UNFAIRLY OBTAINED EVIDENCE: EXPLORING THE BALANCE BETWEEN DEFENDANTS’ RIGHTS AND THE INTERESTS OF JUSTICE

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Abstract
Unfairly obtained evidence is any prosecution evidence that has been obtained in a questionable manner. Courts have the power and discretion to exclude such evidence under both case law and statute. The most important case regarding unfairly obtained evidence is R v Sang (1980), which ruled that a judge can exclude trial evidence if its prejudicial value outweighs its probative value. Following this was the Police and Criminal Evidence Act 1984, which is concerned with the fairness of the proceedings, with section 78(1) being specific to unfairly obtained evidence. The European Convention on Human Rights also plays an important role, in particular Article 6 (the right to a fair trial), and Article 8 (the right to privacy). However, for evidence to be ruled inadmissible there needs to be significant and substantial breaches to these Acts. Despite this protection for the defendant, the fact evidence may not be automatically ruled inadmissible even if there are breaches in PACE or the European Convention of Human Rights seems to favour the criminal justice system. Therefore, this article aims to determine whether English Law benefits the right of the defendant in trial proceedings, or simply ensures greater fairness.

Keywords
Unfairly Obtained Evidence; Police and Criminal Evidence Act 1984; European Convention on Human Rights; Criminal Evidence

Introduction
Unfairly obtained evidence is described as any prosecution evidence which has been obtained in a questionable manner (Munday 2015). This includes evidence that has been obtained illegally, improperly, or unfairly due to unlawful arrest, entrapment, use of unlawful surveillance or bribery, threat or trickery (Munday 2015). There are three main challenges to the fairness of evidence: breaches of the European Convention on Human Rights; breaches of the Police and Criminal Evidence Act 1984 (PACE) and its Codes of Practice; and bad faith on the part of the police (The Crown Prosecution Service 2011). Courts have the power to exclude such evidence under case law guidelines, which were set out in R v Sang, a case that pre-dated PACE (R v Sang 1980); however, for a court to consider whether or not to exclude evidence obtained unfairly, there now needs to be a significant and substantial breach of the European Convention on Human Rights and PACE. Nevertheless, even if evidence has been obtained unlawfully, unfairly or improperly, it does not
automatically result in it being ruled inadmissible (Wortley and Stockdale 2014). This article assesses how far English Law provides a balance between the defendant’s rights and the administration of justice. The main cases and legislation surrounding unfairly obtained evidence will be discussed, as well as the rationale behind them. The application of these in real cases will also be analysed.

**Unfairly obtained evidence: the legal development**

An important turning point regarding unfairly obtained evidence was seen in the case of *R v Sang*. Before this case, there was no law regarding unfairly obtained evidence. As a result, the courts only required a piece of incriminating evidence in order to secure a conviction (Dyer 2015). However, in the case of *R v Sang* the defendant was charged with conspiracy to issue, and unlawful possession of forged banknotes, but there were questions about whether the charged wrongdoings were due to incitement by a police agent provocateur. This prompted the judge to convict the defendant as he had no discretion to exclude this prosecution evidence. However, upon appeal, it was held a judge in a criminal trial always has discretion to exclude evidence if, in his opinion, its prejudicial effect outweighs its probative value (*R v Sang* 1980). This means that in a trial by jury, the judge has discretion to exclude evidence which, even though technically admissible, would probably have a detrimental influence on the minds of the jury that would be out of proportion to its true evidential value (McKay 2009). It was also held that a judge has no discretion to refuse to admit relevant admissible evidence on the grounds that it was obtained by improper or unfair means, as the court is not concerned with how evidence is obtained, but only with how the evidence is used by the prosecution at trial (*R v Sang* 1980). In addition, it was pointed out that it is not the function of the court to exercise disciplinary powers over the police or prosecution (McKay 2009).

The rule of English law, as recognised in *R v Sang*, states that any relevant evidence in a trial is admissible, even if it has been obtained illegally. This raised concerns about whether the fairness of the trial would be affected. As a result, the discretion of the trial judge to exclude evidence on the basis of ‘fairness’ has since been placed on a statutory footing in England and Wales by the enactment of section 78 of PACE, but the principle relating to unlawfully or improperly obtained evidence remains the same (Jackson 2013).

PACE, section 78(1) states:

In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the
circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it (Police and Criminal Evidence Act, 1984).

However, when this section is applied by judges, case law shows that evidence can only be excluded if there is bad faith on the part of the police or impropriety, i.e. significant and substantial breaches of PACE. Only these are interpreted as having ‘an adverse effect on the fairness of the proceedings’ (The Crown Prosecution Service 2011). For example, in the case of R v McCarthy (1996), the defendant was arrested and convicted of conspiring to purchase and distribute a Class B drug. The conviction was obtained due to a stop and search, by police officers, on the car of the accused. Following the search, even though no illegal drugs were found, the police obtained £51,000 which was believed to be used to purchase the supply of the illegal drugs. The defendant appealed this conviction on the grounds that the police officers had not arrested him before the search was conducted and, therefore, no warrant was produced. However, it was held that if the action of the police had been a breach of PACE, it was neither significant nor substantial. In addition, there had been no act of bad faith by the police, as they stopped the car legally and in accordance with Code A: 2 para 4 of PACE, which states that the police may stop and search a person or their property if there is ‘reasonable suspicion … linked to accurate and current intelligence or information’. Consequently, the judge ruled the evidence admissible under section 78 of PACE. However, it can be argued this may not have been the correct decision in this case, as the car the defendant was travelling in was stopped and searched by the police without a warrant and no arrests were made as no drugs were found. The defendant was convicted based upon the fact that the sum of money found was consistent with drug trafficking (R v McCarthy 1996). However, as the presence of drugs was not found, it can be concluded this evidence is circumstantial as, although unlikely, it is still possible the money could have come from another source. This would have had an adverse effect on the fairness of the trial, which, according to section 78(1) of PACE, should result in the evidence being ruled as inadmissible.

A similar situation occurred in the more recent case of R v Khan (2013). Here, the defendant was charged with attempted murder based upon audio recordings put in place by the police without the knowledge or consent of the defendants. The recording equipment was installed in the vans that were used to take the defendants to court for the hearing of an application for a warrant for their further detention. The purpose of the exercise was stated to be the gathering of intelligence and
evidence with a view to proving or disproving their involvement in the offence (R v Khan 2013). The admissibility of the recordings was questioned as it was believed the police had acted in bad faith by installing them. However, in this case the judge ruled that even though there had been a breach of PACE, there was no ground to exclude the recordings under section 78(1) and there was no misrepresentation, entrapment or other conduct that could be characterised as misbehaviour. The police had simply given the defendants the opportunity to talk together and so the fairness of the trial had not been affected (R v Khan 2013). This can be seen as the correct decision as, although there was a breach of PACE, the police did not obtain the incriminating evidence through force or entrapment.

Conversely, a DNA profile that was unlawfully retained and resulted in the conviction of the defendant in R v Nathaniel was held to have an adverse effect on the fairness of the trial (R v Nathaniel 1995). In this case, a DNA profile matching the defendant was produced from a sample the defendant had provided as part of a separate case. The defendant was acquitted in this other case and so, under the old section 64(1) of PACE, his sample should have been destroyed. However, as it was not destroyed, two years later the defendant’s DNA profile was matched to evidence in a rape case (R v Nathaniel 1995). As the DNA profile should not have existed at the time it was matched, it was ruled the results should have been excluded under section 78 of PACE and so an appeal was allowed (O’Doherty 2000). Here, the judge made the correct decision in excluding this evidence, as there was a significant and substantial breach of section 64(1) of PACE, especially as the conviction was based solely on the fact that the evidence matched the DNA profile that should not have existed (Forster 2001).

In cases such as R v Smurthwaite (1994) the prosecution depended upon evidence gained from undercover police officers who were posing as contract killers. In this case, the defendant was convicted of soliciting to murder his spouse (R v Smurthwaite 1994). Entrapment is a big issue with undercover police work and occurs when the undercover officer gives the suspect an opportunity to commit a crime in order to gain evidence of ongoing criminal activity. In doing this, the undercover officer allows the suspect to create an offence that would not have otherwise been committed (Choo 2015). Part of section 78(1) of PACE is the ability to exclude evidence obtained by police agent provocateurs. However, for evidence to be excluded on these grounds there has to be evidence the undercover officer had acted as an agent provocateur (Choo 2015). In the case of R v Smurthwaite, the defendant approached the undercover officers voluntarily, so the officers could not be described as an agent provocateur, and the tape evidence recording the offence could be admitted (R v
Smurthwaite 1994). Similarly, in *R v Christou* it was held the discreetly sited cameras and sound equipment recording the illegal selling of stolen jewellery in a shop deliberately set up to encourage criminals to enter was properly admitted. This is because the police had not acted as agent provocateurs (*R v Christou* 1992).

PACE, nevertheless, acts as a safeguard for defendants when it comes to confessions. A confession does not have to be oral or written (Emson 2010). In *R v Bailey* the defendants were tricked into believing the police did not want them to share a cell whilst in custody, in order to make them feel a false sense of security. However, they were put together in a bugged cell, where they made damaging admissions during their conversations together. The court held that the defendants’ remand in police custody was unlawful and the evidence of their conversations was inadmissible (*R v Bailey* 1993). In contrast, in the case of *R v Heibner* (2014), the appeal against the admissibility of the defendant’s confession was dismissed. The defendant believed his confession about his involvement in a murder should have been excluded due to the fact he was not allowed access to a solicitor. This was dismissed as the confession was made voluntarily, even though there was a breach of both PACE and Article 6 of the European Convention on Human Rights, involving the privilege against self-incrimination (*R v Heibner* 2014). However, it is possible this confession may never have been made if a solicitor was present, raising questions about whether the fairness of proceedings had, indeed, been affected.

**The position of the European Convention on Human Rights**

The European Convention on Human Rights is also a major factor when it comes to unfairly obtained evidence. For example, Article 6 guarantees the right to a fair trial and it is believed this right cannot be qualified, compromised or restricted in any way, regardless of the circumstances and the public interest in convicting the offender (Hoyano 2014). The administration of justice will fail if a defendant does not receive the fair trial he is entitled to (Hoyano 2014), as demonstrated in *Teixeira de Castro v Portugal* (*Teixeira de Castro v Portugal* 1999). In this case, the defendant was a Portuguese drug trafficker who had been convicted of his crime in Portugal following the actions of two undercover police officers, who disguised themselves as customers. The actions of these undercover officers were later found to be in breach of Article 6 of the European Convention on Human Rights, outlining the right to a fair trial, as the officers had acted as agent provocateurs, therefore tricking the defendant into committing the crime (*Teixeira de Castro v Portugal* 1999). Similarly, in *R v Mason* (1988) the police deceived not only the defendant but also his solicitor into
falsely thinking the defendant’s fingerprint was left at the scene of the crime. As a result, it was held the trial was unfair and the conviction was quashed (R v Mason 1988).

Article 8 is also important to consider, as this guarantees the right to privacy (European Convention on Human Rights). However, despite this right to privacy, the secret listening device planted by police in R v Khan was held to be rightly admitted at trial as there was no significant breach of the Article (R v Khan 1997). This can be contested as, in order to install the listening device, it involved trespass, property damage and invasion of privacy by the police (Carter 1997). This can be seen by some as being a substantial breach to someone’s right to privacy, questioning how far the police are allowed to go before it is considered a significant and substantial breach in the eyes of the law (Uglow 1999). Even more worrying is the possibility that a breach considered significant and substantial by one judge may not necessarily be seen as significant and substantial by another judge (Ormerod 2003). It is important to realise the European Convention on Human Rights is not concerned with the admissibility of evidence (Choo 2015). Nevertheless, it is still significant in relation to the application of section 78 of PACE (Mead 1999).

The right to legal assistance is another fundamental right stated within the European Convention on Human Rights. Legal assistance is needed for four main reasons: to provide emotional support to the suspect; to protect the suspect from ill-treatment; to help the suspect understand or to enforce their right to silence; and to prevent wrongful conviction (Leverick 2011). In R v Samuel (1988) the defendant was denied the right to legal assistance – one of the most important and fundamental rights of a citizen. The Superintendent refused legal advice on the grounds of Section 58(8)(b) of PACE, which states:

An officer may only authorise delay where he has reasonable grounds for believing that the exercise of the right … will lead to the alerting of other persons suspected of having committed such an offence but not yet arrested for it (Police and Criminal Evidence Act 1984; R v Samuel 1988).

However, upon appeal, it was found this piece of legislation was utilised incorrectly, resulting in the Superintendent being in breach of Section 58(1) of PACE, which states:
A person arrested and held in custody in a police station or other premises shall be entitled, if he so requests, to consult a solicitor privately at any time’ (Police and Criminal Evidence Act 1984; *R v Samuel* 1988).

In addition, it was revealed the solicitor was experienced and well respected and there were no longer any reasonable grounds to suggest he would have warned other suspects and so should not have been refused access to the defendant (*R v Samuel* 1988). As a result, the defendant confessed and was convicted of robbery, for which he received a sentence of ten years. However, this conviction was quashed upon appeal – a decision deemed to be appropriate given the significant breach of the European Convention on Human Rights.

The court also has the power to exclude evidence on the grounds of abuse of process (Munday 2013). The proceedings are halted, often permanently, if it becomes clear the defendant cannot receive a fair trial, or if the police have shown bad faith or serious misconduct (Emson 2010). In the case of *R v Quinn* (1990), on trial for the murder of a policeman in 1975, the murdered policeman’s colleague had identified the defendant as the murderer eleven weeks after the murder. The defendant was unaware of the identification at the time and, following conviction, appealed on the ground that the trial judge was wrong in admitting evidence of that identification. The evidence obtained was considered a deliberate breach of the procedures stated in an official code of practice and the trial judge was considered wrong to admit the evidence in the original trial (*R v Quinn* 1990). The exclusion of evidence on the grounds of abuse of process was put in place to prevent an abuse of executive power and, therefore, maintain the integrity of the criminal justice system (Emson 2010). This is necessary if the police obtain evidence unlawfully, such as encouraging a defendant to commit an offence as in the case of *Nottingham City Council v Amin* (*Nottingham City Council v Amin* 2000). In this case, the defendant was a taxi driver driving outside his licensed area without his sign lit up when he was stopped and hired by plain clothed policemen. A stipendiary magistrate refused to admit the policemen’s evidence, in the exercise of his discretion under section 78 of PACE, on the ground that the officers had acted as agents provocateurs and so admitting the evidence would, therefore, have affected the fairness of the trial (*Nottingham City Council v Amin* 2000).

**Rationale**

Evidence is ruled admissible if the fairness of the trial is deemed not to be affected and there is no significant nor substantial breach of PACE or the European Convention on Human Rights. However, if a significant and substantial breach of either PACE or the European Convention on Human Rights is
found, or there is bad faith by the Police resulting in the defendant being unable to receive a fair trial, the evidence is excluded. Several principles have been put in place and may be relied upon to justify this exclusion of evidence. The first is the reliability principle, which explains that if the method of obtaining evidence has adversely affected its reliability, or would prevent the accused from being able to challenge its reliability if it is admitted, then the evidence can be excluded in order to ensure forensic fairness (Emson 2010). However, it can be argued that real evidence exists independently of how it was obtained, resulting in the forensic fairness of the trial not being affected. This would mean the interests of justice favour the admission of this real evidence (Emson 2010). An example of a case where this was used is in R v Grayson (R v Grayson 1997). The second principle is the disciplinary principle, which suggests excluding evidence may encourage police officers not to use the same approach again. However, this has a lack of practical use as other factors, such as the need to gain results quickly, could easily override it (Emson 2010). This is shown in the case of R v Delaney, where police officers failed to record an interview with the defendant that contained a confession (R v Delaney 1989). Similarly, in R v Keenan police officers failed to give the defendant the opportunity to read the interview record and point out any part which he considered inaccurate (R v Keenan 1990). Upon appeal, both convictions were quashed as the trial judge had wrongly admitted the evidence. The third principle is the protective principle, which is linked to the rights of the defendant, as it expects the human rights of the suspect to be respected. If evidence is obtained that violates any of these rights, it stops this evidence being admitted (Emson 2010). An important part of this principle is the privilege against self-incrimination (Emson 2010), which was used in the Lam Chi-Ming v R (1991) case, as the defendant’s confession could not be proved to be made voluntarily, resulting in the confession being inadmissible (Lam Chi-Ming v R 1991). Integrity is the last principle, which excludes unlawfully or unfairly obtained evidence to preserve the integrity of the criminal justice system (Emson 2010); this ensures that any guilty verdict is factually and morally sound (Dennis 1989).

Conclusion
In terms of unfairly obtained evidence, the balance between the rights of a defendant and the interests of justice is swayed more favourably towards the latter. A defendant’s rights are protected by the guidelines set out in section 78(1) of PACE, which ensures every defendant enjoys a fair trial and any evidence that is likely to have an adverse effect on the fairness of a trial can be excluded. This Act also protects defendants against evidence obtained in bad faith by police agent provocateurs and by an abuse of process – tricking defendants into making a confession is an example. Alongside this Act are Articles 6 and 8 of the European Convention on Human Rights, which
also ensure that every defendant is given a fair trial and their right to privacy is not violated. The defendant is also protected by the principles laid out in *R v Sang*, which gives a judge wider discretion to exclude prosecution evidence by allowing them to refuse to admit technically relevant evidence. However, evidence will not automatically be ruled inadmissible if it had been obtained unlawfully, unfairly or improperly. For a judge to consider excluding evidence due to breaches of PACE or the European Convention on Human Rights there must have been significant and substantial breaches of these Acts. In addition, for evidence to be excluded due to the action of police agent provocateurs, a trial judge must be certain the defendant would not have committed the offence they had been charged with if there had been no intervention by the police. To summarise, case law and legislation favour the criminal justice system as the evidence is considered admissible until proven otherwise, leading to the conclusion that the balance between the rights of defendants and the interests of justice is weighted more favourably towards the interests of justice.

**Bibliography**

**Cases**

*Lam Chi-Ming v. R* [1991] 2 W.L.R 1082

*Nottingham City Council v. Amin* [2000] 2 All E.R. 946 (Divisional Court)


*R v. Christou* [1992] Q.B. 979 (CA)


*R v. Grayson* [1997] 1 NZLR 399 (CA)

*R v. Heibner* [2014] EWCA Crim 102 (CA)

*R v. Keenan* [1990] 2 Q.B. 54 (CA)


*R v. Mason* [1988] 1 W.L.R. 139 (CA)


*R v. Quinn* [1990] Crim. L.R. 581 (CA)


Legislation
European Convention on Human Rights 1950
Police and Criminal Evidence Act 1984

Books / Journal Articles


Hoyano, L. 2014. ‘What is balanced on the scales of justice? In search of the essence of the right to a fair trial’, Criminal Law Review 1, 4-29.


Websites / Reports
Mead, L. 1999. ‘Police conduct in the obtaining of evidence, application of the Codes of Practice, and judicial discretion in the determining of admissibility of such evidence’, available at: http://www.bileta.ac.uk/content/files/conference20papers/1999/Police20Conduct20in20the