Neutral Citation Number: [2007] IEHC 108

THE HIGH COURT

[2005 No. 1088 S.S.]

IN THE MATTER OF SECTION 52 OF THE COURTS (SUPPLEMENTAL) PROVISIONS ACT, 1961

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS (AT THE SUIT OF DETECTIVE GARDA BARRY WALSH)

PROSECUTOR

AND

JOHN CASH

ACCUSED

Judgment of Mr. Justice Charleton delivered the 28th March, 2007

Facts

1. This case concerns three different fingerprints. It brings into focus again the intractable question of improperly obtained evidence. Here, the submission on behalf of the accused is that any piece of information that might lead to a step in the criminal process, including an arrest, must be proved by the prosecution to have been obtained in strict compliance with law.

2. Judge Aingeal Ní Chondúin stated the case which raises these problems on the basis of a burglary charge that appeared before her on two dates in 2004.

3. On the 21st July, 2003 Roisín Walsh called the gardaí to her home at St. Martin's, Kylemore Road in Dublin. In her absence, a bedroom window had been smashed and property had been stolen from the house. Detective Garda Barry Walsh called in a fingerprint expert from the Scenes of Crime Office who found finger marks on two pieces of smashed glass in the window frame where the thief had gained entry. As these are the second-last of a series of fingerprints, I will call them prints 2. Two months after the burglary, on 23rd September, 2003, Detective Garda Walsh arrested the accused at his home in Ballyfermot, Dublin 10, under the provisions of s. 4 of the Criminal Law Act, 1997 on suspicion that he had committed the burglary on the Kylemore Road. The reason that he arrested the accused was one which, quite properly, he was reluctant to divulge to the trial judge. When the case came on for hearing, counsel for the accused asked him to explain the "evidence grounding the arrest". He replied that it was confidential information and that to disclose it to the court would be prejudicial to the accused. When counsel for the accused insisted on receiving the information, the Detective Garda said he was referring to a match between prints 2 and another set of fingerprints, which I will call prints 1, held in the Garda Technical Bureau.

4. When the fingerprints from the scene of the burglary at Kylemore Road had been run against a computer programme which identifies fingerprints stored in the records of an Garda Síochána, a match came up with a set previously taken from the accused, on an earlier arrest, namely prints 1. On arresting the accused on suspicion of the Kylemore Road burglary, the gardaí wished to obtain his prints to see if they matched those at the burglary scene, namely prints 2. This was done by requesting the accused to provide his fingerprints. When he indicated that he was willing, a written consent form was signed by his mother because he was under, I am told, eighteen years of age. This resulted in prints 3, which matched to those of the burglary at Kylemore Road, namely prints 2.

5. It is not the function of this court on a case stated to seek to resolve facts: this is a matter for the learned district judge. In the course of his evidence, Sergeant Philip Burke agreed that he had indicated to the accused that it was his intention to take fingerprints from him and that they would be taken "one way or another". He told the court that he had sought fingerprints with the consent of the accused because, as he told the court, it was "the policy of the gardaí to offer the defendant the opportunity to provide prints first, prior to making an application to the superintendent for an order compelling an arrested person to co-operate". He claimed he did this out of courtesy. A superintendent, under the terms of s. 6 of the Criminal Justice Act, 1984, could have required the accused to be fingerprinted or photographed.

6. Section 8 of the Criminal Justice Act, 1984 provides:-

> "(1) Every photograph (including a negative), fingerprint and palm print of a person taken in pursuance of the powers conferred by section 6 and every copy and record thereof shall, if not previously destroyed, be destroyed as this section directs.
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> (2) Where proceedings for an offence to which s. 4 applies are not instituted against the person within the period of six months from the date of the taking of the photograph or print and the failure to institute such proceedings within that period is not due to the fact that he has absconded or cannot be found, the destruction shall be carried out on the expiration of that period."

7. The section has now been amended by s. 13 of the Criminal Justice Act, 2006 which provides for an extension for the relevant six month period to twelve months. If the criminal proceedings end by acquittal, the prints must be destroyed within 21 days after that. A judge may extend the period for preserving a print for up to twelve months. Neither s. 6 of the Criminal Justice Act, 1984, nor s. 8 was used by the gardaí in this instance. Instead, as regards the prints taken on the arrest of the accused for the issue of legal comparison raised here, prints 1 from the earlier arrest, as stored in the Technical Bureau, were taken pursuant to a procedure of which none of the gardaí giving evidence on the Kylemore Road burglary charge were aware. They did not know whether prints 1 were taken by consent, in which case there is no statutory requirement ever to destroy them, or under s. 6, in which case there is. They could not definitely "stand over" the fact that these prints were held legally when they were challenged on this point.

8. The accused asserts that there is a burden of proof on the State to show the lawful history of any piece of evidence proposed to be put before a criminal court. In addition, it is asserted on behalf of the accused that the State must show that any administrative step in the criminal process, including arrest, was taken on foot only of material which must be proved by the State to have been lawfully obtained.

The Case Stated

9. The learned district judge indicated that she was of the opinion that she could admit the match between prints 3, taken in the Garda station, and prints 2, taken at the scene of the burglary. She was uncertain in that determination and therefore stated the following case for the opinion of the High Court:-

> "Whether I was correct in determining, on foot of the evidence before me, that the prosecution evidence be admitted and that the accused had a case to answer, in reaching this decision:-

(i) Whether, in circumstances where the basis of a garda investigation is a record of the accused's fingerprints, retained by gardaí which, on being so challenged by the Defence, the gardaí are not in a position to "stand over whether they were lawfully taken or kept", the evidence obtained during that investigation can form the legitimate basis for an arrest and subsequent detention pursuant to section 4 of the Criminal Justice Act, 1984?

(ii) If the answer to the above question is No, must any evidence obtained during and consequential upon the said section 4 detention be excluded?

(iii) Whether the gardaí, following the entry into force of section 6 of the Criminal Justice Act, 1984 have a power to take fingerprints from a person who is in section 4 garda detention, other than pursuant to the said section 6, in circumstances where a person has signed a written consent?

(iv) If such a power exist, is it lawfully exercised where a Garda witness has given evidence on oath that the 'consent procedure', rather than the procedure under section 6, is preferable so as to avoid the requirements of section 8 of the Criminal Justice Act pertaining to the keeping and destruction of fingerprints?

(v) If such an exercise of power is not lawful, is any evidence obtained as a result inadmissible?

(vi) If a Garda has the power to take a fingerprint from a detainee who has given signed consent to the taking of the print, is it open, as a matter of law, for me to find that he consented voluntarily in the circumstances where a garda witness agreed with the assertion of Counsel for the Accused that it was his intention that his fingerprints would be obtained from the accused 'one way or another' and it was conveyed to the accused that if he did not wish to give consent to have his fingerprints taken that permission would be sought from a Superintendent?'

(vii) If the answer to the previous question is No, is the consequential evidence admissible?

Arrest

10. The basic rules for arresting people on suspicion of criminal offences is now set out in s. 4 of the Criminal Law Act, 1997. These mirror the old common law rules. An arrestable offence is one which carries a potential maximum term of at least five years imprisonment. A citizen may arrest without warrant anyone who, with reasonable cause he or she suspects to be in the act of committing an arrestable offence. Where an arrestable offence has, as a matter of fact, been committed, a citizen may arrest any one whom they reasonably suspect to have committed that offence. The powers of the gardaí exceed that. A member of An Garda Síochána may, with reasonable cause, arrest anyone whom they suspect of having committed an arrestable offence; provided they reasonably suspect that such offence has been committed. Section 6 of the Act allows for entry by a garda into a dwelling or other premises, for the purposes of the garda effecting an arrest. Section 30 of the Offences Against the State Act, 1939, as amended, allows a member of An Garda Síochána to arrest persons who are suspected to have committed, or to be committing, or to be about to commit, an offence scheduled under that Act, or who are suspected to have information on such an offence. This schedule includes a wide range of explosive and firearms offences as well as the offences created by the Act itself, as amended. A s. 30 arrest can lead to a detention of twenty-four hours, often extended to a forty-eight hour period of detention; or, exceptionally, that can be extended further by a judge. The ordinary arrest for an arrestable offence, outside the Offences Against the State Act, 1939, as amended, usually leads to a detention under s. 4 of the Criminal Justice Act, 1984. The period of detention therein, usually six hours, often extended to twelve hours, can be further extended under different Acts, including the Criminal Justice (Drug Trafficking) Act, 1996, s. 2. Although s. 30 of the Offences Act Against the State Act, 1939, as amended, does not, as does s. 4 of the Criminal Law Act, 1997 require reasonable cause, the application of reason is implied by law into all administrative decisions including those related to arrest and detention.

11. Reasonable cause for arrest equates with the concept of reasonable suspicion. In that regard, a reasonable suspicion is one founded on some ground which, if subsequently challenged, will show that the person arresting the suspect acted reasonably in suspecting them. A suspicion communicated by one garda to another can be sufficient to constitute a reasonable suspicion, provided there is sufficient particularity provided as to why that suspicion should be held; *The People (D.P.P.) v. McCaffrey* [1986] I.L.R.M. 687. Information offered by an informer who was adjudged reliable can be sufficient to ground an arrest; *Lister v. Perryman* [1870] L.R. 4 H.L. 521, *The People (D.P.P.) v. Reddin and Butler* [1995] 3 I.R. 560. In Canada, greater experience with the perils attendant on relying on informers has led to the application of detailed rules to this situation which are set out in *R. v. Debot* [1989] 2 S.C.R. 1140. The Supreme Court of Canada considered in that decision when it was proper to rely on the word of an informer in an arrest. In that case, a reliable informer had told the police that the appellant, together with two other people, was going to a meeting to complete an illegal drug deal. This information had been obtained by the informer in conversation with one of the persons who was to be party to the deal. Acting on the information, the constable felt that he had reasonable and probable grounds, the relevant test in Canada, to believe that the appellant, was mixed up in this affair, and had a drug on him. He proceeded with a search as authorized by the relevant criminal statute. The Supreme Court indicated that the police may take action on the word of an informer where certain minimum standards are met. These include whether the information is compelling; is sufficiently specific; is obtained from a reliable source; is based on a source that has real knowledge of the information; and may, to a degree, if time allows, be verified; see pp. 1143-1144. The idea of informers is worth mentioning in this context as, of their nature, they are either a participant in criminal activity or are closely associated with those who are. If an informer is acting as an agent of the State, any illegal actions can be ascribed to his or her police controller; yet, their evidence has never been blocked for that reason. Even less has it been rejected because information from a dubious source, as regards its legality, has been seen as corrupting an entire investigation. Nor has it been held, in this context, that a spy reporting from within a criminal organization is infringing anyone's constitutional right to privacy.

12. It has never been held that what would be 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. On the contrary, a reasonable suspicion can be based on hearsay evidence or can be inferred from discovering that an alibi which a suspect has given to the police turns out to be false. In *Hussein v. Chong Fook Kam* [1970] A.C. 942 the issue of the parameters of what was a reasonable suspicion came up before the Privy Council in the context of the criminal code of Malaysia. A car was travelling home one night with five people in it when, on passing a lorry, a log fell from that vehicle on to the car. One passenger was killed and another was injured. The lorry did not stop. A registration number had been obtained which resulted in the arrest of the driver and passenger of the lorry. On questioning, they denied they had driven past the place where the accident had occurred. The Privy Council explained that reasonable suspicion should not be equated with *prima facie* proof, as that concept is understood in the law of evidence. The police force was entitled to act on a lessor standard of reasonable cause, or reasonable suspicion. Lord Devlin offered the following analysis, which I would follow:-

> "The test of reasonable suspicion prescribed by the Code is one that has existed in the common law for many years. The law is thus stated in *Bullen and Leake*, 3rd ed. (1868), p. 795, the "golden" edition of (1868):

> "A *constable* is justified in arresting a person without a warrant, upon a reasonable suspicion of a *felony* having been committed and of the person being guilty of it".
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> Their Lordships have not found any English authority in which reasonable suspicion has been equated with prima facie proof. In *Dumbell v. Roberts* [1944] 1 All E.R. 326, Scott L.J. said, at p. 329:
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> "The protection of the public is safeguarded by the requirement, alike of the common law and, so far as I know, of all statutes, that the constable shall before arresting satisfy himself that there do in fact exist reasonable grounds for suspicion of guilt. That requirement is very limited. The police are not called upon before acting to have anything like a prima facie case for conviction; …".
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> There is another distinction between reasonable suspicion and prima facie proof. *Prima facie* proof consists of admissible evidence. Suspicion can take into account matters that could not be put in evidence at all. There is a discussion about the relevance of previous convictions in the judgment of Lord Wright in *McArdle v. Egan* (1934) 150 L.T. 412. Suspicion can take into account also matters which, though admissible, could not form part of a *prima facie* case. Thus the fact that the accused has given a false alibi does not obviate the need for prima facie proof of his presence at the scene of the crime; it will become of considerable importance in the trial when such proof as there is is being weighed perhaps against a second alibi; it would undoubtedly be a very suspicious circumstance."

13. The crucial issue in this case is whether a suspicion arrising from a piece of evidence the origin of which is uncertain as to whether it was properly obtained, or arriving from an illegally obtained piece of evidence, destroys the legality of an arrest. In that regard, it is claimed that the prosecution must prove that upon which a reasonable suspicion was founded was lawfully obtained. This argument seeks to import the rules of evidence into police procedures. It has no place there. If the prosecution was obliged to prove legality in respect of every step leading to an arrest or charge, this would have the result that the prosecution, in presenting a case, would be required not only to show, against objection by the defence, that the evidence which they proposed to lead was lawfully obtained, but to open to the court every facet of the investigation to ensure that no illegality ever tainted any aspect of police conduct.

History of the Rule

14. The rule requiring the exclusion of evidence obtained by a mistake on the part of members of An Garda Síochána, which has the incidental and unintended result that the accused's constititutional rights are infringed, should be seen in its historical context. It is not an imperative that is the subject of any Act of the Oireachtas nor is it provided for in the text of the Constitution.

15. The earliest reported case has a parallel to this one. In *The People (A.G.) v. Thomas McGrath* (1965) 99 I.L.T.R. 59, the accused was charged with breaking and entering an office in Dublin in January, 1959. The only evidence against the accused was the correspondence between fingerprints found at the scene, on the dividing panel of cash box from which money was stolen, and those of the accused. His fingerprints were taken by a prison officer while he was remanded in custody prior to appearing in the District Court. No warrant had ever been sought for this purpose and neither was he asked for his consent. A case was stated for the opinion of the High Court which was heard in January, 1960 and Davitt P., McLoughlin and Murnaghan JJ. delivered their judgment in March of that year. The arguments are fully reported and no Irish decision was opened to the court. Davitt P. quotes with approval Professor Wigmore's strong dissent from the rule as it then existed in America whereby illegally obtained evidence could be excluded, to this effect:-

> "The judicial rules of evidence were never meant to be an indirect process of punishment. It is not only anonmolous to distort them to that end but it is improper (in the absence of express statute) to enlarge the fixed penalty of the law that of fine or imprisonment, by adding to it the fortfeiture of some civil right through loss of the means of proving it. The illegality is by no means condoned; it is merely ignored. For those reasons it has long been established that the admissibility of evidence is not affected by the illegality of the means through which the party has been unable to obtain the evidence."

16. To this opinion Davitt P. offered his own reflections, at p. 72, in ruling that the fingerprint evidence in that case was admissible:-

> "We have no Irish authorities to bind or guide us, and are free to consider the question from the point of view of principle. I take the view that the Courts should not confuse the purposes of substantive and adjective law. Substantive law regulates legal rights and determines what acts amounts to infringements. For any such infringement it provides a remedy. It determines what wrongful acts are to be dealt with and punished as crimes. The law of evidence is adjective law and confirms the rules which govern as a procedure of the Courts as to matters of proof and as to what evidence may be accepted or rejected. It is obviously inappropriate for the purpose of remedying civil wrongs or punishing criminal offences; and since it cannot deal with these matters properly, it should not allow them to affect its application. One must recognise a material disinclination to accept evidence which has been illegally procured. In sporting parlance, it is somewhat like allowing a goal or a try scored from an off-side position. The adminsitration of the law is, however, not a game. Accomplices and informers obtain the evidence which they are able to give as a result of participation in the offence with which the accused, against whom they give evidence, is charged; yet this does not affect the admissibility of this evidence. A person who is arrested upon an illegal warrant and brought before the court for trial may have very good reason to feel aggrieved, and to complain of the procedure, but the illegality of the process does not necessarialy affect the jurisdiction of the Court to try him… When a Court admits evidence which has been illegally obtained it does not excuse, condone or encourage the illegality; it merely ignores it. Its ruling in no way affects the right of the injured person to sue, or the right of the State to prosecute. If the illegality is deliberate the intention of a proper authorities should be directed to it; if this should prove ineffective there are surely means available, in a democratic country, for bringing proper pressure to bear upon such authority to take suitable action. I do not suggest that a judge, if in the course of trying a case he becomes aware of an offence or irregularity commited by, say, a police or prison officer, should be completely unconcerned as to whether the matter is properly dealt with. I do take the view that he should not try to deal with it indirectly by what I conceive to be a mis-use of the law of evidence."

17. McLoughlin J. in his judgment referred to *Sullivan v. Robinson* [1954] I.R. 161 in which it had been held that the evidence of a doctor as to the measurements, photographs and fingerprints of a convicted prisoner may be taken without restriction where he is an untried prisoner, where he consents on being informed on his right to object; and otherwise on application to a district judge. No statement of principle was adumbrated in the judgment but both he and Murnaghan J. agreed with the reasoning of Davitt P.

18. Although the facts of *The People (A.G.) v. O'Brien*, [1965] I.R. 142, are well known it is important to record them in this context. The accused was charged with receiving stolen clothing. These were identified by the owners because they had been found in the

course of the search when members of An Garda Síochána at 118 Captain's Road in Crumlin. The search warrant obtained, however, stated the place to be searched as 118 Cashel Road, Crumlin. This was not noted by the gardaí before going to the place to be searched. The Supreme Court held that as this mistake was a pure oversight, not noticed by anyone before entering the premises, and that the absence of any evidence of treachery or deliberate illegality required the evidence to be admitted. Kingsmill Moore J., with whom Lavery and Budd JJ. agreed, held that any question as to admissibility of evidence, where it had been illegally obtained, was to be decided on the balance of competing interests as a matter of judicial jurisdiction.

19. To the question as to whether illegally obtained evidence is admissible, Kingsmill Moore J. stated that there were three possible answers. Firstly, that the evidence would always be admitted because its provenance in illegal action cannot cause it to be excluded; secondly, that illegally obtained evidence should be ignored by the court, as if it never existed; thirdly, that there was a discretion vested in the trial judge to decide whether or not to admit illegally obtained evidence. He decided for the last of these: that an intermediate solution had to be found as between desirable ends which may be regarded as incompatible. At p. 160 – 161 his reasoning is as follows:-

> "It is desirable in the public interest that crime should be detected and punished. It is desirable that individuals should not be subjected to illegal or inquisitorial methods of investigation and that the State should not attempt to advance its ends by utilising the fruits of such methods. It appears to me that in every case a determination has to be made by the trial judge as to whether the public interest is best served by the admission or by the exclusion of evidence of facts ascertained as a result of, and by means of, illegal actions, and that the answer to the question depends on a consideration of all the circumstances. On the one hand, the nature and extent of the illegality have to be taken into account. Was the illegal action intentional or unintentional, and, if intentional, was it the result of an *ad hoc* decision or does it represent a settled or deliberate policy? Was the illegality one of a trivial and technical nature or was it a serious invasion of important rights the recurrence of which would involve a real danger to necessary freedoms? Were there circumstances of urgency or emergency which provide some excuse for the action? Lord Goddard in *Kuruma's Case* mentions as a ground for excluding relevant evidence that it had been obtained by a "trick" and the Lord Justice-General in *Lawrie's Case* refers to an "unfair trick". These seem to me to be more dubious grounds for exclusion. The police in the investigation of crime are not bound to show their hand too openly, provided they act legally. I am disposed to lay emphasis not so much on alleged fairness to the accused as on the public interest that the law should be observed even in the investigation of crime. The nature of the crime which is being investigated may also have to be taken into account. Mr. McCarthy has called our attention to a decision of the Appeal Court of California, *People v. Cahan* , a prosecution for a gambling offence where microphones had been illegally concealed on private property and it was sought to give in evidence conversations overheard by this means. The Court, by a narrow majority applying the strict rule of exclusion, refused to admit the evidence. The case of *Silverman v. U.S.*, already mentioned, where this same rule was applied, was also a gambling prosecution. I can, however, conceive that if a discretionary rule were applicable a judge might take a different review if the conversation revealed a conspiracy to murder or the activities of a narcotic organisation.
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> It would not in be in accordance with our system of jurisprudence for this Court to attempt to lay down rules to govern future hypothetical cases. We can do no more than decide the case now before us, and to lay down that, in future cases, the presiding judge has discretion to exclude evidence of facts ascertained by illegal means where it appears to him that public policy, based on a balancing of public interests, requires such exclusion. If he decides to admit the evidence an appeal against his decision should lie to a superior Court which will decide the question according to its own views and will not be bound to affirm the decision of the trial judge if it disagrees with the manner in which the discretion has been exercised, even if it does not appear that such discretion was exercised on wrong principles. The result of such decisions, based on the facts of its individual cases, may in time give rise to more precise rules."

20. At the end of this judgment, at p. 162, Kingsmill Moore J. stated that he agreed with the judgment of Walsh J. that where evidence had been obtained by the State as a result of a deliberate and conscious violation of the constitutional (as opposed to the common law) rights of an accused person it should be excluded, save where there are extraordinary excusing circumstances; such as the need to prevent the imminent destruction of vital evidence, the need to rescue a person in peril or where evidence was seized incidental to a lawful arrest but where the premises had been entered without a search warrant. At p. 170 Walsh J. made reference to the clash of interests between competing rights which often occurs in the investigation of crime:-

> "I have already referred, in the earlier part of this judgment to what are sometimes, regrettably, the competing interests of the trial and conviction of criminals and the frustration of police illegalities. When the illegality amounts to infringement of a constitutional right the matter assumes a far greater importance than is the case where the illegality does not amount to such infringement. The vindication and the protection of constitutional rights is a fundamental matter for all the Courts established under the Constitution. That duty cannot yield place to any other competing interest. In Article 40 of the Constitution, the State has undertaken to defend and vindicate the inviolability of the dwelling of every citizen. The defence and vindication of the constitutional rights of the citizen is a duty superior to that of trying such citizen for a criminal offence. The Courts in exercising the judicial powers of government of the State must recognise the paramount position of constitutional rights and must uphold the objection of an accused person to the admissibility at his trial of evidence obtained or procured by the State or its servants or agents as a result of a deliberate and conscious violation of the constitutional rights of accused person where no extraordinary excusing circumstances exist, such as in the imminent destruction of vital evidence or the need to rescue a victim in peril. A suspect has no constitutional right to destroy or depose of evidence or to imperil the victim. I would also place in the excusable category evidence by a search incidental to and contemporaneous with a lawful arrest although made without a valid search warrant.
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> In my view evidence obtained in deliberate conscious breach of the constitutional rights of an accused person should, save in the excusable circumstances outlined above, be absolutely inadmissible. It follows therefore that evidence obtained without a deliberate and conscious violation of the accused's constitutional rights is not excludable by reason only of the violation of his constitutional right.
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> In the present case it is abundantly clear from the evidence that it was through an error that the wrong address appeared on the search warrant and that the searching officers were unaware of the error. There was no deliberate or conscious violation of the right of the appellants against arbitrary intrusion by the Garda officers. The evidence obtained by reason of this search is not inadmissible upon the constitutional ground."

21. These principles were applied for the next 25 years. The only exception to the principles excusing a deliberate and conscious breach of a constitutional right of the accused, enunciated by Kingsmill Moore J., was that it eventually came to be held that an unlawful entry for the purposes of arrest would cause both that arrest and anything seized in the course of the entry to be classified as an invasion of constitutional rights and accordingly excluded; *DPP v. Closkey*, (Unreported, High Court, O'Hanlon J., 6 February,

1984) and see *DPP v. McCreesh* [1992] 2 I.R. 239, where the Supreme Court approved the earlier High Court decisions. The principle in *O' Brien's* case applied to all forms of evidence deliberately taken in conscious breach of a constitutional right of the accused, whether real items like finger prints or items which might be influenced by police misconduct, such as admission statements by a prisoner. A voluntary statement taken while the accused was in unlawful custody became inadmissible where the deprivation of his liberty was both illegal and deliberate; *The People (DPP) v. Walsh* [1980] I.R. 294. To regard the taking of a statement as being more important than informing the accused that his time of detention in Garda custody had elapsed, by reason of the efflux of time, was to deliberately and consciously infringe the accused's constitutional right to liberty; *The People (DPP) v. Madden* [1977] I.R. 336. In that case an argument was advanced to the Court of Criminal Appeal that unless the deprivation of liberty had been wilful, no deliberate and conscious breach of the accused's constitutional rights could have been involved. This argument was rejected, the Court holding that there was a positive duty on the gardaí to seek to defend and vindicate the constitutional rights of all citizens, including those whom they suspect of having committed a crime. O'Higgins CJ, at p. 347, said :-

> "In the view of this Court to adopt that approach is to misunderstand the decision in *O'Brien's* case and, accordingly, to err in law. What was done or permitted by Inspector Butler and his colleagues may have been done or permitted for the best of motives and in the interests of the due investigation of the crime. However, it was done or permitted without regard to the right to liberty guaranteed to this defendant by Article 40 of the Constitution and to the State's obligation under that Article to defend and vindicate that right. This lack of regard for, and failure to vindicate, the defendant's constitutional right to liberty may not have induced or brought about the making of this statement, but it was the dominating circumstance surrounding its making. In the view of this Court this fact cannot be ignored".

22. A good illustration of how the law following *O'Brien's* case worked out in practice is provided by the case of *The People (DPP) v. John Lawless*, (Unreported, Court of Criminal Appeal, 28th November, 1985). In that case the gardaí entered the premises of the accused at 60 Rathland Road Flats, Dublin 12, the address of the premises having been given the warrant as 60 Rathland Flats, Dublin 12. In addition, the form of the warrant did not quite coincide with the wording required by s. 26(1)(a) of the Misuse of Drugs Act, 1977, as amended. The main ground on which the appeal was rejected was that the accused did not reside in that house as his dwelling, but was merely a visitor there. He could, however, have pleaded rights of privacy which have, as follows herein, been pleaded in similar circumstances in every subsequent case. The judgment of the court, however, in rejecting the appeal makes it clear that a mere mistake, as opposed to a deliberate and conscious violation of a constitutional right, could not possibly result in the automatic exclusion of evidence in accordance with the decision of the Supreme Court in *O'Brien's* case. At p. 5 and 6 of the unreported decision McCarthy J. observed:

> "The warrant being defective, because of the defective information, the entry into and search of the premises was unlawful. It is argued, further, that it was in breach of a constitutional right; if it was, such was not the right of the applicant but of the tenant of the flat in question and persons residing with him. On his own evidence, the applicant was not the tenant but had been asked by Noel Foy, "the owner of 60" to wait there for his, the applicant's brother. The arrest there carried out of the applicant was an interference with his constitutional right to personal freedom, but no illegality attached to it; the Court is not satisfied that there was any breach of the constitutional rights of the applicant. Even if, however, there were such a breach in respect of inviolability of the home, or personal liberty, the Court is satisfied that there was no conscious violation of any constitutional right of the applicant. The act of Detective Sergeant O'Malley and his colleagues in entering the premises was, of course, a deliberate act. The omission of the necessary statutory foundation for the issue of the search warrant was a pure oversight; there was no evidence of deliberate deceit or illegality, no policy to disregard the provisions of the Constitution or to conduct searches without a warrant (see the observations of Kingsmill Moore J. at 161 in *O'Brien's* case even if there was deliberate and conscious violation of the constitutional rights of an accused person, in the instant case there are "extraordinary excusing circumstances" - the need to prevent the destruction of imminent vital evidence. (See observations of Walsh J. at 170 in *O'Brien's* case cited with approval by Kingsmill Moore J. at 162).
>
> It is true that in this case the learned trial judge did not reach the stage of exercising a discretion to overlook a illegality or, fortiori, the conscious breach of constitutional rights, but the Court is satisfied that if he had done so, his discretion could only have been exercised one way, to admit the evidence."

23. In practice, an unnoticed mistake in a warrant never had the effect, in the 25 years subsequent to the Supreme Court's decision in *O'Brien's* case, of automatically causing the exclusion of evidence. Judicial discretion decided whether the evidence was to be admitted. In principle, the nature of the crime and the infringement were balanced against each other. That situation ended as a result of a Supreme Court decision in 1990 in another drugs search case, namely *The People (D.P.P.) v. Kenny* [1990] 2 I.R. 110. As a result of the decision of the High Court in *Byrne v. Gray* [1988] I.R. 31, it had been clarified that a judge or peace commissioner issuing a warrant must do more than rubber stamp the suspicion of the garda officer applying for same. Instead, there must be a sufficient communication of the factual basis for the garda's suspicion to enable the court or peace commissioner to also reasonably suspect that drugs were to be found on the premises specified in the application for the warrant. The same principle would apply, of course, to any situation where the court, or a peace commissioner, was issuing a warrant pursuant to a statutory power requiring the issuing authority to reasonably suspect that an item of contraband, or evidence related to a crime, was to be found in a particular premises, or might be discovered as a result of a particular test. *In The People (DPP) v. Kenny* there was no evidence that the peace commissioner had enquired into the basis of the suspicion of the garda who had applied to him for a warrant to search the flat in which, as a matter of fact, when the search took place, quantities of heroin were found. The Court of Criminal Appeal, McCarthy, O'Hanlon and Lardner JJ. held that there had been no deliberate and conscious violation of the appellant's constitutional rights as the garda applying for the warrant had taken all the steps that he believed to have been necessary for obtaining it validly and because the peace commissioner had also believed that he was issuing the search warrant in compliance with the Misuse of Drugs Act, 1977, as amended. On an appeal under s. 29 of the Courts of Justice Act, 1924, as amended on a point of law of exceptional public importance, the Supreme Court held that in deciding whether a violation of constitutional rights was carried out consciously and deliberately, the test was whether the action in question, here entering into the accused's flat, was a conscious and deliberate action; as opposed to the extraordinarily rare occurrence of an automatous act. For the majority, Finlay C.J., Walsh and Hederman JJ. held that it was immaterial whether the police officer was or was not aware that what he was doing was in breach of the constitutional rights of the accused. This reversed the line of authority that had always been applied by the courts to the effect that a conscious and deliberate violation of someone's constitutional rights required that the act should be done deliberately with a consciousness that the effect of it would be to unlawfully invade someone's dwelling, or to deprive them of their liberty or whatever other constitutional right was infringed by the impugned action. A mistake of law did not excuse, of itself, such an action; once it was deliberate. As the *Lawless* case indicates clearly, mistakes had never been found to fit within the category of action that required the automatic exclusion of evidence. In his dissenting judgment in the *Kenny* case, Lynch J. made it clear that he was following the decision in *O'Brien's* case. At p. 141 and 142 he said:-

> "Insofar as there was any fault leading to the invalidity of the warrant that fault must rest rather with the peace

commissioner who is interposed between the garda authorities and the citizen to see that the citizen's dwelling is not entered without due cause and on whom s. 26 of the Act of 1977 imposes the duty of satisfying himself by proper evidence that there is due cause for such entry on the citizen's dwelling. The peace commissioner is independent of the gardaí and if not satisfied by proper evidence he must refuse the warrant unless and until he becomes so satisfied by additional evidence.

Of course the gardai contributed to the error by adopting a form of information which was in fact inadequate but which had for many years been accepted by both District Justices and peace commissioners as adequate. To suggest that the gardai deliberately withheld evidence of facts in their possession from the peace commissioner is to suggest that they deliberately imperilled the strength of their own case against the appellant without any reason whatever especially as the evidence in the trial demonstrates that if the peace commissioner had asked for evidence of facts there would have been no difficulty in furnishing him with such evidence so as to lead to the valid issue of the warrant which was in fact invalidly issued.

The adoption of such an inadequate form of information by the gardaí is a far cry from a deliberate intention to violate the appellant's constitutional rights in relation to his dwelling and neither did it lead to any form of unfairness in the investigation or the trial.

The inviolability of the citizen's dwelling must be upheld but this does not mean that evidence obtained in breach of it must always be rejected however relevant it may be to the case at hearing. It must be rejected if there is any 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* ") in relation to the breach of the right on the part of those who obtained the evidence unless there are adequate excusing circumstances. In all cases heretofore, where evidence has been rejected, including the recent case of *The People (Director of Public Prosecution) v. Healy* [1990] 2 I.R. 73 there was manifest a deliberate disregard of the accused's rights. Not only did the gardaí deliberately do the acts complained of, but they did them knowing that they contravened the accused's legal, if not his constitutional, rights. I take the view that if the garda deliberately do acts which they know or ought to know contravene the accused's legal rights, but not his constitutional rights, and if the rights are thereafter held to be constitutional rights, the exclusionary rule should apply, but there must be some such element of blame or culpability or unfairness to bring the exclusionary rule into operation. If there is no such element of blame or culpability or unfairness in relation to the breach of the constitutional right on the part of those who obtained the evidence then the evidence should be admitted and no question of excusing circumstances arises.

In my opinion *The People (Attorney General) v. O'Brien* [1965] I.R. 142 is on all fours with this case and I follow it. I also follow the majority judgment in *The People v. Shaw* [1982] I.R. 1 which emphasises the importance of fairness or unfairness in the admissibility or inadmissibility of the evidence.

24. In his dissent Griffin J. analysed all of the previous decisions and also held that there could be no distinction between the case on appeal and the earlier case of *The People (AG) v. O'Brien*. I reproduce the reasoning of Finlay C.J., for the majority, on this issue at p. 133-134:-

The constitutional rights with which all these cases are concerned are personal rights, being either the right to liberty: *Walsh's* case; Madden's case; *Shaw's* case, or the inviolability of the dwelling: *O'Brien's* case and the instant case.

The duty of the Court pursuant to Article 40, s. 3, sub-s. 1 of the Constitution is as far as practicable to defend and vindicate such rights.

As between two alternative rules or principles governing the exclusion of evidence obtained as a result of the invasion of the personal rights of a citizen, the Court has, it seems to me, an obligation to choose the principle which is likely to provide a stronger and more effective defence and vindication of the right concerned.

To exclude only evidence obtained by a person who knows or ought reasonably to know that he is invading a constitutional right is to impose a negative deterrent. It is clearly effective to dissuade a policeman from acting in a manner which he knows is unconstitutional or from acting in a manner reckless as to whether his conduct is or is not unconstitutional.

To apply, on the other hand, the absolute protection rule of exclusion whilst providing also that negative deterrent, incorporates as well a positive encouragement to those in authority over the crime prevention 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 such rights.

It seems to me to be an inescapable conclusion that a principle of exclusion which contains both negative and positive force is likely to protect constitutional rights in more instances than is a principle with negative consequences only.

The exclusion of evidence on the basis that it results from unconstitutional conduct, like every other exclusionary rule, suffers from the marked disadvantage that it constitutes a potential limitation of the capacity of the courts to arrive at the truth and so most effectively to administer justice.

I appreciate the anomalies which may occur by reason of the application of the absolute protection rule to criminal cases.

The detection of crime and the conviction of guilty persons, no matter how important they may be in relation to the ordering of society, cannot, however, in my view, outweigh the unambiguously expressed constitutional obligation "as far as practicable to defend and vindicate the personal rights of the citizen.

After very careful consideration I conclude that I must differ from the view of the majority of this Court expressed in the judgment of Griffin J. in *The People v. Shaw* [1982] I.R. 1. I am satisfied that the correct principle is that evidence obtained by invasion of the constitutional personal rights of a citizen must be excluded unless a court is satisfied that either the act constituting the breach of constitutional rights was committed unintentionally or accidentally, or is satisfied that there are extraordinary excusing circumstances which justify the admission of the evidence in its (the court's) discretion".

Practical Consequences
25. In my judgment, there are three practical consequences to the decision in *Kenny's* case. Firstly, every error on the part of the agents of the State which takes their action outside the strict letter of the law causes the exclusion at trial of any evidence which directly results therefrom. Examples of this are very easily found. The most recent instance of it which came before the Supreme Court was in *Curtin v. The Clerk of Dáil Éireann*, [2006] IESC 14. There, the issue before the court was the validity of the procedures decided on by the Oireachtas for the purpose of undertaking the impeachment of a serving judge of the Circuit Court. His house had been searched under a warrant which, at the time of the search, had just expired by efflux of time. No one apparently noticed this. The exploration of the computer taken in that search led to a charge being preferred against Judge Curtin of possession of images of child pornography. The trial ended when the trial judge ruled, as he was bound to do by *Kenny's* case, that the evidence taken in consequence of the search amounted to a deliberate and conscious violation of the accused's constitutional right to the inviolability of his dwelling under Article 40.5 of the Constitution. The expiration of the warrant, at a time shortly before the search had taken place, was a simple error on the part of the garda officer leading the investigation and there was no evidence to suggest that it was adverted to in any way prior to the accused's house being entered. If it had been, a further warrant would most probably have been applied for.

26. In his judgment in *O'Brien's* case, Kingsmill Moore J. drew a distinction between the infringement of common law rights and the infringement of constitutional rights. One might suppose, from the existence of that distinction, that a large category of cases might exist where a mistake might merely lead to a judicial conclusion that an illegality was involved, in distinction to the accidental infringement of a constitutional right. Where mere illegality is involved, then judicial discretion applies in much the same way as judicial discretion applied to a mistaken infringement of an accused's constitutional rights prior to the decision in *Kenny's* case.

27. The second consequence that has resulted from *Kenny's* case is that every breach of an accused person's rights is always pleaded at trial as an infringement of the Constitution. It seems possible that Kingsmill Moore J. wished to draw a distinction between a mere tort and the infringement of a constitutional right. A tort based upon the infringement of a constitutional right could not then, and still cannot, be pleaded unless there is an absence of a tort remedy for a wrong.

28. The fact that this has changed, or has not been applied, is illustrated by *The People (DPP) v. Elizabeth Yamanoha*, [1994] 1 I.R. 565. The accused was charged with the possession and importation of a very substantial quantity of cocaine contrary to the Misuse of Drugs Acts, 1977-1984. The sworn information grounding the warrant issued by the peace commissioner contained an assertion by a detective sergeant that he had reasonable grounds for suspecting that "a person is in possession in contravention of the Misuse of Drugs Acts, 1977 and 1984, of a controlled drug". He swore that this was as a result of "confidential information and surveillance over a number of hours by members of An Garda Síochána". These statements were supplemented by oral exchanges between the Garda and the peace commissioner but, and this is what went wrong, these were not on oath. The Court of Criminal Appeal held that the written information could not satisfy the peace commissioner that reasonable grounds existed for suspecting that an offence was being committed at the premises in question. On foot of that warrant, held by the Court of Criminal Appeal to be invalid, the gardaí had entered a hotel room in Jury's Hotel in Ballsbridge, where the accused was staying. There, wrapping packages alleged to be consistent with having being strapped to her body on the way through customs, and thus alleged to be consistent with the possession of cocaine, were found. That evidence, crucial to the prosecution's case, was ruled inadmissible by the Court of Criminal Appeal and the conviction of the appellant was overturned. It is to be inferred that the constitutional right infringed had to be one of privacy. There is very little privacy in a hotel bedroom and it is certainly not a dwelling within the meaning of Article 40.5 of the Constitution. Nonetheless, the case illustrates that it is very difficult to find circumstances where an illegality is involved in a breach of an accused's person constitutional rights: it is more easy, and seems sometimes to be invariable, that a constitutional right is accepted by the courts as being infringed where any accidental violation of any legal right of any kind occurs.

29. The third consequence of the decision in *Kenny's* case is that it has become practically impossible to say when a constitutional right begins and ends. An illustration of this tendency is the decision of the Court of Criminal Appeal in *The People (DPP) v. Joseph Dillon* [2002] 4 I.R. 501. There, a Garda answering a telephone belonging to, but taken from, an arrested person was interpreted as an illegal action, involving an interception of a telephone message within the meaning of s. 2(1) of the Interception of Postal Packets and Telecommunications (Regulations) Act, 1993. The Court of Criminal Appeal held that answering someone else's telephone amounted to an interception as defined by s. 98 of the Postal and Telecommunications Services Act, 1983. After arresting Nicholas Power and Michael Carey in Limerick City on suspicion of the possession of controlled drugs, Detective Inspector Quilter had in his possession a mobile phone which had been in the possession of one of these suspects. As will be recalled, *O'Brien's* case allows the seizure of an item on a suspect on arrest. The telephone rang: so the garda answered it. On receiving a telephone call, Detective Inspector Quilter pretended to be involved in activities related to controlled drugs. This he was, in truth; though not in the sense that the caller expected. An arrangement was then made for Detective Inspector Quilter and the caller, who was the accused, to meet up for the purpose of the criminal supply of controlled drugs at an agreed location. There, the accused, who was the telephone caller, was arrested in the possession of heroin. The Court of Criminal Appeal held that the action by the Garda was unlawful because the scheme of the two Acts excluded spontaneous actions of this kind, as it was put, even in the investigation of crime. Hardiman J. held that before Detective Inspector Quilter had answered the phone he ought to have applied for a warrant to intercept the relevant communication, and stated at p. 514:-

> "It seems to us that the decision to operate entirely outside the terms of the statute would be a grave difficulty in the way of the State's relying on extraordinary excusing circumstances. Counsel for the Director of Public Prosecutions asked rhetorically – "even if the statute were breached, what was the Inspector to do? Ignore the ringing telephone?" Forceful though these questions are, they do not address the decision to operate with any regard at all for the statute and the rights protected by it. The issue underlying these questions may point to a lacuna in the statute that this is not one which the court can fill."

30. The reference to the right protected by the statute had to be a reference to the right to privacy. That right apparently extended by operation of lawto have a private telephone conversation for the purpose of breaching the criminal law of Ireland so that heroin could be made more readily available in one of our cities.

31. As regards any obligation there is on anyone apart from the gardaí to obey the law, that appears nowhere in any judgment since *Kenny's* case: the entire focus is on the accused and his rights; the rights of the community to live safely has receded out of view.

Fingerprints
32. There is a line of authority that the rules governing items of physical evidence obtained from an accused person differ from the rules governing the exclusion of confession statements. A confession statement, to be admissible, must not have resulted from an illegal inducement; a hope of favour or fear of disadvantage excited by a person in authority. A fingerprint, in common with a blood sample or scraping for the purpose of obtaining DNA evidence, and such like, is in no way affected by the mood of a suspect giving same. Whether it is voluntary or involuntary, a fingerprint, or a sample of the accused's DNA, or blood or urine for the purpose of

testing for the presence of particular substances, does not change its nature. If a scraping of cells from the accused's cheek is taken by a trick, or if a hair is taken in an illegal search of his home, the later match of the DNA that might be analysed in consequence to a semen sample from a rape victim will always be the same, no matter the circumstances in which it was obtained. A physical or verbal attack on the accused can, on the other hand, easily lead to a false confession. Confession evidence is inherently dangerous. Hence, it is argued that different rules apply to these situations. In *The People (AG) v. McGrath*, Davitt P. observed at p. 73

> "The person who submits to having his finger-prints taken undergoes no test and brings no evidence into being. The evidence already exists upon his fingertips. There is nothing subjective involved, the process is purely mechanical, and his reactions are immaterial and cannot affect the matter in any way.

33. In *The People (DPP) v. Pringle* (1981) 2 Frewen 57, this principle was apparently applied to some clothes and shoes taken from the accused while he was in hospital. The shoes linked the suspect to a footprint at the scene of the crime. While there was no authority to take the clothing, the action was characterised as an unlawful act rather than a breach of the accused's constitutional rights."

34. As a matter of principle, in *The People (DPP) v. Walsh* [1980] I.R. 294, O'Higgins CJ followed the decision in *McGrath's* case at p. 308-309:-

> "I now turn to consider the alternative submission which is to the effect that the fingerprint evidence ought to have been excluded because the appellant was neither cautioned nor informed that he was not obliged to submit to having his fingerprints taken. It will be recalled that at Store Street the appellant had been informed of the reason for his arrest and had been cautioned. Some short time afterwards the appellant was told by the sergeant that he, the sergeant, proposed taking the appellant's fingerprints and he was asked if he had any objection. Not only did the appellant not state any objection but he later acknowledged in writing that the prints had been taken with his consent. There was ample evidence to indicate that the fingerprinting was done with the consent of the appellant. However, the submission is that this is not enough. It is submitted that a warning or caution was required so that the appellant would know that he was not obliged to submit or consent and that he was entitled to refuse. I do not accept this submission.
>
> The purpose of a caution in relation to a confession or a statement is to ensure that what is said or written is said or written voluntarily. An involuntary confession or statement, given out of fear or induced by hope, is tainted evidence of a quality not acceptable in our Courts. It is not so with a fingerprint. A fingerprint does not change. Whether the person concerned submits voluntarily to having his print taken or whether he fiercely objects and resists makes no difference to the probative value of the evidence obtained. His fingerprint remains the same and indicates always the same association or disassociation with the crime under investigation, irrespective of the circumstances under which it is obtained. Therefore, I cannot see why the administering of a caution, or anything resembling a caution, should be a necessary preliminary to the admissibility of fingerprint evidence. I think the correct view of the law in this respect was taken by the High Court in *The People (Attorney General) v. McGrath*: see the judgments of Davitt P. at p. 70 and of McLaughlin J. at p. 76 of the report of that case. What a court ought to be concerned about is whether the evidence sought to be admitted was or was not taken by illegal means. If illegal means were used (assuming these to fall short of a breach of constitutional rights), the trial judge would have to consider whether in the particular circumstances the public interest was best served by the admission or the rejection of such evidence: see the judgment of Kingsmill Moore J. at p. 160 of the report of *The People (Attorney General) v. O'Brien*."

35. In its Report on the establishment of a DNA Database, the Law Reform Commission considered this issue; L.R.C. 78-2005. At para. 5.39 the Commission stated:-

> "The Commission recommends that, as at present, where DNA evidence is obtained illegally, but not in breach of a person's constitutional rights, the trial judge shall be empowered to determine as a matter of discretion, whether to admit it in evidence."

36. Where a person is in unlawful custody, the taking of fingerprint, a DNA sample or a blood or urine sample must become inadmissible as a breach of the detainee's constitutional right to liberty, whether as a result of a mistake or deliberation. In *Walsh's* case a reason for arrest was not given to the suspect immediately, but this was cleared up after his arrival at the Garda Station to which he was brought. That lawful period of detention allowed the admission of the relevant fingerprint evidence; see the judgment of O'Higgins C.J. at p. 298 – 299 [1981] I.R. 294.

37. Section 6 of the Criminal Justice Act, 1984 sets out the powers of An Garda Síochána in relation to a person who has been lawfully detained under s. 4 of that Act. These powers are amended by the Criminal Justice Act, 2006. For these purposes, however, s. 6 authorises a superintendent to have a detainee give his name and address; to be searched; to be photographed; to have his fingerprints and palm prints taken; to have firearms and explosive substances residue tests taken, including a sample of hair; and to seize anything he has in his possession.

38. In the Court of Criminal Appeal judgment in *The People (D.P.P.) v. Costigan*, Macken J. emphasized the distinction between securing items of physical evidence and seeking a confession from an accused person:-

> "It is clear that a distinction is drawn between, on the one hand, the taking or securing of evidence, such as fingerprints or blood, and the procuring of confessions or admissions made by an accused on the other hand. The latter will most likely be subject to exclusion orders in the course of a trial, even if short of illegality, where there has been some conduct of which the prosecution ought not to be permitted to take advantage, such as a trick or a ruse, but the former, which do not change in nature depending on whether they have been procured voluntarily or involuntarily, have been admitted with their full probative value, even where they have been secured by some ruse or trickery, which the learned trial Judge properly found not to have been the case here."

39. Under Article 18 of the Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987, fingerprints, palm prints and photographs may be taken with the written consent of a detainee or, where the person is seventeen years of age and under, the written consent of an appropriate adult. This document must be signed and retained. In this instance, it is argued that the resort to the consent procedure was specifically chosen by the Gardaí in order to avoid the statutory consequences of destruction under ss. 6 to 8 of the Criminal Justice Act, 1984, as amended. The signing of a consent form is evidence of consent; *The People (D.P.P.) v. Costigan* [2006] IECCA 57. A strict procedure for the taking of samples also exist under the Criminal Justice (Forensic Evidence) Act, 1990. Prior to these Acts, a Garda investigating a crime was entitled to seek the consent of any citizen to furnishing a relevant item, for example a blood sample, that might assist in enquiries. This principle is confirmed, as regards statements, by Rule 1 of the Judges Rules. In *The People (D.P.P.) v Boyce* [2005] IECCA 143, it was emphasized

that the powers to gather evidence granted by statute are in addition to, and not in extinction of, the existing lawful power of the gardaí to seek to gather relevant material with the consent of citizens. Murray C.J. indicated:-

> "It has long been the case that the prosecution are entitled to introduce such forensic evidence obtained from a person in custody at a trial provided it was obtained voluntarily and with the full consent of the person in custody. Provided consent is fully and voluntarily given and the person in custody is a full age and not otherwise suffering from any legal or other incapacity, they may give a forensic sample, including in response to a garda request, and the gardaí may take it or receive it. That is an essential part of the evidence gathering aspect of a criminal investigation provided it is done within the ambit of the law but it has not always been and is not necessarily dependent, as such, on the existence of express statutory powers to collect such voluntarily provided forensic evidence. In short, it is not unlawful to take voluntarily provided forensic samples from persons in custody… The court can find nothing in the Act which suggests that the Oireachtas intended to abolish the existing and valuable faculty of the gardaí to obtain or receive from persons in custody forensic samples that are voluntarily provided by such persons. It would indeed be extraordinary if the Oireachtas contemplated that any sample freely and voluntarily provided by a person in custody and then forensically examined by the gardaí which was lawful before the passing of the Act should be considered unlawful after the passing of the Act without any express provision to that effect, even though it was provided without any element of coercion and when the consequences of the refusal were nil from the point of view of an accused. The Act creates a distinct statutory regime fundamentally different in nature and consequences from the gathering of evidence under common-law rules or powers and does not the effect of abolishing the right or faculty of the gardaí to take or accept forensic samples from persons in custody that are voluntarily provided. It is an extension of the law rather than abrogation of the existing law. Although the learned trial judge decided that the provisions of the Act of 1990 did not apply to the circumstances of this case from a different legal perspective, the end result is the same. Since the Act does not apply and the blood sample was provided voluntarily he was bound to admit the relevant evidence."

40. Murray C.J. also held that forensic samples, like blood, hair or nail or fingerprint samples fall into the category of objective evidence and are not subject to the rules relating to confessions; provided these are lawfully obtained.

41. I consider that these decisions are directly in point. Once a fingerprint sample has been obtained by consent it is in the same category as an item of clothing which an accused person, or a suspect, hands over voluntarily to the gardaí in aid of their inquiries. A statutory formula may be applicable before particular kinds of samples are produced to the court; an example of this is s. 18 of the Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations (Regulations) 1987. Were it to be the case, however, that a fingerprint was proposed to be admitted and a consent document was either missing or absent, then it should be noted that a breach of the Regulations can be excused and the failure in that regard might be a rare example of a mere illegality, as opposed to a mistaken infringement of a constitutional right. I would be reluctant to hold, based on the decisions cited above, that a constitutional right to privacy extends to the map of one's DNA, one's fingerprints or the chemical composition of blood or urine. It may be, however, on the basis of the decisions to which I have already referred, that I am bound to so hold. I therefore turn to consider whether there is any room left for a balancing of rights where a mistaken violation of the constitutional rights of an accused person, for example to total privacy, has occurred.

Balance

42. In *O'Brien's* case the competing interests identified by the Supreme Court were both related to the community: its interest in the prosecution of crime and its interest in the maintenance of legal rules in the detection of crime. In *Kenny's* case the sole interest identified by the Supreme Court was that of ensuring proper police conduct. It seems to me this statement of the law may not have taken into account that more rights than those of the accused are involved in every criminal prosecution. This is otherwise more clear, as a matter of law, there where that judgment was given.

43. The rights of a victim of a crime are subsidiary to those of the community. When a crime is committed, it is the legal rights of the entire people of Ireland that are being attacked: hence, crimes are prosecuted in the name of the people under Article 30.3, "… is in ainm an Phobail … a dhéanfar an cúiseamh". Such acknowledgement as there has been in Irish law that the victim also has a right, because of the commission of a crime against her or him, to ensure that the prosecution is conducted fairly has been very limited. The fact that there is a balance, however, to be struck between the competing rights of the accused to have the law observed and that of the community to have social order maintained was expressly acknowledged by the Supreme Court in *B. v. D.P.P.*, [1997] 3 I.R. 140. At p. 195-196 Denham J., with whom all the other members of the court agreed, stated:-

> "It is not the applicant's interests only which have to be considered. It is necessary to balance the applicant's right to reasonable expedition in the prosecution of the offences with the community's right to have criminal offences prosecuted. The community's right to have offences prosecuted is not absolute but is to be exercised constitutionally, with due process. If there is a real risk that the applicant would not receive a fair trial then, on the balance of these constitutional rights, the applicant's right would prevail see *D. v. Director of Public Prosecutions* [1994] 2 I.R. 465 at pp. 473 and 4; *Z. v. Director of Public Prosecutions* [1994] 2 I.R. 476 at p. 506."

44. Earlier, in *The People (D.P.P.) v. J.T* , (1988) 3 Frewen 141, the Court of Criminal Appeal declared that the rule whereby a wife was prevented at common law from giving evidence against her husband was incompatible with the protection afforded to the family under Article 41 of the Constitution. The accused had been charged with incest; the victim being his mentally handicapped daughter. Paternity is one of the elements of the offence of incest and the prosecution called his wife to prove that the girl was the accused's daughter. This was not allowed for by the Criminal Justice (Evidence) Act, 1922 and the common law forbade generally wife to give evidence against her husband. Walsh J. on behalf of the Court of Criminal Appeal, analysed why the common law rule had not been carried over as part of the law of the State under Article 50 of the Constitution. I quote the relevant passage at p. 160:-

> "The Constitution places upon the courts the obligation to enforce the protection given to the family and family life by the Constitution itself. That must necessarily include an obligation to enforce these protective provisions even against members of the family who are guilty or alleged to be guilty of injuries to members of the family.
>
> It would be difficult to consider or to imagine any matter which would be more subversive of family life than sexual offences committed against his child by a spouse of the nature alleged in the present case particularly when the child in question is less than fully normal. It is obviously the duty of one spouse to protect the child or children against the other in cases of such abuse, and it would completely frustrate the obligation placed upon the State to protect the family if the very person upon whom the obligation is said to rest should be prevented or inhibited from testifying in a prosecution against the offending spouse. This is particularly so in the circumstances where a spouse whose testimony it is sought to introduce is a vital witness. Insofar as the justification sought for the existence of the rule is the prevention of family dissension, it can quite clearly have no validity in a situation where the application of the rule is so far from preventing

dissension, is assisting in concealing in effect, and thus permitting to go unpunished, a serious offence committed upon members of the family by other members of the family, particularly sexual offences by a father upon his own daughter. In view of the sense of obligation placed upon this Court to assist insofar as it can in the protection of the family the Court must take the view that the maintenance of the common law rule relied on in this case would be a failure to comply with the obligations imposed by the Constitution. This is all the more so in cases of assault upon the children of the family by the parents. Such a case should not be more hampered in its proof by the existence or the enforcement of the rule than in the case of an assault by the husband upon the wife."

45. This development in Irish law is mirrored by the emergence of similar considerations elsewhere. Under Article 8 of the European Convention on Human Rights it is declared that everyone "has the right to respect for his private and family life, his home and his correspondence". The Convention begins in Article 2 by declaring "everyone's right to life should be protected by law". Article 3 prohibits torture and inhuman or degrading treatment. Article 5 requires that states protect everyone's rights to liberty and security. These rights apply to the entire community: not solely to a person accused of a crime. Article 6 demands that before someone is deprived of his liberty, there has to be a procedure prescribed by law. Crucially, a point to which I will return, the European Convention on Human Rights does not require the exclusion of unlawfully obtained evidence. One decision, that of *X and Y v. The Netherlands*, (Application no. 8978/80), (1986) 8 E.H.R.R. 235, tends to suggest that rules which hinder a fair prosecution may be incompatible with the Convention. Ms. Y. was the victim of the crime and she was also, like the daughter of J.T. mentally handicapped. She was woken up in the middle of the night and forced into the room of Mr. B., who made her undress and have sexual intercourse with him. The Dutch Criminal Code required a complaint from her, as victim, before a prosecution could be initiated. This was impossible because, as was explained, "since, although sixteen years of age, she is mentally and intellectually still a child". Her father, Mr. X., therefore filed the required complaint on behalf of Ms. Y. The European Court of Human Rights held that a legal provision requiring a complaint from the victim in those circumstances constituted a failure by the Netherlands to protect the integrity of Ms. Y's family life under Article 8 of the Convention. A domestic legal obligation arises by virtue of ss. 2 and 3 of the European Convention on Human Rights Act, 2003. I consider that a rule providing for the automatic exclusion of evidence obtained in consequence of any mistake that infringes any constitutional right of an accused, may be incompatible with Ireland's obligations to provide, for both the accused and the community, a fair disposal of criminal charges.

46. In terms of this problem, Article 6 of the Convention is the most relevant:-

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and impartial hearing within a reasonable time by an independent and impartial Tribunal established by law. Judgment shall be pronounced publicly by the press and the public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of private life of the party so require or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3. Everyone charged with a criminal offence, has the following minimum rights:
>
> a) to be informed promptly, in the language which he understands and in detail, of the nature and cause of the accusation against him;
>
> b) to have adequate time and the facilities for the preparation of his defence;
>
> c) to defend himself in person or through legal assistance of his own choosing, or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

47. The European Court of Human Rights has held that it is not a principle of Convention law that unlawfully obtained evidence should not be admissible; *Schenk v. Switzerland* (1988) 13 E.H.R.R. 242, para. 46 and see *R. v. Khan* [1997] 1 A.C. 558.

48. In the neighbouring kingdom, the European Convention on Human Rights is incorporated into domestic law by the Human Rights Act, 1998. In *Attorney General's Reference (No. 3 of 1999)* [2001] 2 A.C. 91, D was charged with a particularly savage rape, following a burglary, on B, a 66 year old woman living in a terraced house in London in January, 1997. Semen swab samples were taken from the victim from which a DNA profile was constructed. A year later, D was arrested and charged with a burglary entirely unconnected to the earlier incident. A saliva sample obtained in custody resulted in a DNA profile being lodged in the National DNA Database. D was then charged and was subsequently acquitted of this later offence. Under s. 64 of the Police and Criminal Evidence Act, 1984 the DNA profile from this arrest should have been destroyed. However, it was not. The DNA sample from the rape victim was run on the National DNA Database and was discovered to match the DNA sample taken from the later burglary. D was therefore arrested on the basis of this suspicion and a new sample was taken from a sample of his hair. That new DNA profile matched the semen sample from the burglary in January, 1997. At the trial, however, it was asserted that the earlier sample should have been destroyed following the accused's acquittal on the unrelated burglary; it was thus argued that the evidence of the DNA profile upon his arrest could not be given in evidence. The evidence was excluded by the trial judge and the trial collapsed. The Court of Appeal agreed with this result. The case went to the House of Lords on a reference from the Attorney General. Section 64 of the Police and Criminal Evidence Act, 1984 spelt out that a sample which had not been destroyed as was required by the statute, could not be used in evidence against the person entitled to its destruction. It also specified that a sample which was required to be destroyed should "not be used…for the purposes of any investigation". A clear illegality had thus occurred by reason of the police basing their suspicion to found the arrest of the accused on a sample which should have been destroyed. The section did not go on, however, to state that any evidence obtained in consequence of an investigation based on a sample that should have been destroyed would be inadmissible in evidence. This was the construction put by the Court of Appeal on the section, which the House of Lords reversed. At p. 118, Lord Steyn stated:-

> "Counsel for the respondent was further compelled to concede that the construction adopted by the Court of Appeal leads to absurd consequences. Counsel for the Attorney General gave the following illustration. The police receive information from a forensic laboratory that X appears to have been responsible for a number of serial murders. The source

of the information is derived from a sample which ought to have been destroyed pursuant to

s. 64(1) of PACE. The police can do nothing until a further crime is committed. Even a consequential confession by X or discovery of the murder weapon in the house of X could not be used. But one does not have to resort to hypothetical examples: on the interpretation of the judge and the Court of Appeal the case involving evidence of a very serious rape could never reach the jury and in *Weir* [Unreported, Court of Appeal, 26th May, 2000] a conviction for a brutal murder was quashed on the ground that the DNA evidence should not have been placed before the jury."

49. The House of Lords held that the investigation based upon the illegal sample could give rise to evidence that was admissible against the accused. Lord Cooke reviewed the law in various countries, at p. 121, and noted that he could not find "any remorseless principle of the exclusion of evidence unlawfully obtained" in any Commonwealth country. All the members of the House of Lords agreed with Lord Steyn that in a criminal trial the question of the admissibility of evidence did not simply depend on the rights of the accused. That view seems to me to be consistent with Irish constitutional law in terms of recognising that no one person's rights can be considered where those rights conflict with the rights of others. It is also, at least arguably, in accord with our obligation to provide a "fair trial" in the determination of any criminal charge" under Article 6 of the European Convention on Human Rights. It is the view I would follow, if I could. At p. 118 Lord Steyn stated:-

> "It must be borne in mind that respect for the privacy of defendants is not the only value at stake. The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family and the public. In my view the austere interpretation which the Court of Appeal adopted is not only in conflict with the plain words of the statute but also produces results which are contrary to good sense. A consideration of the public interest reinforces the interpretation which I have adopted."

50. In my judgment it should now be possible, in considering whether to exclude evidence which has been unlawfully obtained, to take into account factors other than the isolated interests of the accused, divorced from any other consideration. Criminal trials are about the rights and obligations of the entire community; of which the accused and the victim are members. It is not a function of the criminal courts to discipline police officers by causing the exclusion of evidence. Sometimes, however, the balancing of competing interests requires that exclusion in the overall interests of the administration of justice. The cases of *J.T.* and *B.* and *X. and Y.* make it clear that the victim, being the subject of a crime, can have interests which should be weighed in the balance as well of those of the accused. But I would hold that the primary interest in the prosecution of crime is the maintenance of social order under the Constitution as provided for in the Preamble.

51. In the course of his speech in *A.G.'s Reference, at pp. 121 – 122, (No. 3 of 1999)* Lord Cooke gave the following useful summary of the law in other countries:-

> "It may be worth adding that just as in European Convention. law, as Lord Steyn has pointed out, there is no principle that unlawfully obtained evidence is not admissible, so there is no such general principle in Commonwealth countries. Approaches differ somewhat among the jurisdictions. Thus in Canada evidence obtained in breach of the Charter will be excluded if its admission is likely to bring the administration of justice into disrepute (*R. v. Collins* [1987] 1 SCR 265); in Australia the leading cases recognise a judicial discretion in which the competing demands of the public interest in the prevention and punishment of crime, on the one hand and fairness to the accused, on the other, have to be weighed (*Bunning v. Cross* (1978) 141 CLR 54; *Ridgway v. The Queen* (1995) 184 CLR 19); and in New Zealand, while it has long been held that the judicial discretion to exclude unfairly obtained evidence is wider than that recognised in England at common law in *R. v. Sang* [1980] A.C. 402 and *Kuruma v. The Queen* [1995] A.C. 197, a line of cases has treated evidence obtained in breach of the semi-constitutional provisions of the Bill of Rights as *prima facie* inadmissible but subject to exceptions created by the overriding demands of justice (*Howden v. Ministry of Transport* [1987] 2 NZLR 747; *R. v. Grayson and Taylor* [1997] 1 N.Z.L.R 399."

52. In *R. v. Shaheed*, [2002] 2 N.Z.L.R. 377 the New Zealand Court of Appeal reviewed the law relating to the exclusion of illegally obtained evidence from many countries, including Ireland and the United States. It is of interest to note that the rule from the United States may now be less strict than when Ireland first imported it in the *O'Brien* case. Not all fruits of an illegality are to be excluded. Nor does there seem to a burden cast upon the prosecution to prove that every manoeuvre made in the course of the investigation of an offence was strictly in accordance with law. Rather, unlawful searches and seizures are targeted, as the Fourth Amendment requires but, evidence unlawfully obtained may be dissipated, as to the legal effects, by collateral inquiries. The following passage in the judgment of Blanchard J. at p. 399 of the report makes this clear:-

> "In *Stone v. Powell*, [428 U.s. 465 (1976)] the Supreme Court emphasised the high costs of enforcing the rule to exclude reliable and trustworthy evidence, even when violations had been technical or in good faith. It suggested that such use of the rule might well generate disrespect for the law and the administration of justice:
>
> > 'Particularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system.' (page 490).
>
> United States Courts have accordingly to some extent in recent decades backed away from a very strict application of the rule although it still holds sway generally. It is established that evidence obtained following a wrongful search and seizure may be able to be used in a criminal trial if the prosecution has shown sufficient attenuation of the link between police misconduct and the obtaining of the evidence; there is no "but for" rule (*Brown v. Illinois* 422 US 590 (1975); *Wong Sun v. United States* 371 US 471 (1963)). In deciding whether exclusion is appropriate in a particular case the Supreme Court has applied a "dissipation of the taint" concept. This expression, first used by Frankfurter J. in *Nardone v. United States* 308 US 338 (1939), "attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost." (*Browne and Illinois* at p.609).

53. In the United States, members of the Supreme Court has also indicated that there should be a good faith exception to the rule of excluding evidence obtained in contravention of the Fourth Amendment; *United States v. Leon* (1984) 468 U.S. 897. Since the purpose of the exclusory rule is to deter unlawful police conduct, knowledge, or negligence as to knowledge, that the search was unconstitutional should be required before the exclusionary rule operates; *United States v. Peltier* (1975) 422 U.S. 531 at 542 and 539.

54. The Court of Appeal of New Zealand has expressly disapproved the Irish practice of excluding evidence merely because a mistake had been made. At p. 420 of the report in *R. v. Shaheed*, Blanchard J. stated:-

> "Exclusion will often be the only appropriate response where a serious breach has been committed deliberately or in reckless disregard of the accused's rights or where the police conduct in relation to that breach has been grossly careless. A system of justice which readily condones such conduct on the part of law enforcement officers will not command the respect of the community. A guilty verdict based on evidence obtained in this manner may lack moral authority. Society's longer term interests will be better served by ruling out such evidence. We would not, however, subscribe to the Irish view of what constitutes deliberate breach, but would confine it to acts or omissions which are to the knowledge of the officers concerned a breach of rights. An action not known to be a breach of rights does not merit the same degree of condemnation as one which is known to be so, particularly if the police error arose from a genuine misunderstanding of a difficult legal complication."

55. Two provisions of the Canadian Charter of Rights and Freedoms are relevant in this context, namely Articles 8 and 24:-

> "8. Everyone has the right to be secure against unreasonable search or seizure.
>
> 24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may applied to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."

56. The application of this express constitutional rule requires the court to balance all of the interests involved. Before deciding that any evidence should be excluded on the basis of impropriety, rights and obligations besides those of the accused and the police should be judicially scrutinized. That consideration involves looking at the nature of the evidence, the nature of the conduct by which it was obtained and the effect on the system of justice of excluding the evidence. In *R. v. Collins* [1987] 1 S.C.R. 265, the Supreme Court of Canada, at page 281, indicated that the purpose of the constitutional provision was to prevent the administration of justice being brought into further disrepute through the accused being deprived of a fair hearing, or through judicial condonation of unacceptable conduct. The balancing test in Canada involves looking at factors which are listed in the judgment as including the nature of the right infringed; whether that was serious or merely technical in nature; whether the conduct of the police officers was wilful or committed in good faith; whether there were circumstances of urgency; and whether there were other investigatory techniques available. This all makes sense.

57. After an exhaustive review of the authorities from many jurisdictions, Blanchard J. in *R. v. Shaheed* summed up the arguments for the exclusion of improperly contained evidence, stating at pp. 418-419:-

> "There is much force in these arguments, although the last of them is of greater relevance to a deterrence-centred regime. But a balancing test in which, as a starting point, appropriate and significant weight is given to the fact that there has been a breach of a quasi-constitutional right, can accommodate and meet them. Importantly, a *prima facie* rule does not have the appearance of adequately addressing the interest of the community that those who are guilty of serious crimes should not go unpunished. That societal interest, in which any victim's interest is subsumed, rather than being treated as a separate interest, will not normally outweigh an egregious breach of rights – particularly one which is deliberate or reckless on the part of law enforcement officers. But where the disputed evidence is strongly probative of guilt of a serious crime, that factor too must be given due weight. A system of justice will not command the respect of the community if each and every substantial breach of an accused's rights leads almost inevitably to the exclusion of crucial evidence which is reliable and probative of a serious crime. The vindication will properly be seen as unbalanced and disproportionate to the circumstances of the breach. Nor does a presumptive rule seem entirely consistent with the concept of a specific tailoring of remedies to the circumstances of the particular case which this Court favoured in *Simpson v. Attorney-General [Baigent's Case]* [1994] 3 NZLR 667.
>
> A careful consideration of the experience in this country and the other broadly comparable jurisdictions is persuasive that the proper approach is to conduct a balancing exercise in which the fact that there has been a breach of the accused's guaranteed right is a very important but not necessarily determinative factor. The breach of a right would be given considerable weight (the Privy Council in *Mohammed* called it a "cogent factor militating in favour of exclusion"). But it might, in the end, be held to be outweighed by the accumulation of other factors. In such a case, the conscientious carrying out of the balancing exercise will at least demonstrate that the right has been taken seriously."

58. It follows, from the foregoing survey, that Ireland is the only country with a common law heritage which does not apply a balancing exercise as to the exclusion of unlawfully obtained evidence. Further, two quite recent decisions indicate a reluctance on the part of the Supreme Court to extend the rule that a mistake which results in an accidental infringement of an accused person's constitutional rights should be extended in any way.

Limits

59. In *The People (D.P.P.) v. Cooney* [1997] 3 I.R. 205 the accused was identified by a number of witnesses as the man who had stabbed a person dead in a public house in Limerick. This identification of the accused was by means of an identification parade. This had taken place during the time when he was in unlawful custody in a Garda Station. That arose due to the fact that the Garda Superintendent in charge of his detention mistakenly believed, as a matter of law, that he could suspend the period of questioning of an arrested person where he had requested that it should continue beyond midnight, and thus extend the detention by reason thereof. A number of the witnesses from the public house identified the accused at this identification parade. This evidence was excluded at the trial by Costello J. The judge ruled, however, that an identification could be made, by these witnesses, of the accused in the dock. This they proceeded to do and the accused was convicted. In the Supreme Court, it was argued that the dock identifications would not have taken place but for the earlier identification at the identification parade where the accused was accidentally in unlawful custody. Further, it was argued that what was happening in the dock identification was recognition, at least in part, of the person identified at the earlier identification parade. The Supreme Court declined to accept these arguments and directed the rule as to the exclusion of evidence mistakenly obtained in breach of the accused's constitutional rights only towards such evidence as actually resulted from it: the rule did not apply when no right of the accused was been infringed; in this case, the dock identification.

60. I note further that in *Curtin v. Clerk of Dáil Éireann*, the Supreme Court refused to declare that a computer which was unlawfully, but accidentally in that regard, resulting in Mr. Curtin's acquittal, seized in relation to a child pornography investigation from a judge could never be the subject of a further official demand for production. The later demand was made by the Oireachtas committee investigating his fitness to be a judge. It would be difficult, if not impossible, to sort out the motive for demanding the computer. After all, the knowledge gleaned as to its contents in the investigation by the gardaí, following its earlier seizure, might be regarded as the predominant reason giving rise to the suspicion of possession of child pornography. The Oireachtas committee investigating the judge's conduct, could hardly be said to be unaware of what the earlier, and unlawful, garda investigation had revealed. Murray C. stated at p. 72:-

> "If the computer could have been and had been returned to his possession it could not be said that the exclusionary rule means it was forever immune, in all circumstances, from a lawful seizure or order for production."

Separation of Powers

61. As has been seen, Article 24 of the Canadian Charter of Rights and Freedoms expressly provides for the exclusion of evidence. The New Zealand Charter has a similar provision. The Fourth Amendment to the United States Constitution, in providing for the immunity of citizens from unlawful searches and seizures, is the basis for rules of exclusion in that country. No provision of Bunreacht na hÉireann indicates the existence of any similar rule. At common law, as carried over under Article 50, evidence which had been unlawfully obtained remained admissible subject to the exercise of a very limited judicial discretion. That discretion applied only where, in the judge's opinion, the prejudicial effect of the evidence outweighed its probative value or where confession evidence which was unfairly obtained was likely to be devalued as to its reliability. The courts have always maintained jurisdiction over the admissibility of confession statements under the maxim *nemo tenere prodere se ipsum*. This power continues to be maintained by the courts due to the fact that a confession statement was, of itself, sufficient to prove a case beyond reasonable doubt and because judicial experience had shown that false or unreliable admissions could easily be obtained, or might readily be corruptly manufactured.

62. Judicial discretion to invent laws, in our constitutional scheme, is limited or, perhaps, absent. Article 6 of Bunreacht na hÉireann provides:

> "1. All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good.
>
> 2. The powers of government are exercisable only by or on the authority of the organs of State established by this Constitution."

63. The effect of Articles 15.2.1, 17.2, 28.2 and 28.4.1 is to locate the power to make laws in the legislative arm of Government; *T.D. v. Minister for Education* [2001] 4 I.R. 259. The powers of the courts, in that regard, to invent new rules is, at most, strictly limited. I would consider that the separation of powers doctrine requires that the courts refrain from inventing any law. Insofar as that power once existed in the courts, it is now limited by the form and the extent of any discretion granted to judges under the laws as they existed in 1937 and carried over as consistent with the constitutional scheme that the people, through their elected representatives, make laws for the governance of Ireland.

64. What powers to invent laws do the courts have? The courts are entitled to control the admissibility of confessions, as this power as always existed, and the courts are entitled to utter judicial warnings to juries based on their experience as this power also existed in 1937. Even that later power is strictly limited. Giving the judgment of the Supreme Court in *The People (A.G.) v. Casey* (No. 2) [1963] I.R. 33 Kingsmill Moore J., at pp. 37 – 38, stated:-

> It is the function of a judge in his charge to give to the jury such direction and warnings as may in his opinion be necessary to avoid the danger of an innocent man being convicted, and the nature of such directions and warnings must depend on the facts of the particular case. But, apart from the directions and warnings suggested by the facts of an individual case, judicial experience has shown that certain general directions and warnings are necessary in every case and that particular types of warnings are necessary in particular types of case.
>
> Such accumulated judicial experience eventually tends to crystallise into established rules of judicial practice, accepted rules of law and statutory provisions. Thus the general directions which must be given in every case as to the onus of proof and the necessity of establishing guilt beyond reasonable doubt have arisen from experience of the fallibility of human testimony in general, whether due to mendacity, imperfect observation, auto-suggestion or other causes. The suggestibility and lack of responsibility of children of tender age find recognition in the statutory provision that their unsworn evidence shall not be sufficient to convict of an offence, unless corroborated by other material evidence implicating the accused, and even when such evidence is received under oath it is customary for judges to tell juries that they should not convict unless they have weighed the evidence with the most extreme care. Similarly the opportunities for giving false evidence afforded to an accomplice and to a person who alleges that a sexual offence has been committed against him or her, coupled with the extreme temptation to give false evidence frequently present in such cases, have given rise to the rule that a judge must warn the jury that it is always dangerous to convict on the evidence of such persons unless it is corroborated in some material particular implicating the accused.
>
> The category of circumstances and special types of case which call for special directions and warnings from the trial judge cannot be considered as closed. Increased judicial experience, and indeed further psychological research, may extend it. It is submitted by Mr. Sorahan, counsel for the prisoner, that the time has come for such an extension, that accumulated experience has demonstrated the necessity for warning a jury as to the mistakes which can be made, and which have been made, in the identification by witnesses of persons accused and, in particular, that a jury should be told that an identification parade, though the best available method of confirming identification, is very far from infallible.

Conclusion

65. I have difficulty in accepting that the separation of powers doctrine allows the courts to invent rules whereby juries, or judges as triers of fact in criminal cases, are deprived, on a non-discretionary basis, of considering evidence which is inherently reliable. I am bound by the decision in *The People (DPP) v. Kenny* [1990] 2 I.R. 110. 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.

66. Any system of the exclusion of improperly obtained evidence must be implemented on the basis of a balancing of interests. The two most fundamental competing interests, in that regard, are those of society and the accused. I would also place the rights of the victim in the balance. I note, in writing this judgment, that the third anniversary of the March, 2004 train bombings in Madrid is being marked. That atrocity led to the death of 191 commuters making their way to work and was inspired, apparently, because of the involvement of Spain in a foreign policy with which an international terrorist organisation did not agree. It is entirely conceivable, were the same thing to occur in Ireland, that vital evidence that might lead to the conviction of the perpetrators might have been uncovered through the infringement of someone's privacy as they spoke on a telephone or as a result of a comparison of DNA samples which the prosecution could not strictly prove were obtained by consent or through the proper exercise of statutory powers. The original test, as propounded by the Supreme Court in *O'Brien's* case would have allowed for a balancing of the rights of parties. In particular, the gravity of the offence and the nature of the infringement by the State authorities would have been taken into account. The current rule, as set forth by the Supreme Court in *Kenny's* case, automatically requires the exclusion of any evidence obtained through a mistake which had the accidental, and therefore unintended, result of infringing any constitutional right of one individual, namely the accused. The entire rational of the original Supreme Court decision in *O'Brien's* case is undermined by *Kenny's* case. The principle that extraordinary excusing circumstances can allow for the admission of evidence obtained in breach of a constitutional right can no longer be applied. It is an impossibility to make a mistake while, at the same time, acting to rescue a victim in peril or prevent the destruction of vital evidence. The whole rationale for a balanced rule with exceptions, set out in *O'Brien's* case, has been replaced.

67. I would also note that in every other respect, where constitutional rights conflict, a balance is sought to be struck; In *Re Article 26 of the Constitution and the Regulation of Information (Services Outside the State for the Termination of Pregnancy) Bill*, 1995 [1995] 1 I.R. 1. I should further note privileges in the law of evidence, whether State or diplomatic, are all now decided on a balancing test. Medical privilege can be argued for on analogous basis of resolving conflicting rights; see *Simon P. O'Leary*, March 2007 in the Bar Review (2007) 12(1) BR 33. There can be no doubt that exclusion is sometimes the only correct response to egregious police misconduct The admission of evidence obtained in flagrant violation of fundamental rights without excusing circumstances can amount to an attack on the very administration of justice. The problem identified, however, is the isolation of the rule of exclusion formulated in *Kenny's* case from any principle of balance as it otherwise operates within the constitutional scheme.

68. In the result , I would answer the questions posed by the learned District judge as follows:

> 1. A suspicion which gives rise to reasonable cause for arrest does not have to be justified on the basis that every element of it arose solely on the basis of evidence that was properly obtained.
>
> 2. It follows 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.
>
> 3. Members of An Garda Síochána have the power to seek the cooperation of individuals in the investigation of crime. They are entitled to take fingerprints, clothing, or any other samples, with the consent of a citizen, be he a suspect or not.
>
> 4. A garda is entitled to seek the consent of a citizen, be he a suspect or not, in relation to the gathering of relevant samples.
>
> 5. The district court is bound by the decision of the Supreme Court in *The People (DPP) v. Kenny* [1990] 2 I.R. 110. However, that decision should not be extended as to its effects to require the prosecution to prove that every element of an investigation was entirely proper and in accordance with statutory powers. The rule requires the exclusion of evidence where, as result of a mistake, an identifiable constitutional right of the accused is infringed by the agents of the State.
>
> 6. A judge is entitled to assess the evidence in deciding whether there was consent to the taking of any samples proposed to be given in evidence.
>
> 7. If a judge is satisfied that evidence has been obtained lawfully, the decision in *Kenny's* case does not apply and there is no judicial basis for the exclusion of evidence on the ground of the mistaken infringement of any constitutional right.