European Criminal Bar Association

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NATIONAL DELEGATE REPORT – IRELAND

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***By way of demonstrating how interesting life is for a criminal practitioner in Ireland at the moment is, what follows in italics is the text of the National Delegate report which I had prepared prior to 15th April 2015 and the seminal decision of our Supreme Court in* DPP v JC**

"Introduction

Ordinarily in Ireland we expect at least one significant piece of legislation in the criminal's year each year. However, because of the difficulties managing our economic situation, and the requirements imposed by the troika, government focus has drifted away from criminal justice matters and legislation has been reduced in this area as a result. The only significant legislative development has been the passage of the Act providing for the establishment of a DNA database.

However, there have been developments outside of Parliament, which are of great concern to criminal lawyers.

Surveillance

In the course of complying with an order for discovery made in a controversial civil case, it emerged that there had been a widespread practice of telephone calls made to police (garda) stations being recorded. These included conversations between lawyers and suspected clients held in custody. Many defence lawyers, myself included, had always operated on the basis that it was likely that our calls were being listened in to. I had never, however, suspected that they actually were recording calls on a routine basis.

The resultant public concern lead, ironically, to the resignation of the Chief of Police, who disclosed that the practice had been ongoing, and subsequently to the resignation of the Secretary General of the Department of Justice and the Minister for Justice himself.

The government established a committee under the widely respected retired Supreme Court Judge Mr Justice Nial Fennelly, a former Advocate General of the European Court, to investigate the practice.

While he has not yet issued a final report, he has made it public that the volume of the recordings is such that to listen to them all would take decades rather than years and that, accordingly, his report will, necessarily, deal with representative issues, rather than a comprehensive review of all improper recording.

The fact that this practice was ongoing at a domestic level further fuels the concerns of defence lawyers that their calls are being eavesdropped by foreign governments, especially the United States.

The Courts

During this period of comparative inactivity by the Parliament, our courts have been very active and have brought in a number of judgments widely welcomed by criminal lawyers.

Gormley & White

In this case, which dealt with the entitlement to legal advice for persons in custody, our Supreme Court went beyond the facts of the individual cases, to make a broad pronouncement to the effect that if, in a future case that emerged the a suspect had asked for his lawyer to be present during interrogation and that request was refused, the court might proceed to exclude any evidence obtained thereby. Clearly sensing the mood of the court, the Director of Public Prosecutions very swiftly issued a directive to the police force, to the effect that they should accommodate these requests with immediate effect.

Overnight, defence lawyers went from a culture where we were entitled to visit our clients and advise them before interrogation, to having a situation, familiar in most other jurisdictions, of being present during interrogation.

That specific right had been previously refused by our Supreme Court in the case of Lavery -v- Member in Charge of Carrickmacross Garda Station, and, as Mr Lavery was not prosecuted for any offence, the European Court of Human Rights would not consider his complaint. We were hopeful, of course, that the thinking of the Strasbourg Court in Salduz, Brusco, etc., and of the UK Supreme Court in Cadder, would bring this situation about, in the long term, it was a surprise to us that it happened so swiftly. We are still grappling with issues, including proper training for lawyers, availability of lawyers, the legal aid that should be provided and the simple logistics of having to remain with an investigation which is being conducted at a time when court obligations also arise.

Damache -v- DPP

Because of our complicated political history, Ireland has, for some centuries, been subject to special emergency type legislation dealing with political crime. Even after the foundation of

the independent state, these measures continued on the statute book and, under the Offences against the State Act, 1939, there was an exceptional provision which entitled a senior police officer to issue to his subordinates a search warrant. This was in contradistinction to the ordinary position which applied, namely that a court would have to authorise a search. It also transpires in violation of the constitutional inviolability of the dwelling provision.

Surprisingly, in a case which had Al Qaeda overtones, our Supreme Court held that the section 29 warrant was unconstitutional and could not be relied upon. Many decades of unsuccessful challenge to the warrant were cast aside in one fell swoop. Cynical commentators would point out that the courts that had the greater experience of dealing with IRA cases would never have come to the same conclusion!

Bederev

In a decision which might have resonance in other member states, our court took the view that the parliamentary policy of criminalising the possession of certain drugs, on the basis that a secondary piece of legislation (a statutory instrument), would define what the criminalised drugs were, was a wrongful excess of Parliamentary authority, and that the net effect was that drugs not mentioned in the primary legislation were not to be deemed criminal at all. Of course, Parliament convened immediately and rescinded, or re-enacted, the necessary provision."

Supreme Court of Ireland 15th April 2015 DPP v JC

"All is changed,changed utterly a terrible beauty is born" (W.B.Yeats)

In this case, the Director of Public Prosecutions exercised a rarely invoked power under Section 23 Criminal Procedure Act 2010 to appeal against a legal ruling which led to an acquittal in a case. The legal ruling at issue had been the exclusion from evidence of the product of a search which had been purportedly authorised by a Section 29 Offences Against The State Act Warrant. This Warrant, issued by one policeman to another was of the same kind used in the previously referred to case of Damache where the court struck down that power in its entirety as being unconstitutional. However the Warrant at issue in the JC case had been issued and exercised before the Supreme Court had made its ruling in the Damache case.

By way of brief background, in the Irish system of hierarchy of rights if evidence is obtained illegally it might nonetheless be admitted into evidence in the exercise of the Judge's discretion. However if the breach is not a mere illegality but rather a breach of a constitutional right, the most common being an improper arrest or detention (right to liberty) or an improper search (the inviolability of the dwelling) then the evidence is automatically excluded from consideration. The position was most clearly stated in the 1990 case of DPP-v Kenny

In Ireland, as elsewhere, opinion among criminal lawyers is sharply divided as to the merits of the exclusionary rule. On the one hand there were those who believe

that it's apparent clarity, and its strong deterrent effect against breaches of constitutional rights improve the administration of justice. Others, and not just prosecutors, held a deep sense of frustration that entire prosecutions could collapse because of an apparently minor clerical error which would have been considered immaterial if it had been a mere illegality, but which was fatal to the prosecution because it touched on a constitutional right resulting in evidence being excluded. In the instant case one can see how a court would be persuaded of the difficulties for policemen acting on foot of a power which was at the time believed to be both lawful and constitutional, only to be declared unconstitutional subsequently by a court ruling.

As a cynical aside, I would point out that that the Damache case itself related to a suspected Al Qaeda member (a rarity before the Irish courts) whose lawyers took a pre-emptive strike by bringing Judicial Review (civil) proceedings seeking to declare the power unconstitutional.

Generations of court challenges to powers under the Offences against the State Act on behalf of (usually) IRA members charged before our nonjury Special Criminal Court failed to dislodge similar emergency powers in the past .. Thus a cynical person (and naturally I am not one) would suggest that the " floodgates" argument was not considered in Damanche because it was not a truly domestic case.

In any event the Supreme Court gave its ruling on the 15th April 2015 and it will be truly considered a landmark judgement for many reasons.

For law enforcement undoubtedly there will be a review of cases which were considered incapable of successful prosecution because of some identified breach of constitutional rights which may now be prosecuted.

Perhaps there will even be retrials in cases of previous acquittals with the prosecution contending that the ruling in JC amounts to a "newly discovered fact" which entitles the prosecution in our very limited jurisdiction for retrials to bring a fresh prosecution.

The converse argument led to a highly nuanced jurisprudence following the Damanche decision as parties who had been convicted on foot of evidence obtained by Section 29 warrants naturally sought to overturn their convictions. This led to the following anomalous developments.

Cases that were awaiting trial but which turned on the Section 29 Warrants were in many but not all instances discontinued.

Cases where the Warrant had been challenged a trial and the appeals were pending those appeals were generally allowed.

In some cases where the Warrants had not been challenged but there was an appeal pending on other grounds, leave was granted to extend the Grounds of Appeal to include Warrant point.

In cases were all appeals had been concluded and an application was made to revisit the conviction under the " newly discovered evidence" provisions, permission was refused because the courts took the view that the fact that a power was unconstitutional, did not amount to a newly discovered fact even though the court had not previously declared that to be the position.

The same argument applied in cases such as A v The Governor of Wheatfield Prison where our law criminalising sex with a minor was one of strict liability, not providing for a defence of a genuine and reasonable belief that the person was of full age. Our court had held in the famous C v Governor of Arbour Hill case that the criminalising provision was repugnant to the constitution.

A who was serving a sentence under the impugned provision applied for his release but the court held that as the point had not been raised in his trial he could not avail of it thereafter. It remains controversial among legal commentators as to how a system can justify holding a prisoner who has been convicted of a crime that no longer exists!

For defence lawyers many trial strategies have revolved almost entirely on relying on the exclusionary principle. Clients have acted accordingly and in current pending cases there will have to be dramatic reconsideration of tactics.

In new cases advice given to persons in custody will similarly have to reflect this dramatic change . There will also be appeals pending where the Grounds of Appeal have been too narrowly cast relying on the exclusionary principle and some fancy footwork of a rapid nature will be required to restore any prospect of success to those cases.

For legal academics the talking point will be the unusual configuration of the court. It is exceptional in our system to have a seven Judge Supreme Court. Where the constitution is considered typically a court of five will preside. On this occasion the seven delivered six judgements. The Chief Justice was the only person not to deliver a judgement although she voted with the majority – perhaps somewhat surprising given that she was on the court in the Damache case.

The language of the judgements is trenchant, much more so than we are used to. One of the judgements for the majority that of Justice O'Donnell referred to the 1990 case of Kenny as being "patently wrong".

One of the dissenting judgements, that of Mr Justice Hardiman expressed himself to be gravely apprehensive at the decision of the majority of overruling Kenny "one of the monuments of Irish constitutional jurisprudence".

The court service summary of the case is as follows I would commend the judgements to all criminal lawyers for their robust debate of the fundamental issues involved.

INFORMATION NOTE

THE SUPREME COURT
[Appeal No: 398/2012]

Denham C.J.
Murray J.
Hardiman J.
O'Donnell J.
McKechnie J.
Clarke J.
MacMenamin J.

Between/

The Director of Public Prosecutions
Prosecutor/Appellant
and

J.C.
Accused/Respondent

In this case judgments are delivered by Murray J., Hardiman J., O'Donnell J., McKechnie J., Clarke J., MacMenamin J.

1. This appeal raises two main issues:

(i) the scope of appeals which can be brought to this Court by the D.P.P. under s. 23 of the Criminal Procedure Act, 2010; and

(ii) the exclusionary rule.

2. The background to this appeal includes the fact that J.C., the accused/respondent, was on trial before the Circuit Criminal Court (Her Honour Judge Ring) when the trial judge decided to exclude evidence on the basis of the application of the exclusionary rule as stated by this Court in D.P.P. v. Kenny [1990] 2 I.R. 110. It was agreed that the Circuit Criminal Court was required to apply the rule in Kenny and to exclude the evidence in issue. The evidence having been excluded, the case against J.C. collapsed.

3. The D.P.P. brought an appeal under s. 23 of the Criminal Procedure Act, 2010, seeking a review of the decision to exclude the evidence.

4. A question which arose on the appeal was whether Kenny was correctly decided and, if not, what is the appropriate test for the admission or exclusion of evidence obtained in circumstances where the method of taking the evidence involved a breach of constitutional rights.

5. A preliminary question for the Court was whether an appeal lay under s. 23 of the Criminal Procedure Act, 2010. Historically no appeal lay from an acquittal in criminal proceedings. Prior to the enactment of s. 23, the only appeal which lay to this court from an acquittal was a consultative appeal without prejudice to the verdict or decision in favour of an accused person. However, s. 23 of the Criminal Procedure Act, 2010, provides for a form of appeal which, if the Court so directs, can be with prejudice to an accused, as it can lead to a retrial where an accused could be convicted.

6. Section 23 states that the D.P.P. may appeal an acquittal on a question of law, where a ruling was made during the course of a trial which erroneously excluded compelling evidence.

7. A significant issue on this appeal was whether the issue of the exclusionary rule could be raised properly under s. 23 of the Criminal Procedure Act, 2010.

8. A majority of the Court (Denham C.J., O'Donnell J., Clarke J. and MacMenamin J.) considered that the rule could be raised. However, MacMenamin J. was critical of s. 23 in his judgment.

9. Murray J. in a dissenting judgment held, for the reasons stated, that an appeal did not lie under s. 23 because the ruling of the trial judge, being one which she was bound as a matter of law to make, was not an erroneous ruling within the meaning of s. 23.

10. Hardiman J. dissents as to whether there is jurisdiction to entertain this appeal. He points out, and it is agreed, that in order to establish such jurisdiction, error on the part of the trial judge must be established. He says there was no such error by Judge Ring and that this is agreed by the majority. He says that a learned trial judge who follows a binding authority of which a higher court subsequently disapproves, does not commit any error.

Hardiman J. also dissents from the setting aside of the decision of this Court in Kenny. He regards that case as a monument of Irish jurisprudence, essential to the maintenance of the liberties of the citizen. He dissents in particular from the provision of an excuse of "inadvertence" on the basis of which a public official can excuse a breach of the Constitution and have the fruit of such breach admitted in evidence against a citizen. He is apprehensive about the consequences of the majority decision.

11. McKechnie J. in a dissenting judgment analysed in detail s. 23 of the Criminal Procedure Act, 2010, and concludes that the decision of the trial judge could not be said to be "erroneous" as that term should be understood, that in the absence of what has been described as a "concession" it would not have been possible to hold that "compelling evidence" existed but that in any event for the reasons given the section is in practice inoperable. Notwithstanding, he reviewed the Kenny decision, relevant case law both at home and abroad, and stated that he remains unwavering in his view that the justification offered for the rule in Kenny was correct. Moreover the decision itself in accordance with the review jurisdiction could not be said to be plainly wrong for compelling reason. Accordingly, he would dismiss the appeal.

12. A complicating factor in this appeal was that the law in issue appeared to be clear since the Kenny decision.

13. Thus, the Court had to consider whether it could be said that a trial judge erroneously excluded the evidence in question if the trial judge properly applied the established case law of a higher court, by which the judge was bound, even if this Court takes the view that the established case law required to be reviewed.

14. A majority of the Court (Denham C.J., O'Donnell J., Clarke J., MacMenamin J.) held that if it was wrong to exclude that evidence then it was an error, even if the trial judge, because of the hierarchy of courts, was bound to follow Kenny, unless Kenny was redefined by this Court.

15. It should be noted that counsel for both parties agreed that it could be said that a trial judge had erroneously excluded evidence even though the trial judge had properly applied the case law by which that court was bound.

16. The decision in Kenny was a determination of the proper balance to be struck in vindicating the constitutional rights and principles at stake. This Court is concerned with the same question.

17. At issue is a question of the admissibility of evidence.

18. O'Donnell J. has analysed, in his judgment, the sequence of cases in this area of law.

19. A majority of the Supreme Court determined that there should be described a clear test designed to affect an appropriate balance between competing factors.

20. Clarke J. set out a test, in his judgment, with which Denham C.J., O'Donnell J. and MacMenamin J. agreed.

21. The test is as follows:-

(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 a 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 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.

22. Applying the said test to the facts of this case, a majority of the Court held that while the trial judge was bound by Kenny, her decision to exclude the evidence in issue was erroneous in the sense in which that term is used in s. 23.

23. A final decision on whether the appeal should be allowed awaits a determination as to whether it is in the interests of justice to quash the acquittal of J.C. This matter was left over until the other issues were determined.

24. The Court will relist this appeal to hear counsel on the issue as to whether J.C.'s acquittal should be quashed and a retrial ordered, or whether his acquittal should be affirmed on the basis that it would not be in the interests of justice, in light of the matters specified in s. 23(12), to order a retrial.

25. The judgments of the Court are delivered today.

The hearing of this appeal proceeded on the acceptance that both sides would have an opportunity to address the question of a retrial.

This matter will be listed shortly to address this and any other outstanding issues.

Some preliminary thoughts.

It is very early days but my initial sense of dismay at this ruling is being overcome by a more realist consideration. In the first instance there were in reality very few cases where the issue of breach of constitutional rights was cut and dried. Obviously in the *Damache* type case when Section 29 simply no longer existed that was self-executing. Similarly where search warrants were limited by time and executed out of that time that issue too was clear.

However more complicated issues including the lawfulness of arrest, conditions of detention, reasonableness of suspicion etc. where an examination of the evidence was necessary and where there was scope for a contest on that evidence, judges tended, as judges worldwide tend to do, to be more disposed to the prosecution than to the defence.

Any Irish lawyer could point you to cases where " on the evidence" the court concluded that there had been no breach of constitutional rights despite every appearance to the contrary. In many cases therefore that status quo will remain.

Secondly while prosecutors will be instinctively pleased at what they will see as greater flexibility in the pursuit of justice, in reality the exclusionary rule was an effective management aid in ensuring that frontline police officers did their homework and got the basics right. If policemen believe that "inadvertence" will have no consequences for them or their cases then I suspect that there will be a

deterioration in standards which ultimately will not be welcomed by prosecutors or senior police.

Thirdly, the new dispensation, ushered in by the slimmest of majorities, does not abolish the exclusionary rule but rather qualifies it – albeit in a very material fashion. The issue will continue to be litigated but the litigation will be more complex and more time-consuming. It is inevitable that trials will take longer and that appeals will be more complex. At a time of great pressure on prosecutorial resources the victory in the *JC* case may come at a heavy cost.

Fourthly the examination of the cause for any inadvertent breach appears to me in this new formulation to introduce an element of command responsibility. This is it going to impose on the prosecution quite demanding obligations in terms of the evidence that they will have to adduce to satisfy the criteria for the exception should they seek to avail of it. This will create avenues for examination of witnesses not previously open to the defence but in circumstances where the prosecution will not be in a position to avoid placing their senior officers in the evidential crossfire.

Finally (for now) I think the courts ruling will impose dramatic new obligations of disclosure on the prosecution when they seek to avail of the exception. There is a firm basis I believe for contending that matters of policy are legitimately matters for investigation by the defence and disclosure, of materials hitherto considered to be privileged, such as internal prosecution legal advice, may have to follow as a result.

Despite the reservations of Mr Justice Hardiman who expressed grave concern about this judgement reducing the accountability of the police, the litigation that will follow in cases where the exception is sought to be availed of might ironically hold the authorities to greater accountability by virtue of enhanced disclosure requirements and new opportunities for cross examination of their witnesses

Let the games commence

And finally

To alleviate our gloom there was of course the excellent news towards the end of 2014 that ECBA member and conference officianado **Bobby Eager** was deservedly appointed by government to be a Judge of the Irish High Court

17th April 2015
Dublin