Ch 11: Evidence obtained by illegal or unfair means

Evidence obtained by torture

Page 304

In civil proceedings, a party seeking to exclude evidence of any kind on the basis that it was obtained by torture, must prove this to the civil standard, on a balance of probabilities. If the civil standard is not met but the judge finds that the evidence may well have been obtained by torture, this should be taken into account when deciding what weight to give to the evidence. See *Shagang Shipping Co Ltd (In Liquidation) v HNA Group Co Ltd* [2020] 1 WLR 3549, SC, at [106] - [107] – [109] and [112].

Intercepted evidence

Page 325

The Investigatory Powers (Code of Practice) Regulations 2018, SI 2018/355, have brought into force five Codes of Practice relating to the interception of communications.

In *R v A* [2021] EWCA 128 at [18], the court expressed reservations that mobile handsets could be ordinarily considered part of a public telecommunications 'system' within the meaning of the 2016 Act.

Criminal cases: s 78 of the Police and Criminal Evidence Act 1984

The reliability principle

Page 332

In *R v Thomasson* [2021] EWCA Crim 114, a distinction was drawn between challenges to admissibility which relate to credibility and challenges based on substantive unreliability or unfair prejudice arising, for example, from breaches of PACE Codes or impropriety by those

who obtained the evidence. In respect of the former, only exceptionally would it be unfair to leave issues of pure credibility to the jury however crucial (at [31]).

The rights-based principle

Page 335

In *R v Abdurahman* [2020] 4 WLR 6, an appeal which arose from the Grand Chamber's decision in *Ibrahim v UK,* the Court of Appeal disagreed with the approach taken by the Grand Chamber in *Ibrahim v UK*, adopted in *Bueze v Belgium* (see the text at p 335). In *Ibrahim v UK*, the Grand Chamber held that a breach of Art 6 occurred in respect of one of the applicants, A, because in his case compelling reasons for restricting his access to a lawyer had not been demonstrated, nor had it been demonstrated that the fairness of the proceedings was not irretrievably prejudiced as a result of the restriction. However, the Court of Appeal stated, obiter, that even if there were no compelling reasons for restricting access to a lawyer – and the court held that there were - it would not have applied any presumption of irretrievable prejudice, let alone a strong presumption (see at [114] and [116]). The court observed that prior to the decision in *Ibrahim v UK*, Strasbourg authority was to the effect that, apart from cases involving a breach of Art 3, any evaluation of whether there was a breach of Art 6 was holistic and multi-factorial, weighing the rights of the defence against the public interest in prosecuting and punishing those who commit crimes, although not to the extent that the essence of defence rights would be extinguished (At [38]. See also *Jalloh v Germany* (2006) 44 EHRR 32, GC).

In *R v Abdurahman*, A had made self-incriminating statements when interviewed as a witness and police officers had taken a clear and deliberate decision not to caution him or inform him of his right to legal advice. It was accepted that these were very significant and substantial breaches of Code C and the right to legal advice, but the court held that the admission of the incriminating statements at the trial did not affect the safety of the conviction, this being the primary question which the court had to address. The court attached weight to the fact that when A was interviewed a second time under caution and with a legal representative, he adopted the statements made in the earlier interview. In this respect, the court noted that whether a statement was 'promptly retracted or modified' was an important factor in Strasbourg jurisprudence when deciding whether a breach of Art 6 has occurred (at [119] and, indeed, acknowledged in *R v Ibrahim* [2016] ECHR 750, GC at [274 (f)]). The court also attached weight to the existence of other probative evidence in the case, another important factor in Strasbourg jurisprudence (at [111(d)]). As to the issue of the other evidence having been obtained in consequence of the incriminating statements, the court, agreeing with

the Supreme Court's decision in *Her Majesty's Advocate (Scotland) v P* [2011] UKSC 44, eschewed any extension of the 'fruits of the poisoned tree' doctrine as unwarranted and undesirable (at [121]).

Covert recording and filming

Page 338

In *R v Bond* [2020] EWCA Crim 1596, covertly recorded incriminating conversations between co-accused were admissible even though the recordings were obtained unlawfully in breach of the provisions of the Regulation of Investigatory Powers Act 2000. The officers had acted in good faith, believing that they had proper authorisation, they had not sought to circumvent the rights of the co-accused and there had been no oppression, inducement, misrepresentation, entrapment or lies. Drawing an analogy with *R v Bailey*, the court observed (at [87]) that, '… what was said was done so of their own free will. The police did no more than give the suspect the opportunity to talk and then record what they chose to say.'

Entrapment and undercover operations

R v Smurthwaite and Gill

Page 343

As to the principle at paragraph 6, see *Sutherland v HM Advocate for Scotland* [2021] AC 427, SC, a so-called 'paedophile hunters' case, where it was held that there had been no breach of the accused's rights under Art 8 arising from the collection and use at trial of messages exchanged on a dating app with an adult decoy who had created a false profile and posed as a child. (No issue of entrapment had arisen).

Adrian Keane and Paul McKeown, The Modern Law of Evidence, 13th Edition

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