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The divers, and diverse, opinions of the English judiciary over the last quarter of a century as to the existence and scope of the discretion of a trial judge in a criminal trial to exclude evidence had created a state of uncertainty in this area of evidentiary law. That uncertainty has been largely dispelled by the recent decision of the House of Lords in *R.* v. *Sang*.[1]

The facts are these. Sang was charged with conspiracy to utter counterfeit American banknotes. On his arraignment he pleaded not guilty to the charge. Then, in the absence of the jury, his counsel alleged that Sang had been induced to commit the offence by an informer acting on the instruction of the police, and that, but for such inducement, he would not have committed the offence charged.

The defence counsel had made this submission at the outset of the trial because he was faced by a number of decisions[2] of the Criminal Division of the Court of Appeal to the effect that "entrapment" is no defence in English law. The defence counsel sought by his submission to achieve the same effect as if entrapment were a valid defence.

In his submission the defence counsel contended that if the judge were satisfied that the offence was instigated by an informer acting on the instructions of the police and but for this the offence would not have been committed by the accused the trial judge had a discretion to refuse to allow the prosecution to adduce evidence of the commission of the offence.

The trial judge heard legal submissions on the question and ruled that he had no discretion to exclude the prosecution's evidence. As a result of this ruling Sang withdrew his plea of not guilty and pleaded guilty.

The appeal to the Criminal Division of the Court of Appeal was dismissed. However, as a result of its review of previous cases on

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1. [1979] 2 All E.R. 1222 (H.L.)
2. *R.* v. *McEvilly, R.* v. *Lee* (1973) 60 Cr. App. R. 150 (C.A.)
R. V. *Mealey, R.* v. *Sheridan* (1974) 60 Cr. App. R.59 (C.A.)

the issue of the trial judge's discretion to exclude in a criminal trial the Court of Appeal certified as the point of law of general importance involved in their decision a much wider question than is involved in the use of agents provocateurs. This question was stated as follows: —

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

Moreover, as pointed out by Lord Diplock, the Law Lords understood the question "as enquiring what are the circumstances, if there be any, in which such a discretion arises; and as not being confined to trials by jury."[3]

The narrower point of law concerning the validity or otherwise of the argument of the defence counsel, was dealt with briefly by the Law Lords. Lord Diplock disposed of the point of law in the following words:

> "I understand your Lordships to be agreed that whatever be the ambit of the judicial discretion to exclude admissible evidence it does not extend to excluding evidence of a crime because the crime was instigated by an agent provocateur."[4]

The Law Lords wrote individual judgments in the case. However, all the Law Lords agreed with the answer given by Lord Diplock to the certified question.

In light of this unanimous decision by the Law Lords I propose to consider the judgment of Lord Diplock in some detail.

Lord Diplock initially notes that the recognition of a discretion in the trial judge to exclude had grown up piecemeal. He states that it appeared first in cases[5] arising under s. 1 proviso (f) of the Criminal Evidence Act 1898 which concerns the cross-examination of an accused as to his previous convictions or bad character.

Next he notes the existence of a judicial discretion to exclude evidence of similar facts was recognized by Lord du Parcq in *Noor Mohamed* v. *R.*[6] and by Viscount Simon in *Harris* v. *Director of Public Prosecutions*.[7]

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3. *Supra*, footnote 1, at p. 1225
4. *Ibid.*, at p. 1226
5. *R.* v. *Watson* (1913), 109 L.T. 335 (C.C.A.) *Selvey* v. *Director of Public Prosecutions*, [1968] 2 All E.R. 497 (H.L.)
6. [1949] 1 All E.R. 365, [1949] A.C. 182 (P.C.)
7. [1952] 1 All E.R. 1044, [1952] A.C. 694 (H.L.)

Having reviewed the case law, Lord Diplock concludes that a general rule of practice has developed whereby in a trial by jury the judge has a discretion to exclude evidence which, though technically admissible, would probably have a prejudicial influence on the minds of the jury, which would be out of proportion to its true evidential value.

He queries whether the discretion should be held to extend more widely than that recognized as a general rule of practice despite the comparatively recent dicta that suggest that it does.

The recent dicta is then considered. He notes that the following statement by Lord Goddard in *Kuruma, Son of Kaniu* v. *R.*[8] has been regarded as "the fountain-head" of all the recent dicta:

> "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 the accused. This was emphasized in the case before this Board of *Noor Mohamed* v. *Regem,* and in the recent case in the House of Lords of *Harris* v. *Director of Public Prosecutions*. If, for instance, some admission of some piece of evidence, e.g. a document had been obtained from a defendant by a trick, no doubt the judge might properly rule it out."[9]

While he observes that the only case that had been brought to their Lordships' attention in which an appellate court had actually excluded evidence on the ground that it had been unfairly obtained was *R.* v. *Payne,*[10] he does allow that there is an unbroken series of dicta in judgments of appellate courts since *Kuruma* to the effect that there is a judicial discretion to exclude admissible evidence which has been obtained unfairly or by trickery or oppressively.

Lord Diplock then expresses his opinion on the intended scope of the above-mentioned statement of Lord Goddard in the following terms:

> "That statement was not, in my view, ever intended to acknowledge the existence of any wider discretion than to exclude (1) admissible evidence which would probably have a prejudicial influence on the minds of the jury that would be out of proportion to its true evidential value and (2) evidence tantamount to a self-incriminatory admission which was obtained from the defendant, after the offence had been committed by means which would justify a judge in excluding an actual confession which had the like self-incriminating effect."[11]

8. [1955] 1 All E.R. 236, [1955] A.C. 197 (P.C.)
9. *Ibid.*, at p. 239, All E.R.
10. [1963] 1 All E.R. 848; [1963] 1 WLR 637 (C.C.A.)
11. *Supra,* footnote 1, at p. 1229-1230

Having thereby restricted the scope of Lord Goddard's statement, Lord Diplock answers the certified question in the following words:

> "(1) a trial judge in a criminal trial has always a discretion to refuse to admit evidence if in his opinion its prejudicial effect outweighs its probative value.
> (2) Save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after commission of the offence, he has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means. The court is not concerned with how it was obtained . . ."[12]

In my opinion, there are at least two aspects of Lord Diplock's judgment which would be of interest to those who preside over or appear as counsel in criminal trials in Canada.

Firstly, there is a marked similarity between Lord Diplock's description of the function of a judge at a criminal trial as respects the admission of evidence and that of Martland, J. in *The Queen* v. *Wray*.[13]

Martland, J. described the function as follows:

> "The exercise of a discretion of that kind [i.e. to disallow evidence if the strict rules of admissibility would operate unfairly against an accused] is a part of the function of the Court to ensure that the accused has a fair trial. But other than that, in my opinion, under our law, the function of the Court is to determine the issue before it, on the evidence admissible in law, and it does not extend to the exclusion of admissible evidence for any other reason."[14]

And later in his reasons:

> "In cases such as *R.* v. *Court* and *R.* v. *Payne,* I think confusion has arisen between 'unfairness' in the method of obtaining evidence, and 'unfairness' in the actual trial of the accused by reason of its admission. The result of those two cases was in effect to render inadmissible evidence which the ratio decidendi of the *Kuruma* case had held to be admissible. The view which they express would replace the *Noor Mohamed* test, based on the duty of a trial judge to ensure that the minds of the jury be not prejudiced by evidence of little probative value, but of great prejudicial effect by the test as to whether evidence, the probative value of which is unimpeachable, was obtained by methods which the trial judge, in his own discretion, considers to be unfair. Exclusion of evidence on this ground has nothing

12. *Ibid.*, at p. 1231
13. [1971] S.C.R. 272, [1970] 4 C.C.C. 1, 11 D.L.R. (3d) 673
14. *Ibid.*, at pp. 685-686 D.L.R.

whatever to do with the duty of a trial judge to secure a fair trial for the accused."[15]

Compare that description of the function with the following passages from Lord Diplock's judgment:

". . . the function of the judge at a criminal trial as respects the admission of evidence 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. If it was obtained illegally there will be a remedy in civil law; if it was obtained legally but in breach of the rules of conduct for the police, this is a matter for the appropriate disciplinary authority to deal with. What the judge at the trial is concerned with is not how the evidence sought to be adduced by the prosecution has been obtained but with how it is used by the prosecution at the trial.

A fair trial according to law involves, in the case of a trial on indictment, that it should take place before a judge and a jury, that the case against the accused should be proved to the satisfaction of the jury beyond reasonable doubt on evidence that is admissible in law; and, as a corollary to this, that there should be excluded from the jury information about the accused which is out of proportion to the true probative value of admissible evidence conveying that information. If these conditions are fulfilled and the jury receive correct instructions from the judge as to the law applicable to the case, the requirement that the accused should have a fair trial according to law is, in my view, satisfied . . . However much the judge may dislike the way in which a particular piece of evidence was obtained before proceedings were commenced, if it is admissible evidence probative of the accused's guilt it is no part of his judicial function to exclude it for this reason. . ."[16]

Secondly, there is a clearly discernible but significant difference in the enunciations of Martland, J. in *The Queen* v. *Wray* and of Lord Diplock in the first paragraph of his answer to the certified question in *R.* v. *Sang* as to the scope of the trial judge's discretion.

In *The Queen* v. *Wray* Martland, J. had this to say:

"In my opinion, the recognition of a discretion to exclude admissible evidence, beyond the limited scope recognized in the *Noor Mohamed* case, is not warranted by authority, and would be undesirable. The admission of relevant admissible evidence of probative value should not be prevented except within the very limited sphere recognized in that case."[17]

15. *Ibid.*, at p. 691 D.L.R.
16. *Supra*, footnote 1, at p. 1230
17. *Supra*, footnote 13, at p. 691-2 D.L.R.

The limited scope of the discretion recognized in the *Noor Mohamed* case is described by Lord du Parcq in the following passage from that case:

> "It is right to add, however, that in all such cases the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the judge."[18]

In other words, in a case where the evidence would only have trifling weight if admitted but would be gravely prejudicial to the accused Lord du Parcq and Martland J. would agree that the trial judge has the discretion to exclude that evidence.

On the other hand Lord Diplock states that the discretion arises where, in the opinion of the trial judge, the prejudicial effect of the evidence outweighs its probative value.

Lord Diplock, in his description of the scope of the discretion is in effect referring with approval to what Viscount Simon had said in the following passage from his judgment in *Harris* v. *Director of Public Prosecutions:*

> "This second proposition flows from the duty of the judge when trying a charge of crime to set the essentials of justice above the technical rule if the strict application of the latter would operate unfairly against the accused. If such a case arose, the judge may intimate to the prosecution that evidence of 'similar facts' affecting the accused, though admissible, should not be pressed because its probable effect would be out of proportion to its true evidential value." (per Lord Moulton in *Director of Public Prosecutions* v. *Christie,* (1914) 24 Cox C.C. 249,257). Such an intimation rests entirely within the discretion of the judge."[19]

Thus, what difference there is between the scope of the discretion approved by Martland, J. speaking for the majority in *The Queen* v. *Wray,* and Lord Diplock speaking for all the Law Lords in *R.* v. *Sang* is to be found by a comparison of the scope of the discretion as

18. *Supra,* footnote 6, at p. 370 All E.R.
19. *Supra,* footnote 7, at p. 1048 All E.R.

described in the aforementioned passages by Lord du Parcq in *Noor Mohamed* and Viscount Simon in *Harris* v. *Director of Public Prosecutions*.

In that regard, I think it is apparent, as it was to Lord Diplock, that Lord du Parcq's description of the scope of the discretion was rather more narrowly stated than that of Viscount Simon.

The difference obviously lies in Lord du Parcq's use of the terms "trifling weight" and "gravely prejudicial" to describe evidence in respect of which a discretion to exclude arises whereas Viscount Simon simply said that the prejudicial influence of the evidence on the minds of the jury need only be out of proportion to its true evidential value.

However, there is still some uncertainty as to the extent of the difference since Lord Diplock in stating the general rule of practice uses the expression "out of proportion" whereas in describing the discretion at the end of his judgment he uses the expression "outweighs". On the other hand, Lord Fraser of Tullybelton while agreeing with Lord Diplock's description of the discretion interpreted the expression "out of proportion to its true evidential value" in the following manner:

> "I read the latter expression as meaning that the discretion can be exercised where the prejudicial value of the evidence would greatly exceed its probative value."[20]

Perhaps of greater significance in a comparison of the Canadian and British position concerning the scope of the discretion is the second paragraph of Lord Diplock's answer to the certified question, and more particularly the words "Save . . . generally with regard to evidence obtained from the accused after commission of the offence, he has no discretion. . . ."

To what kind of evidence is Lord Diplock referring?

In expressing his opinion on the intended scope of Lord Goddard's statement in *Kuruma Son of Kaniu* v. *R.* he made reference not only to "admissible evidence which would probably have a prejudicial influence on the minds of the jury that would be out of proportion to its true evidential value" but also to "evidence tantamount to a self-incriminatory admission which was obtained from the defendant, after the offence has been committed by means which would justify a judge in excluding an actual confession which had the like self-incriminating effect."

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20. *Supra*, footnote 1, at p. 1239

It is apparent, I suggest, to what kind of evidence Lord Diplock is referring when one considers the following paragraph from his judgment:

> "My Lords, I propose to exclude, as the certified question does, detailed consideration of the role of the trial judge in relation to confessions and evidence obtained from the defendant after commission of the offence that is tantamount to a confession. It has a long history dating back to the days before the existence of a disciplined police force when a prisoner on a charge of felony could not be represented by counsel and was not entitled to give evidence in his own defence either to deny that he had made the confession, which was generally oral, or to deny that its contents were true. The underlying rationale of this branch of the criminal law, though it may originally have been based on ensuring the reliability of confessions is, in my view, now to be found in the maxim, *nemo debet prodere se ipsum,* no one can be required to be his own betrayer, or in its popular English mistranslation 'the right to silence'. That is why there is no discretion to exclude evidence discovered as the result of an illegal search but there is discretion to exclude evidence which the accused has been induced to produce voluntarily if the method of inducement was unfair."[21]

It is suggested that Lord Diplock might have been thinking of a case such as *R.* v. *Barker*[22] where it was held by the English Court of Criminal Appeal that fraudulently prepared documents produced to a tax inspector stood "on precisely the same footing as an oral or written confession which is brought into existence as the result of such promise, inducement or threat"[23] or alternatively of the English position with respect to the admissibility of evidence obtained as a consequence of an inadmissible confession as reflected by the court in *R.* v. *Warickshall*[24] declaring:

> "Facts thus obtained, however, must be fully and satisfactorily proved, without calling in the aid of any part of the confession from which they may have been derived."[25]

However, it is also apparent, I suggest, that Lord Diplock is not approving the descriptions of the scope of the discretion given by Lord Parker C.J. in *Callis* v. *Gunn*[26] when he said:

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21. *Ibid.*, at p. 1230
22. [1941] 3 All E.R. 33, [1941] 2 K.B. 381 (C.C.A.)
23. *Ibid.*, at pp. 36-37 All E.R.
24. (1783) 1 Leach 263, 168 E.R. 234
25. *Ibid.*, at p. 264 Leach
26. [1963] 3 All E.R. 677, [1964] 1 Q.B. 495 (D.C.)

> "... in considering whether admissibility would operate unfairly against a defendant, one would certainly consider whether it has been obtained in an oppressive manner, by force or against the wishes of an accused person. That is the general principle."[27]

Or again that the discretion

> "would certainly be exercised by excluding the evidence if there was any suggestion of it having been obtained oppressively, by false representations, by a trick, by threats, by bribes, anything of that sort"[28]

nor is he approving a similar view of the ambit of the discretion expressed by Lord Widgery C.J. in *Jeffrey* v. *Black*.[29]

Rather the discretion to exclude to which he is referring in the second paragraph of his answer relates only to the obtaining of evidence from the accused which the accused has been induced to produce voluntarily and the trial judge considers that the method of inducement was unfair because the rule against self-incrimination is likely to have been infringed.

In any event it is clear from the above-mentioned passage[30] from the judgment of Martland J. in *The Queen* v. *Wray* that there is no such discretion to exclude under Canadian law.

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27. *Ibid.*, at p. 680 All E.R.
28. *Ibid.*, at p. 681 All E.R.
29. [1978] 1 All E.R. 555 at 559
30. *Supra*, footnote 17