COMMENTS ON RECENT DEVELOPMENTS IN THE LAW

DEATH OF A DISCRETION

The decision of the House of Lords in *R* v *Sang*[1] is concerned with both a narrow and a broad issue. The narrow issue is whether or not the judge in a criminal trial may exclude the evidence of an agent provocateur when the accused has been the victim of entrapment; the broad issue concerns the power of the judge in a criminal trial to exclude improperly obtained evidence generally.

Sang was charged with conspiracy to utter forged banknotes and unlawful possession of forged banknotes. He pleaded not guilty and his counsel sought to adduce evidence on the voir dire to show that the offence had been instigated by a police informer. Sang had allegedly been approached by an agent provocateur with a view to procuring the notes while he was in Brixton Prison as a result of previous conviction. Counsel argued that if incitement could be established then the judge possessed a discretion to exclude the evidence of the informer. Without hearing the evidence, however, Judge Buzzard ruled that he did not possess such a discretion. There was thus no need for a voir dire, Sang changed his plea to guilty and was sentenced.

An appeal against the Judge's ruling was dismissed by the Court of Appeal[2] but the following point of law, phrased in very broad terms, was certified for consideration by the House of Lords:[3]

> Does a trial judge have a discretion to refuse to allow evidence—being other than evidence of admission—to be given in any circumstances in which such evidence is relevant and of more than minimal probative value?

Lord Diplock's answer to this question, concurred in by the other members of the House,[4] was that a trial judge may, at his discretion, exclude such evidence only where its prejudicial effect outweighs its probative value[5] or where the evidence has been obtained from the accused after the commission of the offence, as in cases of admissions and confessions.

The divergence between this decision and current New Zealand practice raises the much-disputed question of the desirability of excluding evidence to protect rights and control police malpractice.

I The Discretion to Exclude Improperly Obtained Evidence

The parties to this dispute may be divided into two schools of thought. On one side stand the advocates of what has been described as the "reliability" principle; on the other side are the supporters of the "disciplinary" principle.[6]

1 [1979] 3 WLR 263.
2 [1979] 2 WLR 439.
3 At 266.
4 Present were Lord Diplock, Viscount Dilhorne, Lord Salmon, Lord Fraser of Tullybelton and Lord Scarman.
5 The existence of a discretion of this nature is supported by much high authority and was not doubted by their Lordships. See eg *Noor Mohamed* v *R* [1949] AC 182; *Harris* v *DPP* [1952] AC 694.
6 These terms appear to have been coined by Ashworth, "Excluding Evidence as Protecting Rights" [1977] Crim LR 723.

Those who adhere to the "reliability" principle ground their argument upon the pre-eminence of relevance in the law of evidence. Admission of evidence, it is argued, is based upon the intrinsic value of that evidence and is not affected by such extrinsic factors as police impropriety. Supporters of this approach have a narrow view of the function of a criminal trial which, they believe, is solely to determine whether or not the accused is guilty of the crime charged. To this end the court must seek the truth, using all available relevant evidence. The disciplining of the police or other law enforcement personnel is a separate, independent function. The court is concerned with the trial of the accused; any attempt to police the police serves only to confuse this function. Control of the police is not a matter for the judiciary at all. Lord Diplock said in *Sang*:[7]

> [T]he function of the judge . . . is to ensure that the accused has a fair trial according to law. It is no part of a judge's function to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at the trial is obtained by them.

It is not the judiciary but the executive which is to watch the watchman. The proper means to control the police is through existing civil remedies such as actions for trespass, assault and false imprisonment and through the police's internal disciplinary procedures.

Writers of the "reliability" school also attack the logical basis of exclusion. It is absurd, they argue, to acquit an obviously guilty defendant because the policeman has also acted improperly. As Justice Cardozo quipped,[8] "The criminal is to go free because the constable has blundered." The appropriate procedure is for both to be sanctioned, in independent proceedings. Exclusion does not punish the errant officer but society at large for it protects only the guilty, who go free because the truth is not told. There is no remedy in exclusion for the innocent whose rights have been infringed.

On the other hand, advocates of the "disciplinary" principle do not deny the importance of all relevant evidence being placed before the court nor do they deny the importance of convicting the guilty. The pursuit of truth is seen as an important value but not as an absolute. Protecting citizens from unlawful state interference is an equally, and in some cases more, important value. The end of obtaining convictions cannot always justify the means of gathering the evidence.

The disciplinarians have a wider and more pragmatic conception of the function of a criminal trial. If the executive is unable to exercise effective control over the police then the judiciary must fill the gap. It is conceded that, ideally, it is not the court's function in applying rules of evidence to enforce essentially political judgments about the appropriate means of law enforcement. Exclusion of evidence is a clumsy and indirect method of enforcing rights but it is the only effective method currently available. Existing disciplinary remedies are ineffective and rarely invoked with respect to the irregular collection of evidence. In the last resort, improper practices can only be stamped out if those who indulge in such practices are denied the prize they have gained. Further, only if the means by which evidence is obtained is a live issue at the criminal trial will questions of police impropriety be raised or come to light at all.

In *Sang*, all members of the House emphasised that the judge's power

7 At 271.
8 *People* v *Defore* 242 NY 13, 21.

to exclude otherwise admissible evidence was based on the general principle that an accused must be given a "fair trial".[9] They were also agreed that it was no part of the judge's duty, in pursuance of the principle, to exclude evidence obtained by the police through the use of an agent provocateur.[10] To that extent at least, whatever their differences on other aspects of the discretion, their Lordships lent their support to the "reliability" principle and weakened the position of those who advocate the "disciplinary" principle. They also returned to a more restrictive view of the scope of the discretion than appears to have prevailed in Commonwealth and recent English cases.

Modern Commonwealth discussion of the exclusion of evidence has focused on Lord Goddard CJ's famous, yet seemingly contradictory, statements of principle in *Kuruma* v *R*:[11]

> . . . the test to be applied in considering whether 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. . . . No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused.

A broad reading of the second limb of this statement gave rise to a line of authority which may be described as the "oppression" cases. In *Callis* v *Gunn*[12] Lord Parker CJ declared that the discretion may be exercised to exclude evidence which[13] "had been obtained in an oppressive manner by force or against the wishes of an accused person." The Privy Council ruled in *King* v *R*[14] that evidence should be excluded which[15] "has been obtained by conduct of which the Crown ought not to take advantage." This principle not only covered improperly obtained pre-trial admissions but could, in a proper case, lead to the exclusion of the fruits of an illegal search and seizure. As recently as 1977 Lord Widgery CJ wrote in *Jeffrey* v *Black*[16] that the discretion is one[17] "which every judge has all the time in respect of all the evidence which is tendered by the prosecution."

A broad, disciplinary approach has been consistently followed in New Zealand. The Court of Appeal stated in *R* v *O'Shannessy*[18] that "the well known residual discretion to exclude evidence . . . has always received support and encouragement here" and in *R* v *Capner*[19] this was declared to be[20]

> a desirable attitude. To deny the discretion would be to take away something which acts very much in the interests of accused persons.

9 Per Lord Diplock at 271; Viscount Dilhorne at 274; Lord Salmon at 279; Lord Fraser at 281; Lord Scarman at 287-288.
10 Lord Diplock at 267-268; Viscount Dilhorne at 276; Lord Salmon at 277-278; Lord Fraser at 280; Lord Scarman at 285.
11 [1955] AC 197, 203-204.
12 [1964] 1 QB 495.
13 Ibid at 501. Lord Parker CJ went on to state that evidence should not be admitted where it had been obtained "by false representations, by a trick, by threats, by bribes, anything of that sort." Ibid at 502.
14 [1969] 1 AC 304.
15 Ibid at 319.
16 [1977] 3 WLR 895.
17 Ibid at 900.
18 Unreported, Court of Appeal, 8 October 1973, CA 78/73, per McCarthy P.
19 [1975] 1 NZLR 411.
20 Ibid at 414 per McCarthy P.

The discretion has been exercised on a number of occasions in recent years to exclude evidence as diverse as the testimony of an agent provocateur,[21] statements obtained in breach of the Judges' Rules[22] and a blood sample taken after the accused had been assaulted by a traffic officer.[23]

Neither the "oppression" cases nor the decisions of the New Zealand courts may be reconciled with the approach of Lord Diplock in *Sang*. A very narrow construction was placed upon Lord Goddard's dictum in *Kuruma*. He regarded it as simply affirming the judge's discretion to exclude evidence which would have a prejudicial effect out of all proportion to its probative value.[24] Attempts to found upon the dictum a more general discretion to exclude improperly obtained evidence on the grounds of unfairness were mistaken. Lord Goddard had followed his dictum, however, with an example of a situation in which the discretion might properly be exercised:[25]

> If, for instance, some admission of some piece of evidence, eg, a document, had been obtained from a defendant by a trick, no doubt the judge might properly rule it out.

This example was regarded by Lord Diplock as merely a reference to the controversial decision in *R* v *Barker*.[26] There the accused had been read an extract from Hansard declaring that if a taxpayer voluntarily disclosed past frauds no criminal proceedings would be instituted. The accused produced two ledgers which had been fraudulently prepared and was subsequently charged with an offence. The documents were excluded, however, on the basis that they stood on the same footing as an induced confession.

While *Barker* is clearly a just decision on its facts, the court's reasoning is open to criticism. Primarily, the decision seems in direct conflict with the principle that facts learned or discoveries made as a result of an involuntary confession are admissible although the confession itself is not. This principle is as old as *R* v *Warickshall*[27] where it was held that: "Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or are not entitled to credit." This has remained the traditional rationale for the exclusion of involuntary confessions—that they are unreliable. In *Barker* there was no question of the documents being unreliable so why were they not admitted? As Glanville Williams writes:[28] "There is an obvious difference between a fraudulent written account and a confession of past fraudulent accounting."

In *Sang* Lord Diplock attempted to explain *Barker* on the basis that the document was[29] "clearly analogous to a confession" and that the accused had been induced to incriminate himself. The use of an inducement has such importance, argued Lord Diplock, because:[30]

21 *R* v *Pethig* [1977] 1 NZLR 448.
22 *R* v *Rowlands* [1974] 1 NZLR 759; *R* v *Hartley* [1978] 2 NZLR 199.
23 *Stowers* v *Auckland City Council*, unreported, Supreme Court, Auckland, 21 December 1977, M 1280/77, Mahon J.
24 At 269.
25 Supra n 11 at 204.
26 [1941] 2 KB 381.
27 (1783) 1 Leach 263; 168 ER 234.
28 "Evidence Obtained by Illegal Means" [1955] Crim LR 339, 341.
29 At 270.
30 At 271.

> The underlying rationale of this branch of the criminal law . . . is . . .now . . . the right to silence. That is why there is no discretion to exclude evidence discovered as a result of an illegal search but there is a discretion to exclude evidence which the accused has been induced to produce voluntarily if the method of inducement was unfair.

This argument gives rise to two separate observations. First, if the exclusion of evidence is based upon the privilege against self-incrimination and induced confessions are not excluded because they are unreliable, where does this leave the two-hundred-year-old *Warickshall* principle? For surely the privilege against self-incrimination is also breached when evidence is admitted which was discovered as a result of an induced confession? One wonders whether Lord Diplock in *Sang* has overruled *Warickshall* by implication.

Further, if the exercise of the discretion is based upon this privilege, it is, with respect, difficult to explain the decisions in cases such as *R* v *Maqsud Ali*[31] and *R* v *Keeton*.[32] In the latter case, for example, the accused, who was in custody, asked to telephone his wife. He was allowed to do so but a constable listened in at the switchboard. Incriminating statements made during the conversation were admitted by the Court of Appeal. A more clear-cut case of a man being tricked into incriminating himself is hard to imagine. Why was the evidence not excluded?

The second observation is that Lord Diplock's approach may produce strangely contradictory results. It means, for example, that where the accused is induced to hand over incriminating evidence that evidence may be excluded, but evidence obtained by a blatantly illegal search may not be. In the former case the right to silence has been infringed whereas in the latter it has not. With respect, there seems to be little logic in this distinction and no good reason for treating police misconduct which infringes the right to silence differently from other forms of impropriety. It is submitted that the option of exclusion should be available to the court in all cases of official malpractice.

Lord Diplock's views were evidently premised on the traditional "reliability" view; the judge's sole concern is to give the accused a "fair trial" and not to exercise disciplinary powers over the police. This control is left to the courts who give civil remedies[33] and to the appropriate disciplinary authorities. This view seems to be shared by all of their Lordships. Thus Lord Scarman emphasised the same division of powers. He said:[34] "The role of the judge is confined to the forensic process. He controls neither the police nor the prosecuting authority." The court is not concerned with how evidence was obtained but only with the unfair use of that evidence at the trial. His Lordship illustrated this distinction by reference to the Judges' Rules:[35]

31 [1966] 1 QB 688.
32 (1970) 54 Cr App R 267.
33 His Lordship does not question whether these remedies are adequate to prevent police misconduct. This approach may be compared with the dominant role which the deterrence debate has played in judicial thinking about the exclusion of evidence in the United States. See eg *Mapp* v *Ohio* 367 US 643 (1961); *Bivens* v *Six Unknown Named Agents* 403 US 388 (1971).
34 At 288.
35 Idem.

> The Judges' Rules, for example, are not a judicial control of police interrogation, but notice that, if certain steps are not taken, certain evidence, otherwise admissible, may be excluded at the trial.

It is submitted that this distinction is illusory. The sole reason for the exclusion of the evidence is because "certain steps are not taken": ie, the judge is simply saying to the police, "You have acted improperly. As a result this evidence is excluded." In this context, fairness to the accused and control of police practices must always go together. The distinction between disciplining the police and fairness to the accused at the trial cannot be sustained.

Lord Diplock's approach, with which Viscount Dilhorne appeared to concur, led him to extreme positions which are respectfully questioned in this note. It is apparent, however, that the other Law Lords were not prepared to carry the "reliability" principle quite so far. Lord Salmon considered that the precise scope of the discretion did not require consideration in the present case. The category of cases calling for the exercise of the discretion was not closed, nor was it necessarily confined to the types of cases which had already been decided.[36] In particular, he reserved for future consideration the correctness of the dicta in *Callis* v *Gunn*[37] and *Jeffrey* v *Black*.[38] Lord Fraser also took a broader view of the discretion than Lord Diplock, although he doubted whether it could ever apply "to evidence obtained from sources other than the accused himself or from premises occupied by him."[39] He was not prepared to circumscribe its exercise with any further limits. It is apparent from his speech that he accepted that there were situations in which evidence might be rejected on account of an illegality in police methods of arrest and search.[40] Lord Scarman's view of what was involved in a "fair trial" was perhaps more restrictive. For him, a key question (which he left unanswered) was whether evidence obtained by a deception or trick practised on the accused, might be rejected in the exercise of the discretion.[41] As both Lord Salmon[42] and Lord Scarman[43] pointed out, their Lordships' observations on the content of the duty to ensure a "fair trial" were obiter, and it is clear that in England different views may still be held about the types of improper police practice which may lead to the exclusion of otherwise admissible evidence. It is respectfully suggested, however, that these different positions are to a greater or lesser degree, open to similar criticisms to those advanced against Lord Diplock's speech.

The broad statements of the New Zealand Court of Appeal suggest that the general approach in *Sang* may not be followed in New Zealand. *Kuruma,* being a decision of the Privy Council, remains binding on New Zealand courts. It is however, an ambiguous decision and, as the House of Lords in *Sang* has shown, can be given an interpretation so narrow as almost to deny altogether the existence of a discretion to exclude im-

36 At 279.
37 Supra n 12.
38 Supra n 16
39 At 283.
40 At 282-283.
41 At 290.
42 At 278-279.
43 At 289.

properly obtained evidence. It remains open to a New Zealand judge to adopt this interpretation in the future. However, as Livesey has written in another context:[44]

> To submit that a trial judge has no discretion to exclude admissible and relevant evidence is not the same as to say that the law is in an entirely satisfactory state without it.

To deny the power of the judge to sanction police misbehaviour in the collection of evidence by the exclusion of that evidence is to leave many constitutional "rights" without protection and malpractice undeterred. The position of the entrapped defendant provides a striking illustration.

II Entrapment

An accused person is "entrapped" if law enforcement officers or their agents create or encourage or stimulate an offence involving him which would not otherwise have been committed. In New Zealand and England proof of entrapment does not constitute a substantive defence to the crime charged. But where the encouragement of the police does constitute entrapment, this activity is regarded by the New Zealand courts as unfair conduct justifying the exclusion of the testimony of the official participator or agent provocateur.[45] The decision of the House of Lords in *Sang* declares that the English judiciary may not exclude evidence for this reason. In both England and New Zealand, however, it is agreed that the degree of official involvement may be relevant to sentence.

The decision incorporates three main arguments. First, it is axiomatic that a trial judge has no responsibility for the prosecution and cannot prevent a prosecution from proceeding merely because he believes that as a matter of policy it should never have been brought. Second, there is no doctrine of entrapment as a defence in English law. To exclude the evidence of an agent provocateur would, it is argued, give the trial judge the power to effectively halt the prosecution merely because he objected to the police conduct. It would also lead to the introduction of the defence of entrapment by the back door, the defence being available, however, only at the judge's discretion.

Third, it is denied that proof of incitement can alter the guilt of the accused because both the actus reus and mens rea of the offence are present whether the offence was instigated by a police agent or not. The substantive law must not be evaded by the procedural device of the exclusion of the prosecution's evidence. Lord Scarman said:[46]

> The judge may not by the exercise of his discretion to exclude admissible evidence secure to the accused the benefit of a defence unknown to the law.

It is stressed, however, that a person who incites a crime is also guilty of an offence and should also be prosecuted. No difference can be made in this respect between police incitement and incitement by others.

It must be conceded that this argument is both logical and consistent

44 "Judicial Discretion to Exclude Prejudicial Evidence" [1968] CLJ 291, 309.

45 See *R* v *O'Shannessy* supra n 18; *R* v *Capner* supra n 19; *R* v *Pethig* supra n 21; *R* v *Climo*, unreported, Supreme Court, Auckland, 16 August 1977 A 85/77, Speight J.

46 At 288.

with the attitude of their Lordships to the exercise of the discretion to exclude improperly obtained evidence generally. It is submitted, however, that it has a number of drawbacks.

First, even when analysed in terms of the "reliability" principle, a special case can be made with regard to entrapment. For example, it can easily be appreciated why followers of that principle would always admit evidence obtained by an illegal search, for the legality or otherwise of the search has no relevance to the veracity of the evidence. But this is not the case where the accused has genuinely been entrapped. For, without the official involvement, the crime would never have been committed at all.

Special characteristics also distinguish the official from the lay instigator. It may be that no logical distinction can be made, but surely there is a moral difference. The policeman is the representative of law and order. When he creates an offence this is official participation in crime which should be met with the strongest discouragement. Further, the likelihood of the police instigator being prosecuted is much less than is the case with other inciters of crime. The activities of the agent provocateur may have been approved by his superiors or even the result of a policy decision at the highest level. The chances of an undercover officer being prosecuted in these circumstances are surely remote. His conduct may be seen as over-eager but is unlikely to be regarded as criminal.[47]

It is not denied that it may be very difficult or even impossible to prosecute certain types of crime without the use of agents provocateurs or infiltrators. This is a factor which may well weigh heavily with the court when it comes to exercise the discretion but does not automatically preclude the existence of such a discretion in all cases.

Their Lordships' approach to the question of sentencing also appears inconsistent. Lord Salmon, for example, stated that where an accused person has been the victim of entrapment the court must convict but[48]

> . . . may, however, according to the circumstances of the case, impose a mild punishment upon him or even give him an absolute or conditional discharge and refuse to make any order for costs against him.

With respect, this again leaves the law in a contradictory position. The reason why a sentence is reduced is because the court disapproves of police involvement in the creation of offences. Yet this very policy argument, which could lead to the discharge of a prisoner, can never lead to an acquittal. Why the issue of entrapment is relevant to sentence but not to guilt is not satisfactorily explained.

The most disturbing feature of the decision, however, is that it will prevent evidence of improper police practices from coming to light. Because police involvement is not relevant to guilt the defendant will often be obliged to plead guilty. There will be no voir dire at which the alleged agent provocateur will give evidence and no opportunity for counsel to cross-examine. The extent of the official involvement will never be known. This is precisely what happened in *Sang*. Lord Diplock said:[49]

47 In this regard it is well to remember the comment of Justice Brandeis delivering his famed dissent in *Olmstead* v *US* 277 US 438, 479 (1928): "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding."

48 At 278.

49 At 265-266.

> It is only fair to the police to point out that there never was a trial within a trial. The judge's ruling made it unnecessary to go into the facts relating to the appellant's claim that he was induced by a police informer to commit a crime of a kind which but for such persuasion he would never have committed; so no evidence was ever called to prove that there had been any improper conduct on the part of the police or of the prosecution.

This is, in effect, a presumption in favour of police propriety which the accused is unable to rebut. It is difficult to see how the trial judge can reach an informed decision as to whether the penalty should be mitigated or whether he should state his disapproval of the police activity if, as Lord Diplock points out, the facts have never been ascertained. Judicial disapproval is likely to provide a stimulus to the police authorities to prosecute or to invoke their own disciplinary procedures, but if the court is as willing to make assumptions in favour of the police as were their Lordships in *Sang,* such disapproval will be rare.

Further, one of the major reasons which led their Lordships to restrict severely the power to exclude relevant evidence was their belief that the gathering of evidence could be controlled by the use of civil remedies. For the victim of entrapment, however, there is no civil remedy available.

The result of *Sang,* therefore, is that there will be no effective sanction to deter official participation in crime and such conduct will seldom be exposed, despite the apparent distaste with which the English judiciary regard the activities of agents provocateurs.

It is strongly suggested that the approach of the New Zealand courts is to be preferred.[50] If official incitement of a crime is alleged, evidence will be given which will enable this serious charge to be tested. If the case is an extreme one, in which the crime would not have been committed at all but for police involvement, then the accused may be acquitted. If police involvement has not reached that extent, the facts will at least have been established upon which the court can make an informed decision as to possible reduction of sentence. Above all, the use of this more flexible procedure will enable an independent body, the judiciary, to oversee the activities of the police in this area, where otherwise no effective deterrent would exist.

J B DAWSON

50 The approach of the House of Lords in *Sang* had previously been adopted by the English Court of Appeal in *R* v *Mealey* (1974) 60 Cr App R 59. That decision was expressly rejected by the New Zealand Court of Appeal in *R* v *Capner* supra n 19 at 414.