230 (C.A.); and *Regina* v. *Bonnar* (1975), 34 C.R.N.S. 187 (N.S. App. Div.).

[11] Mr. Justice Pigeon delivered a very brief judgment on behalf of Martland, Ritchie, Beetz and Pratte JJ.; *ibid.*, at p. 503.

[12] *Ibid.*, at p. 489.

[13] See *Regina* v. *Chernecki* (1971), 16 C.R.N.S. 230 (B.C.C.A.) and *Regina* v. *Kirzner* (1977), 14 O.R. (2d) 665 (C.A.).

[14] *Supra*, footnote 10, at pp. 494-498.

[15] *United States* v. *Russell* (1973), 411 U.S. 423, at p. 435, per Rehnquist J. For a survey of the development of American law since *Sorrells* v. *United States* (1932),

form by the Supreme Court of New Zealand.[16] Nevertheless, the English courts were unable to accept this distinction and held that such a doctrine would be tantamount "to giving the judge the power of changing or disregarding the law . . . [and] would be seriously detrimental to public safety and to law and order".[17] Also, as Lord Fraser opines, such arguments cannot be logically supported:[18]

> The assertion by an accused person that he has been induced by some other person to commit a crime necessarily involves admitting that he has in fact committed the crime. Ex hypothesi he must have done the necessary act and have done it intentionally in response to the inducement. All the elements, factual and mental, of guilt are thus present and no finding other than guilty would logically be possible.

In his wide-ranging judgment in *Kirzner,* Laskin C.J.C. had occasion to summarise the English approach to the question of a defence of entrapment and stated that "in England, judicial revulsion against entrapment of an accused has been manifested not through the recognition of a defence on that ground, but rather through a discretionary control of the admissibility of evidence".[19] Although he favoured such an approach, he recognized that the road to Canada adopting that solution had been cut off by the decision of the Supreme Court of Canada in *Regina* v. *Wray*[20] which decided that no such residual discretion existed. The Supreme Court interpreted and relied upon a line of English authorities in arriving at its conclusions.[21] However, the decision of the House of Lords in *Sang* shows not only that that description of English law was inaccurate[22] but also demonstrates that a solution of that nature would be unsound both in logic and in practice. To adopt such a solution would be equal to letting in at the back door that which has

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287 U.S. 435, see Park, The Entrapment Controversy (1975-76), 60 Minn. L. Rev. 163.

[16] See *Regina* v. *Capner*, [1975] 1 N.Z.L.R. 411 and *Regina* v. *Pethig*, [1977] 1 N.Z.L.R. 448. The Supreme Court held that a judge had a discretion to exclude evidence if the police actually encouraged or stimulated offences that otherwise would not be committed. For an examination of the law leading up to these decisions, see Barlow, Recent Developments in New Zealand in the Law relating to Entrapment, [1976] N.Z.L.J. 304.

[17] *Supra*, footnote 1, at p. 1236, per Lord Salmon.

[18] *Ibid.*, at p. 1238.

[19] *Supra*, footnote 10, at pp. 494-495.

[20] [1971] S.C.R. 273.

[21] See *infra*, text accompanying footnotes 29-31.

[22] Laskin, C.J.C. is not alone in reaching this conclusion. Paterson contends that the English courts hold an untrammelled discretion to exclude evidence obtained by oppressiveness "and have a considerable margin of flexibility within which to operate and to achieve a significant degree of control over police malpractice"; *op. cit.*, footnote 9, at p. 267. Also, J.D. Heydon advocates the use of such a discretion in English law and suggests that it should be exercised after certain considerations have been taken into account: The Problem of Entrapment, [1973] Camb.L.J. 268.

been kept out at the front door;[23] "it is the law that there is no defence of entrapment . . . [and] the judge may not by the exercise of his discretion to exclude admissible evidence secure to the accused the benefit of a defence unknown to the law".[24] Moreoever, the House of Lords did not confine its remarks on exclusionary discretion to the defence of entrapment alone, but seized the opportunity to examine the much wider question of the scope and exercise of a criminal judge's discretion to exclude technically admissible evidence.

The Discretion to Exclude Evidence

It will be remembered that, in *Wray*,[25] the Supreme Court of Canada concluded by a majority, that there exists no residual discretion to exclude admissible evidence because its admission might bring the administration of justice into disrepute or be unfair to the accused.[26] The majority drew a sharp and important distinction between unfairness in the method of obtaining evidence and in the use to which it is put at trial.[27] The paramount duty of the trial judge is to secure a fair trial for the accused and, to this end, all relevant and logically probative evidence, regardless of how it was obtained, must be admitted unless its admission would jeopardize the likelihood of a fair trial. As Mr. Justice Martland noted:[28]

> The exercise of a discretion by the trial judge arises only if the admission of the evidence would operate unfairly. The allowance of admissible evidence relevant to the issue before the court and of substantive probative value may operate unfortunately for the accused, but not unfairly. It is only the allowance of evidence gravely prejudicial to the accused, the admissibility of which is tenuous and whose probative force in relation to the main issue before the court is trifling which can be said to operate unfairly.

In arriving at this decision, the court placed a restrictive interpretation on the English authorities of *Noor Mohamed* v. *The King*,[29]

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[23] *Supra*, footnote 1, at p. 61, per Roskill L.J.

[24] *Ibid.*, at p. 1245, per Lord Scarman; see also the observations of Lord Diplock, at p. 1227 and Lord Fraser, at p. 1238.

[25] *Supra*, footnote 20.

[26] The court also held following *Rex* v. *St. Lawrence* (1949), 93 C.C.C. 376, [1949] O.R. 215, that that part of inadmissible evidence confirmed by the discovery of subsequent facts is admissible.

[27] The majority consisted of Martland, Ritchie, Pigeon, Abbott, Fauteux and Judson JJ. A strong dissent was delivered by Cartwright C.J. and Hall and Spence JJ. who tended to blur the distinction between the right to a fair trial and fairness in obtaining of evidence.

[28] *Supra*, footnote 20, at p. 239.

[29] [1949] A.C. 182, [1949] 1 All E.R. 365.

Kuruma Son of Kaniu v. *The Queen*[30] and *Callis* v. *Gunn*[31] and doubted the wisdom of extending such an uncertain and unstructured concept as the judicial discretion to exclude evidence.[32]

Although this decision has been consistently followed by Canadian courts,[33] it was given a cold reception by many lawyers.[34] Apart from claiming that the precedential foundation of the decision was unsound and unjustifiable, the major thrust of the critics' arguments was that, by taking such a stance, the court had shown scant regard for individual rights and had provided no disincentive to the police to refrain from objectionable tactics and practices in the obtaining of evidence.[35] Indeed, much of the lingering dissatisfac-

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[30] [1955] A.C. 197, [1965] 1 All E.R. 236.

[31] [1964] 1 Q.B. 495 (C.A.), [1963] 3 All E.R. 677.

[32] As Mr. Justice Judson observed, "Judicial discretion . . . is a concept which involves great uncertainty of application. The task of a judge in the conduct of a trial is to apply the law and to admit all evidence that is logically probative unless it is ruled out by some exclusionary rule"; *supra*, footnote 20, at p. 300.

[33] See, for instance, *Cronkwright* v. *Cronkwright*, [1970] 3 O.R. 784; *Regina* v. *Glynn* (1971), 15 C.R.N.S. 343; *Regina* v. *Deleo* (1972), 18 C.R.N.S. 261; *Laporte* v. *Laporte* (1972), 18 C.R.N.S. 357; *Regina* v. *Darwin* (1974), 13 C.C.C. (2d) 432; *Regina* v. *Thompson* (1974), 26 C.R.N.S. 153; *Regina* v. *Tretter* (1974), 26 C.R.N.S. 144; *Regina* v. *Moore* (1974), 17 C.C.C. (2d) 348; *Regina* v. *Paquette* (1976), 27 C.C.C. (2d) 145; *Regina* v. *Turner* (1977), 19 N.S.R. (2d) 82; *Regina* v. *Powell* (1978), 37 C.C.C. (2d) 117; *Regina* v. *Dingham* (1978), 4 C.R. (3d) 193; *Regina* v. *Gill*, [1979] 1 W.W.R. 475; *Regina* v. *Andrews* (1979), 8 C.R. (3d) 1; and *Regina* v. *Letendre* (1979), 7 C.R. (3d) 320. It has been held, however, that *Wray* does not extend to collateral issues such as credibility and should be restricted to substantive issues: *Regina* v. *Hawke* (1974), 3 O.R. (2d) 210.

[34] For a survey of the allegedly disagreeable implications, see A.F. Sheppard, Restricting the Discretion to Exclude Admissible Evidence; An Examination of *Regina* v. *Wray* (1972), 14 Crim. L.Q. 334.

The case also elicited a response from the Federal and Ontario Law Reform Commissions. The Ontario Law Reform Commission's, Reform on The Law of Evidence (1976), p. 94, recommended that the Evidence Act of Ontario, R.S.O., 1970, c. 151, be amended to include a provision that "In a proceeding the court may refuse to admit evidence that otherwise would be admissible if the court finds that it was obtained by methods that are repugnant to the fair administration of justice and likely to bring the administration of justice into disrepute." The Federal Law Reform Commission's, Report on Evidence (1975) contains a draft Act and s. 15 provides that "Evidence shall be excluded if it was obtained under such circumstances that its use in the proceedings would tend to bring the administration of justice into disrepute"; sub-section (2) provides that: "In determining whether evidence should be excluded under this section, all the circumstances surrounding the proceedings and the manner in which the evidence was obtained shall be considered, including the extent to which human dignity and social values were breached in obtaining the evidence, the seriousness of the case, the importance of the evidence, whether any harm to an accused or others was inflicted wilfully or not, and whether there were circumstances justifying the action, such as a situation or urgency requiring the action to prevent the destruction or loss of evidence".

[35] An example of the strength of feeling that the decision has engendered is reflected in the words of Clayton C. Ruby: "The most significant event in Canadian

tion with the decision can be traced back to the derivative and sweeping nature of the court's argument and to the failure of the court to address itself to and articulate fully the major premises and principles upon which it based its decision. However, in what can be seen as support for the Supreme Court of Canada and a reply to its critics, the judgments of the House of Lords and the Court of Appeal in *Sang* provide ample support for the actual decision and general line of reasoning adopted by the majority in *Wray*.

In the Court of Appeal (Criminal Division), Roskill L.J., delivering the judgment of the court, undertook a thorough and informative review of the authorities[36] and rejected the argument that the trial judge possessed a discretion to exclude probative evidence on the particular facts. The court, therefore, reaffirmed the status of *Kuruma Son of Kaniu* v. *R.*,[37] that evidence which is relevant to the issue before the court is admissible, regardless of how that evidence has been obtained. It stated that this rule was to be qualified only in cases where the evidence was of little probative value but of highly prejudicial effect[38] and, in the case of confessions, improperly obtained. Roskill L.J. argued that the courts have always had power to exclude such evidence since "it is always the duty of the Court to

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law in the last 10 years was the case of *Regina* v. *Wray* in 1970, in which it was brought out that the judge has little or no discretion to exclude from a trial illegally-obtained Crown evidence. This meant that in a trial, a piece of evidence can be used no matter how it was obtained. In other words, it sanctions police lawlessness in order to obtain evidence. The significance of this event is that it encourages police to commit crimes in the course of gathering evidence against a suspect, and has embedded in our legal theory the dangerous idea that the end justifies the means.": Canadian Lawyer (December 1979), at p. 29.

[36] Roskill L.J. traced the development of the law from the observations of Lords Moulton and Reading, respectively, in *R.* v. *Christie*, [1914] A.C. 545, at pp. 559 and 564-565, [1914-15] All E.R. 63, at pp. 69 and 71; to the statements of Lord Du Parcq in *Noor Mohamed* v. *The King*, *supra*, footnote 29, at pp. 192 (A.C.), 370 (All E.R.), and of Viscount Simon in *Harris* v. *D.P.P.*, [1952] A.C. 694, at p. 707, [1952] 1 All E.R. 1044, at p. 1048; and of their treatment by Lord Goddard C.J. in *Kuruma Son of Kaniu* v. *The Queen*, *supra*, footnote 30, at pp. 204, (A.C.), 239 (All E.R.). Other cases discussed are *Brannon* v. *Peek*, [1948] 1 K.B. 68, [1947] 2 All E.R. 572; *R.* v. *Payne*, [1963] 1 All E.R. 848, [1963] 1 W.L.R. 637; *R.* v. *Murphy*, [1965] N.I. 138; *Callis* v. *Gunn*, *supra*, footnote 31; as well as a series of recent cases in the area, notably, *R.* v. *Birtles*, [1969] 2 All E.R. 1131; *R.* v. *McCann* (1972), 56 Cr. App. R. 359; *R.* v. *McEvilly* (1973), 60 Cr. App. R. 150; *R.* v. *Mealey* (1974), 60 Cr. App. R. 59; *R.* v. *Willis*, [1976] Crim. L.R. 127; and *Jeffrey* v. *Black*, [1978] Q.B. 490, [1978] 1 All E.R. 555.

[37] *Ibid.*; see the remarks of Roskill L.J., *supra*, footnote 1, at pp. 50 and 62.

[38] It is unclear whether Roskill L.J. would apply this equation to any evidence called or only to evidence of so-called "similar facts". His concluding remarks, *supra*, footnote 1, at p. 62, would seem to suggest the latter stance; but compare his views expressed, *ibid.*, at p. 53, which can be read as envisaging a wider scope for this discretion to exclude.

safeguard an accused person against the risks of wrongful conviction in consequence of the admission of evidence of that kind''.[39] The existence of any wider discretion was denied, although the court did observe that ''if . . . there is a residual discretion of the kind contended for, it can . . . only be where the actions of the prosecution amount to an abuse of the process of the court and are oppressive in that sense''.[40]

Leave to appeal from this decision was granted by the House of Lords as a point of law of general public importance was involved in the decision; namely, whether a trial judge[41] had a discretion to refuse to allow evidence, being evidence other than evidence of admission, to be given in any circumstances in which such evidence is relevant and of more than minimal probative value. Their Lordships were unanimous in dismissing the appeal and, although five separate opinions were delivered, all agreed with the answer to the stated question given by Lord Diplock:[42]

> (1) A trial judge in a criminal trial has always a discretion to refuse to admit evidence if in his opinion its prejudicial effect outweighs its probative value.
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> (2) Save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after the commission of the offence,

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[39] *Ibid.*, at p. 62.

[40] *Ibid.*, at p. 63. The essence of the doctrine of abuse process is that it provides a device through which the courts can ensure that the use to which proceedings are put and the exercise of prosecutorial discretion are controlled; ''the jurisdiction which is inherent in a superior court of law is that which enables it to fulfill itself as a court of law'': see Jacobs, The Inherent Jurisdiction of the Court (1970), 23 Curr. L. Prob. 23.

The continued existence and scope of the inherent jurisdiction of the criminal courts to prevent an abuse of process has been severely challenged by the recent decisions of the Supreme Court of Canada in *Regina* v. *Osborn*, [1971] S.C.R. 184 and *Rourke* v. *The Queen*, [1978] 1 S.C.R. 1021. However, the preferred view seems to be that, as a result of the uncertainty and division of opinion expressed in those cases, the doctrine of abuse of process still exists, but is only applicable in exceptional circumstances; see Cohen, Abuse of Process: The Aftermath of *Rourke* (1977), 39 C.R.N.S. 349 and Olah, The Doctrine of Abuse of Process: Alive and Well in Canada (1978), 1 C.R. (3d) 341. However, it would seem that those exceptional circumstances would be ''so rare as to be predictably more theoretical than practical''; see Jacobs, Comments (1978), 12 U.B.C.L. Rev. 127.

[41] Their Lordships took the view that their comments upon the existence of the discretion were not confined to trials by jury and that the discretion, whatever be its limits, extended to whoever presides in a judicial capacity over a criminal trial, whether it be held in the Crown Court or in a Magistrates Court. See, for example, Lord Diplock, *supra*, footnote 1, at p. 1225; Viscount Dilhorne, at p. 1234; Lord Fraser, at p. 1242; and Lord Scarman, at pp. 1246-1247.

[42] *Ibid.*, at p. 1231. This was the answer agreed to by Viscount Dilhorne, at p. 1235; Lord Fraser, at p. 1242; and Lord Scarman, at p. 1247. Lord Salmon, at p. 1237, offered his conclusions in different terms but said that he understood Lord Diplock's proposition to accept that which he had stated and expressed his agreement, on that basis.

> he has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means.

The primary interest in the case, therefore, stems from the differing approaches taken to the scope of the discretion to exclude relevant and technically admissible evidence, rather than the existence of such a discretion which all of their Lordships accepted.[43] Lord Diplock was of the clear opinion that there was a general rule of practice whereby a trial judge has the discretion to exclude relevant evidence when its prejudicial influence was out of proportion to its true evidential value.[44] However, he saw the difficult question to be the extent of such a discretion. For Lord Diplock, the source of the arguments for a wider discretion can be traced to a misinterpretation of the celebrated dictum of Lord Goddard in *Kuruma*[45]: "No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against the accused . . . If, for instance, some admission of some piece of evidence, e.g., a document, had been obtained from a defendant by a trick, no doubt the judge might properly rule it out."[46] Lord Diplock rationalises this dictum with his own conclusions by arguing that the situation envisaged by Lord Goddard would clearly fall within the second limb of his statement of the law and would be treated in the same manner as an unfairly induced confession.[47] Also, His Lordship endeavoured to explain *Regina* v. *Payne*[48] on the same ground, the only case relied upon by Sang's counsel in which evidence was actually excluded because it had been obtained unfairly. Accordingly, the core of the opinion is that the court should not be concerned, except in the case of admissions, with how evidence was obtained but with

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[43] See the observations of Lord Diplock, *ibid.*, at p. 1228; Viscount Dilhorne, at pp. 1231-1232; Lord Salmon at p. 1237; Lord Fraser, at pp. 1238-1239; and Lord Scarman at p. 1243.

[44] *Ibid.*, at p. 1228.

[45] *Supra*, footnote 30.

[46] *Ibid.*,at p. 204 (A.C.).

[47] *Supra*, footnote 1, at p. 1229. Reference was made in this context to *R.* v. *Barker*, [1941] 2 K.B. 381, [1941] 3 All E.R. 33, where an incriminating document was obtained from a defendant by a promise of favours and was held to be inadmissible. In his opinion, Viscount Dilhorne also referred to this case in similar vein: see *ibid.*, at p. 1233. As Cross points out in Cross on Evidence (5th ed., 1979), in the Addendum, p. ix, *Barker* was a decision which had been thought to turn on admissibility as a matter of law. Viscount Dilhorne was, however, more critical in his observations on Lord Goddard's dictum, stating that this was "not an instance of evidence which a judge can exclude on account of its prejudicial effect as compared with its probative value and is not easily reconcilable with his statement that the court is not concerned with how evidence was obtained", *ibid.*

[48] [1963] 1 All E.R. 848, [1963] 1 W.L.R. 637.

the use to which the prosecution may put such evidence at trial. In so holding, Lord Diplock was anxious to avoid "a claim to a judicial discretion to acquit an accused of any offences in connection with which the conduct of the police incurs the disapproval of the judge".[49]

Viscount Dilhorne took a similar approach to Lord Diplock asserting that, in his view, the trial judge has the ability to "disallow the use in any trial of admissible relevant evidence if . . . its use would be accompanied by effects prejudicial to the accused which would outweigh its probative value".[50] Despite a minor disagreement on the function of the judicial process,[51] both Lord Salmon and Lord Scarman were united in the view that the trial judge possesses "a discretion to exclude legally admissible evidence if justice so requires".[52] Lord Fraser was of a similar opinion. He stated categorically that "the discretion is not limited to excluding evidence which is likely to have prejudicial effects out of proportion to its evidential value",[53] arguing that "the dicta are so numerous and so authoritative that I do not think it would be right to disregard them"[54] or to limit them in the way suggested by Lord Diplock and Viscount Dilhorne. Also, he did not share the apprehensions of Lord Diplock and RoRoskill L.J.[55] about the repercussions of allowing such a wide discretion. He stated:[56]

> The result will be to leave judges with a discretion to be exercised in accordance with their individual views of what is unfair or oppressive or morally reprehensible. . . . But I do not think there is any cause for anxiety in that. Judges of all Courts are accustomed to deciding what is reasonable and to applying other standards containing a large subjective element . . . . I do not think it would be practicable to attempt to lay down any more precise rules because the purpose of the discretion is that it should be sufficiently wide and

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[49] *Supra*, footnote 1, at p. 1227. Roskill L.J., *ibid.*, at p. 62, shared similar sentiments: "subjective views of what is morally permissible or reprehensible are an unsafe guide to the administration of the criminal law and to the proper exercise of judicial discretion". But compare the views expressed by Lord Fraser, *infra*, text accompanying footnote 56.

[50] *Supra*, footnote 1, at pp. 1231-1232.

[51] Lord Salmon, *ibid.*, at p. 1237, was of the opinion that "the decision whether evidence may be excluded depends entirely on the particular facts of each case and the circumstances surrounding it, which are infinitely variable"; whereas Lord Scarman expressed the view, *ibid.*, at p. 1244, that "one must . . . emerge from that last refuge of legal thought, that each case depends on its facts, and attempt some analysis of principle".

[52] *Ibid.*, at pp. 1237 and 1243, following Lord Reid in *Myers* v. *D.P.P.*, [1965] A.C. 1001, at p. 1024, [1964] 2 All E.R. 881, at p. 887.

[53] *Ibid.*, at p. 1239.

[54] *Ibid.*, at p. 1241.

[55] *Supra*, footnote 49.

[56] *Supra*, footnote 1, at pp. 1241-1242.

> flexible to be capable of being exercised in a variety of circumstances that may occur from time to time but which cannot be foreseen.

The lack of consensus apparent in the opinions is puzzling, especially considering that all their Lordships agreed with the answer to the stated question formulated by Lord Diplock.[57] Moreover, the central and common theme of each opinion was the duty of the judge to secure a fair trial for the accused.[58] Also, there was substantial agreement on how such a duty should be fulfilled in considering the conduct of the police:

> The role of the judge is confined to the forensic process. He controls neither the police nor the prosecuting authority. He neither initiates nor stifles a prosecution. . . . The judge is concerned only with the conduct of the trial.[59]

However, although all of their Lordships posit the existence and scope of the discretion upon the notion of fairness at trial, there is a major difference of opinion over the ideal of "fairness" and the way in which such a concept is to be articulated within the abstract confines of a discretion to exclude legally relevant evidence. Opinions differed as to what would constitute the unfair use of evidence at the trial and their Lordships' conclusions stemmed from their views on the freedom of the trial judge to determine this for himself. For example, Lord Fraser made it clear that, in his view, an integral part of the judicial function is the making of subjective value judgments by the trial judge on what is, and what is not, morally permissible or reprehensible.[60] Lord Diplock, on the other hand, found himself less able to tolerate a system in which the judge is endowed with an untrammelled freedom to make such decisions.[61] As a result, Lord Fraser, along with Lords Salmon and Scarman, was prepared to subscribe to a discretion, the scope of which was to be related to the requirements of justice in the particular case. Lord Diplock and Viscount Dilhorne, however, took a more cautious stance, reflected in their restriction of the width of the discretion to the situation where the prejudicial effect of adducing the evidence would exceed its probative value. This solution has the merit of presenting the trial judge with, at least, minimally defined legal guidelines on which to base his decision to exclude or not and one which would be susceptible to appellate review.

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[57] *Supra*, text accompanying footnote 42.

[58] See *e.g.*, the observations of Lord Diplock *supra*, footnote 1, at p. 1230; Viscount Dilhorne, at p. 1232; Lord Salmon, at p. 1237; Lord Fraser, at p. 1239; and Lord Scarman, at p. 1244.

[59] *Ibid.*, per Lord Scarman, at p. 1245. See also the observations of Viscount Dilhorne, at p. 1232.

[60] See text accompanying footnotes 49 and 56, *supra*.

[61] *Ibid.*

It is submitted that the House of Lords was committed to admit the existence of, at least, a partial exclusionary discretion as a direct result of the *Kuruma* doctrine. Any scheme of admissibility which permits all relevant evidence, however obtained, to be adduced without any reference to the fairness of calling such evidence will provoke important responses. The judiciary would fear a lack of control over the conduct of the trial, if the prosecution were free to call any relevant evidence it desired. It would seriously handicap the trial judge's ability to maintain an impartial balance between prosecution and defence at a criminal trial. Also, those who fear for individual liberty would resent such a blatant intrusion upon the fundamental right of the accused to a fair trial, and would view it as yet another weapon being placed at the disposal of an already well-stocked prosecutor's armoury. However, the sanctioning of a wide exclusionary discretion is not without its drawbacks and would have potentially strong repercussions for the legal system.

Apart from the obvious danger of the capricious exercise of such discretion, with the likelihood of subverting existing rules of law,[62] there is also the possibility that there would occur an ultimate shift in the regime adopted to control the admissibility of evidence, in general, and illegally obtained evidence, in particular. It is but a short step from admitting the existence of a wide exclusionary discretion based on fairness to a scenario in which the admissibility of evidence depends not upon the *Kuruma* test but upon a subjective judicial assessment of fairness. As Cross notes, the Anglo-Canadian law of evidence "still consists to a large extent of exclusionary rules . . . declaring , in other words, what is not judicial evidence".[63] The premise for such a conclusion is that, *prima facie*, all relevant evidence is admissible. Accordingly, a wide exclusionary discretion would remove questions of admissibility from the relative certainty of established substantive rules and expose them to an ill-defined judicial discretion. Such a drastic upheaval can surely only be reached by conscious reflection, undertaken in a sound and principled fashion, and cannot be allowed to slip inadvertently into the basis of the law of evidence as a by-product of discretion. Furthermore, it can be argued that the protection of individual rights

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[62] See, for example, the instant case, in which the use of such a discretion would have permitted the defence of entrapment to be re-introduced by the "back door", *supra*, footnote 23. There is also evidence of judicial reluctance to exercise such a discretion. As Roskill L.J. noted, *supra*, footnote 1, at p. 63, *Payne* was the only case in which a discretion was exercised to exclude evidence of this kind and one would have thought that, were such a discretion to exist, it would have been invoked to exclude the evidence in cases such as *Kuruma* and *Jeffrey* v. *Black*, *supra*, footnote 36.

[63] *Supra*, footnote 47, at p. 1.

is much better served by a well-ordered legal system than being left to the unsafe and uncertain dictates of judicial discretion. It is by no means certain that all judges would adopt principles acceptable to the guardians of individual liberty and could not be guaranteed to exercise that discretion for the benefit of those most in need of its assistance.

In arriving at its decision, the House of Lords will be seen by many as having compounded the injustice of *Wray*. By turning a blind eye to the manner in which evidence is obtained, the courts will be charged with aiding and abetting police misconduct; their role as bulwarks against oppression and as defenders of civil liberties will be severely compromised. However, on closer examination, the stance taken is not so indefensible and is revealed as being based on logical argument and sound experience. At the heart of the decision lies the belief that the rules of evidence are an inappropriate and ineffective means by which to control police behaviour.[64] This belief can be supported by two convincing arguments. Following the American Supreme Court's introduction of a rigorous regime of procedural safeguards, based on the constitutional requirements of due process, to protect arrested suspects and to curb police misbehaviour,[65] a series of empirical studies revealed that the new regime had no significant impact on police practice and, in certain instances, actually encouraged police perjury.[66] Indeed, the existence of a wide exclusionary discretion would have the effect of deflecting the truth-finding process and allowing guilty persons to go free. It is strange logic that in seeking to support and dispense justice, attention is focused not on bringing to account the policeman

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[64] For a thorough canvassing of all the issues and arguments in this debate, see Wilkey, The Exclusionary Rule: Why Suppress Valid Evidence (1978), 5 Judicature 214.

[65] It is a judge-made rule and originated in *Weeks* v. *United States* (1914), 232 U.S. 384. Although the rule is not required by the American Constitution, it has been developed by invoking the Fifth, Sixth and Fourteenth Amendments (the right against self-incrimination; the right to counsel; and the necessity for due process of law). Its modern formulation stems from *Mapp* v. *Ohio* (1961), 367 U.S. 643, and its full significance was declared in *Miranda* v. *Arizona* (1966), 384 U.S. 436. This strengthening of the doctrine came as a result of a strong liberal lobby to curb police activities. However, some observers felt that the Supreme Court went much too far and that the new regime would unnecessarily hamper the police in their legitimate role and would favour the criminal unduly; see Elsen and Rosett, Protections for the Suspect under *Miranda* v. *Arizona* (1967), 67 Col. L. Rev. 645.

[66] See Special Project, Interrogation in New Haven: The Impact of *Miranda* (1967), 76 Yale L.J. 1519; See Burger and Wettick, *Miranda* in Pittsburgh — A Statistical Study (1967), 29 U. Pitts. L. Rev. 1; Medasie, Zeitz and Alexander, Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement *Miranda* (1968), 66 Mich. L. Rev. 1347; and Oaks, Studying the Exclusionary Rule in Search and Seizure (1970), 37 U. Chi. L. Rev. 655.

who acted improperly, but on setting free a person who committed some criminal act; "the criminal is to go free because the constable has blundered".[67] In short, the rationale for an exclusionary discretion is built on the spurious contention that two wrongs make a right. The control of the police must result in the protection of society and not the release of criminals.

The corollary of such arguments is not that the courts are disinterested in or condone police malpractice, but that other methods will have to be utilized to monitor police activity. It is a pragmatic conclusion based on the most efficient and effective allocation of legal resources. The available alternatives are increased police disciplinary action, improved police training[68] and responsive tortious remedies.[69] Although the present efficacy of these alternatives is questionable, the problem lies not so much in their suitability but in their application and performance. Each alternative strikes directly at the alleged misconduct and can be pursued independently from the criminal prosecution of the victim. Indeed, the existence of an exclusionary discretion undercuts and inhibits the development and increased efficiency of such alternatives.

An issue touched upon tangentially by their Lordships was the question of the exclusion of legally admissible confessions. Their comments were necessarily *obiter*, but some interesting points were raised. Lord Diplock discusses the role of the trial judge in relation to confessions and "evidence obtained from the defendant after the commission of the offence that is tantamount to a confession".[70] Confessions are, once more, treated as a special type of evidence, enabling the judge to control improper prosecution activities entered into before the commencement of the proceedings. However, the only reasons offered for this special treatment are said to be historical[71] and no real investigation into the special status of this type of evidence is put forward. His Lordship also delivers the clearest exposition by an English judge of the rationale for the

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[67] *People* v. *De Fore* (1926), 242 N.Y. 13, at pp. 23-24, per Cardozo J.

[68] For an overview and appraisal of the problem of controlling the police by internal disciplinary procedures and more responsible training, see Grant, The Police: Organization, Personnel and Problems, in The Practice of Freedom, edited by MacDonald and Humphrey (1979), p. 405 and The Control of Police Behaviour, in Some Civil Liberty Issues of The Seventies, edited by Tarnopolsky (1974), p. 75.

[69] For an analysis and evaluation of the available tortious remedies, see Weiler, The Control of Police Arrest Practices: Reflections of a Tort Lawyer, in Studies in Canadian Tort Law, edited by Linden (1968), p. 416 and Spiotto, The Search and Seizure Problem — Two Approaches: The Canadian Tort Remedy and the U.S. Exclusionary Rules (1973), 1 J. of Pol. Sci. and Ad. 36.

[70] *Supra*, footnote 1, at p. 1230.

[71] *Ibid.*

exclusion of confessions, stating that: "the underlying rationale of this branch of the criminal law, though it may have been based on ensuring the reliability of confessions is, in my view, now to be found in the maxim, *Nemo debet prodere se ipsum*, no one can be required to be his own betrayer, or in its popular English mistranslation 'the right to silence'."[72] The move, therefore, is away from trustworthiness as the sole rationale for the doctrine but it remains to be seen what effect this will have on the *Wray* doctrine in Canada.[73]

The importance of the *Sang* case lies in the fact that it re-affirms the foundation of English case law upon which *Wray* was built. It is by no means certain, however, that the decision of the House of Lords will provide any real guidance to the trial judge in the exercise of his discretion to exclude evidence in the individual case. Nevertheless, there can be no doubt that the opinions of their Lordships are intended to redirect our energies for controlling police behaviour away from possible substantive defences and exclusionary rules of evidence towards alternative solutions.

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[72] *Ibid*. Such an approach was recently canvassed by Dubin J.A. in his dissent in *R.* v. *Rothman* (1979), 42 C.C.C. (2d) 377, at p. 385 (Ont. C.A.).

[73] See Weinberg, The Judicial Discretion to Exclude Relevant Evidence (1975), 21 McGill L.J. 1.

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[1] R.S.C., 1970, c. N-1, as am.