

# Medicolegal

## Consent and prisoners

BY OUR LEGAL CORRESPONDENT

The need for exceptional care to ensure reality of consent when treating prisoners has been shown by a recent decision of the Court of Appeal.<sup>1</sup> Specimens of body fluid obtained without consent may be used in evidence against a prisoner.

Alfred Robert Apicella was convicted at the Old Bailey charged with raping three girls and attempting to bugger two of them. Among other evidence the strongest part of the prosecution case against the defendant was medical evidence. As a result of the attacks each of the three girls had contracted an unusual strain of gonorrhoea. This indicated a common attacker, but the prosecution had to show that that attacker was the defendant, and it relied on medical evidence that was improperly obtained—though the doctors themselves were innocent of the impropriety.

While the defendant was in prison awaiting trial the prison doctor suspected that he was suffering from gonorrhoea. With a purely therapeutic intention he called in a consultant physician. The consultant examined the defendant and took from him a sample of body fluid to aid diagnosis. The consultant believed that the defendant was consenting, but (the court found) he was submitting only because, unknown to either doctor, he had been told by a prison officer that as a prisoner he had no choice.

Evidence was given at the trial of the defendant that he was suffering from the same strain of gonorrhoea as the three victims. Objection was taken to the admission of that evidence on the ground that it had been taken without consent and was the physical equivalent of an oral confession. That objection was rejected and the defendant's subsequent appeal was dismissed.

### Confessions

The Court of Appeal distinguished between the law relating to the admission in evidence of confessions and the law concerning the admissibility of evidence obtained as a result of unlawful acts. It cited the decision of the House of Lords in *R v Sang* on the question whether a judge had a discretion to exclude evidence which had been unfairly obtained.<sup>2</sup> The basic principle was that relevant evidence should be admitted unless there was a rule of law which said that it should not be admitted. Here it was accepted that the evidence was relevant, and there was no rule of law that anything taken from a suspect—be it a body fluid, a hair, or an article hidden in an orifice of the body—could not be admitted in evidence unless the suspect consented to the taking. The way in which evidence had been obtained had no relevance to its admissibility, though its intended use in a trial by the prosecution might call for the exercise of judicial discretion to exclude it. In the circumstances the intended use was not, in the view of the Court of Appeal, likely to make the trial unfair, and the judge had been right in the exercise of his discretion not to exclude it.

Whether the Court of Appeal was right in its application of the decision of *R v Sang* to this case is, however, questionable. The House of Lords in *R v Sang* gave a two part answer to the question. "Firstly, 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. Secondly, 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. It is no ground for the exercise of discretion to exclude that the evidence was obtained as the result of the activities of an agent provocateur."

In the second part of that answer the House of Lords put "evidence obtained from the accused after commission of the offence" on a par with admissions and confessions. The sample obtained from the accused was obtained from him after the commission of the offence and therefore one would think, contrary to the decision of the Court of Appeal, that evidence about the sample should have been treated as falling under the rules relating to admissions and confessions. Those rules in English law are very much more in favour of exclusion of evidence than the rules concerning evidence obtained, for example, as a result of an illegal search.

### Purpose of examination

The only case cited to the House of Lords in *R v Sang* in which an appellate court actually excluded evidence on the ground that it had been unfairly obtained was another case concerning medical evidence, *R v Payne*, decided by the Court of Appeal in 1963.<sup>3</sup> A man suspected of drunken driving had been taken to the police station and asked if he was willing to be examined by a doctor. In accordance with a policy then being followed he was told that the doctor would not examine him to see if he was unfit to drive but would merely examine him to see if he was suffering from any other illness or physical disability. At the trial (as a result of a change in policy) the doctor gave evidence for the prosecution that the defendant was under the influence of drink. The Court of Appeal (following an earlier decision of its own<sup>4</sup>) held that the evidence should have been excluded. The late Lord Diplock in *R v Sang* commented that the obtaining of the doctor's evidence of drunkenness "is analogous to unfairly inducing a defendant to confess to an offence, and the short judgment of the Court of Criminal Appeal is clearly based on the maxim *nemo debet prodere se ipsum*."

The law in England and Wales on this vital matter of admissibility of evidence remains difficult and confused, and it will be even more so when section 78 of the Police and Criminal Evidence Act 1984 comes into force. That section gives the court a very general discretion to exclude evidence "if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it." It is by no means clear how that section will be interpreted by the courts.

In Scotland the law is different. There, illegally obtained evidence is excluded unless there is a good reason to exercise a discretion in favour of its reception.

### References

- 1 Anonymous. No consent needed for body fluid evidence. *The Times*, 1985 Dec 5:11 (col 1).
- 2 [1980] AC 402.
- 3 [1963] 1 WLR 637.
- 4 *R v Court* [1962] Crim LR 697.
- 5 *Lawrie v Muir* [1950] JC 19.