



## **ILLEGALLY OBTAINED EVIDENCE AND ITS ADMISSIBILITY**

Evidence is the material presented to the courts in order to prove or disprove a claim in civil cases or to establish a prosecution case or to set up a defence. Normally, there are statutes that regulate on how evidence is to be obtained. Nevertheless, there will be circumstances whereby evidence is obtained in contravention of these statutes, hence considered as illegally obtained evidence.

In Malaysia, locally decided cases seem to hear out that evidence is not inadmissible merely because it has been obtained unfairly or illegally but the test is whether the illegally obtained evidence is relevant and admissible under the Evidence Act 1950. The rule even applies to evidence obtained by means of entrapment or through the agency of an agent provocateur on the manner in which they were obtained. Thus, evidence obtained in breach of the provision relating to confessions and related laws may be regarded as an exception to the general rule that evidence is not rendered inadmissible.

For illegally obtained evidence, before any fact is made admissible, it must pass the test of relevancy. This test is stated in the case of *Kuruma v The Queen*<sup>1</sup>. In the case of *Kuruma v The Queen*, the court was not concerned with how the evidence was obtained. Evidence illegally or improperly obtained is admissible as long as it is relevant. But, it is not admissible if it is obtained from a trick that would be prejudice to the accused where a fair trial would be endangered. However, entrapment set up by the authorities is generally not considered as a trick. Per Lord Goddard in *Kuruma v The Queen* explains that evidence is not admissible if the strict rule of admissibility would operate unfairly against the accused.

In Malaysia, illegally obtained evidence has long been held to be admissible subject to the test of relevancy since the seminal case of *Saminathan v Public Prosecutor*<sup>2</sup> whereby the court held that the documents were admissible as evidence and that the courts were not concerned on how the evidence was obtained.

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<sup>1</sup> [1955] AC 197.

<sup>2</sup> [1937] 1 MLJ 39.

The same principle can be seen applied in the case of *Hanafi bin Mat Hassan*<sup>3</sup>. In this particular case, the accused was convicted for the offences of rape and murder. The defence counsel rose that the blood samples taken from the accused for the purpose of conducting the DNA tests were not taken voluntarily as the accused was handcuffed at that time. Augustine Paul JCA however ruled:

*The court has no discretion to refuse to admit evidence on the ground that it was illegally obtained if it is relevant. Therefore, the evidence relating to the blood sample taken from the accused was admissible as it was relevant even if it was taken without his consent.*

Furthermore, in the case of *Public Prosecutor v Mohamad Rasid bin Jusoh*<sup>4</sup> the court in discussing the non-compliance in taking the urine sample, followed the same principle as the court said:

*My other reason is as follows. Assuming, for the sake of argument, the police breached the proviso to subsection 1A in obtaining the urine specimen from an arrested person, the evidence procured thereby will be considered as improperly or illegally obtained evidence. However it settled law that in our system of justice, illegally or improperly obtained evidence is admissible provided it is relevant (see *Kuruma v R* [1955] AC 197 and *Saminathan v Public Prosecutor* [1937] MLJ39).*

To conclude, it is crystal clear that there are many authorities that admit illegally obtained evidence. This has allowed the prosecution to adduce evidence with liberty so that an accused can be convicted more easily rather than being acquitted on mere technical grounds. The admission of illegally obtained evidence allows the prosecution to retain exhibits seized which are capable of being used in evidence at the trial. However, there also certain circumstances whereby the Court, by its own discretion may reject illegally obtained evidence. This situation happens if it is found that the illegally obtained evidence would operate unfairly or oppressively against the accused.

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<sup>3</sup> [2006] 4 MLJ 134.

<sup>4</sup> [2009] 9 CLJ 557.

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