



Evidence Obtained Through Unlawful Means During Police Custody

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Submitted; May 09, 2024; Reviewed: June 06, 2024; Accepted: September 01, 2024.

Article's Information

keywords:

*Illegally Obtained Evidence.
Police Custody, Relevancy of
Fact.*

DOI :

<https://doi.org/10.25041/ip.v5i1.3472>

Abstract

In contemporary discussions, there is growing debate over the procedural methods employed by police in obtaining evidence from suspects while in custody. A key point of contention is whether evidence acquired through illegal means should be admitted in court, with some arguing that its admission violates the suspect's right to a fair trial, while others contend that such evidence is crucial for proving the case. The law is currently ambiguous on this issue. According to the Oxford Legal Dictionary, illegally obtained evidence is defined as evidence acquired through methods that contravene legal procedures. Importantly, the distinction between evidence obtained illegally and confessions made while in police custody is critical, as Section 26(1) of the Evidence Act 1950 explicitly prohibits the admission of confessions made under such circumstances. This article aims to explore the status of illegally obtained evidence and assess whether it should be admitted or excluded by the courts when the evidence is obtained from a suspect in police custody.

A. Introduction

Tharma Rajen, a healthy 20-year-old individual, was taken into police custody in April. Two months later, he was found dead. His death was officially classified as pneumonia on the death certificate, yet the post-mortem report indicated tuberculosis. The situation attracted further public scrutiny when officials prohibited the photographing of the deceased's body.¹

This paper examines the Court's rationale for rejecting illegally obtained evidence. The principle of dependability asserts that such evidence should be disregarded due to concerns about its reliability. Furthermore, the concept of restorative justice emphasizes protecting the accused from the repercussions of any abuse and ensuring that the violation does not recur. This objective can be achieved by excluding such evidence. Additionally, it is crucial to implement disciplinary measures to prevent police or other authorized bodies from violating the law during

¹ G. Kanchana "Police brutality, torture, and murder - Death in Custody". Malaysiakini. 2009, March 5. <https://www.malaysiakini.com/letters/99721/> retrieved on 01 August 2023.



evidence collection. This is intended to prevent the normalization of illegally obtained evidence within the community.²

B. Discussion

1. Laws and Regulation

The provision regarding illegally obtained evidence in Malaysia remains ambiguous and is unfortunately not addressed in the Evidence Act 1950. However, Section 5 of the Evidence Act 1950 is relevant, as it stipulates that evidence must be presented by a person entitled under the law. This implies that if evidence is pertinent to the case, it is generally admissible, provided it is legally obtained. In Malaysia, due to the ambiguity surrounding illegally obtained evidence, the courts often rely on common law cases and judicial precedents to guide their decisions. In *R v. Leatham*,³ the judge opined:

“In their Lordships' opinion, when considering the admissibility of evidence, it is not strictly a matter of whether the method of obtaining it was tortuous but whether what has been obtained is relevant to the issue being tried.”

A similar principle was demonstrated in *R v. Kuruma*.⁴ In this case, the appellant was convicted of unlawful possession of ammunition under Section 8A(1)(b) of the Emergency Regulations 1952 and sentenced to death. The Emergency Regulations authorized police officers of a rank higher than Inspector to arrest and search individuals suspected of crimes. The appellant, a farmer returning to his rural reserve, was stopped at a roadblock by a police constable. During the search, a penknife and ammunition were found. Although three individuals were present during the search, they were not asked to testify.⁵

On appeal, the appellant contended that the evidence was illegally obtained. However, the court upheld the admissibility of the evidence, reinforcing the principle that evidence is admissible if it is relevant to the issue at hand, regardless of the method of its acquisition. As Lord Goddard stated in *R v. Kuruma*:

“...the test to be applied in considering whether the evidence is admissible, is whether it is relevant to the matters in issue. If it is, it is admissible, and the court is not concerned on how such the evidence was obtained.”⁶

2. The Legal Position in Malaysia

In Malaysia, the lack of a clear provision on illegally obtained evidence often leads courts to adhere to common law principles. This approach is exemplified in *Saminathan v. PP*,⁷ where the court addressed the issue of evidence obtained unlawfully. In this case, the defendant was accused of running an illegal lottery. According to Section 62 of the Criminal Procedure Code, only police officers of the rank of inspector or higher are authorized to conduct raids. However, the raid in question was carried out by an officer of a lower rank. The defense argued that the evidence was unlawfully obtained. Nonetheless, Justice Atkin stated:

“There is an overwhelming mass of authority for the proposition that the legality or illegality of a man's arrest does not concern the court which is trying him. The court is only concerned with the charges brought against him, he has the remedy for illegal arrest elsewhere, and the way the police obtained the possession of these documents does not concern the magistrate who is trying the accused. He is only concerned with the relevancy.”⁸

² Mohamad Ismail B Mohamad Yunus, *The Eyes of the Laws*. Kuala Lumpur: Anaasa Publications, (2020). p. 154.

³ [1861] 8 Cox CC.

⁴ [1955] 1 All ER 236.

⁵ Habibah Omar. *Law of Evidence in Malaysia*, Sweet & Maxwell, 2018, p. 46.

⁶ *Ibid.*

⁷ [1937] MLJ 39.

⁸ *Ibid.*

This judgement indicates that the court focuses on the relevance of the evidence rather than its method of collection, even if it was obtained by an officer who did not meet the required rank.

The case of *Gan Ah Bee*,⁹ further illustrates this principle. In this case, an enforcement officer conducted a search at the respondent's premises and seized several items. However, according to Section 14 of the Price Control Act 1946, the inspector was not authorized to perform this action. Justice Ajaib Singh, in delivering the judgement, emphasized:

"Evidence relating to the seizure and subsequent production of the goods at the trial was relevant evidence to the matters in issue and was therefore admissible, notwithstanding that it was obtained illegally and in non-compliance with the provisions of the Price Control Act 1946."

In addition, the case of *Re Kah Wah Video Sdn. Bhd.*,¹⁰ the judge laid that:

"More than 30 years ago, Lord Goddard in delivering the advice of the Judicial Committee of the Privy Council, in the celebrated case of *Kuruma v. R* said, inter alia: 'the test to be applied in considering whether evidence is admissible is whether it is relevant to the matter in issue. If it is, it is admissible, and the court is not concerned with how the evidence was obtained.'" ¹¹

The case of *Gan Ah Bee* continued to follow the legal principles established in *Saminathan v. PP*, focusing on the relevance and admissibility of evidence. Additionally, in *Ramli b. Kechik v. PP*¹², Mohamed Azmi SCJ affirmed that evidence, even if obtained illegally, remains admissible under English law, reflecting a well-established precedent.

Recent developments in the law regarding illegally obtained evidence can be observed in *Aizuddin Syah bin Ahmad v. PP*.¹³ In this case, the defendant was charged under Section 31A of the Dangerous Drugs Act 1952. According to the Criminal Procedure Code, urine tests must be conducted by police officers with a rank higher than Sergeant. However, in this instance, the test was administered by a Corporal. The High Court ruled that this procedural lapse could be ratified, as it did not significantly affect the admissibility of the evidence. Nevertheless, Hamid Sultan Abu Backer J. of the Court of Appeal ruled that:

"When a statute spells forth that particular procedure, that procedure must be carefully followed,

and common law cases cannot overrule the provision of the statute. Articles 5 and 8 of the Federal Constitution, which provide protection to the accused in common law matters, are subject to both the Act and these provisions." ¹⁴

According to Hamid Sultan Abu Backer J., adherence to the Criminal Procedure Code is essential, as failure to comply constitutes a violation of the rule of law. In the absence of a specific statute governing the manner of evidence collection, principles established in *R v. Kuruma* are applied. Once procedural conditions are set by statute, they must be followed. ¹⁵

Additionally, Section 136 of the Evidence Act 1950 grants judges the authority to determine the admissibility of evidence.¹⁶ This provision allows courts to exclude evidence if its prejudicial effect outweighs its probative value. The prejudicial effect refers to the extent to

⁹ [1975] 2 MLJ 106.

¹⁰ [1987] 2 MLJ 459.

¹¹ *Ibid.*

¹² [1986] 2 MLJ 33.

¹³ [2018] MLJU 910.

¹⁴ *Ibid.*

¹⁵ For further reading, see, Mohamad Ismail Mohamad Yunus (2020). The Current Development of Illegally Obtained Evidence in Malaysia. Law Majjla, vol. 7. pp. 33-55; Mohamad Ismail Mohamad Yunus (2004). The relevancy and admissibility of evidence obtained through unlawful means: a comparative legal appraisal. Jurnal Undang-undang, 8 (1). pp. 111- 174; Mohd Akram Shair Mohamed, Mohamad Ismail Mohamad Yunus (2016). The status of evidence obtained unlawfully: a comparative appraisal of the laws in some selected Common law jurisdictions and Islamic law perspective. Journal of Islamic Law Review, 12 (2). pp. 171-190.

¹⁶ s 136 Evidence Act 1950.

which evidence may unfairly influence the court's judgment, potentially leading to a verdict that disregards the accused's rights due to violations by authorities. In contrast, probative value pertains to the evidence's ability to substantiate a contested claim.¹⁷

In the case of *Krishna Rao Gurumurthy*,¹⁸ Kang J emphasized that judges must exercise discretion in suppressing illegally obtained evidence if its prejudicial effect exceeds its probative value. If admitting such evidence would lead to a miscarriage of justice, it should be rejected by the court.

These considerations underscore the importance of evaluating illegally obtained evidence in judicial decisions. Key reasons include questioning the reliability of such evidence and protecting the accused's rights to ensure a fair and just trial.¹⁹

3. Position in other Countries

The treatment of illegally obtained evidence reflects significant developments across various jurisdictions, illustrating how courts balance legal principles with practical considerations.

In England, while the landmark case *R v. Kuruma* set foundational principles regarding the admissibility of evidence, the Police and Criminal Evidence Act (PACE) 1984 introduced Section 78, which grants courts discretion to exclude evidence if its admission would adversely affect the fairness of the proceedings.²⁰

In the United States, the issue of illegally obtained evidence is prominently addressed through the exclusionary rule, which prohibits the use of evidence obtained in violation of the Constitution. This rule, established in *Mapp v. Ohio*²¹, specifically applies to evidence acquired through unlawful searches or seizures that infringe upon the Fourth Amendment.²²

Canada's approach is governed by Section 24(2) of the Canadian Charter of Rights and Freedoms, which allows for the admissibility of relevant evidence even if obtained illegally.²³ However, the case of *R v. Wray*²⁴ highlighted that trial judges have the discretion to exclude evidence if its admission would be unjust or unfair to the accused, or if it would undermine the integrity of the judicial process.²⁵

Australia generally adheres to the principle that evidence remains admissible regardless of its manner of procurement, provided it is relevant. This principle is similarly observed in New Zealand, where the courts follow the precedent set by *Kuruma*. Nevertheless, in *Trust v. Taylor*, New Zealand courts affirmed the judge's discretion to exclude evidence if its admission would be unfair or detrimental to the administration of justice.²⁶

These cases collectively illustrate that while many legal systems permit the admission of evidence obtained illegally, they also grant judges discretion to exclude such evidence if its inclusion would undermine fairness or justice. Thus, the admissibility of illegally obtained evidence is not an absolute rule but rather subject to judicial discretion based on the specific circumstances of each case.²⁷

¹⁷ Probative Value | Wex | US Law | LII / Legal Information Institute.

¹⁸ [2001] 1 MLJ 274.

¹⁹ *Ibid.*

²⁰ s 78 Police and Criminal Evidence 1984.

²¹ 367 U.S. 643 (1961).

²² S.N Jain. (1980, July - September). Admissibility of Illegally Obtained Evidence. *Journal of Indian Law Institute*, 22(3), 322 - 327.

²³ *Exclusionary Rule* | Wex | US Law | LII / Legal Information Institute. (n.d.). Law Cornell Edu.

²⁴ (1970) 11 DLR (3d) 673.

²⁵ Section 24(2) Canadian Constitution Act 1982.

²⁶ [1975] 1 NZLR 728.

²⁷ *Ibid.*

4. Types of Illegally Obtained Evidence in Police Custody

The general rule regarding the admissibility of evidence obtained through unlawful means is well illustrated in the case of *Saminathan v. Public Prosecutor*.²⁸ In this case, an Inspector of Police, who was not a Senior Police Officer as defined by Section 2 of the Betting Enactment (Cap 48) 1953, conducted a search and arrested the appellant on charges of operating a common betting house. Despite the appellant's claim that the arrest was unlawful and that the evidence obtained was inadmissible, the court held that the magistrate was concerned only with the relevance of the evidence and not with the legality of its acquisition. Consequently, the evidence was admitted due to its relevance to the case, affirming that the court's focus is on the charge and not on the procedural legality of how the evidence was obtained.

Similarly, in *Hanafi bin Mat Hassan v. Public Prosecutor*,²⁹ the court addressed the issue of evidence obtained through coercion.³⁰ The accused, convicted of rape and murder, had DNA evidence showing that his semen was present in the deceased's vagina. The defense argued that the blood samples for the DNA test were taken under coercion, as the accused was handcuffed at the time. The court, however, determined that the voluntariness rule did not apply to Section 27 of the Evidence Act 1950³¹, which states:

“When any fact is deposed as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of that information, whether the information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved”.³²

Therefore, information relating to facts discovered as a result of a confession, even if obtained involuntarily, remains admissible under Section 27 of the Evidence Act 1950.

5. The Impact of Illegally Obtained Evidence on The Fairness of Trials and The Integrity of The Criminal Justice System.

Criminal liability cannot be established solely through the demonstration of the *actus reus* (physical act) and *mens rea* (guilty mind) of a crime. Liability also requires the absence of any applicable defenses available to the accused. A common judicial error is the assumption that defenses automatically negate either the *mens rea* or the *actus reus* of an offense. However, certain well-recognized defenses, such as self-defense, duress, and provocation, do not operate in this manner.

In *R v. Loosely*,³³ Roch L.J highlighted that the law aligns with the European Convention on Human Rights (ECHR) 1950 and its judgments, stating:

“If an offence is due to that person being incited by a law enforcement officer to commit the offence, or by that person being trapped into committing the offence should be excluded by the trial judge”.³⁴

This principle holds that if a law enforcement officer merely provides an opportunity for the accused to commit an offense, and the accused takes advantage of this opportunity as they would have regardless of who presented it, then the officer's evidence should not be excluded. The trial should proceed with the evidence admitted, assuming the officer did not engage in conduct beyond offering the opportunity. Pursuant to Article 6 of the ECHR, subsection (2) states that:

²⁸ [1937] MLJ 39.

²⁹ (2006) 4 MLJ 134.

³⁰ *Ibid.*

³¹ s 27 Evidence Act 1950.

³² (2006) 4 MLJ 134.

³³ [2002] 1 Cr App R 29.

³⁴ *Ibid.*

“Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law”.³⁵

The next subsection further explains that,

“Everyone charged with a criminal offence has the right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; to have adequate time and facilities for the preparation of his defence; to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; to have the free assistance of an interpreter if he cannot understand or speak the language used in court”.³⁶

6. Consequences for Law Enforcement Officials Exclusionary Rule on Illegally Obtained Evidence

In Malaysia, the general acceptance of evidence in court is guided by Section 136 of the Evidence Act 1950³⁷, which permits the admissibility of evidence if it is deemed relevant to the case. There are no specific statutory rules prohibiting the admission of illegally obtained evidence, leading to a broad acceptance of various forms of evidence. The court seldom exercises its discretion to exclude unlawfully obtained evidence unless it is deemed irrelevant to the dispute.

In *Aizuddin Syah bin Ahmad v. Public Prosecutor*³⁸, the Court of Appeal ruled that evidence obtained through illegal means and in violation of prescribed procedures should not be admitted. This case introduced a significant principle regarding the exclusion of unlawfully obtained evidence.

Nevertheless, recent decisions have presented a contradictory stance. In *Pendakwa Raya v. Javier Edgardo Silva*³⁹, the High Court adhered to the principle established by earlier Federal Court decisions, maintaining that rules governing the admissibility of illegally obtained evidence remain effective. This indicates a reluctance to exercise discretion to exclude such evidence, partly due to the absence of a specific Malaysian law prohibiting its use.

Comparatively, while the common law system provides discretion to exclude unlawfully obtained evidence, Malaysian courts traditionally have not explicitly granted this discretion. However, the case of *Aizuddin Syah* suggests a gradual shift in judicial perspective, indicating that Malaysian courts may be re-evaluating their approach to the admissibility of illegally obtained evidence.

7. Discussion of Recent Cases in Malaysia Where Law Enforcement Officials Have Been Held Accountable for Illegally Obtained Evidence.

In *Muhammad Nazrin Bin Ayan v. Public Prosecutor*⁴⁰ case, the appellant was convicted under Section 15(1)(a) of the Dangerous Drugs Act (DDA) 1952⁴¹, for self-administration of drugs, specifically Amphetamine and Methamphetamine. Given the appellant's two prior convictions for similar offenses, the Sessions Court imposed the maximum sentence of seven years' imprisonment and three strokes of the rotan. The appellant's appeal against both the conviction and the sentence was dismissed, leading to a further appeal to provide written grounds.

³⁵ s 6(2) European Convention Human Right 1950.

³⁶ s 6(3) European Convention Human Right 1950.

³⁷ Evidence Act 1950.

³⁸ [2018] 5 MLJ 220.

³⁹ [2019] MLJU 1937.

⁴⁰ [2020] MLJU 1571.

⁴¹ Dangerous Drugs Act 1952.

The key issues in this case involved the alleged breach of Section 31A(1A) of the DDA 1952⁴² regarding the proper collection of urine samples and whether there was a break in the chain of custody.⁴³ The appellant argued that only one bottle of urine was collected, contrary to the requirement of collecting two bottles as specified in the Inspector General's Standing Order F103 and the Kementerian Kesihatan Malaysia (KKM) Guidelines Bilangan 6/2022. Additionally, the appellant contended that there was no evidence to support the medical officer's claim that obtaining the urine sample within a reasonable timeframe was impractical or that such a conclusion was reached. The appellant also raised concerns about a potential break in the chain of evidence and doubts about the identity of the urine sample.

The Court of Appeal dismissed the appeal and affirmed the Sessions Court's decision on both conviction and sentence. The judgment referenced the case of *Majlis Angkatan Tentera Malaysia v. Mohd Nurul Ami Mohd Basri*⁴⁴, which established the principle that procedural deviations, such as the collection of a single bottle of urine when two were required, do not automatically invalidate the evidence if it is proven that the chain of custody and the overall integrity of the evidence remain intact.

"The KKM Guideline was just a guideline issued by the Ministry of Health" in this instance.

The Dangerous Drugs Act of 1952 is mentioned in the KKM Guideline, but this does not give it legal authority. It was decided that "any regulation must be made in accordance with a power granted by law in order to have any legal effect. The KKM Guideline differs from this in this regard. The KKM Guidelines and IGSO are merely administrative guidelines and do not have the status of laws."⁴⁵

The second argument raised by the appellant regarding the admissibility of evidence from the urine sample did not adhere to s. 31A(1A) DDA 1952⁴⁶, which states: "For the purpose of preservation of evidence, it shall be lawful for a police officer not below the rank of Sergeant or an officer of customs to require an arrested person to provide a specimen of his urine for the purposes of an examination under subsection (1) if it is not practicable for the medical officer or the person acting in aid of or on the direction of a medical officer to obtain the specimen of urine within a reasonable period." The appeals court determined that this argument lacked merit and that the appellant's reliance on an overruled authority was inadmissible.

In the third judgment, addressing the issue of reasonable doubt regarding the identity of the urine specimen or a possible break in the chain of evidence, the court found no credibility in these arguments. The appellant failed to establish that the experienced Sessions Court Judge made a clear legal error, that there was a substantive error of law, or that the conviction and sentence lacked sufficient judicial deference. The Sessions Court Judge's grounds for judgment were meticulously organized and considered all evidence, thus making appellate interference unnecessary.

It is submitted that the Court of Appeal was correct in rejecting the appeal and upholding the judgment of the Sessions Court. This is supported by the case of *PP v. Samsul Arifin Bakar*⁴⁷, which has been overruled, permitting a police officer not below the rank of sergeant or an officer of customs to request an arrested person to provide a specimen of urine for examination to preserve evidence. Regarding the identity of the urine sample, the appellant only raised this issue as an afterthought since it was not fully argued during the trial.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ (2019) 2 CLJ 722.

⁴⁵ *Ibid.*

⁴⁶ Dangerous Drugs Act 1952.

⁴⁷ [2019] 2 CLJ 692.

In the case of *Mustadzimaludin Bin Musimin v. Public Prosecutor*⁴⁸, the appellant, who had been convicted of self-administration of drugs, specifically amphetamine and methamphetamine, appealed the sentence imposed. The sentence consisted of one year of imprisonment, followed by two years of police supervision.

The factual circumstances of the case reveal that Inspector Muhammad Noor Hisham Bin Mat (PW1) and four other police officers were present at the Lahad Datu police station when the appellant's urine sample was collected. The sample was subsequently tested by Dr. Norlida Binti Harun (PW5), a pathologist at Makmal Pengesanan Dadah, Jabatan Patologi, Hospital Queen Elizabeth. Dr. Harun's examination confirmed the presence of amphetamine and methamphetamine in the appellant's urine sample. During the trial, PW5's report, titled *Laporan Ujian Pengesanan Dadah Dalam Air Kencing* (Report on the Identification of Drugs in Urine), was submitted as Exhibit P8. The sequence of events indicates that, although the sample collection occurred at one location, the analysis was conducted at a separate location within the same hospital. Therefore, the claim that the test occurred in two different locations lacks merit.

The central issues in this case are whether the police officer violated Section 31A(1A) of the Dangerous Drugs Act 1952⁴⁹ (DDA 1952) in the process of obtaining the urine sample and whether the appellant was lawfully arrested at the time of sample collection as mandated by Section 31A of the DDA 1952.⁵⁰

The appellant's primary argument was that two urine samples should have been collected instead of one, based on the Ministry of Health (MOH) Guidelines, which stipulate the use of two bottles only if the tests are conducted at two separate locations. Additionally, the appellant contended that Section 31A(1A) of the Dangerous Drugs Act 1952⁵¹ was not adhered to, as the police officer failed to provide documentation showing that the necessary steps were taken to request the medical officer to collect the urine sample and that the medical officer had indicated that it was not feasible to obtain the sample within a reasonable timeframe. Furthermore, the appellant argued that his urine sample was collected prior to his arrest.

The court dismissed the appeal, affirming the Magistrates' Court conviction and sentence of one year's imprisonment and two years of police supervision.

Regarding the first issue, the court referenced *Majlis Angkatan Tentera Malaysia v. Mohd Nurul Ami Mohd Basri*,⁵² where it was held that the KKM Guideline, while referencing the Dangerous Drugs Act 1952, does not have the force of law and is not legally binding. The court also cited *PP v. Rosman Saprey*,⁵³ where it was noted that although Sections 44 and 47 of the Dangerous Drugs Act 1952 and Section 28 of the Drug Dependents (Treatment and Rehabilitation) Act 1983 empower the Minister of Health to create subsidiary laws and rules, the Minister had not enacted or delegated such powers. Consequently, the KKM Guidelines, being merely advisory, do not affect the legality of evidence obtained, and evidence collected in contravention of these guidelines remains admissible.

On the second issue, the court referred to *Samsul Ariffin Bakar*,⁵⁴ where it was determined that Section 31A(1A) DDA 1952⁵⁵ does not impose a requirement on the police to prove the impracticality of sending the suspect to a medical officer for urine collection. This provision is intended to preserve evidence in light of situational constraints faced by enforcement authorities. Thus, the inability of the police to demonstrate that it was impractical to send the

⁴⁸ [2022] MLJU 2401.

⁴⁹ Dangerous Drugs Act 1952.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² (2019) 2 CLJ 722.

⁵³ [2019] 4 CLJ 767.

⁵⁴ [2019] 2 CLJ 692.

⁵⁵ Dangerous Drugs Act 1952.

suspect to a medical officer does not invalidate the admissibility of the urine sample. The court also referenced *PP v. Mohamad Rasid Jusoh*⁵⁶ to support this position.

“...assuming, for the sake of argument, the police breached the proviso to sub-s. 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 is settled law that in our system of justice, illegally or improperly obtained evidence is admissible provided it is relevant.”⁵⁷

Regarding the final issue, the court referenced *Fakhrurrazi Ismail v. PP*⁵⁸, which addresses the interpretation of the term “arrested” in relation to the collection of urine samples. The court in this case determined that requiring a person to be arrested in the conventional sense before providing a urine sample would severely limit the utility of Section 31A of the Dangerous Drugs Act 1952 (DDA 1952).⁵⁹ This provision is particularly relevant in situations such as surprise visits or raids, where individuals at the location are required to provide a urine sample. Consequently, in the current case, it was established that the appellant was indeed considered to be under arrest when the urine sample was collected.

The Court of Appeal’s decision to reject the appeal and uphold the Magistrates’ Court ruling was therefore justified. The appellant’s argument that the urine sample collection was illegal due to non-compliance with the KKM Guidelines, which are advisory and lack legal authority, was deemed unsubstantiated. Furthermore, the appellant’s claim regarding the definition of “arrested” was addressed by noting that his freedom of movement was restricted during the collection of the urine sample, thereby affirming that he was effectively under arrest.⁶⁰

C. Conclusion

In conclusion, the courts should consider adopting a broader interpretation of judicial discretion to exclude evidence, aligning with the more liberal approaches taken in other common law jurisdictions. Such a shift would better balance the integrity of the judiciary with competing interests and values, particularly in light of *Maqasid al-Shari’ah* (the Objectives of Islamic Law). The court must ensure that decisions uphold human rights, as reflected in Surah Al-Hadid, verse 25 of the Holy Quran “And We sent down iron with its great might, benefits for humanity, and means for Allah to prove who ‘is willing to’ stand up for Him and His messengers without seeing Him. Surely Allah is All-Powerful, Almighty”.⁶¹

Maintaining rigorous legal procedures for evidence collection is crucial to ensuring a fair and just criminal justice system in Malaysia. It is imperative that police officers adhere strictly to procedural guidelines to prevent any infringement on the rights of the accused. Furthermore, the accused’s rights, as outlined in Article 6 of the European Convention on Human Rights 1950, must be respected and protected. In Malaysia, contradict to the earlier judgment of Court of Appeal decision in *Aizuddin Syah*’s case, in the recent High Court case *Pendakwa Raya v. Javier Edgardo Silva*,⁶² where the court believed the rules governing the admissibility of evidence obtained illegally remain in effect to adhere to earlier Federal Court decisions. It could be said that the court is hesitant to use this discretion because no Malaysian law specifically prohibits the use of evidence obtained illegally in a court proceeding as long as it is relevant to the fact in issue. Comparatively to the common law system, the courts in Malaysia do not explicitly grant them the discretion to exclude evidence that they believe to have been obtained

⁵⁶ [2009] 9 CLJ 557.

⁵⁷ *Ibid.*

⁵⁸ [2021] 1 LNS 122.

⁵⁹ Dangerous Drugs Act 1952.

⁶⁰ *Ibid.*

⁶¹ *Surah Al Hadid*: verse 25.

⁶² [2019] MLJU 1937.

unlawfully provided the probative value of it clearly outweigh its prejudicial effect. For example, from the discussion above, it can be seen from *Aizuddin Syah's* case that the Court of Appeal, has the authority to reject such evidence if they determine that it was obtained unlawfully. As a result, the courts are gradually changing their minds about the principle of the admissibility of evidence obtained illegally especially when the accused person is in the custody of the police.

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