Overruling the protectionist exclusionary rule: *DPP v JC*

Dr Yvonne Marie Daly*

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Introduction

In the investigation of criminal offending, through search, arrest, detention, questioning, forensic sampling and so on, important rights of suspects, and others, are sometimes transgressed by police. Such transgressions, by agents of the state, may occur in differing contexts, may be deliberate, reckless or accidental, and may affect relevant rights to varying extents. While every effort should be made to avoid the breach of rights in the first instance, the ideal of a clean slate in this regard is simply unobtainable. Accordingly, a criminal justice system requires a defined approach to police breaches of rights during an investigation and, more specifically, a criminal process requires a clear policy in relation to the admissibility at subsequent trial of any evidence obtained in breach of a suspect's rights.

In the mid-1990s, Judge Harold J. Rothwax, acting New York State Supreme Court justice, expressed the view that the exclusionary rule applicable in the United States was the strictest in existence in the democratic world: "We [the United States] are the only country in the world, certainly the only democracy in the world, that has a mandatory exclusionary rule."[1] However, the learned judge was incorrect in that regard. The exclusionary rule in operation in Ireland in relation to unconstitutionally obtained evidence, certainly from 1990 onwards, was in fact much stricter than the U.S. rule. The latter operated, and continues to operate, only in the context of deterrence, i.e. where the exclusion of the impugned evidence would highlight the transgression of rights to police and prosecutors and result in such rights being properly observed in the future.[2] By contrast, the Irish rule, originally set out in the 1965 case of *People (AG) v O'Brien*[3]

* Senior Lecturer, Socio-Legal Research Centre, School of Law and Government, Dublin City University, Ireland

[1] Cossack, R. "Are too many Guilty Defendants going free? The Right Honorable Harold Rothwax vs. Professor Alan Dershowitz" (1995-1996) 33 Am. Crim. L. Rev. 1169, 1178.

[2] *U.S. v Leon* 468 U.S. 897 (1983); *U.S. v Calandra* 414 U.S. 338 (1974); *Wolf v Colorado* 338 U.S. 25 (1949). Although it has been argued that there are a number of rationales for the exclusionary rule adopted and applied in

but refined and clarified in *People (DPP) v Kenny* (1990),[4] was expressly centred on a rationale of protectionism such that evidence obtained in breach of constitutional rights had to be automatically excluded in almost all circumstances. As the U.S. rule is based solely on deterrence, evidence is only excluded where police *knowingly* breach suspects' rights. To exclude where rights were unknowingly or inadvertently breached would have no deterrent value. Indeed, relatively recent U.S. case-law seems to suggest that even where rights are knowingly breached a high degree of deterrent value may be required before exclusion will be justified as a remedy.[5] A protectionist rationale was expressly preferred by the Irish Supreme Court in *Kenny* over what was viewed as the weaker protections of a deterrence rationale. Accordingly, under the Irish rule, evidence was excluded not only on the basis of *knowing* garda (police)[6] breaches of constitutional rights, but also where such breaches were accidental or unintentional (unless there were "extraordinary excusing circumstances" in existence justifying admission).

In April of this year, however, the Irish Supreme Court in *DPP v JC*[7] expressly overruled *Kenny*, declaring it to have been erroneously decided, and established a new exclusionary rule in its place. This was a 4-3 majority decision of the Court (Denham CJ, Clarke, O'Donnell and MacMenamin JJ in the majority; Hardiman, Murray and McKechnie J dissenting), which Hardiman J (dissenting) described as a "revolution in principle" and "an alteration of [a] fundamental decision which is based on [the] exegesis of the Constitution itself."[8] Before looking at the judgment in *JC* in detail, some background on the *Kenny* rule is provided below.

The *Kenny* Rule

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the United States, the deterrence rationale has been most often relied on in the courts. See, for example, Jackson, H.A. "Arizona v. Evans: Expanding Exclusionary Rule Exceptions and Contracting Fourth Amendment Protection" (1995-1996) 86 J. Crim. L. & Criminology 1201 and Lynch, T. "In Defense of the Exclusionary Rule" (1999-2000) Harv. J. L. & Pub. Pol'y 711. See also the judgment of Alito J. (Roberts C.J., Scalia, Kennedy, Thomas and Kagan J.J. concurring) in *Davis v United States* 564 U. S. ____ (2011).

[3] [1965] I.R. 142.

[4] [1990] 2 I.R. 110.

[5] *Hudson v Michigan* 547 U.S. 586 (2006).

[6] The Irish police force as a whole is known as the "Garda Síochána" (the Guardians of the Peace is the direct translation from the Irish language). An individual police officer is known either as a member of the Garda Síochána, or as a "garda", with the plural being "gardaí".

[7] [2015] IESC 31.

[8] *Ibid.* per Hardiman J. at [134].

A two-tiered approach to improperly obtained evidence was established by the Irish Supreme Court in *People (AG) v O'Brien*[9]: a discretionary approach was adopted in relation to evidence obtained in breach of legal rights only, with a stricter rule operating where there was a "deliberate and conscious" breach of constitutional rights. Evidence obtained unconstitutionally became automatically inadmissible. The only circumstance in which such evidence might be admitted was where there were so-called "extraordinary excusing circumstances", such as the need to rescue a victim in peril or to prevent the imminent destruction of vital evidence.

"Deliberate and Conscious" Breach of Rights

The courts grappled with the concept of "deliberate and conscious" breach in a number of cases subsequent to *O'Brien*,[10] attempting to determine whether or not this phraseology required that gardaí should have *knowingly* breached rights in order for evidence to be excluded. Ultimately, the matter was clarified in *Kenny*: because the dominant rationale for the exclusion of unconstitutionally obtained evidence in Ireland was the protection of a suspect's constitutional rights there was no requirement of *mala fides* on the part of the gardaí in obtaining the impugned evidence in order for it to be excluded at trial. The phrase "deliberate and conscious", then, related to the actions of the gardaí rather than their knowledge of the breach. For example, as in *Kenny* itself, the impugned evidence had to be excluded where gardaí purposefully entered a dwelling to execute a search warrant, not realising that the warrant had not been properly issued. The majority of the Supreme Court rejected a rationale of deterrence which would necessitate exclusion only where the gardaí *knowingly* breached constitutional rights. The exclusionary rule was restated by Finlay C.J. in *Kenny* in the following terms, omitting the confusing terminology of "deliberate and conscious" breach:

[9] The decision on the facts in *O'Brien*, as noted in the text below, was that the impugned evidence had been obtained in breach of legal and not constitutional rights and that the trial judge had correctly employed his discretion to admit the evidence. Accordingly it might be considered that comments relating to the exclusionary rule on unconstitutionally obtained evidence within the judgments are *obiter dicta*. However, there is no doubting the fact that the rule on unconstitutionally obtained evidence stems from this case and McGrath suggests that any question as to the true *ratio decedendi* of *O'Brien* is of academic interest only at this juncture as the judgment of Walsh J., which contains the two-tiered approach, has generally come to be regarded as containing the *ratio* of the case: McGrath, D. *Evidence* (Dublin: Thomson Round Hall, 2005), para.7.07 fn.23.

[10] For example, *People (D.P.P.) v Shaw* [1982] I.R. 1; *People (D.P.P.) v Madden* [1977] I.R. 336; *People (D.P.P.) v Walsh* [1980] I.R. 294; *People (D.P.P.) v Healy* [1990] 2 I.R. 73; [1990] I.L.R.M. 313.

> "… [E]vidence obtained by invasion of the constitutional personal rights of a citizen must be excluded unless a court is satisfied that either the act constituting the breach of constitutional rights was committed unintentionally or accidentally, or is satisfied that there are extraordinary excusing circumstances which justify the admission of the evidence in [the court's] discretion."[11]

Finlay CJ acknowledged that the adoption of this high protectionist stance could create problems in criminal trials given its propensity to exclude evidence of immense probative value. However, he was of the opinion that:

> "[T]he detection of crime and the conviction of guilty persons, no matter how important they may be to the ordering of society, cannot … outweigh the unambiguously expressed constitutional obligation 'as far as practicable to defend and vindicate the personal rights of the citizen'."[12]

Resultantly, for the past twenty-five years, evidence has been excluded at trial in Ireland where it has been obtained in breach of the constitutional rights of the accused, and the actions of the gardaí which led to the breach could not be said to have been accidental or unintentional.[13]

How strict is strict?

The majority of the Supreme Court in *JC* seemed eager to present the *Kenny* rule as an absolute rule of exclusion which has been operating in an overly strict manner. O'Donnell J., for example, stated that "one of the troubling features of *Kenny* is that it adopts a rule on its face qualified, but

[11] [1990] 2 I.R. 110, at 134.
[12] *Ibid.*
[13] See, for example, *DPP v Yamanoha* [1994] 1 I.R. 565; *DPP v Connell* [1995] 1 I.R. 244; *People (DPP) v Dillon* [2002] 4 I.R. 501; and, *People (DPP) v Laide and Ryan* [2005] 1 I.R. 209. For more on the Irish exclusionary rule prior to *DPP v JC* see Martin, F. "The rationale of the exclusionary rule of evidence revisited" (1992) 2(1) I.C.L.J. 1; Walsh, D. *Criminal Procedure* (Dublin: Thomson Round Hall, 2002) Chapter 9; McGrath, D. "The exclusionary rule in respect of unconstitutionally obtained evidence" (2004) 26 D.U.L.J. 108; McGrath, D. *Evidence* (Dublin: Thomson Round Hall, 2005) Chapter 7; O'Malley, T. *The Criminal Process* (Dublin: Round Hall, 2009) Chapter 19; Fennell, C. *The Law of Evidence in Ireland* (3rd ed.) (Dublin: Bloomsbury Professional, 2009) Chapter 4; Daly, YM "Unconstitutionally Obtained Evidence in Ireland: Protectionism, Deterrence and the Winds of Change" (2009) 19 (2) I.C.L.J. 40; Collins, D. "The Exclusionary Rule – Back on the Agenda?" (2009) 19 ICLJ 98; Conway, V., Daly, Y. M., & Schweppe, J. *Irish Criminal Justice: Theory Process and Procedure* (Dublin: Clarus Press, 2010) pp. 77-8; and Heffernan, L. and Ní Raifeartaigh, U. *Evidence in Criminal Trials* (Dublin: Bloomsbury Professional, 2014) Chapter 8.

in reality absolute or near absolute, at least in the field of warrants."[14] Arguably, however, this does not give the full picture.

The facts of the *O'Brien* and *Kenny* cases were rather different and, although the *Kenny* judgment is viewed as at least a clarification of and at most an overruling of *O'Brien*,[15] a dichotomy in the types of cases subject to the exclusionary rule can be traced back to this factual distinction. In *O'Brien*, gardaí executed a search warrant at 118 Captain's Road but were unaware that the address innocently but erroneously listed on the face of the warrant was 118 Cashel Road. While establishing the parameters of the Irish exclusionary rule, the Supreme Court in *O'Brien* in fact held on the facts that the evidence could be admitted in circumstances such as this, which the Court designated a "mere illegality". In *Kenny*, there was no apparent defect on the face of the search warrant, rather it was found to be invalid because it had been issued by a Peace Commissioner without any evidence that he himself was satisfied, as required by statute, that there were reasonable grounds for the suspicion held by garda who swore information before him. Accordingly the search warrant had been issued without lawful authority and the evidence obtained had to be excluded.

In the 1998 case of *People* (*D.P.P.) v Balfe*,[16] Murphy J. suggested that there were two different rules formulated in *O'Brien* and *Kenny* respectively to deal with two different scenarios: the *O'Brien* formula being relevant where a mistake in the recording of the order of a District Court judge or Peace Commissioner issuing a search warrant is made and is apparent on the face of the warrant; and the *Kenny* formula applying where a search warrant is made without lawful authority.[17] As the facts in *Balfe* related to defects on the face of the warrant, they were held to fall under the *O'Brien* rule, were deemed to be mere illegalities, and ultimately it was held that the trial judge had correctly exercised his discretion to admit the relevant evidence.

This dichotomy of approach to the factual scenarios which have given rise to claims for exclusion due to breach of constitutional rights in Ireland, while arguably artificial, has provided

[14] [2015] IESC 31 per O'Donnell J. at [49].
[15] *Ibid.* per Clarke J. at [4.2]: Clarke J in *DPP v JC* states that *Kenny* overruled *O'Brien*.
[16] [1998] 4 I.R. 50.
[17] *Ibid.* at 60.

the courts with something of an escape valve and has mitigated the hard edges of the strict rule to a notable extent.[18] However, surprisingly, this was not given any real acknowledgement or subjected to any analysis by the Court in *JC*. It might be argued that there is a danger in providing courts with an "out" such as this, as it could give rise to contrived reasoning and the drawing of questionable parameters in order to avoid the application of the strict rule. It is perhaps more intellectually honest to operate a less strict rule through the application of clear principles. In New Zealand where the *prima facie* rule of exclusion in relation to breaches of the New Zealand Bill of Rights Act 1990[19] operated in a comparatively strict manner to Ireland's *Kenny* rule (prior to the case of *R v Shaheed*[20] and the introduction of s 30 of the Evidence Act 2006), there was some evidence of distortion of rights at the "front-end" so as to avoid the "back-end" remedy of exclusion.[21] However, such distortion of the definitional parameters of constitutional rights has not been a feature of the jurisprudence under *Kenny* in Ireland.

Along with the *Balfe* dichotomy, a further escape valve existed within the *Kenny* rule itself whereby the presence of "extraordinary excusing circumstances" might justify the admission of unconstitutionally obtained evidence. Little if any use has been made of this proviso by the courts,[22] but the judicial reluctance to avail of it does not seem like a compelling reason to deem *Kenny* to have been erroneously decided and to effectively throw it out.

McKechnie J, dissenting in *JC,* pointed to an evidential gap in terms of statistical information showing that the *Kenny* rule has led to significant frustration of prosecutions in the twenty-five years of its operation. While O'Donnell J (in the majority) listed examples of cases where the

[18] See also *DPP v Mallon* [2011] 2 IR 544, 573 where O'Donnell J (then a High Court judge, later in the majority in the Supreme Court in *DPP v JC*) stated that "so long as Irish law maintains an almost absolute exclusionary rule for evidence obtained as a result of an illegal and therefore unconstitutional search of a dwelling house, courts should be slow to invalidate warrants on the grounds of typographical grammatical, or transcription errors, which are neither calculated to mislead, nor in truth do mislead, any reasonable reader of the words." This is discussed further in Daly, YM ""Improperly Obtained Evidence, Silence and Legal Advice: Ongoing Change In Seemingly Settled Situations?" (2014) 1 *Criminal Law and Practice Review* 1, 5-9.

[19] Set out in *R v Butcher* [1992] 2 NZLR 257.

[20] [2002] 2 NZLR 377.

[21] See Optican, Scott " 'Front-End'/'Back-End' Adjudication (Rights Versus Remedies) Under Section 21 of the New Zealand Bill of Rights Act 1990" (2008) 2 *New Zealand Law Review* 409.

[22] McGrath has suggested that the courts wish to avoid undermining the exclusionary rule and therefore adopt a restrictive approach to extending this list: McGrath, D. Evidence (Dublin: Thomson Round Hall, 2005) para.7.46.

Kenny rule had applied,[23] McKechnie J suggested that in each of those cases the outcome was either favourable to the prosecution or unknown, such that they did not illustrate a significant difficulty with the rule to the level necessary to involve the Supreme Court in overruling its own previous decision,[24] which should only be done for the most compelling reasons.[25]

Criticism of the *Kenny* Rule and Opportunities for Review

The *Kenny* rule was never universally popular. Indeed, strong dissents were issued by two of the Supreme Court bench in the case itself: Griffin and Lynch JJ. favoured a deterrence-based approach centred on proof of blameworthiness, culpability or unfairness in terms of the evidence-gathering procedures[26] and preferred to interpret "deliberate and conscious breach" as applying to the intentions of the gardaí rather than their actions.

More recently, the majority of the Balance in the Criminal Law Review Group, an *ad hoc* committee established by the Minister for Justice in 2006 to examine a number of issues within criminal procedure, advocated a change to the *Kenny* rule. They argued that a trial judge should have discretion to admit unconstitutionally obtained evidence, having regard to the totality of the circumstances in a given case, with particular regard to the rights of the victim.[27] The Chairman of the Committee, Dr Gerard Hogan SC (now a judge of the Irish Court of Appeal), added a note of dissent from the majority view on this issue wherein he stated:

> "Our society has committed itself to abiding by the rule of law and to respect and vindicate the fundamental freedoms enshrined in the Constitution. It behoves us to take these rights and freedoms seriously and if the occasional exclusion of otherwise relevant evidence is the price of respecting these constitutional rights, then that is a price society should be prepared to pay in the interests of upholding the values solemnly enshrined in our highest law..."[28]

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[23] [2015] IESC 31 *per* O'Donnell J.at [6].
[24] *Ibid. per* McKechnie J.at [236].
[25] As *per The State (Quinn) v Ryan* [1965] IR 70.
[26] See *People (DPP) v Kenny* [1990] 2 IR 110, 142 *per* Lynch J.
[27] *Final Report of the Balance in the Criminal Law Review Group,* March 15, 2007, p.166.
[28] 'Note of Dissent on Exclusionary Rule' in the *Final Report of the Balance in the Criminal Law Review Group* March 15, 2007, pp.287–88.

A potential opportunity for Supreme Court review of the *Kenny* rule arose in *DPP (Walsh) v Cash*, which was before the High Court in 2007 and the Supreme Court in 2010.[29] Defence counsel in *Cash* sought to have a set of fingerprints taken from the appellant following his arrest on a burglary charge excluded from evidence at trial. He had been arrested on the basis of a match between fingerprints taken from the scene and prints that had been taken from him in relation to another matter some years previously which were held on file. The prosecution had been unable to state clearly the legal position of the retained prints, specifically, whether or not they ought to have been destroyed following the passage of time and the fact that no proceedings had been instituted in relation to the earlier matter.

Although Charleton J., in the High Court, had deemed the *Kenny* rule to be inapplicable on the facts, he took some time in his judgment to outline his grievances with the rule, stating that "[a] rule which remorselessly excludes evidence obtained through an illegality occurring by a mistake does not commend itself to the proper ordering of society which is the purpose of the criminal law."[30]

The majority of the Supreme Court also deemed the *Kenny* rule inapplicable in *Cash*, preferring to base its decision in that case on the law of arrest. In submissions before the Supreme Court in *JC* the Director of Public Prosecutions (DPP) appeared disappointed that the Court had not taken the opportunity presented by *Cash* to review the *Kenny* rule.[31] It seems that an appropriate case to allow for such review was being actively sought. Five years after *Cash* the DPP brought *JC* to the Supreme Court.

DPP v JC

Facts and Jurisdiction

Before outlining the new exclusionary rule set out in *JC*, the manner in which this case came before the Supreme Court cannot be ignored. JC was suspected of involvement in three robberies. His dwelling was searched in May 2011 under the authority of a search warrant issued

[29] [2007] IEHC 108; [2010] 1 IR 609. See Daly, YM "Exclusion of Evidence: DPP (Walsh) v Cash" (2011) 15 E&P 62.
[30] [2007] IEHC 108 at [65].
[31] [2015] IESC 31 *per* McKechnie J. at [96].

pursuant to s 29 of the Offences Against the State Act 1939. He was thereafter arrested, detained and questioned by gardaí and made a number of inculpatory statements. Section 29 was declared unconstitutional by the Supreme Court in the case of *Damache v DPP*[32] in February 2012, several months prior to JC's trial before the Circuit Criminal Court in Waterford. As s 29 warrants were now viewed as unconstitutional, the Circuit Court judge effectively found that there had been no lawful authority in the warrant to allow the gardaí to enter JC's dwelling and thereafter effect an arrest. Accordingly, and because there was no evidence to support any claim that the gardaí had entered the dwelling on foot of any other legal power, the accused was in unlawful custody at the time when he made the inculpatory statements, which were therefore inadmissible. Under the *Kenny* rule, this was absolutely the correct outcome of the circumstances which arose before the Circuit Criminal Court.

However, the DPP appealed to the Supreme Court under s 23 of the Criminal Procedure Act 2010. This provision, in pertinent part, allows for "with prejudice" prosecutorial appeals against acquittal on a question of law to the Supreme Court where a trial court has "erroneously excluded compelling evidence".[33] While it was accepted by all members of the Supreme Court that the trial judge had correctly applied the *Kenny* rule, the majority accepted jurisdiction to hear the appeal under s 23 by contending that *Kenny* had been erroneously decided and accordingly exclusion of the evidence at JC's trial, while precedent-compliant, was erroneous.

This is a most unsatisfactory approach to the interpretation of s 23. It required significant linguistic acrobatics by the Supreme Court and it opened up the possibility that the respondent might be retried on the basis of the new exclusionary rule which was about to be set out by the Court, despite the fact that the trial judge had correctly applied the law as it had stood for almost a quarter of a century. As noted by McKechnie J (dissenting), even if no retrial was ordered, the finding of the Supreme Court in this case that there was compelling evidence which was wrongly excluded could lead to an ongoing query of guilt over the respondent, despite his acquittal. McKechnie J declared the use of s 23 in this case a "… frontal attack on the acquittal" which

[32] [2012] IESC 11. See Daly, Y.M. "Independent Issuing of Search Warrants: DPP v Damache" (2013) 17(1) E&P 114.
[33] Criminal Procedure Act 2010, s 23(3)(a).

would leave "…a public blur on the character of the respondent who has no legal means of correcting that life lasting stigma."[34]

The distortion of language and threat to the rule of law necessitated by the use of s 23 proved superfluous in this particular case in the end as the Court unanimously refused to order a retrial of JC "in the interests of justice".[35] The same outcome could have been achieved under s 34 of the Criminal Procedure Act 1967 (as inserted by s 21 of the Criminal Justice Act 2006) which allows for a "without prejudice" appeal following acquittal and does not require the Court to find that the trial judge fell into error in excluding evidence. The willingness of the majority of the Supreme Court to accept jurisdiction through a contortion of the language of s 23 is disappointing, if not disingenuous. Arguably the decision of the DPP to pursue this case under s 23 rather than s 34 is even more questionable.

The new exclusionary rule

The fundamental and express decision of the majority of the Irish Supreme Court in *DPP v JC* was that the *Kenny* case was erroneously decided and that the exclusionary rule as set out therein is no longer to be applied. There is some indication in the majority judgments that modern developments in terms of garda accountability and suspect rights might have led to the view that the *Kenny* rule is no longer appropriate,[36] although the actual decision is to the effect that it was erroneously decided from the start. The newly-stated rule, while there is more to it than this (as discussed below), allows for evidence obtained in inadvertent breach of constitutional rights to be admitted at trial while evidence obtained in knowing, reckless or grossly negligent breach must be excluded, except in exceptional circumstances.

Six separate judgments were issued by the Supreme Court (the Chief Justice did not issue a judgment of her own, but concurred with the majority), amounting to over 155,000 words. The majority acknowledged the difficult balance to be achieved by the need to ensure that all potentially relevant evidence is considered at a criminal trial and the need to ensure that

[34] [2015] IESC 31 *per* McKechnie J. at [78].
[35] *DPP v JC (No.2)* [2015] IESC 50.
[36] See, for example, [2015] IESC 31 *per* McMenamin J. at [18] where he asks "Are there now circumstances where the continuance of the rule is less warranted than at the time of its adoption?"

investigative and enforcement agencies (including the Garda Síochána) operate properly within the law.[37] O'Donnell J. noted the societal cost which can come from the exclusion of probative evidence:

> "the exclusion of evidence of undoubted cogency extracts a significant price in terms of the capacity of the court to perform its primary function [to determine contested matters to a requisite standard of proof], and accordingly in terms of confidence in, and respect for, the legal system. Such a course must always be justified by considerations sufficient to pay that price."[38]

The majority held that *Kenny* had been erroneously decided. O'Donnell J., for example, declared himself satisfied that "the decision in Kenny is wrong by any standard."[39]

Strong dissents were issued by Hardiman, Murray and McKechnie JJ. Rejecting the contention that *Kenny* was erroneously decided, McKechnie J stated:

> "Whether one favours or dislikes the result in Kenny, it cannot be doubted but that all issues and matters of relevance were considered, that such issues were fully debated, that means of engaging with both interests were looked at and that reasons were given for the court's ultimate conclusion. Moreover, by openly acknowledging that disadvantages or anomalies might result from the approach taken, the court must be credited with having been ever so mindful of the consequences which might flow from its decision."[40]

In the view of Hardiman J. the judgment in *Kenny* is "one of the monuments of the constitutional jurisprudence of independent Ireland"[41] and he contended that the outcome sought, and achieved, by the DPP in *JC* was "quite inconsistent with the gradualist, minimalist and 'interstitial' power of the Common Law judges to develop or evolve the law in light of changing circumstances."[42]

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[37] See [2015] IESC 31 *per* Clarke J. at [4.8]-[4.11].
[38] *Ibid. per* O'Donnell J. at [4].
[39] *Ibid. per* O'Donnell J. at [99].
[40] *Ibid. per* McKechnie J. at [247].
[41] *Ibid. per* Hardiman J. at [198].
[42] *Ibid. per* Hardiman J. at [132].

As to any question of changes in the past twenty-five years which might make it desirable to abandon the *Kenny* rule, Hardiman J., referencing the Morris Tribunal,[43] amongst other matters, stated that, to the contrary "there have, during that time, been a considerable number of deeply disturbing developments both in relation to the Garda Síochána itself and to the arrangements for its oversight."[44]

The internal consistency of the three majority judgments issued is likely to require some attention in future cases. While a clear decision was made to state the new rule only once - in the judgment of Clarke J. - the existence of a number of majority judgments may still create some confusion. For example, O'Donnell J specified that the decision in *JC* applies only in the context of search warrants, while Clarke J was not quite as restrictive. He suggested that the new rule applies only where there is a question about the manner in which a relevant piece of evidence was gathered, as opposed to any question relating to the probative value of the evidence given the way in which it was obtained. Accordingly, the decision does not relate to cases where, for example, a confession is alleged to have been obtained through oppression or threats. But what if the admissibility of inculpatory statements was in issue due to a garda breach of a suspect's right to legal advice, for example? Would that now be ruled by *JC*? It seems that it would have to be, given the express overruling of *Kenny*, though the judgment of O'Donnell J. is arguably more restrictive than that.

In any event, the rule as now constructed is set out clearly in the judgment of Clarke J,[45] and he helpfully provides clear reasons for the inclusion of each individual aspect of this rule. The main elements are as follows:

- The onus is on the prosecution to establish the admissibility of all evidence.
- If a claim is raised that evidence was obtained in breach of constitutional rights, the onus is on the prosecution to establish either (i) that there was no unconstitutionality, or (ii) that despite any interference with constitutional rights the evidence should still be admitted.

[43] Tribunal of Inquiry into complaints concerning some Gardaí of the Donegal Division. See www.morristribunal.ie
[44] [2015] IESC 31 *per* Hardiman J. at [160].
[45] *Ibid. per* Clarke J. at [7.2].

- Where evidence is obtained in deliberate and conscious violation of constitutional rights (in the sense of knowing breach of rights) it should be excluded, except in exceptional circumstances.
- Whether or not a breach of constitutional rights was deliberate and conscious requires analysis of the conduct or state of mind of the individual who actually gathered the evidence, as well as any senior official or officials within the investigating or enforcement authority concerned who was involved either in that decision or in decisions of that type generally or in putting in place policies concerning evidence-gathering of the type concerned.
- Where evidence was taken in breach of constitutional rights, but this was not deliberate and conscious, there is a presumption in favour of exclusion, which can be rebutted by evidence that the breach of rights was either (i) inadvertent or (ii) derived from subsequent legal developments.

Basically, while the *Kenny* rule operated on a rationale of protectionism, the *JC* rule operates on a rationale of deterrence: evidence will not be excluded if it was obtained in inadvertent breach of constitutional rights. Hardiman J (dissenting) profoundly objected to the "finding that 'inadvertence' by public officials with coercive powers will sufficiently excuse a breach of a citizen's constitutional rights to allow material obtained by such breach to be proved in evidence against that citizen."[46] He stated that he regarded this "as a gratuitous writing down of the respect due to the Constitution, which is an absolutely retrograde step which I deeply deplore."[47]

<u>"Deliberate and Conscious" Breach of Rights (again)</u>

The shift from protectionism to deterrence in *JC* was partly achieved through the determination that the term "deliberate and conscious" relates to the state of mind of the person obtaining the evidence (and/or any relevant senior officials) rather than his/her actions. One might have thought that in boldly overruling the *Kenny* case, as the majority of the Supreme Court has expressly done in *JC*, it would have been better to avoid this particular turn of phrase altogether, as its meaning has been so contentious over the years since *O'Brien* and on through *Kenny*.

[46] *Ibid. per* Hardiman J.
[47] *Ibid.*

Indeed, the "deliberate and conscious" formulation is not fully accurate in terms of the test emanating from the Court in *JC* as Clarke J clarifies that the concept of "inadvertence" for the purposes of the rule does not include recklessness or gross negligence.[48] O'Donnell J concurs with this view.[49] Accordingly, evidence obtained in knowing, reckless or grossly negligent breach of constitutional rights will be excluded, except in exceptional circumstances. So, "deliberate and conscious" breach of rights also includes reckless and grossly negligent breach of rights, which the everyday meaning of "deliberate and conscious" might not readily impart.

What will be the impact of a "deliberate and conscious" breach of rights, within the meaning of the *JC* rule? It seems that a garda who knows he holds an invalid search warrant will obtain evidence that will later be excluded; a garda who is subjectively reckless, in the sense that he knows there is a risk that the warrant he holds may be invalid, will obtain evidence that will later be excluded; and, a garda who takes an objectively unreasonable risk that the warrant he holds may be invalid which falls so far below the standard of care that he ought to take in executing a warrant that it amounts to gross negligence, will also obtain evidence that will later be excluded. Only a garda who has no idea that the warrant he holds may be invalid will obtain evidence that can be admitted.

The exact operation of the new rule in practice obviously remains to be seen in individual, subsequent cases. But, it seems possible that the outcome could be something of a reversal of the dichotomy which has come about since *Balfe*: *O'Brien* allowing for admission of the evidence where there is an error on the face of the warrant and *Kenny* leading to exclusion where there is a deficiency in the authorisation of the warrant or its legal value. If evidence is to be excluded now in circumstances involving gross negligence on the part of the gardaí, the *O'Brien* scenario could attract more serious consequences under *JC*. In *O'Brien*-type cases, the difficulty in the warrant is usually visible on its face – an incorrect address, for example, as in *O'Brien* itself, or in the more recent case of *DPP v Mallon*.[50] In such cases, will the newly-expressed rule now require that gardaí check their warrants for the correct information before executing them? Surely a failure to do so could, and should, be viewed as reckless, or at least grossly negligent. Will these

[48] [2015] IESC 31 *per* Clarke J. at [5.14].
[49] *Ibid. per* O'Donnell J. at [96].
[50] [2013] IECCA 29.

errors, previously viewed as mere typographical errors, now take on a greater significance? This remains to be seen and is certainly arguable, though it is unlikely to have been the intent of the majority in *JC*.

Unconstitutionality derived from subsequent legal developments

A further notable aspect of the newly-stated rule is the notion that evidence ought to be admitted where its unconstitutionality arises as a result of a subsequent legal development. This matter is directly related to the facts of *JC* itself, given the impact of the finding of unconstitutionality in the *Damache* case between the execution of the warrant at JC's dwelling and his trial.

Under *Kenny*, the statements obtained in *JC* were correctly excluded. However, under the new *JC* rule, such statements would be admissible as although s 29 warrants are now invalid and could not be used to gain entry to a dwelling from the date of the *Damache* decision onwards, they were valid at the time of execution at JC's dwelling. This gives rise to some concern.

The constitutional difficulty with s 29 was that it allowed for warrants to be authorised by senior gardaí who were involved in the investigation for which the warrant was deemed necessary. This, as the Supreme Court found in *Damache*, provided no independent oversight of garda conduct and inadequate protection for the rights of citizens. Section 29, accordingly, was struck down for good reason: independence and impartiality are essential to the integrity of the criminal process, and were not provided for by the s 29 procedure. The notion that because it was viewed as good law at the time of the execution of a specific warrant – largely because no case had yet made it to the Supreme Court to test its constitutionality – evidence obtained thereunder should be admitted at a trial arising after it has been declared to be bad law, undermines the declaration of unconstitutionality. Perhaps more significantly this approach also draws the relevant trial court into acting upon evidence obtained in breach of the Constitution. Although the gardaí in the relevant circumstances were unaware of the unconstitutionality, as it had yet to be declared, a later trial court admitting and acting upon the evidence obtained does so knowing that such evidence was obtained in what are now viewed as unconstitutional circumstances. Surely this would bring the administration of justice into greater disrepute than any alleged frustration of a prosecution by the *Kenny* rule. The fact that Ireland is a small jurisdiction which generates a

correspondingly limited pool of litigation makes this concern all the more profound; as *Damache* demonstrated, some time may elapse before a challenge to the constitutionality of a practice is raised before the courts. The approach advocated in *JC* would allow for evidence obtained under such a practice over the course of that time to be admitted at trial despite an eventual finding of unconstitutionality.

Conclusion

There are many more facets to the judgments in *DPP v JC* which will require attention in the fullness of time. The nuances of operating the new rule will only become apparent as cases come through the trial and appellate courts. What might be noted in conclusion at this juncture, however, is that the *Kenny* rule was one of the few remaining true "due process" aspects of Irish criminal procedure. While the Supreme Court recently enhanced the constitutional right to legal advice, by acknowledging that this right includes a prohibition on questioning a detained suspect prior to the arrival of his/her requested solicitor,[51] in recent years there has been much curtailment of suspect rights within the criminal process, both in the pre-trial investigative stage and at trial. Since the decision in *Kenny*, for example, we have seen extended detention periods,[52] extremely broad intrusions on the right to silence,[53] the curtailment of the right to bail,[54] an increase in reliance on opinion evidence from gardaí at trial,[55] alterations to the rule against hearsay in relation to witness statements[56] and so on. The existence of the strict exclusionary rule from *Kenny* may have been thought of as a last refuge of "due process" in a swell of "crime control" rights-limiting enactments.[57] But it is definitively no more as a result of *DPP v JC*.

[51] *DPP v Gormley and White* [2014] 1 ILRM 377.
[52] Including provision for up to seven days detention under s.2 of the Criminal Justice (Drug Trafficking) Act 1996 and s.50 of the Criminal Justice Act 2007.
[53] For example under s.19A of the Criminal Justice Act 1984 as inserted by s.30 of the Criminal Justice Act 2007.
[54] By virtue of a constitutional referendum in 1996 and the Bail Act 1997.
[55] Under s.7 of the Criminal Justice (Amendment) Act 2009.
[56] Under s.16 of the Criminal Justice Act 2006.
[57] On the concepts of "due process" and "crime control" see Packer, H.L. *The Limits of the Criminal Sanction*, Stanford: Stanford University Press (1968).