Michaelmas Term
[2011] UKSC 44

JUDGMENT

REFERENCE - Her Majesty's Advocate *v* P (Scotland)

before

Lord Hope, Deputy President
Lord Brown
Lord Kerr
Lord Dyson
Lord Matthew Clarke

JUDGMENT GIVEN ON

6 October 2011

Heard on 28, 29 and 30 June 2011

Appellant	*Respondent*
Frank Muholland QC, Lord Advocate Joanna Cherry QC Catherine Devaney (Instructed by the Crown Agent, Crown Office)	Matthew Auchincloss (Instructed by Public Defence Solicitors Office)

LORD HOPE (WITH WHOM LORD DYSON, LORD KERR AND LORD MATTHEW CLARKE AGREE)

1. On 26 October 2010 this Court issued its judgment in *Cadder v HM Advocate* [2010] UKSC 43, 2010 SLT 1125. It held that the Crown's reliance on admissions made by an accused who had no access to a lawyer while he was being questioned as a detainee under section 14 of the Criminal Procedure (Scotland) Act 1995 gave rise to a breach of his right to a fair trial, having regard to the decision of the European Court of Human Rights in *Salduz v Turkey* (2008) 49 EHRR 421. This was because the leading and relying on incriminating statements made by the appellant while being interviewed by the police in such circumstances was a violation of his rights under article 6(3)(c) read in conjunction with article 6(1) of the European Convention on Human Rights: see *Cadder v HM Advocate*, para 63.

2. The evidence that was in question in *Cadder* consisted of incriminating statements that the appellant made when he was being questioned while in detention at a police station. The applicant in *Salduz* too had been taken into custody before he was interrogated during his detention by police officers of the anti-terrorism branch of the Izmir Security Directorate. But the facts of those cases by no means exhaust the situations in which the Crown may seek to rely on answers to questions that have been put to the accused by the police. The Court now has before it four references by judges of the High Court of Justiciary which have been required by the Lord Advocate under paragraph 33 of Schedule 6 to the Scotland Act 1998. Three of them are cases where the evidence in question was obtained by the police otherwise than by questioning at a police station following detention under section 14 of the 1995 Act. The fourth is concerned with whether the ratio of the decision in *Salduz* extends to lines of enquiry which have been derived from answers that the accused gave to questions while he was being detained in the police station.

3. Common to all four cases is the fact that incriminating answers were given to questions put by the police when the accused did not have access to legal advice. In each case this occurred before the judgment was given in *Cadder*. The issue that the first three references raise is whether the decision in *Salduz* to which *Cadder* gave effect has established that anyone who has been "charged" with an offence, so that article 6 is engaged, and is then questioned by the police is entitled to access to a lawyer at that stage; or whether the right of access to a lawyer applies only where the accused is being subjected to police questioning while in custody. These cases can be grouped together under the general heading "pre-detention questioning". I propose to deal with them in a separate judgment: *Ambrose v HM Advocate* [2011] UKSC 43.

4. The issue in the fourth reference, which is the subject of this judgment, is whether the *Salduz* principle extends to the use of any evidence whatever, the existence of which was discovered as a result of answers given by the accused while in custody without access to legal advice; or whether the principle does not extend to evidence which, although its existence was derived from those answers, has an independent life of its own and does not require to be linked to those answers in order to support the Crown's case. Evidence of this kind has been referred to as "the fruit of the poisonous tree": see Stephen C Thaman, "Fruits of the Poisonous Tree" in Comparative Law, (2010) 16 Southwestern Journal of International Law 333, 335, fn 5. The use of such evidence was at one time thought to have been excluded in the United States of America, but the doctrine has been relaxed in favour of admissibility by decisions of the US Supreme Court. In *Murray v United States* 487 US 533 (1988), paras 7-8, the test that was applied by Scalia J was whether the search pursuant to a warrant was a genuinely independent source of the information relied on by the prosecutor. The question which we have to decide depends on an analysis of the jurisprudence of the European Court of Human Rights at Strasbourg.

The facts

5. This is a case which has not yet gone to trial, so the names of those involved have been anonymised. The reference has been made at the request of the Lord Advocate by the trial judge, Lord Bracadale. The accused, referred to as P, has been indicted in the High Court of Justiciary on a charge of assault and rape which was alleged to have taken place on 10 and 11 October 2009. On 11 October 2009 he was detained under section 14 of the 1995 Act in connection with the allegation which had been made against him by the complainer. He was taken to a police station where he was interviewed. He was not given access to legal advice prior to or during the interview. He was asked where he had been on the date of the alleged rape. The locus of the complaint was a short walking distance from a pub where he and the complainer met. He said that, prior to the alleged assault and rape, he had taken a powdered substance at another pub that had provoked an adverse reaction.

6. His interview then continued in these terms:

> "Q- … Are there people that you, you could say that would back up how you were reacting to that?
>
> A – Erm, yeah, yeah, there would be yeah.

Q – Who are they?

A – Erm could say my best mate I suppose

Q – Who's that?"

He then gave his friend's name and address to the police and added that his friend would be able to back him up. The police subsequently took a statement from his friend in which he spoke to the accused's reaction after he had taken a drug and provided support for what the accused had said about this. But he also described having a telephone conversation with the accused on the morning of 11 October 2009 in which the accused described meeting a woman the previous night and having consensual sexual intercourse with her.

7. The accused lodged a devolution minute in which he submitted that his rights under article 6(3) would be contravened if the Crown were permitted to elicit evidence of his police interview, and that the evidence of his friend about the telephone conversation was incriminatory evidence which had been obtained as a direct result of his replies during the police interview and that the Crown should not be permitted to lead this evidence. A diet of debate was then fixed, prior to which written submissions were lodged on behalf of the Crown and the accused. In its written submissions the Crown accepted that any incriminatory statements that the accused made during his police interview without having had access to legal advice were inadmissible. But it indicated that it proposed to lead the friend's evidence at the trial, and in particular to elicit from him evidence of what the accused said to him during his telephone conversation with the accused.

8. At the diet of debate, prior to any argument, the then Lord Advocate intimated that she required the court to make a reference to this court. The questions that were then referred by the trial judge are in these terms:

> "(i) Whether the act of the Lord Advocate in leading and relying on evidence obtained from information disclosed during the course of a police interview with an accused person conducted in accordance with section 14 of the Criminal Procedure (Scotland) Act 1995 without the accused person having had access to legal advice would be incompatible with the accused person's rights under article 6(1) and 6(3)(c) of the European Convention on Human Rights, having regard in particular to the decision of the Supreme Court of the United Kingdom in *Cadder v HM Advocate* 2010 SLT 1125.

(ii) Whether the act of the Lord Advocate in leading and relying on evidence in these proceedings from Crown witness number 13 [SF] (whose identity was disclosed to the police, and thereby the Crown, during the course of a police interview with the accused conducted in accordance with section 14 of the Criminal Procedure (Scotland) Act 1995 on 11 October 2009 without the accused having had access to legal advice), would be incompatible with the accused's rights under article 6(1) and 6(3)(c) of the European Convention on Human Rights."

9. In *Cadder v HM Advocate* 2010 SLT 1125, para 48 I said that, although it was held in *Gäfgen v Germany* (2010) 52 EHRR 1 that there had been no violation of articles 6(1) and 6(3) as the evidence that had been secured as a result of interrogation in that case did not have bearing on the applicant's conviction and sentence, the decision served a warning that the *Salduz* principle could not be confined to admissions made without access to legal advice during police questioning. In para 50 I said that the guarantees that are otherwise available under the Scottish system were incapable of removing the disadvantage that a detainee will suffer if he says something which enables the police to obtain incriminating evidence from other sources which is then used against him at his trial. The question that this reference raises is whether the Convention jurisprudence shows that there is an exclusionary rule to this effect of the kind described in *Salduz* as my observations in these paragraphs might be taken to have suggested, or whether evidence which was obtained because of things learned because of what the detainee said during such police questioning but exists independently of it will normally be admissible. Does the rule extend to evidence derived from his answers but which can speak for itself, without it being necessary to refer for support or explanation to anything the detainee said in the course of his police interview?

10. As this is a devolution issue, guidance as to how these questions should be answered must be found in the jurisprudence of the European Court of Human Rights at Strasbourg. The position as regards evidence obtained from the accused which is not derived from anything that the accused said to the police at his interview is not in doubt. As the court is primarily concerned with the right to remain silent, the right not to incriminate oneself does not extend to incriminating evidence that has been obtained from him other than by reference to what he has said. In *Saunders v United Kingdom* (1996) 23 EHRR 313, para 69 the Court observed that, as commonly understood in the legal systems of the contracting parties to the Convention and elsewhere the right not to incriminate oneself does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue

for DNA testing. It returned to the point in *Jalloh v Germany* (2006) 44 EHRR 667, para 102 where it said:

> "The Court has consistently held, however, that the right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the contacting parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood, urine, hair or voice samples and bodily tissue for the purpose of DNA testing."

11. The court said in *Jalloh*, para 101 that in examining whether a procedure has extinguished the very essence of the privilege against self-incrimination, it will have regard, in particular, to the nature and degree of the compulsion, the existence of any relevant safeguards in the procedures and the use to which any material so obtained is put. But the question whether respecting the will of an accused person to remain silent means that anything that is derived from what he said at a police interview which was incompatible with his rights under articles 6(1) and 6(3)(c) must always be excluded was not resolved by that statement. Where the only reason why the answers that he gave at his interview are inadmissible is that he did not have access to a lawyer when he was being interviewed, the decision in *Salduz* must be the starting point. But it is only the starting point, as it will be necessary to look at what can be derived from what the Strasbourg court has said since judgment in that case was given.

12. The Advocate Depute submitted that, as Strasbourg has not spoken, evidence of this kind should be regarded prima facie as admissible. For the accused Mr Auchincloss said that he was not contending for an absolute exclusionary rule. He directed his argument instead to the particular circumstances of this case. His point was that, but for what the accused told the police when he was interviewed, the police would not have gone to his friend at all. The effect of imparting this information to the police was that he had incriminated himself. That was enough for the friend's evidence about the telephone conversation to be inadmissible.

Background

13. The general rule, so far as Strasbourg is concerned, is that the rules about the admissibility of evidence are for the contracting states. In *Schenk v Switzerland*

(1988) 13 EHRR 242, which was a case about unlawful telephone tapping, the court said in para 46:

> "While article 6 of the Convention guarantees the right to a fair trial, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law. The court therefore cannot exclude as a matter of principle and in the abstract that unlawfully obtained evidence of the present kind may be admissible. It has only to ascertain whether Mr Schenk's trial as a whole was fair."

The same approach to cases raising questions about article 6 rights generally is to be found in a great many cases. In *Gäfgen v Germany* (2010) 52 EHRR 1, paras 162-163 the court said:

> "162. … While article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law.
>
> 163. It is, therefore, not the role of the court to determine, as matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law may be admissible. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the unlawfulness in question and, where the violation of another Convention right is concerned, the nature of the violation found."

14. As Lord Bingham of Cornhill said in *Brown v Stott* 2001 SC (PC) 43, 50, what a fair trial requires cannot be the subject of a single, unvarying rule or collection of rules. Article 6(1) has been interpreted broadly by reading into it a number of other rights to which the accused person is entitled. Their purpose is to give effect, in a practical way, to the fundamental and absolute right to a fair trial. This approach is to be found also in *Salduz*, para 52, where the court took the following propositions as its starting point for the issue it was addressing in that case:

> "National laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings. In such circumstances, article 6 will normally require that the accused

> be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation. However, this right has so far been considered capable of being subject to restrictions for good cause. The question, in each case, has therefore been whether the restriction was justified and, if so, whether, in the light of the entirety of the proceedings, it has not deprived the accused of a fair hearing, for even a justified restriction is capable of doing so in certain circumstances."

It is not for this court to say how the matter should be dealt with in domestic Scots law: see *Fraser v HM Advocate* [2011] UKSC 24, 2011 SLT 515, para 11. But it is proper for it to take note of how the law stands on this issue as part of the background because the domestic requirement of fairness will need to be satisfied in any event for such evidence to be admissible.

15. As Lord Justice Clerk Thomson said in *Chalmers v HM Advocate* 1954 JC 66, 81, the law has to reconcile two principles: (1) that no accused person is bound to incriminate himself, and (2) that what an accused person says is admissible evidence against him, provided he says it freely and voluntarily. There is no reason to think that what the accused's friend says the accused said to him in the telephone conversation was not said freely and voluntarily. It was, in part at least, incriminatory, as the accused is said to have admitted to having had sexual intercourse with the complainer at the locus, albeit consensually. But this, of itself, does not make it inadmissible. The assumption is, however, that the police would not have obtained this evidence but for what the accused told the police when he was interviewed. The question is whether, if the Crown cannot show that the assumption is incorrect, the fact that the source of their information was the accused himself renders the friend's evidence inadmissible.

16. The Advocate Depute submitted that no clear answer to this question emerges from the Scottish case law. There is no doubt as to where the law stands if, as in *Chalmers*, the evidence which the police discovered as a result of what they were told by the accused when he was interviewed would not have been relevant without linking it to what was said by the accused. Lord Justice General Cooper said that he regarded the appellant's visit under the surveillance of the police to the cornfield where the purse was found as part and parcel of the same transaction as the interrogation: 1954 JC 66, 76:

> "if the interrogation and the 'statement' which emerged from it are inadmissible as 'unfair', the same criticism must attach to the conducted visit to the cornfield."

He returned to the point later on the same page, when he said:

> "The significance of the episode is plain, for it showed that the appellant knew where the purse was. If the police had simply produced, and proved the finding of, the purse, that evidence would have carried them little or no distance in this case towards implicating the appellant. It was essential that the appellant should be linked up with the purse, either by oral confession or by its equivalent – tacit admission of knowledge of its whereabouts as a sequel to the interrogation."

The effect of the decision in *Salduz*, as explained in *Cadder*, is that evidence of that kind, which must inevitably be linked to what the detainee said to the police without access to a lawyer while he was being interviewed if it is to be used to incriminate him, will always be inadmissible. That is what I had in mind when I drew attention in *Cadder*, paras 48 and 50, to the fact that exclusion of evidence on the *Salduz* principle could not be confined to the admissions made during police questioning.

17. As for the position where the evidence that has been discovered as a result of what was said at the police interview can speak for itself, the guiding principle in Scots law is to be found in *Lawrie v Muir* 1950 JC 19. It was laid down by a full bench in that case that an irregularity in the method by which evidence has been obtained does not necessarily make that evidence inadmissible in a criminal prosecution. Lord Justice General Cooper explained the basis for this approach at p 26:

> "From the standpoint of principle it seems to me that the law must strive to reconcile two highly important interests which are liable to come into conflict – (a) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and (b) the interest of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from Courts of law on any merely formal or technical ground. Neither of these objects can be insisted upon to the uttermost."

He went on at p 27 to approve Lord Justice Clerk Aitchison's statement in *HM Advocate v McGuigan* 1936 JC 16 at p 18, that an irregularity in the obtaining of evidence does not necessarily make that evidence inadmissible. The irregularity in *Lawrie* was that the inspectors had conducted a search of the appellant's premises which they had no right to carry out. But the decision has a much wider

application. It was referred to by the Scottish Law Commission in their Research Paper on the Law of Evidence of Scotland, written by I D Macphail, later the Hon Lord Macphail, (1979, reissued and updated 1987) when it was considering the effect of the decision in *Chalmers*. They took from what Lord Justice General Cooper said at p 76 that the evidence of the finding of the purse by the police would not have been treated as inadmissible if it had been capable of being led as relevant evidence without reference to the appellant's confession. In para 21.04 they concluded that, while logic might demand that such evidence should, together with the confession, be inadmissible, logic must yield in favour of a flexible rule which was consistent with the modern Scottish decisions on illegal searches and seizures in criminal cases.

18. It is no doubt true, as the Advocate Depute said, that no clear answer emerges from the Scottish case law. But there is good reason to think that the approach laid down in *Lawrie v Muir*, which is entirely consistent with the approach of the Strasbourg court to national rules as to the admissibility of evidence, would be adopted. The law of England and Wales is to the same effect. Section 58 of the Police and Criminal Evidence Act 1984 provides that a person arrested and held in custody in a police station or other premises shall be entitled, if he so requests, to consult a solicitor privately at any time. Section 76(4) provides that a confession that is wholly or partly excluded does not affect the admissibility of any facts discovered as a result of the confession. Under section 78(1) of that Act a breach of section 58 may lead to the exclusion of evidence as to what the person said under police questioning, including any evidence that has been derived from it. But evidence improperly obtained in this way is not invariably inadmissible, as section 78(1) requires the court to have regard to all the circumstances. Ultimately the question is whether it would or would not be fair to admit the evidence: *R v Looseley* [2001] UKHL 53, [2001] 1 WLR 2060 (a case of entrapment), per Lord Nicholls of Birkenhead at para 19. The question that the reference raises, therefore, is whether there is anything in the Strasbourg jurisprudence which lays down that any evidence discovered as a result of what a detainee who was without access to a lawyer said during his police interview must always, as a rule, be held to be inadmissible in the absence of compelling circumstances to restrict the right of access. If that were so, it would be a considerable innovation on what, so far, has been thought to be the position in Scots law.

Discussion

19. Nothing that was said in *Salduz* offers any guidance as to how this question should be answered. The point was not in issue in that case. In para 54 the court said that the assistance of a lawyer to ensure respect of the right of an accused not to incriminate himself presupposed that the prosecution in a criminal case will seek to prove their case without resort to evidence obtained through methods of

coercion or oppression in defiance of the will of the accused. Reference was made in a footnote to *Jalloh v Germany* (2006) 44 EHRR 667, para 100 and to *Kolu v Turkey*, application no 35811/97, para 51. Neither of these cases was concerned with evidence that was derived from what was said during interrogation by the police.

20. But *Gäfgen v Germany* (2010) 52 EHRR 1 was a case of that kind. The applicant abducted and killed a child and then demanded a ransom from his family. He was arrested by the police, who had kept him under surveillance after he collected the ransom payment. Hoping that the child was still alive, the police questioned him about the child's whereabouts. In reply to their questions the applicant said that the child was being held by another kidnapper. He was then allowed to consult a lawyer. Under later questioning he indicated that the boy had been kidnapped by two other people who had hidden him in a hut by a lake. Early the next day he was subjected to threats of extreme violence if he did not tell the police where the child was. For fear of being exposed to the measures he was threatened with he disclosed the whereabouts of the child's body. He was then taken to the place which he had indicated and, while being filmed, pointed out its precise location.

21. In para 173 the court noted that it was being called upon to examine the consequences for a trial's fairness of the admission of real evidence obtained as a result of an act which qualified as inhuman treatment in breach of article 3, but falling short of torture. It referred to what it had said in paras 166-167 in its review of the relevant principles, where it stated that incriminating real evidence obtained as a result of acts of violence should never be relied on as proof of a victim's guilt, irrespective of its probative value. The court went on in para 173 to observe that, in its case law to date, it had not yet settled the question whether the use of such evidence will always render a trial unfair, irrespective of other circumstances of the case. It had however found that the use of statements obtained as a result of a person's treatment in breach of article 3, and the use of real evidence obtained as a direct result of acts of torture, made the proceedings as a whole automatically unfair, in breach of article 6: *Göçmen v Turkey* (application no 72000/01) (unreported) given on 17 October 2006, paras 73-74.

22. There then followed this important paragraph, in which the court picked up a point that it had already noted in para 69:

> "174. The Court notes that there is no clear consensus among the contracting states to the Convention, the courts of other states and other human-rights monitoring institutions about the exact scope of application of the exclusionary rule. In particular, factors such as whether the impugned evidence would, in any event, have been

> found at a later stage, independently of the prohibited method of investigation, may have an influence on the admissibility of such evidence."

In para 73 the court referred to indications in the case law of the United States that the exclusionary rule does not apply where the connection between the illegal police conduct and the discovery of the evidence was so remote as to dissipate the taint, as where the police relied on an independent source to find the evidence or where it would ultimately have been discovered even had no violation of any constitutional provision taken place. In para 74 it referred to the judgment of the Supreme Court of Appeal in South Africa in *Mthembu v The State* (379/2007) [2008] ZASCA 51, where the impugned evidence was excluded because there was an inextricable link between the accused's torture and the nature of the evidence that was produced. In para 33 of its judgment the court said that there was no suggestion that the discoveries would have been made in any event and that, if they had, the outcome might have been different.

23. There is an obvious link between the situation that was before the court in *Gäfgen* and that in *Chalmers*. Under the law as set out in *Chalmers*, the evidence that the accused pointed out the precise location of the body to the police would have been held to have been inadmissible. It was part and parcel of the same transaction as the interrogation. But that is not this case. The court in *Gäfgen*, which was primarily concerned with the consequences of a violation of article 3, did not find it necessary to resolve this issue to which it drew attention in para 174. It held that, having regard to the particular circumstances of that case, the failure to exclude the impugned evidence did not have a bearing on the applicants conviction and sentence, so there had been no violation of articles 6(1) and 6(3): paras 187-188. In a joint partly dissenting opinion Judges Rozakis, Tülkens, Jebens, Ziemele, Bianku and Power said that in their view there had been a violation of those articles, but this was because the evidence had been obtained as a direct result of a violation of article 3. Where the boundary lies between what the Convention requires to be automatically excluded because it is derived from what the person has said and what is not remains unclear. There have been no other cases that deal with the issue since *Gäfgen* to which we can look for guidance. But at least it can be said that the Strasbourg court has not suggested that leading evidence of the fruits of questioning that is inadmissible because the accused did not have access to a lawyer when he was being interviewed will always and automatically violate the accused's rights under article 6(1) and 6(3)(c).

24. In *Salduz* para 53 the court said that the principles which it had outlined in para 52 (see para 14, above) were in line with the generally recognised international standards. The same point emerges from the passages in *Gäfgen* to which I have just referred: see para 22, above. So I think that regard can be had to the position in England and Wales which is dealt with in section 76 of the Police

and Criminal Evidence Act 1984, as Lord Brown has explained: see para 32, below. Subject to the court's discretionary power to exclude it under section 78(1), evidence derived from an involuntary statement which can be adduced without having to rely on that statement is admissible. And further assistance may be found in the approach which was taken to this issue in the Supreme Court of Canada in *Thomson Newspapers Ltd v Canada (Director of Investigation and Research)* [1990] 1 SCR 425, to which the Court's attention does not appear to have been drawn in *Gäfgen*.

25. Among the issues that were before the court in that case was the question whether section 17 of the Combines Investigation Act 1970, which provides that the Restrictive Trade Practices Commission may order that a person be examined on oath and make production of books, papers, records or other documents, was inconsistent with the provisions of sections 7 and 8 of the Canadian Charter of Rights and Freedoms. Section 7 includes among its provisions the right not to be deprived of liberty except in accordance with the principles of fundamental justice. It was argued that section 17 was contrary to two principles of fundamental justice, namely the right against self-incrimination and the right to remain silent. One of the questions in the case was whether the protection of article 7 extended to derivative evidence. Two other provisions of the Charter were relevant to this issue: section 11(c), which provides that a person is protected against being compelled to give evidence in proceedings that have been brought against him, and section 13, which provides the person with a limited right against self-incrimination. The court was divided on the question whether the use of derivative evidence, which fell outside the protections of articles 11(c) and 13, was nevertheless contrary to the principles of fundamental justice. Wilson J, in a dissenting opinion said that because there was a direct causal relationship between the compelled testimony and the derivative evidence the privilege against self-incrimination, if it was to be meaningful, requires that neither the testimony nor the evidence derived from it should be used against him: para 69. Lamer J, declined to pronounce on this issue: para 5. But La Forest, L'Heureux-Dubé and Sopinka JJ said that, to the extent that it authorised an order to compel the production of documents, section 17 did not contravene section 7 of the Charter: paras 225, 270, 327.

26. The reasons that La Forest J gave for holding that there was no breach of the principles of fundamental justice are particularly instructive. He said that there were serious grounds on which objection can be raised to an absolute rule that testimonial immunity must always extend to evidence derived from compelled testimony:

> "199. …While allowing the Crown to use such evidence in criminal proceedings may in a formal sense be equivalent to permitting direct reliance on the compelled testimony itself, there is an important

> difference between the type of prejudice that will be suffered in the two cases. It is only when the testimony itself has to be relied on that the accused can be said to have been forced to actually *create* self-incriminatory evidence in his or her own trial. The compelled testimony is evidence that simply would not have existed independently of the exercise of the power to compel it; it is in this sense evidence that could have been obtained *only* from the accused.
>
> 200. By contrast, evidence derived from compelled testimony is, *by definition*, evidence that existed independently of the compelled testimony. This follows logically from the fact that it was evidence which was found, identified or understood as a result of the 'clues' provided by the compelled testimony. Although such evidence may have gone undetected or unappreciated in the absence of the compelled clues, going undetected or unappreciated is not the same thing as non-existence. The mere fact that the derivative evidence existed independently of the compelled testimony means that it *could* have been found by some other means, however low the probability of such discovery may have been."

He went on to say in para 202 that the fact that the derivative evidence exists independently of the compelled testimony also means that its quality as evidence and its relevance to the issues in the trial do not depend on its past connection with the compelled testimony. These are matters which can be determined independently of any consideration of its connection with the testimony of the accused.

27. One must, of course, be careful about drawing conclusions from a Canadian case, as the provisions of the Charter differ both in their structure and their wording from those of the Convention. But the concept of fundamental justice is by no means alien to the European concept of a fair trial, which lies at the heart of article 6(1). So I think that the reasoning which La Forest J set out in these paragraphs can be regarded as providing support for the conclusion that I would draw from what Strasbourg has said so far on this issue. This is that there is no absolute rule that the fruits of questioning of an accused without access to a lawyer must always be held to be a violation of his rights under article 6(1) and 6(3)(c) of the Convention. It is one thing if the impugned evidence was created by answers given in reply to such impermissible questioning. The leading of such evidence will be a breach of the accused's Convention rights unless there are compelling reasons to restrict the right of access: *Cadder*, para 55. It is another thing if the evidence existed independently of those answers, so that those answers do not have to be relied upon to show how it bears upon the question whether the accused is guilty of the offence with which he has been charged. So far as the accused's Convention rights are concerned, there is no rule that declares that evidence of that

kind must always be held to be inadmissible. The question whether it should be admitted has to be tested, as in domestic law, by considering whether the accused's right to a fair trial would be violated by the leading of the evidence.

Conclusion

28. I would answer question (i) of the questions referred, which is addressed to the issue of principle, in the negative. There is no absolute rule to this effect, as the wording of the question suggests. I would decline to answer question (ii), as it raises a question for determination by the trial judge. The question for him will be whether, if the Crown were to lead and rely on the friend's evidence about the telephone conversation, the accused would, in all the circumstances, be deprived of his fundamental right under article 6(1) to a fair trial.

LORD BROWN

29. I have had the advantage of reading Lord Hope's judgment in draft and am in full agreement with all that he says and with the way in which he proposes we should deal with the two questions raised by this Reference. The conclusion he arrives at is, to my mind, entirely consistent with the position which I believe to be clearly established under English law – and, I hope we may all agree, none the worse for that.

30. Although Lord Hope (at para 18) has already referred to section 78(1) of the Police and Criminal Evidence Act 1984 (PACE) and noted its obvious relevance in the context of any breach of section 58 of PACE, it is, I think, worth setting out its terms verbatim and briefly then looking also at section 76 of PACE.

31. Section 78(1) of PACE is a general provision under the heading *Exclusion of unfair evidence* and provides:

> "In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given 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."

32. Section 76, under the heading *Confessions*, provides (I summarise) that, notwithstanding that it may be true, a disputed confession shall not be admissible in evidence unless the prosecution prove it not to have been obtained "by oppression" or "in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof." Particularly noteworthy for present purposes, however, is section 76(4):

> "The fact that a confession is wholly or partly excluded in pursuance of this section shall not affect the admissibility in evidence - (a) of any facts discovered as a result of the confession; or (b) where the confession is relevant as showing that the accused speaks, writes or expresses himself in a particular way, of so much of the confession as is necessary to show that he does so."

As Lord Bingham of Cornhill observed in *A v Home Secretary (No 2)* [2006] 2 AC 221, 249 (at para 16):

> "[T]here is an obvious anomaly in treating an involuntary statement as inadmissible while treating as admissible evidence which would never have come to light but for the involuntary statement. But this is an anomaly which the English common law has accepted, no doubt regarding it as a pragmatic compromise between the rejection of the involuntary statement and the practical desirability of relying on probative evidence which can be adduced without the need to rely on the involuntary statement."

I too sought to deal with the point at para 161:

> "Several of your Lordships have remarked on the tensions in play and have noted the balances struck by the law, different balances according to whether one is focusing on the executive or the judicial arm of the state. Essentially it comes to this. Two types of information are involved: first, the actual statement extracted from the detainee under torture ('the coerced statement'); second, the further information to which the coerced statement, if followed up, may lead ('the fruit of the poisoned tree' as it is sometimes called). Generally speaking it is accepted that the executive may make use of all information it acquires: both coerced statements and whatever fruits they are found to bear. . . . So far as the courts are concerned, however, the position is different. Generally speaking the court will shut its face against the admission in evidence of any coerced

> statement (that of a third party is, of course, in any event inadmissible as hearsay); it will, however, admit in evidence the fruit of the poisoned tree. The balance struck here ('a pragmatic compromise' as . . . [Lord Bingham describes it]) appears plainly from section 76 of the Police and Criminal Evidence Act 1984. There is, moreover, this too to be said: whereas coerced statements may be intrinsically unreliable, the fruits they yield will have independent evidential value."

33. If, then, as I believe, the position is that the facts discovered as a result even of a coerced confession are (subject always to the court's discretionary power under section 78(1) to exclude evidence) admissible in evidence – although not, of course, evidence that it was the accused's statement that led to the discovery of the fact, ie the situation in *Chalmers v HM Advocate* [1954] JC 66 itself (see section 76(5) and (6) of PACE) – the position cannot be different (and certainly the prosecution cannot be under greater inhibition) with regard to facts discovered (as here) as a result of a police interview notwithstanding the wrongful failure to provide the accused with legal assistance.

34. If there would be a discretion in the court to admit evidence of, say, a bomb found with the accused's fingerprints all over it discovered by the police as a result of a confession extracted from him by torture, it surely must be in the court's discretion to admit oral evidence from the friend in the particular circumstances of the present appeal.