THE LAW ON ILLEGALLY OBTAINED EVIDENCE : A COMPARATIVE STUDY

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PREFACE

The law on illegally obtained evidence has always intrigued the writer particularly because it is the kind of evidence that invariably creeps into the casefiles of the writer.[1]

It is hoped that this paper would serve as a starting point for the more thorough research on the subject.

The law is stated as at 17th May 1994.

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1 The writer is a member of the Polis Di Raja Malaysia

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CHAPTER 1

THE ADMISSIBILITY OF ILLEGALLY OBTAINED EVIDENCE IN MALAYSIA

A series of locally decided cases seem to hear out the principle that evidence is not inadmissible merely because it has been obtained unfairly or illegally. The test is whether it is relevant and admissible under the Evidence Act. The rule even applies to evidence obtained by means of entrapment or through the agency of an **agent provocateur**.

The rules enunciated above do not affect the specific laws of evidence governing the admissibility of confessions. The admissibility of confessions including cautioned statements depends

on the manner in which they were obtained. They are dealth with sections 24 to 30 of the Evidence Act 1950, and 113 of the Criminal Procedure Code and other related laws. To this extend, therefore, evidence obtained in breach of the provisions relating to confessions and related laws may be regarded as an exception to the general rule that evidence is not rendered inadmissible.

In 1987, in In re Kah Wah video (Ipoh) Sdn. Bhd.[2], Edgar Joseph Jr. J. said:

> "More than 30 years ago, Lord Goddard in delivering the advice of the Judicial Committee of the Privy Council, in the celebrated case of **Kuruma v R**[3] said, inter alia

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2 [1987] 2 MLJ 459

3 (1955) AC 197 (Privy Council)

"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".

His Lordship was, of course, not making new law when he penned those off-quoted words for the principle he referred to was well-settled, in this country, long before that (see, for example **Saminathan v Public Prosecutor**[4])

Saminathan was followed in **Lee Sang Cheah v R**[5], where the evidence against the accused on a charge of assisting in the carrying out of a public lottery contrary to section 4(c) of the Common Gaming Houses Ordinance (Cap. 30) comprised documents

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4 [1937] MLJ 39 per Aitkin J (page no.)

5 [1946] MLJ 22

which were procured by police officers as a result of an illegal arrest of the accused.

Mc Elwaine CJ after quoting Aitkin J. in Saminathan that, "the manner in which police obtained possession of these documents does not concern the Magistrate who is trying the accused. He is only concerned with their relevancy," said,

> "I agree with this conclusion. The admissibility is rarely dependent on the manner in which the exhibits are discovered".

In **Wong Liang Nguk v PP**[6], the appellant was convicted of assisting in carrying on a public lottery contrary to section 4(i)(c) of the Common Gaming Houses Ordinance. The charge was that, she

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6 [1953] MLJ 246

was knowingly carrying in a motor car, of which she was the sole occupant, a number of books containing the records of stakes relating to 1000 character lottery.

The evidence against the appellant consisted of three books which the police officer had seized from her possessions when he stopped and searched her car such a search was clearly unlawful because the police officer was not authorised to do so under the Common Gaming Houses Ordinance.

Thomson J. in overruling the trial court which had held such evidence to be inadmissible said;

> "Generally speaking that fact that evidence is unlawfully obtained does not affect its admissibility. If the police officer in this case had no authority to

search, then no doubt he would have been open to some sort of civil action, but the question of his authority to search is completely irrelevant to the admissibility of the evidence of his statement of what he found in the course of that search, that is abundantly clearly as a matter of general principle and in particular relation to this type of case it was accepted as long ago as 1936 by Aitkin J. in the case of **Saminathan v PP**."

In **PP v Tan Keng Siew**[7], on a charge under the Merchandise Marks Ordinance 1950, certain exhibits seized by a police officer from the accused, were proffered in evidence against him. It was argued on behalf of the accused that the search carried out by the Inspector under the search warrant was not in compliance with the provisions of Section 28(i) of the Ordinance. Under the

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7 [1955] MLJ 59

provision of this Ordinance information that there is reasonable cause to suspect that any goods or things in relation to which an offence has been committed are within the house or premises of the defendant or otherwise in his possession or under his control in any place must be on oath. It was argued that because the information was not given on oath, the search was therefore carried out illegally, and thus evidence obtained in the course of and by means of such an illegal search was inadmissible.

Rejecting this argument Buhagiar J. said:

> There is authority for the proposition that evidence unlawfully obtained is admissible: **Wong Liang Nguk v PP**. There is also recent authority for this proposition in the recent case of **Kuruma v R**".

In Sow Kim Hai & Anor v PP[8] the appellant was convicted on charges of assisting in carrying lottery offences under section 4 of the Common Gaming Houses Ordinance 1953. The evidence procured was by unlawful entry by the Police in non-compliance with section eleven (11) of the ordinance. In rejecting the appellant's contention that the illegally obtained evidence should have been rejected, Spencer Wilkinson J. said:

> "It is settled law that when an accused person is before a Court, the Court has jurisdiction to try him, notwithstanding the fact that his arrest may have been illegal, and it has recently been held by the Privy Council that the fact that the evidence has been illegally obtained does not affect the question of its admissibility: Kuruma v Queen. Even therefore if

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8 [1956] MLJ 21

"evidence of possession..... of the documents in question in this case was illegally obtained that would not affect its admissibility".

That relevancy and not how the evidence was obtained is the criterion which decides admissibility was again in **PP v Foong Kow & Ors**[9], where the accused was charged for being in possession of obscene films and abetment thereof.

The police had procured the incriminating evidence by illegal entry, in non-compliance with the requirements of section 24(2) of the Cinematograph Film Ordinance 1952.

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9 [1967] 1 MLJ 141

The trial judge had rejected the evidence because it was unlawfully procured. On appeal Mc Intyre J. following cases supra allowed the appeal, saying that;

> "Illegal entry and search by the police may give rise to a cause of action for damages... But the illegality cannot vitiate the trial of any person found committing an offence in the premises when it was raided or render inadmissible in evidence any incriminating implements or documents found therein".

In **PP v Gan An Bee**[10], an Enforcement Inspector had entered and seized some goods from the respondent's premises. But he was not the authorised person under section 14 of the Price Control Act. At the conclusion of the prosecution case the learned

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10 [1975] 2 MLJ 106

Magistrate had acquitted the respondent because there was no prima facie case against the respondent except for the illegally obtained evidence, which was rejected as it was illegally procured. Ajaib J. however, following local authorities, including Kuruma, allowed the appeal. He held that the 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.

The question of the admissibility of illegally obtained relevant evidence was again considered by Peh Swee Chin J. in a novel form in **PP v Seridaran**[11]. The novel question on appeal to the learned Judge was whether

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[11] [1984] 1 MLJ 141

"In a prosecution of a non-seizable case conducted by the police before the court.... is it incumbent on the prosecution to produce the order to the police to investigate issued by the Public Prosecutor,?[12]"

The learned Judge said;

"Clearly this sub-section makes it mandatory for the police to have, in hand an order to investigate from the Public Prosecutor before proceeding to do so. The failure to do so would render the evidence obtained by the police in such investigation, illegal.....on the footing that such evidence is illegally obtained, I am bound by, and I do certainly subscribe to the view that if such illegally obtained evidence is relevant to the

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12 (under section 108(ii) of the Criminal Procedure Code which provides: (ii) No police officer shall in a non-seizable case exercise any of the special powers in relation to police investigations given by this chapter without the order of the Public Prosecutor".

matters in issue it is admissible in evidence on the authority of the judgement of the Privy Council in **Kuruma v The Queen**."

In the leading case of re Kah Wah Video (Ipoh) Sdn. Bhd' the principles enunciated in Saminathan and Kuruma was again reasserted.

The facts relevant to our topic were that police had seized certain infringing videotapes under a search warrant. It appeared that while the "scheduled" videotapes were lawfully seized, there were the "unscheduled" tapes which were unlawfully seized. The contention before Edgar Joseph JR. J. was that these "unscheduled" videotapes, because they were unlawfully seized, proceedings under section 15(I) Copyright Act 1969 could not be commenced against

the offenders. Giving short shrift to this argument the learned Judge said:

> "More than 30 years ago, Lord Goddard...in the celebrated case of **Kuruma v R** said interalia: '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'. His Lordship was of course not making new law....for the principles he referred to was well-settled, in this country, long before that (see, for example **Saminathan v Public Prosecutor** per Aitkin J.)

The effect of holding that proceedings under section 15(I) can only commence if the infringing copies are lawfully seized must be to drain the principle enunciated in Kuruma's case of all its vitality.

The only bar against a prosecution under section 15(I) is where a period of six months has elapsed since the seizure of the infringing copies or contrivance concerned without the institution of such proceedings.

Clearly, if the prosecution are at liberty to adduce evidence of the recovery of the articles seized as a result of an illegal search, this must imply the right to prosecute and for this purpose, to retain exhibits seized which are capable of being used in evidence at the trial.

Since Kuruma has become a locus classicus on illegally obtained evidence, it is only apt that the facts and judgement of the case be given:

The accused, a Kenyan African while travelling on his reserve, passed along a road, on which he knew there would be a road block. He would have gone by another route on which there was no road block. He was stopped and searched illegally in that the searchers were not of the rank of Assistant Inspector or above. They found on him some ammunition. He appealed. The main thrust of his appeal was that the evidence given against him being illegally procured was wrongly admitted. Dismissing his appeal Lord Goddard speaking for the Privy Council in what has become a locus classicus said:

> "In their Lordships' opinion 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. While this proposition may not

have been stated in so many words in any English case there are decisions which support it, and in their Lordships' opinion it is plainly right in principle. In R v Leatham (1861) 8 Cox CC 498 an information for penalties under the Corrupt Practices Act, objection was taken to the production of a letter written by the defendant because its existence only became known by answers he had given to the Commissioners who held the inquiry under the Act, which provided that answers before that tribunal should not be admissible in evidence against him. The Court of Queen's Bench held that though his answers could not be used against the defendant, yet if a clue was thereby given to other evidence, in that case the letter, which would prove the case it was admissible. Crompton J said (Ibid 501): "It matters not how you get it; if you steal it even, it would be admissible". Lloyd v

Mostyn (1842) 10 M&W 478 was an action on a bond. The person in whose possession it was objected to produce it on the ground of privilege. The plaintiff's attorney, however, had got a copy of it and notice to produce the original being proved the court admitted the copy as secondary evidence. To the same effect was **Calcraft v Guest** [1898] 1 QB 759. There can be no difference in principle for this purpose between a civil and a criminal case. 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. This was emphasized in the case before this Board of **Noor Mohamed v The King** [1949]AC 182 at 191-2, and in the recent case in the House of Lords, **Harris v Director of Public Prosecutions** [1952] AC 694. If, for instance, some admission of some piece of evidence, e.g. a document, had been obtained from a defendant by a trick, no