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Dr. Mazlena Mohamad Hussain

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Islam As The Religion Of The Federation: An Overview
Muhamad Haiqal bin Mohd Anis, Ahmad Firdaous bin Mohd Saleh & Muhammad Ikhlas Mohd Shafe'e



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THE CURRENT DEVELOPMENT OF ILLEGALLY OBTAINED EVIDENCE IN MALAYSIA

Dr. Mohamad Ismail bin Mohamad Yunus⁶⁵

ABSTRACT

Under the focus of evidence law in general, the authorities or any agencies involved in the investigation of crime may obtain the evidence by unlawful means. For instance, the evidence may be obtained through the commission of crime, a tort or a breach of contract or a breach of statutory or provisions governing the powers, procedure and the duties of the police or individual involving in the investigation of crime.⁶⁶ Among the unlawful ways that sometimes are used to obtain the evidence are stealing, confiscating goods that were not listed in the search warrant or confiscating goods without consent, collecting evidence illegally by way of entrapment, obtaining evidence through the wrong standard operating procedure (SOP) and using unnecessary force in confiscating the good or obtaining the evidence. The issue that arises currently is whether the admissibility of the evidence which is illegally obtained is affected by the manner of it being obtained even though the evidence ought to be relevant? This has caused a dilemma between two competing policies. Thus, this paper will clarify the latest standing of the Court of Appeal decision in 2018 in light of the Federal Constitution and Rule of Law.

Keywords: Evidence, illegally obtained evidence.

⁶⁵ Dip. in Public Administration (UiTM), LL.B (IIUM), MCL (IIUM), Ph.D (University of Canterbury, New Zealand). Senior Assistant Professor, Ahmad Ibrahim Kulliyyah of Laws.

⁶⁶ Mohd Akram Shair Mohamed & Mohamad Ismail bin Mohamad Yunus (2016), *The Status of Evidence Obtained Unlawfully: A Comparative Appraisal of the Laws in some selected Common Law Jurisdiction and Islamic Law Perspective*, Journal of Islamic Law Review, Vol. 12, No. 2, p. 172.

ABSTRAK

Secara umumnya, di bawah undang-undang keterangan pihak berkuasa atau mana-mana agensi yang terlibat dalam penyiasatan jenayah boleh mendapatkan bukti dengan cara yang menyalahi undang-undang. Sebagai contoh, bukti boleh diperolehi melalui perbuatan jenayah, tort atau pelanggaran kontrak atau pelanggaran undang-undang atau peruntukan yang mengawal kuasa, prosedur dan tugas polis atau individu yang terlibat dalam penyiasatan jenayah. Antara cara yang menyalahi undang-undang untuk mendapatkan bukti ialah mencuri, merampas barangan yang tidak disenaraikan dalam waran geledah atau merampas barangan tanpa kebenaran, mengumpul bukti secara haram melalui penahanan, mendapatkan bukti melalui prosedur operasi standard (SOP) yang salah dan menggunakan kekerasan dalam merampas barang atau mendapatkan bukti. Isu yang timbul ialah sama ada kebolehterimaan bukti atau keterangan yang diperoleh secara haram terjejas dengan cara ia diperoleh walaupun keterangan tersebut sepatutnya relevan? Hal ini telah menyebabkan dilema antara dua dasar yang bersaing. Oleh itu, artikel ini akan menjelaskan kedudukan terkini keputusan Mahkamah Rayuan pada tahun 2018 berdasarkan peruntukan Perlembagaan Persekutuan dan Kedaulatan Undang-undang.

Kata kunci: Keterangan, keterangan diperoleh secara haram.

INTRODUCTION

It has been contended that the reliability of any evidence obtained in an illegal manner should not be the reason for such evidence to be set aside, however if the issue of admissibility is neglected it would often result in the acquittal of the accused⁶⁷ However, there is another contended policy which implies that admitting illegally obtained evidence is equivalent to endorsing the inappropriate manner on how the evidence is procured.⁶⁸ As it has been expressed by Justice Homes in the case of *Olmsted v. United States*⁶⁹, that:

“Therefore, we must consider the two objects of desire both of which we cannot have and make up our minds on which to choose. It is desirable that criminals should be detected and to that end all available evidence should be used. It is also desirable that the government should not itself foster and pay for other crimes when they are the means by which the evidence to be obtained. If it pays its officers for having obtained evidence by crime, I do not see why it may not as well pay them for getting it in the same way and I can attach no importance to protestations of disapproval if it knowingly accepts and pays and announces in future it will pay for the fruits. We have to choose; I think it is less evil that some criminals should escape than that the government should play an ignoble part.”

⁶⁷ Mohd Akram Shair Mohamed & Mohamad Ismail bin Mohamad Yunus (2016), *The Status of Evidence Obtained Unlawfully: A Comparative Appraisal of the Laws in some selected Common Law Jurisdiction and Islamic Law Perspective*, Journal of Islamic Law Review, Vol.12, No.2, p. 172.

⁶⁸ Mohd Akram Shair Mohamed (2014), *Exclusion of Relevant Evidence Procured Improperly or Illegally*, Malayan Law Journal Articles, Vol.4 No. xiix p. 2.

⁶⁹ [1928] 277 U.S. 438.

Based on the views expressed by Justice Homes, it can be summarised that, generally, such policy of rejecting evidence which is illegally obtained is not within Malaysia's approbation.

THE POSITION IN MALAYSIA

Unfortunately, there is no specific provision which mentions expressly on illegally obtained evidence in the Malaysian Evidence Act 1950. However, illegally obtained evidence falls under the category of relevancy of facts which under Section 5 of the Evidence Act 1950, which states that:

“Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.”

The section explains that evidence shall be given by a person who is entitled under the law. This means that as long as the evidence is relevant to the fact in issue, it shall be admissible as if it is procured by the authorised entities.⁷⁰

Under the Malaysian Law of Evidence, the local courts frequently refer to common law cases. If there is any ambiguity or lacuna in the statutory provision, the court shall refer to the judicial precedents of the common law. In the case of *PP v Yuvaraj*⁷¹, Lord Diplock stated that:

“But no enactment can be fully comprehensive. It takes its place as part of the general corpus of the law. It is intended to be construed by lawyers and upon matters about which it is silent or fails to be explicit it is to be presumed that it was not the intention of the legislature to depart from well-established principles of law.”

⁷⁰ Augustine Paul, *Evidence Practice and Procedure*: Second Edition (Kuala Lumpur: Malayan Law Journal Sdn Bhd, 2000), p. 31.

⁷¹ [1969] 2 MLJ 89.

In the current context, since there is no certain provision on the admissibility of illegally obtained evidence, the court then shall refer to the common law jurisdiction.

It has been a settled rule of common law that if the evidence is relevant to the fact in issue, it does not matter in what manner the evidence is being procured, it is admissible. In the case of *R v Leatham*⁷², Crompton J. expressed that regardless of the manner in which the evidence was procured, the evidence will still be admissible. In the locus classicus case of *Kuruma v R*⁷³, Lord Goddard cited Crompton J. The case of *R v Leatham* affirmed that:

“In their Lordships opinion, when it is a question of the admissibility of evidence, strictly it is not whether the method by which it was obtained is tortuous but excusable, but whether what has been obtained is relevant to the issue being tried”.

In the case of *Kuruma v R*⁷⁴ the appellant was convicted of unlawful possession of ammunition which was in breach of Regulation 8A (1)(b) of Emergency Regulations 1952. The appellant was then sentenced to death. Under the Emergency Regulations, it is under the prerogative of the police officer or an officer above the rank of an assistant to stop and search an individual on suspicion for committing crime. The evidence found that appellant worked as a farmer. On the day he was caught, he was on leave to return to his rural home in the reserves. A Police Constable then stopped him at the roadblock, searched and found ammunition and a penknife inside his car. There were three individuals witnessing the search, but they were not called to give testimony. The appellant was then charged for capital punishment. Upon appeal, the appellant contended that the evidence procured by the Police Constable was illegally obtained. It was held in this case that the evidence was properly admitted. Lord Goddard in this case articulated that:

⁷² [1861] 8 Cox CC. 498, 502.

⁷³ [1955] 1 All ER 236.

⁷⁴ Ibid.

“...the test to be applied in considering whether the evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible, and the court is not concerned with how the evidence was obtained.”

Since the Evidence Act 1950 is silent on the admissibility of illegally obtained evidence, the common law rule is to be applied, in which the illegally obtained evidence is admissible as long as it is relevant.

THE DEVELOPMENT OF THE ADMISSIBILITY OF ILLEGALLY OBTAINED EVIDENCE IN MALAYSIA

In Malaysia, the court in *Saminathan v PP*⁷⁵ pioneered in developing the issue of illegally obtained evidence. The accused was charged for running an illegal lottery. In one provision of the Act, the raid must be done by police rank of inspector and above. However, the raid was conducted by those below the rank. The defence in this case contended that the evidence was illegally procured. In this case, J. Atkin expressed that:

“There is an overwhelming mass of authority for the proposition that the legality or illegality of a man’s arrest does not concern the court which is trying him. The court is only concerned with the charges brought against him, he has the remedy for illegal arrest elsewhere, and the manner in which the police obtained the possession of these documents does not concern the magistrate who is trying the accused. He is only concerned with the relevancy.”

The above judgment depicts that the court is not concerned with the way the evidence is being obtained. Even if it is obtained by a police officer below the entitled rank, the court will still look at the relevancy of the evidence.

The judgment in *Saminathan v PP* was then followed by the case of *Gan Ah Bee*⁷⁶. In this case, the respondent's premise was raided by an

⁷⁵ [1937] MLJ 39.

⁷⁶ [1975] 2 MLJ 106.

enforcement officer. There were some goods from the respondent's premise being seized by the inspector. However, the inspector was not the authorised person under Section 14 of the Price Control Act. His Lordship Ajaib Singh J. firmly articulated that:

“Evidence relating to the seizure and subsequent production of the goods at the trial was relevant evidence to the matters in issue and was therefore admissible, notwithstanding that it was obtained illegally and in non-compliance with the provisions of the Price Control Act.”

In 1987, Edgar Joseph Jr. J. in the case of *Re Kah Wah Video Sdn Bhd*⁷⁷, stated that:

“More than 30 years ago, Lord Goddard in delivering the advise of the Judicial Committee of the Privy Council, in the celebrated case of Kuruma v R said, inter alia: ‘the test to be applied in considering whether evidence is admissible is whether it is relevant to the matter in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained.’”

The above-mentioned case has followed the principle of law in the case of *Saminathan v PP* whereby the principle of relevancy and admissibility is applied. Furthermore, in the case of *Ramli b. Kechik v PP*⁷⁸, Mohamed Azmi SCJ said that the rule has been well established in English law, that even though the evidence is procured in an illegal manner, the evidence is still said to be admissible.

In *Wako Merchant Bank v Lim Lean Heng*⁷⁹, the evidence was illegally procured by the plaintiff's private investigator in breach of Section 97 of Banking and Financial Institution Act 1989. This section relates to information relating to banking transactions if disclosed will be an offence, to prevent insider dealing. The defendant owed money to the plaintiff. The plaintiff then obtained a Mareva Injunction to prevent the

⁷⁷ [1987] 2 MLJ 459.

⁷⁸ [1986] 2 MLJ 33.

⁷⁹ [2000] 4 CLJ 233.

defendant from taking assets out of jurisdiction, freezing the defendant's assets. In the affidavit supporting the ex-parte application, there was information of deposits obtained by the plaintiff's private investigator from the defendant's bank. That information was in breach of Section 97 of Banking and Financial Institution Act 1989, thus making evidence illegally procured. The defendant objected as the disclosure was in breach of Banking and Financial Institution Act 1989. The court found that the statutory provision did not mention the issue of admissibility of evidence. The provision only provides that it constitutes an offence to disclose such information and/or evidence. This case follows the principle of admissibility established in *Ramli b. Kechik v PP*.

Discretion to Exclude Illegally Obtained Evidence in Malaysia

There are academic discussions on the probable reasons for the courts' rejection to consider illegally obtained evidence. There are four principles as to why illegally procured evidence shall be excluded. Firstly, the reliability principle is one of the principles such evidence should be excluded as the reliability of the evidence can be questionable. Secondly, the remedial principle whereby the accused person should be protected from the consequences of the infringement, as being placed in a position in which the infringement never occurs and can be achieved by excluding such evidence in an illegal manner. Thirdly, disciplinary disciplines must be enforced to avoid the police or any authorised entities to commit such infringement when conducting investigation to obtain the evidence. Fourthly, is the integrity principle as it depicts the disapproval of impropriety and as a result, the purity of the court and criminal justice will be preserved.⁸⁰

⁸⁰ Mohd Akram Shair Mohamed & Mohamad Ismail bin Mohamad Yunus (2016), *The Status of Evidence Obtained Unlawfully: A Comparative Appraisal of the Laws in some selected Common Law Jurisdiction and Islamic Law Perspective*, Journal of Islamic Law Review, Vol.12, No.2, p. 175.

Again, we refer to the Malaysian case of *Saminathan v PP*⁸¹, which expounded the principle of admissibility of illegally obtained evidence. The case of *Re Kah Wai Video Ipoh Sdn Bhd*⁸², also states that:

“The test to be applied in considering whether evidence is admissible is whether it is relevant to the matter in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained. Nevertheless, the Malaysian courts have recognised the narrow aspect of the judicial discretion to exclude illegally obtained evidence if the strict rules of admissibility would operate unfairly against the accused.”

The same principle was laid down in *Chee Swee Tiang v PP*⁸³, wherein the majority bench invoked the discretion of the court to exclude illegally obtained evidence but there was a dissenting judgment by Ambrose J that the Singapore court had no such discretion. The reason was that Singapore Evidence Act, similar to the Malaysian Evidence Act 1950, which both are in *pari materia* with the Indian Evidence Act 1972 does not express the exclusion of illegally obtained evidence even though it is relevant. The position in regards to the discretion of the court to exclude such evidence has been settled in the case of *Law Society of Singapore v Tan Guat Neo Phyllis*⁸⁴. In this case, it was held that the court has no discretion to exclude illegally obtained evidence, including evidence obtained by entrapment because in the Singapore Evidence Act it does not mention about illegally obtained evidence and the court will only have discretion if the authority is in breach of constitutional power and consequently would cause infringement to the constitutional rights and protections to an individual. It is certain that the discretion of the court to exclude illegally obtained evidence is narrow unless there is outstandingly bad circumstance in obtaining the evidence illegally.

⁸¹ [1937] MLJ 39.

⁸² [1987] 2 MLJ 459.

⁸³ [1964] MLJ 291.

⁸⁴ [2008] 2 SLR 239.

CURRENT POSITION IN MALAYSIA

In the recent case of *Aizuddin Syah bin Ahmad v PP*⁸⁵, the accused was charged under Section 31A Dangerous Drug Act. According to the Criminal Procedure Code, it mandates urine tests to be conducted by police officers ranked above Sergeant. However, in this case, the urine test was conducted by a Corporal. The High Court decided that it was merely a procedural issue and it can be ratified as it does not involve crucial evidential matter. However, in the Court of Appeal, Hamid Sultan Abu Backer J decided that:

“When an act sets out that particular procedure, that procedure must be meticulously followed and common law cases cannot override the provision of the Act. The common law cases are subjected to the Act as well as the Federal Constitution which gives protection to the accused (Article 5 and Article 8 of the Federal Constitution).”

Thus, according to Hamid Sultan J, the provision in the Criminal Procedure Code must strictly be followed. Failure to comply amounts to a breach of the rule of law. The local classicus *R v Kuruma* comes into play when there is no governing statute to regulate how the evidence must be procured. Once the provision has established the requirements, they must be respected.

⁸⁵ [2018] MLJU 910.

PREJUDICIAL EFFECT v. PROBATIVE VALUE

Under the context of Evidence Law, it is up to the judges' discretion to exclude the evidence if the prejudicial effect outweighs the probative value.

Prejudicial effect is the extent that the evidence detracts from a court's ability to determine what happened. For example, the evidence may cause prejudicial inference whereby the judge may convict the accused regardless of the infringement being made upon the accused by the authority. Probative value means the ability of a piece of evidence to make a relevant disputed point more or less true. For instance, in the case of murder, if the defendant was fighting with his neighbour which bears no relation to the crime of murder, such matter has no probative value.

Nevertheless, if the fighting with the neighbour leads to the defendant's act of crime, there is probative value.⁸⁶

In the case of *Krishna Rao Gurumurthy*⁸⁷, Kang J expressed that the judge must judiciously exercise his discretion to exclude illegally obtained evidence if the prejudicial effect outweighs its probative value. If the prejudicial effect outweighs the probative value, the court must reject the evidence as it will cause miscarriage of justice.

DEFENCE OF ENTRAPMENT

The issue of fairness of trials is often associated with the methods of undercover police investigation. Entrapment occurs when an individual has been forced by the agent provocateur to commit the offence which he did not intend to do.⁸⁸ An agent provocateur refers to a person who entices an individual to commit a crime he otherwise would not

⁸⁶ "Probative Value," Legal Information Institute (Legal Information Institute), accessed January 14, 2022, https://www.law.cornell.edu/wex/probative_value.

⁸⁷ [2001] 1 MLJ 274.

⁸⁸ Michel I. Stober (1997), *Entrapment in Canadian Criminal Law* (Toronto: Carswell Legal Publications) p. 57.

committed in order for said individual to be convicted.⁸⁹ For instance, a person is instructed to deliver packages containing drugs whilst having the genuine belief that the package contains milk powder. The issue arises when the innocent minded person is enticed to commit a crime by a perverse tactic. Entrapment is also a method employed to procure evidence illegally.

The starting point with regard to the defence of entrapment is based on *R v Sang*⁹⁰, whereby the House of Lord expressed that the English law is silent on the defence of entrapment. Besides that, the court has no discretion to exclude the evidence procured by way of entrapment. However, it was held that if such evidence would have an adverse effect on the fairness of the trial then it should be excluded by the court. One of the factors to determine whether evidence obtained by way of entrapment should be excluded is to consider whether the authorised entity acting as the agent provocateur was enticing the accused to commit the crime otherwise he would not have committed. Whilst the rule has been enunciated in *R v Sang*, however, entrapment is still considered to be an abusive way to procure evidence and the courts are using their discretion to exclude such evidence to be admissible.

Consequently, under the common law, in *R v Loosely*⁹¹, the police entrapped the accused by a telephone call by pretending to be interested in procuring the drugs he was offering. The House of Lord acknowledged that evidence procured by way of entrapment may be excluded according to the discretion of the judge, as evidence procured by entrapment is still frowned upon.

In a Singaporean case of *How Poh Sun v PP*⁹², the Appellate Court refused to recognise the evidence procured by the agent provocateur by way of entrapment. While in certain cases, the evidence procured by the agent provocateur is given paramount consideration for sentencing.

⁸⁹ Archbold Criminal Pleading Evidence and Pleading.

⁹⁰ [1979] 69 Cr. App Rep 282.

⁹¹ [2001] 4 All ER 897.

⁹² [1991] 3 MLJ 216.

Thus, the court held that the judge has no discretion to exclude evidence which was unfairly or illegally obtained.

Position of Entrapment Defence in Malaysia

In Malaysia, there is no rule mandating the exclusion of evidence obtained by way of entrapment or trickery. Thus, it is under the court's responsibility to protect the integrity of the criminal justice system. In this case, the court should consider whether when such evidence is being brought before the court to be excluded or omitted.⁹³

In the case of *Wan Mohd Azman bin Hassan v PP*⁹⁴, the Federal Court expounded on the defence of entrapment. The appellant's contention was that the evidence acquired through entrapment was highly prejudicial and that it was incumbent upon the trial court to do a balancing exercise before acting on such prejudicial evidence. Thus, it was held in this case that the admissibility of the evidence of an agent provocateur is not in issue, neither is his credibility as a witness. Statutory legislation has provided for this in the form of Section 40A of the Dangerous Drug Act. It was stated in Section 40A that:

“(1) Notwithstanding any rule of law or the provisions of this Act or any other written law to the contrary, no agent provocateur shall be presumed to be unworthy of credit by reason only of his having attempted to abet or abetted the commission of an offence by any person under this Act if the attempt to abet or abetment was for the sole purpose of securing evidence against such person.

(2) Notwithstanding any rule of law or the provisions of this Act or any other written law to the contrary, and that the agent provocateur is a police officer whatever his rank or any officer of customs, any statement, whether oral or in writing made to an agent provocateur by any person who subsequently is charged

⁹³ Andrew Choo (1990), *A defence of Entrapment: An overview and analysis*, *The Modern Law Review*, Vol. 53.

⁹⁴ [2010] 4 MLJ 141.

with an offence under this Act shall be admissible as evidence at his trial.”

In this case, it also discussed the abuse of doctrine process recognised in the case of *Loosely*, that the evidence procured by way of entrapment by the agent provocateur may be excluded under the discretion of the court.

Thus, it was highlighted in this case that under the Malaysian law there was no defence of entrapment. In any event, it was for the appellant to prove that he committed the offence as a result of entrapment, which was a finding of fact, but as there was no such finding by the trial court the defence of entrapment as a defence was not raised. For the defence to operate at all, the appellant had to show that he was actually an 'unwary innocent' who would not, but for the entrapment, have committed the offence. However, the facts showed that the appellant was an 'unwary criminal' who readily participated in the offence and thus there was no entrapment in the instant case.

APPRAISAL OF THE LAWS IN SOME SELECTED COMMON LAW JURISDICTIONS

The contemporary law of evidence in Canada, England, Australia, and New Zealand represents a compromise between the two extremes of inclusionary and exclusionary of illegally obtained evidence. As to the judicial discretion to exclude such evidence, the trial judges have adopted a narrow or wider aspect of the discretion.

The Position in Canada

The main principle is that relevant evidence even if obtained illegally is admissible subject to its broad discretion to exclude if the illegality involves the violation of the Canadian Constitution Act 1982, Section 24(2).⁹⁵ The impact of Section 24(2) of the Charter of Rights and

⁹⁵ Mohd Akram Shair Mohamed & Mohamad Ismail bin Mohamad Yunus (2016), *The Status of Evidence Obtained Unlawfully: A Comparative Appraisal of the Laws in some selected Common Law Jurisdiction and Islamic Law Perspective*, Journal of Islamic Law Review, Vol.12, No.2, p. 175.

Freedoms can be seen under the principal section dealing with illegally obtained evidence which provides: If a court concludes that evidence was obtained in a 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.

The conflict between the wide and narrow views as to the scope of judicial discretion is vividly seen in the Canadian Supreme Court's case of *R v Wray*⁹⁶. The accused was charged with murder. The trial judge held that the statement signed by the accused was inadmissible as being not voluntary. In the statement, the accused said he threw the murder weapon, a rifle, into a swamp. The police found the rifle the following day. In the Court of Appeal, the judge affirmed the acquittal on the ground that the trial judge has a discretion to reject evidence, if the judge considers that its admission would be unjust or unfair to the accused or calculated to bring the administration of justice into dispute. On appeal by the Crown, the majority (6 to 3) held that the judge should have received evidence of the finding of the rifle, and the statement related to the location of the rifle. Catwright CJC, dissenting, stated that the confession of the accused was improperly obtained and was rightly excluded as being involuntary.

The Position in Australia

The common principle is that if the evidence is relevant, how it was procured, did not make such evidence inadmissible, subject to the Court's exclusionary discretion. The leading case that established the existence of the exclusionary judicial discretion is *R v Ireland*⁹⁷. The accused was convicted of murder by stabbing, in circumstances where it was likely the perpetrator had sustained injury to his hand. The accused was required by police to have his hand both photographed and examined by a doctor. The photos were tendered at trial and the doctor gave evidence for the prosecution. On appeal, the High Court held that the police had acted improperly and that, as the trial judge had not

⁹⁶ (1970) 11 DLR (3d) 673.

⁹⁷ (1970) 126 CLR 321.

adequately considered the question of discretion, the accused was entitled to a retrial.

In the words of Sir Garfield Barwick CJ:

“Whenever such unlawfulness or unfairness appears, the judge has a discretion to reject the evidence. He must consider the exercise of it; the competing public requirements must be considered. On the one hand there is the public need to bring to conviction those who commit criminal offence. On the other hand, is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion.”

In *Bunning v Cross*⁹⁸, the decision in *R v Ireland* was affirmed and guidelines were spelt out to assist trial judges in the exercise of discretion. On a charge of driving while under the influence of alcohol, police had mistakenly believed they were entitled to require the defendant to undertake a Breathalyzer test without first conducting a preliminary on-the-spot test. The results of the test were rejected by the magistrate.

On appeal to the High Court, Stephen and Aickin JJ isolated a set of principles and guidelines to be considered by trial judges in exercising their discretion. First, an account should be taken as to whether the police deliberately disregarded the law. Where the illegality occurs because of a mistake that is a factor pointing in favour of admissibility. Secondly, consideration may be given to the question of whether the illegality affects the cogency of the evidence. Cogency should play no part in the exercise of discretion where the illegality was intentional or reckless. However, where ‘the illegality arises only from mistake, and is neither deliberate nor reckless, cogency is one of the factors to which regard should be had’. Thirdly, consideration should be given to the ease with which the law might have been obeyed in procuring the

⁹⁸ (1977) 141 CLR 54.

evidence in question. While a deliberate ‘cutting of corners’ ought not to be tolerated, the fact that the evidence could easily have been procured without illegality had different procedures been adopted may point towards admissibility. Fourthly, the nature of the offence should be regarded. The more serious the offence, the stronger are the arguments in favour of admissibility. Finally, regard should be had to the scheme of any legislation the police may have failed to obey. If the legislation shows a deliberate attempt to restrict the powers of investigating authorities from obtaining certain evidence, that consideration will point towards rejection of evidence obtained in breach of such legislation.

Applying these considerations, the Court held that the results of the Breathalyzer test should have been admitted as evidence. Two factors were crucial: first, the unlawful conduct of the police had resulted from a mistake and not from deliberate or reckless disregard of the law; and secondly, the nature of the illegality had in no way affected the cogency of the evidence.

The Position in England

In the leading case *Kuruma v R*⁹⁹, the accused was charged with unlawful possession of ammunition during the period of emergency in Kenya. The ammunition was found during the period of emergency in Kenya. The ammunition was found during an unlawful search, and it was argued that the evidence of finding is inadmissible because of the manner in which it had been obtained. Lord Goddard said:

“the test to be applied in considering whether the evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence is obtained.”

In *Kuruma*, the Court adopted a narrower view of the discretion. Lord Goddard CJ acknowledged that the only basis for exclusion of evidence

⁹⁹ [1955] AC 197.

illegally obtained is to disallow evidence if the strict rules of admissibility would operate unfairly against an accused.

In addition to the common law discretion, the judge has now given a wider discretion to exclude evidence in the form of Section 78 of the Police and Criminal Evidence Act;

“..in any proceedings the court may refuse to allow evidence on which the prosecutor proposes to rely to be given, if it appears to the court that having regard to all the circumstances in which the evidence was obtained, the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.”

The Position in New Zealand

The Court in New Zealand has followed *Kuruma* and recognised that illegally obtained evidence if relevant is admissible. However, the courts have also recognised that there is a discretion to exclude such evidence. In the case of *Trust v. Taylor*¹⁰⁰, a police raid over a medical clinic and seized the patient’s files. The Court of Appeal ruled that although the search warrant was unlawful, the police could apply to retain the files, or at least have access to them, for use in any upcoming criminal charges. Furthermore, at the subsequent trial of the doctor on charges of unlawfully proceeding a miscarriage, no objection was made by the defence as to the admissibility of illegally obtained evidence.

The discretion to exclude was exercised in *Police v Hall*¹⁰¹, where the Court of Appeal held that the evidence of a medical doctor should have been excluded because of the cumulative unfairness of a medical examination without consent, the police refused to let the suspect telephone either his father or solicitor, and the eventual loss of the blood sample taken.

¹⁰⁰ [1975] 1 NZLR 728.

¹⁰¹ [1976] 2 NZLR 678.

ILLEGALLY OBTAINED EVIDENCE FROM ISLAMIC POINT OF VIEW

In discussing on the admissibility of the illegally obtained evidence in Islam, it is essential to understand the underlying principles of Maqasid al-Shari'ah (Objectives of Islamic law). Five vitalities are enshrined by the Shari'ah namely Religion, Life, Intellectual, Dignity and Property. The highlighted principles are to seek the balance of the right of the state to enforce its criminal law by apprehending criminals and tender evidence to secure conviction and the rights of individual.¹⁰²

The general rule in Islam is that evidence obtained in violation of such rights is inadmissible based on various authorities. However, it should be borne in mind that this rule is subject to exception, if it is highly probative and as such, admitting such evidence will be for the benefit of the public at large. As such, the rule can never be used to excuse the high potential and profile offenders.¹⁰³ There are some rights in Islam (during interrogation and primary questioning stage), which has been generally recognised and practiced universally. For examples are:

- a. Freedom from unreasonable searches and seizures
- b. Interrogation to be conducted only by designated official
- c. Right to take an oath
- d. Right to refuse answering questions and remain silent
- e. Rights to be free from pressures, tortures, and cruel/ inhumane treatment or punishment.¹⁰⁴

However, these rights are not absolute but subject to maintain social order and security. In regard to state's right, it should also be noted that

¹⁰² Ma'moun M. Salama, 1982, *The Islamic Criminal Justice System: The Right of Individual to Personal Security in Islam*. USA. Oceana Publication, Inc. 55.

¹⁰³ Mohamad Ismail Yunus. *The Relevancy and Admissibility of Evidence Obtained through Unlawful Means: A Comparative Legal Appraisal* (2004) IKIM Law Journal vol. 8 No. 1 (January - June 2004) 111.

¹⁰⁴ Ibid.

State's right is further governed by conditions and guarantees aimed at preventing arbitrary and intimidating searches. The restrictions are:

- a. The issuance of a search warrant to persons or premises.
- b. The warrant of arrest issued must have some evidentiary basis, i.e., sufficient evidence to constitute probable cause that a crime was committed by the accused.
- c. There must be lawful discovery of sufficiently incriminating proof of existence of offence.¹⁰⁵

If the discovery is unlawful e.g. as the result of spying the evidence cannot be used for incriminating purposes. The fundamental principle which correlates with the topic can be found in the maxim "Everything which is based on bathil is bathil."¹⁰⁶

In deciding the issue of admissibility of illegally obtained evidence, one should bear in mind that to some extent, the state does have the right to violate the individual rights of privacy.

Legal maxims supported are the public interest is given priority over the specific interest of the individual, between two evils choose the lesser one and preventing evil should be given priority than preserving interest.¹⁰⁷

The Position in Malaysian Shari'ah Courts

The local Islamic enactments have inserted the term *Bayyinah* in the definition of evidence. *Bayyinah* is defined as to enlighten, explain, or clarify a right or interest. Undoubtedly, evidence, though illegally obtained, will still trickle within the purview of *Bayyinah* and thus be

¹⁰⁵ Sami Hasan Al-Husayni, *Al-Nazhoriyah al-Ammah Liltafsir fi Qanun al-Misriwa al-Muqaran* 74 (Cairo, dar al-Nadah al-Arabiyah, 1972) 79.

¹⁰⁶ S. Mahmassani. 1987. *The Philosophy of Jurisprudence in Islam*. Kuala Lumpur. Hizbi Publications. 206; See also Article 72 of The Majelle. Pakistan. The Book House.

¹⁰⁷ Mohamad Yunus, Mohamad Ismail. (2004). *The Relevancy and Admissibility of Evidence Obtained through Unlawful Means: A Comparative Legal Appraisal*. Vol. 8 No. 1. IKIM Law Journal. 110.

rendered admissible. The court, however, maintains its inclusionary and exclusionary discretion power either to admit or reject such evidence in any case where the prejudicial effects outweigh the probative value or whether the issue of miscarriage of justice arises.¹⁰⁸

CONCLUSION

The courts should rethink and seriously consider adopting the wider version of the judicial discretion to exclude, to be in line with other common law jurisdictions which adopt a more liberalised version of the discretion. This will pave the way forward in attaining fairness and justice and not a way backwards. Whereas, under Islamic law, the balance between the right of the state to enforce its criminal law by apprehending criminals and to collect evidence and the right of individuals to be observed. The judge should refer to al-Quran, Hadith, and Ijtihad to achieve justice between parties.

To admit or exclude the evidence would depend on the circumstances or facts of each case, by considering the need to maintain the integrity of the judiciary and the need to balance the competing interests and values in light of Maqasid al-Shari'ah.

¹⁰⁸ Mahmud Saedon A. Othman. 1996. *An Introduction to Islamic Law of Evidence*. Kuala Lumpur. HIZBI Publications. 8.

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