Does the Irish Legal System Favour the Criminal?

The subject you have chosen for your debate the evening "The Irish Legal System Favours the Criminal" is a challenging one. Some recent developments in our courts have caused a number of people, and in particular aggrieved victims of high profile crimes, to question the functioning of our criminal justice system. Others have suggested that perhaps the time has come for us to look in a very fundamental way at how the system works.

First of all, I would like to put the question in context. The vast majority of criminal cases which are brought in this State end in the conviction of the accused. The statistics which I will be presenting shortly in the Annual Report 2004 of my Office show that of all prosecutions on indictment brought in this country over 86% result in a plea of guilty. Of the remaining 14% which are fought, a further 8% result in a conviction, making an overall conviction rate of between 94 and 95%.

It may be said that of the cases which are fought quite a high proportion end in an acquittal by a jury or a direction by the judge. This is of course true. However, by definition the cases which are most likely to be fought are the ones where the accused or their legal representatives consider they have the best chance of success. We have a system in this country which gives a right to a first-class defence to all persons accused of crimes on indictment, who are entitled to legal aid funded out of the public purse. Under the system almost all of the criminal bar in the country are available to do cases on legal aid and any person accused of a serious crime is therefore entitled to the best possible advice. One can only assume that the 86% of persons charged with crime who decide to plead guilty do so after having received the best advice from their solicitors and counsel.

Of course, these figures do not tell the full story. They relate only to the cases which are actually brought. It is certainly true that there are categories of crime where it is notoriously difficult to bring a case in the first instance. This is

particularly true in relation to complaints of sexual assault and rape many of which will have no independent evidence to support the complaint of the victim. While the legal requirement for corroberation has been abolished, it will often be necessary or appropriate for a judge to warn a jury of the dangers of convicting in the absence of corroberating evidence, and in these circumstances it will be often difficult to persuade a jury, even a jury who think the account of the victim is probably true that they should convict an accused person on the criminal standard which is that of proof beyond reasonable doubt.

There are other offences which are notoriously difficult to prove as well. Corruption is a case in point. In some cases there is a presumption that certain payments made to persons in authority are made corruptly in the absence of evidence to the contrary. But in relation to other cases, even where it is possible to establish that a payment was in fact made, it can often be difficult if not impossible to establish the corrupt motive for the payment. Suspicion is not enough to convict a person beyond reasonable doubt. A further problem is that, in such transactions, typically both parties commit an offence and both parties, who are the only people who know the nature of the transaction, have a strong interest in ensuring that the truth does not come to light and moreover cannot be compelled to give evidence against each other.

But, taking account of these particular difficulties which arise in relation to particular offences, and also in relation to certain other offences, I am not one who overall believes that we should undertake a root and branch upheaval of our legal system. In my view to do so would be to throw out the baby with the bath water.

Irish lawyers are fond of praising the common law system. The common law system has many strengths but some weaknesses as well.

Unlike civil law systems which operate on the basis of a written code, the common law system operates on the basis of precedence. Of course, nowadays much of

this is tempered by statutory intervention. The principles are distilled from the case-law rather than guiding the case-law. But there can be one difficulty, and that is that it is not easy for the common law to find its way out of a cul-de-sac. In the case of a code based system, where the law departs from the basic principle which is stated in the code it is possible to see that this has happened. However, where the common law takes a wrong turning, providing the precedents are clear there is no real way to get out of it without statutory intervention. Furthermore, common law courts only decide cases brought before them by parties and only create precedent in relation to issues which are necessary for their decision.

As the legal system operates in this country there is a further problem to which I have drawn attention on a number of occasions. That is the near impossibility of the prosecution bringing appeals to the higher courts. By contrast, defendants have in practice almost unfettered rights of access to the Court of Criminal Appeal and where an important point of law arises, the Supreme Court. As a result, the agenda for reform is set by the defence. The issues which are brought before the Supreme Court for determination are the issues which defendants' lawyers want them to deal with. If the law is unfavourable to the defence in a particular area they can continue chipping away at it by means of appeals to the Court of Criminal Appeal and the Supreme Court. Eventually they may succeed in getting the law changed. If they do so succeed, however, it is relatively difficult for the prosecution to attempt to get the superior courts to re-examine the situation. Once the law is clear and "settled", however unsatisfactory it may be in principle, the precedents are clear and the lower courts must follow them. In the absence of prosecution rights of appeal there is no effective mechanism to get the superior courts to look at matters again. There is no real way to change the law other than through legislation.

A limited right of appeal for the prosecution on a "without prejudice" basis has been proposed and when enacted will undoubtedly improve the prosecutor's access to the courts. In the meantime, the position remains as I have stated.

Probably mostly lawyers have their own list of areas where they think the settled case law has got it wrong. If I were asked just to mention one thing I would single out the rule by which certain evidence must be excluded if it is obtained in breach of an accused person's constitutional rights.

For many years the law in this State gave courts a certain discretion in relation to evidence obtained in breach of legal or constitutional rights. The classic case was *O'Brien*'s[1] case, decided in 1964, which arose out of the issue of a warrant to search a house at number 118 Captain's Road. By mistake the warrant referred to 118 Cashel Road which was nearby. The error was a pure oversight arising from the similar sounding names of the two roads. There was no question of chicanery or deliberate alteration. As a result, when the Gardaí carried out the search they believed they had a warrant to do so even though due to this error the warrant was not valid.

The Supreme Court in *O'Brien*'s case ruled that the evidence obtained could be admitted. Kingsmill Moore J., who spoke for the majority of the court, took the view that in principle three answers in such cases were possible.

> *"First, that if evidence is relevant it cannot be excluded on the ground that it was obtained as a result of illegal action: second, that if it was obtained as a result of illegal action that it is never admissible: third, that where it was obtained by illegal action it is a matter for the trial judge to decide in his discretion, whether to admit it or not, subject, in cases where the evidence has been admitted, to review by an appellate court."* (at p.159)

The Court went on to hold that neither the first or second answer was sustainable. With regard to the view that relevant evidence should never be excluded, the Court referred to precedents which had refused to admit evidence which was undoubtedly

[1] The People (Attorney General) v O'Brien [1966] I.R. 142

relevant where the probative value of the evidence would be slight and its prejudicial effect would great. With regard to the view that the evidence should never be admissible, Kingsmill Moore J. had the following to say

> "*An absolute exclusionary rule prevents the admission of relevant and vital facts where unintentional or trivial illegalities have been committed in the course of ascertaining them. Fairness does not require such a rule and common sense rejects it*." (at pp 159-60)

> "*some intermediate solution must be found … a choice has to be made between desirable ends which my be incompatible. It is desirable in the public interest that crime should be detected and punished. It is desirable that individuals should not be subjected to illegal or inquisitorial methods of investigation and that the State should not attempt to advance its ends by utilising the fruits of such methods. It appears to me that in every case a determination had to be made by the trial judge as to whether the public interest is best served by the admission or exclusion of evidence of facts ascertained as a result of, and by means of, illegal actions, and that the answer to the question depends on a consideration of all the circumstances. On the one hand, the nature and extent of the illegality have to be taken into account. Was the illegal action intentional or unintentional, and, if intentional, was it the result of an ad hoc decision or does it represent a settled or deliberate policy? Was the illegality one of a trivial and technical nature or was it a serious invasion of important rights the recurrence of which would incur a real danger of necessary freedoms? Were there circumstances of urgency or emergency which provides some excuse for the action? … The nature of the crime which is being investigated may also have to be taken into account."*

The Court, however, held that where there had been a deliberate violation of constitutional rights by the State or its agents evidence obtained by such violations

in general should be excluded, subject to the possibility that there might be "extraordinary excusing circumstances" which might warrant its admission.

O'Brien's case remained the law until 1989. During that period the law was effective to prevent the admission of evidence obtained as a result of Gardaí misbehaviour but permitted the admission of evidence where the Gardaí acted wrongly but in good faith or where there was some trivial error. A disadvantage of the rule was that, as in all cases where a court is given discretion, it was not always possible to predict the outcome of a court's decision. However, the loss of predictability was balanced by the court's ability to arrive at a just result in the particular case.

In *Kenny*[2]'s case, decided in 1989, the Court decided, by a 3-2 majority, to abandon the discretionary rule and instead to substitute a rule of what is, in effect, absolute exclusion. The formula of "deliberate and conscious breach" of personal rights was retained but it was held that it was the act constituting the breach which if deliberate and conscious, would lead to exclusion of the evidence, rather than knowledge that a breach of rights was involved. If a Garda actually meant to search a house when in fact he had no valid warrant, even though he believed he had one, even if he would have had a valid warrant but for an error, the evidence could not be admitted.

In explaining the reasoning behind the change in legal policy involved Chief Justice Finlay, speaking for the majority, reasoned as follows: -

> *"As between two alternative rules or principles governing exclusion of evidence obtained as a result of the invasion of the personal rights of a citizen, the Court has, it seems to me, an obligation to choose the principle which is likely to provide a stronger and more effective defence and vindication of the right concerned.*

[2] The People (Director of Public Prosecutions) v Kenny [1990] 2 I.R. 110

> *To exclude only evidence obtained by a person who knows or ought reasonably to know that he was invading a constitutional right is to impose a negative deterrent. It is clearly effective to dissuade a policeman from acting in a manner which he knows is unconstitutional or from acting in a manner reckless as to whether his conduct is or is not constitutional.*
>
> *To apply on the hand, the absolute protection rule of excluding whilst providing also this negative deterrent, incorporates as well a positive encouragement to those in authority over the crime prevention and detection service of the State to consider in detail the personal rights of the citizens as set out in the Constitution and the effect of their powers of arrest, detention, search and questioning in relation to such rights.*
>
> *It seems to me to be an inescapable conclusion that a principle of exclusion which contains both negative and positive force is likely to protect constitutional rights in more instances than is a principle with negative consequences only."*

This is indeed a strong argument but it suffers from one major disadvantage, as was acknowledged by Chief Justice Finlay. Following the passage just quoted he went on to say

> *"The exclusion of evidence on the basis that it results from unconstitutional conduct, like every other exclusionary rule, suffers from the marked disadvantage that it constitutes a potential limitation of the capacity of the courts to arrive at the truth and so most effectively to administer justice.*
>
> *I appreciate the anomalies which may occur by reason of the application of the absolute protection rule to criminal cases.*

> *The detection of crime and conviction of guilty persons, no matter how important they may be in relation to the ordering of society, cannot, however, in my view, outweigh the unambiguously expressed constitutional obligation "as far as practicable to defend and vindicate the personal rights of the citizen."*

It would be difficult to take issue with this reasoning if the constitutional rights of only one person were in issue, such as the right of the accused citizen to the inviolability of the dwelling house. However, Article 40.2.2° expressly requires the State by its laws to protect as best as it may from unjust attack and, in the case of injustice done, to vindicate the life and person of every citizen. Is there not a powerful argument to be made that this provision necessarily implies a right of victims of crimes affecting their life or person to the effective protection of the criminal law? A court of law should have the ability to balance this right against the competing rights of an accused person where such an issue arises; it ought not deprive itself of this ability by the operation of an inflexible rule of exclusion. The judgment in *O'Brien*'s case recognised clearly that competing interests were involved. The effect of *Kenny'*s case, however, is to determine that one right must always prevail, without any proper examination of the competing interests in the particular case.

In saying this I do not suggest that the outcome of any of the recent cases where *Kenny*'s case was invoked to exclude evidence should necessarily have been any different, and it may well be that after a proper consideration of the competing interests involved the evidence would have been excluded. The problem with Kenny's case is that it prevents any such consideration and, potentially at least, requires a trial court to exclude highly relevant and probative evidence where a relatively trivial breach of a constitutional right may have occurred.

It is clear that Article 2 of the European Convention of Human Rights, entailing an obligation on the State to secure the right to life, also requires the State to put in

place effective criminal law provisions to deter the commission of offences against the person, backed by the law-enforcing machinery necessary for the prevention, suppression and sanctioning of any breaches of these provisions[3]. The Convention is now part of Irish law. Although its incorporation by the European Convention on Human Rights Act 2003 was at a statutory level, and therefore lower than the Constitution in the hierarchy of sources of law, even before the 2003 Act, the view had been expressed by the courts that a presumption of compatibility between the Constitution and the ECHR was relevant to constitutional interpretation[4]. It is also worth noting that in its own case law on the admission of evidence obtained in breach of Convention rights, apart perhaps from cases where involuntary confessions have been obtained in breach of Articles 3 and 6 or evidence has been obtained by entrapment in breach of Article 6, the European Court of Human Rights has not opted for a strict exclusionary rule, but instead has emphasised an approach based on all the circumstances of an individual case[5]. This dimension, I believe, reinforces the importance of ensuring that all relevant rights are balanced in any determination by a court of law where competing rights are in question.

The fact that under our system the victim is not a party to the criminal trial should not prevent the law from taking account of the victim's rights in deciding an issue which of necessity affects those rights, nor should the interests and rights of the individual victim be ignored when considering the People's interest in prosecuting crime. In conclusion, I believe the law requires to be revisited in the light of the right to life and person of victims of crime, the State's obligation to vindicate those rights and the State's obligations under the European Convention on human rights.

[3] See e.g. the decision of the European Commission of Human Rights in *Taylor, Gibson and King Families Case*, Appl. 23412/94, D&R 79-A (1993), p. 127 (136).
[4] See, e.g. Henchy J. in *The State (DPP) v Walsh* [1981] IR 412 and O'Hanlon J. in *Desmond v Glackin (No. 1)* [1993] 3 IR 1, in the context of contempt of court.
[5] See, e.g. *Schenk v Switzerland* (1991) 13 EHRR 242 and *Khan v United Kingdom* 8 BHRC 310 and the discussion in B. Emmerson & A . Ashworth, *Human Rights and Criminal Justice*, 2001, pp. 417-440

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