Irish Supreme Court Overturns Absolute Exclusionary Rule for Unconstitutionally Obtained Evidence

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On Wednesday, the Irish Supreme Court ruled by a majority of 4-3 that evidence obtained in criminal cases in breach of constitutional principles need not necessarily be excluded at trial, overturning a 24 year-old precedent on foot of which all such evidence was automatically excluded. The case is notable on a number of levels: it has obvious implications for the conduct of criminal trials, and raises interesting issues around the retrospective application of declarations of unconstitutionality. It also possibly marks the beginning of a more assertive period for the Irish Supreme Court, following two decades of marked restraint.

The position on the admissibility of unconstitutionally obtained evidence in criminal trials in Ireland was unsettled for some time, until the Supreme Court decision in *People (DPP) v Kenny* [1990] 2 IR 110 established that evidence obtained through a breach of a constitutional right is not admissible; to hold otherwise would constitute a breach of the requirement in Article 38.1 that criminal offences shall only be tried "in due course of law". The key issue in the debate is whether the breach of constitutional rights was deliberate and conscious, or whether an inadvertent breach should still lead to the evidence being excluded. A 3-2 majority of the Supreme Court in *Kenny* felt that the evidence should be excluded either way, as "a positive encouragement to those in authority over the crime prosecution and detection services of the State to consider in detail the personal rights of the citizens as set out in the Constitution, and the effect of their powers of arrest, detention, search and questioning in relation to rights" (*per* Finlay CJ at 133). Around the same time, in *People (DPP) v Healy* [1990] 2 IR 73, McCarthy J stated at 89 that it was irrelevant whether the police realised that they were breaching constitutional rights:

> *A violation of constitutional rights is not to be excused by the ignorance of the violator no more than ignorance of the law can ensure to the benefit of a person who … is presumed to have intended the natural and probable consequences of his conduct. If it were otherwise, there would be a premium on ignorance.*

As against this, Lynch J, in his dissenting judgment in *Kenny*, stated at 142 that unconstitutionally obtained evidence should only be excluded if there is an "element of blame or culpability or unfairness (including any such element to be inferred by the reasonable application of the doctrine *ignorantia juris haud excusat*)", and that "adequate excusing circumstances" may exist. Similar suggestions had been made in earlier cases such as *People (DPP) v Shaw* [1982] IR 1.

In this latest judgment, titled *DPP v JC* [2015] IESC 31, this automatic version of the exclusionary rule was described by O'Donnell J (at para 95) as "the most extreme position adopted in the common law world", noting that the courts in the US, the UK, Canada, New Zealand and South Africa all allow the admission of evidence obtained in circumstances amounting to a breach of fundamental rights. He concluded: "with great respect to my colleagues present and past who take or took a different view, that I do not believe that the decision in *Kenny* can withstand scrutiny. It is, in my view, plainly wrong. It is long past time that it was addressed and, so far as it is possible for us to do so, corrected" (para 115). The majority ruling will allow for unconstitutionally obtained evidence to be admitted provided that it was obtained in good faith and that there was no deliberate or conscious breach of constitutional rights. Clarke J set out the new test on admissibility in part 5 of his judgment. The more flexible approach adopted by the Supreme Court in *JC* is in line with a number of decisions of the European Court of Human Rights, including *Khan v United Kingdom* (2001) 31 EHRR 1016 and *Allan v United Kingdom* (2003) 36 EHRR 143.

The issue is obviously the subject of significant judicial disagreement in Ireland; *Kenny* was a 3-2 decision in

favour of the automatic version of the rule, and the decision in *JC* to overturn it was a 4-3 decision. O'Donnell J may have been certain that *Kenny* was "plainly wrong", but his colleagues McKechnie J, Murray J and Hardiman J vigorously dissented from this view. Hardiman J described *Kenny* as "one of the monuments of Irish constitutional jurisprudence" and stated that he was "gravely apprehensive" that the majority decision "is a major step in the disengagement of this Court from the rights-oriented jurisprudence of our predecessors". McKechnie J described the new test set down by the majority as "unworkable".

A side issue that arises in the case is the fact that the evidence was obtained not merely due to unconstitutional action, but pursuant to unconstitutional legislation. *JC* concerned evidence obtained pursuant to a search warrant issued under section 29(1) of the Offences Against the State Act 1939 . That provision was struck down by the Supreme Court in *Damache v DPP* [2012] IESC 11. Strictly speaking, therefore, any evidence obtained pursuant to the warrant was unconstitutionally obtained. In *Murphy v. Attorney General* [1982] IR 241 at 313, Henchy J had stated that "[o]nce it has been judicially established that a statutory provision is invalid, the condemned provision will normally provide no legal justification … for transactions undertaken in pursuance of it; and the persons damnified by the operation of the invalid provision will normally be accorded by the Courts all permitted and necessary redress." Thus, under the previous automatic exclusionary rule, any evidence obtained pursuant to unconstitutional legislation would have to be excluded.

However, where evidence is obtained by police under the authority of legislation which has been enacted by parliament and which enjoys the presumption of constitutionality, it can hardly be said that they were "deliberately and consciously" acting unconstitutionally when serving the warrant. The majority accepted the DPP's argument that police acted reasonably in serving warrant issued under section 29(1) at a time when they could not reasonably have been aware of any issues relating to the constitutionality of that provision. On the other hand, given that the entire purpose of the legislative provision in question is to obtain evidence for use in criminal proceedings, it seems somewhat perverse to find the legislation to be unconstitutional and yet admit the evidence.

Having said that, Irish case law imposes limits on the retroactive effect of declarations of unconstitutionality. Even where a statute creating a criminal offence is struck down, persons previously convicted of that offence will not necessarily have their conviction vacated or be released from prison, notwithstanding the fact that in principle, the offence was never validly enacted to begin with (see *A v Governor of Arbour Hill Prison* [2006] 4 IR 88). The impact in this case is arguably less harsh, given that it relates only to the admissibility of evidence and not to the very offence, conviction and sentence involved.

A further concern relating to retrospectivity in the case is that the accused party now potentially faces a re-trial pursuant to rules of evidence that differ from those that pertained at the time that the offence was committed. In his dissenting opinion, Murray J stated that this changed the goal posts, not during the game, but after the game was over. Thus, while the accused is denied the benefit of a retrospective application of a constitutional decision in his favour (i.e. the declaration that the provision authorising the search warrant is unconstitutional), he is not shielded from a retrospective application of a constitutional decision not in his favour (i.e. the overturning of the automatic exclusionary rule). There is an element of arbitrariness to this that raises concerns from a rule of law perspective.

JC is a decision that will long exercise the minds of lawyers and legal scholars in Ireland. Following the establishment of a Civil Court of Appeal in 2015, the Supreme Court has been relieved of a significant volume of routine appellate work that would in most countries not reach the Supreme Court. The intention was to allow it to focus more on constitutional matters and the development of the law. This is arguably the first major landmark in that process, and one which some commentators have linked to the presence of a relatively new cohort of younger judges on the court. Time will tell whether this new-look court will indeed adopt a more assertive posture, or whether the previous tendency of Irish courts to preserve the status quo in the name of neutrality persists into the future.

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