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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | **Delivered: 28/9/2011**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE PUBLIC PROSECUTION SERVICE

Appellant;

-and-

WILLIAM ELLIOTT and ROBERT McKEE

Respondents.

Before: Higgins LJ, Girvan LJ and Sir John Sheil

Higgins LJ (giving the judgment of the Court)

[1] This is an appeal by way of case stated from a decision of Craigavon County Court whereby the respondents' appeals against their conviction for theft were allowed and the prosecution case against them dismissed.

[2] The prosecution case was that around 9.30 pm on Saturday 6 October 2007, the police received a report of two males in the premises of Aluminium & Plastic Systems. Constable S McKittrick attended and found the premises secured and 3 piles of 10 foot long UPVC guttering and 4 piles of 10 foot long pieces of UPVC facia boards stacked near the perimeter fence. The grass around the premises had been recently cut and there were grass clippings lying at that location. The respondents were located in a Ford Transit van parked nearby. On questioning both said they had been to look at a car parked nearby within the premises of Lenfestey's car dealership and that neither of them had been near the premises of Aluminium and Plastics Systems (AP&S). A hooded top with grass clippings on it was on the front seat of the van. The grass around the van was short and damp but there were no grass cuttings. The rear of the van was empty except for some cord/rope and a roof rack was fitted to the van. The respondents were arrested and cautioned. They maintained that they were at Lenfestey's. McKee was asked under caution to account for the hooded top found on the front seat, and replied "I'm accounting for nothing." The respondents were then conveyed to Lisburn PSNI Station and the van seized, along with a pair of wire cutters found in the front footwell and the hooded top. Around 11:55pm Mr B

McAlinden of the PSNI Scenes of Crime Department, attended at the scene and seized 3 polythene packets from the items that had been stacked. These packets were removed for drying and examination. On the 7th of October 2007, at Lisburn PSNI Station, A/Sergeant S Cochrane took Elliott's finger impressions using the Livescan fingerprinting procedure and forwarded them electronically to Fingerprint Branch. Mr K Adair, a Fingerprint Officer for the PSNI, then examined the polythene packets and one imprint was found which matched Elliott's left thumb impression taken on the Livescan machine. It matched in 45 characteristics. As a result he was certain that the thumb print on the polythene packets was that of the respondent Elliott. When interviewed the respondents stated that they were in each other's company the whole time and had not been in A&PS premises. Livescan is an electronic mechanism whereby finger impressions can be scanned into a machine and then transmitted electronically to other locations for comparison.

[3] The respondents were prosecuted in the Magistrates Court and convicted and sentenced to 8 months imprisonment. They appealed that conviction to Craigavon County Court (His Honour Judge Markey QC). At the hearing no evidence was called. Counsel on behalf of the respondents objected to the admissibility of the evidence of the taking of Elliott's finger impressions. It was submitted that this evidence was not admissible as the Secretary of State had not approved the Livescan device as required by Article 61(8)(b) of the Police and Criminal Evidence (Northern Ireland) 1989. His Honour Judge Markey acceded to that submission and the respondents were acquitted. The Public Prosecution Service (PPS) requested that the learned County Court Judge state a case for the opinion of the Court of Appeal. The Judge acceded to that request. The question posed in the case stated is -

> "Was I correct in law when I found that the fingerprint comparisons taken from William Elliott via the Livescan fingerprint device were not admissible as evidence against him: as an approval from the Secretary of State, for the use of the Livescan device, was not in place as required by article 61(8)(b) of the Police and Criminal Evidence (NI) Order 1989 as inserted by the Police and Criminal Evidence (Amendment) Order 2007?"

[4] Mr Hunter QC appeared on behalf of the appellant and Mr McMahon QC on behalf of the respondents. We are grateful to counsel for their helpful written and oral submissions.

[5] The Police and Criminal Evidence (Northern Ireland) Order 1989 (the 1989 Order) introduced significant changes to the law relating to the powers of the police in the investigation of crime and to evidence in criminal

proceedings. It followed the passing of the Police and Criminal Evidence Act 1984 (the 1984 Act) which introduced similar, but not identical, changes to the law in England and Wales. Article 61 of the 1989 Order made provision for the taking of fingerprints with consent in writing and without consent. Article 29 makes provision for the taking of fingerprints of persons convicted of a recordable offence but not previously held in police detention or fingerprinted. Neither Article makes provision for the method by which fingerprints should be taken.

[6] For decades in this jurisdiction fingerprints were taken on a form known as an FP2. The suspect's digits were placed in an ink-like substance and then placed or rolled firmly on to the form thus creating an impression of the suspect's fingerprint. This form was then used for comparison purposes. The form and the designation FP2 came from internal police procedures established through the police manual. Article 65 of the 1989 Order required the Secretary of State to issue Codes of Practice in connection with the exercise by the police of their statutory powers as well as relating to the detention, treatment, questioning and identification of persons by police officers. Codes of Practice were issued under this Article. They have been revised from time to time. The edition current at the time of the arrest of the respondents was the 2007 Edition which took effect from 1 March 2007. Code D 4 (A) relates to the taking of fingerprints in connection with a criminal investigation. Paragraph 4.1 provides:

> "4.1 References to 'fingerprints' mean any record, produced by any method, of the skin pattern and other physical characteristics or features of a person's:
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> (i) fingers; or
>
> (ii) palms."

No provision is made for the method by which finger and palm prints are to be taken. However Code D 4. 5 provides that 'A person's fingerprints may be taken, as above, electronically'.

[7] The Act of 1984 has been amended from time to time. These changes, where appropriate, have been introduced in Northern Ireland by amendments to the 1989 Order but often some years later. Thus the criminal law in Northern Ireland was often out of step with that in the rest of the UK. In February 2004 a review of the 1989 Order was announced which was aimed primarily at bringing the 1989 Order more into line with the current provisions of the 1984 Act. A number of amendments to the 1984 Act which had not been implemented in Northern Ireland were identified. Collectively these formed the basis of a draft Order in Council (the Police and Criminal Evidence (Amendment) (Northern Ireland) Order (the Order in Council of

2002) aimed at harmonising the law in the two jurisdictions. One of these amendments was Section 61(8A) of the 1984 Act which had been inserted by Section 78(7) of the Criminal Justice and Police Act 2001.

[8] Instructions to the Office of Legislative Counsel on the draft Order requested that an equivalent provision to Section 61(8A) of the 84 Act be inserted to the 1989 Order. The instruction read as follows -

> "A new provision is required under Article 61 (Fingerprinting), to facilitate the taking of fingerprints electronically but only by such manner and by the use of such devices approved by the Secretary of State. This replicates a new provision 8A inserted to Section 61(8) of the 1984 Act by Section 78(7) of the Criminal Justice & Police Act 2001."

[9] This resulted in Article 30(7) of the draft Order in Council of 2007 which inserted a new Article 61(8B) into the 1989 Order. The 'Note on Article' relating to Article 30(7) stated -

> "Technological advances mean that fingerprints can now be taken electronically. Paragraph (7) of this Article adds a new Article 61(8B) to PACE which requires that fingerprints from a person must only be taken in such a manner and by using such devices as the Secretary of State approves."

[10] Article 30 introduced 7 amendments to Article 61 of the 1989 Order. Article 30(7) provided –

> "(7) After paragraph (8A) insert—
>
> (8B) Where a person's fingerprints are taken electronically, they must be taken only in such manner, and using such devices, as the Secretary of State has approved for the purposes of electronic fingerprinting."

[11] The 2007 Amendment Order received Royal Assent on 7 February 2007. Article 1(2) provided that with the exception of Articles 18 and 25(2) the Order would come into operation on 1 March 2007. The Commencement of the new Article 61(8B) on 1 March 2007 was on the assumption that the equivalent provision in the 1984 Act had been commenced. In fact the equivalent provision in England and Wales Section 61 (8A) has never been commenced. This revelation resulted from an email enquiry from the Bar Council to the NIO. Enquiries with the Home Office revealed that the section

had not been commenced and that it was intended to repeal it. Both Section 61 (8A) and the Northern Ireland equivalent Article 61 (8B) were in fact repealed by Section 112 of and Schedule 8 Part 13 (Redundant Provisions) of the Policing and Crime Act 2009 with effect from 10 January 2010 (Section 116(6)(b)).

[12] In March 2009 a decision was taken to obtain device approval from the Secretary of State but this is not retrospective. The device is an LS1 Smith Heimann LITE Ue Livescanner Model RJ0453 known colloquially as 'Livescan'. The device operates on a similar basis to a document scanner (or photocopier) using appropriate software. The hand or fingers are placed on a plate which is then scanned producing digital images in real time. Immediate feedback on the captured image quality is available to the operator. Workstations containing Livescan machines are located in custody suites and a router provides electronic connection with the PSNI Fingerprint Bureau. Its use is password protected and only those trained in its use at the PSNI Training Branch are provided with the password. The Livescan device has been in operation by the PSNI since July 2006. It has been used and is used extensively throughout the UK and worldwide. It is presently used without any requirement for device approval.

[13] It was accepted by the appellant that the use of the Livescan device to obtain the finger impressions of the Respondent Elliot was in breach of Article 61(8B). Nonetheless counsel submitted that the evidence was admissible in his criminal trial for the offence of theft and should not have been ruled inadmissible by the learned County Court Judge. It was submitted that it is well understood in the context of a criminal prosecution that evidence obtained unlawfully, improperly or unfairly is nonetheless admissible as a matter of law (Kuruma v Queen [1955] AC 197, R v Sang [1980] AC 402). This was relevant evidence, obtained with the consent of the respondent Elliott, which should only be excluded if Article 76 of the 1989 Order rendered it inadmissible. The legislation does not state that finger impressions taken on a device which has not been approved would be inadmissible. The Court should look to the purpose of the legislation and the requirement in the legislation for the approval of the Secretary of State. It is in the public interest that crime is effectively investigated and prosecuted (Lord Steyn in Attorney General's Reference No 3 of 1999 [2001] 2 AC 91) and that otherwise reliable evidence is admitted. This point was not taken in the Magistrates Court when the respondents were convicted. There had been no challenge to the accuracy of the evidence of the finger impressions. This was a technical point without merit as to the substance of the prosecution case. It was taken only at the outset of the appeal, when no evidence was called. If it had been known that Section 61 (8A) had not been commenced no amendment would have been made in Northern Ireland. The use of a Livescan device is to be distinguished from devices which measure alcohol in the body, for example, breathalysers and such like. The use of those devices involves a necessary step towards

procuring a conviction for an offence (see Scott v Baker (1969) 1 QB 659). The result of the breath test is the evidence itself on which the conviction will rest. This step is absent in the use of the Livescan device. The taking of a fingerprint is but one element of the accumulation of evidence upon which the prosecution case is based. It is very different from the taking of a breath sample which exists only for a moment of time. Livescan records what is present and copies what is physically there and observable all the time. Counsel referred to a number of cases in which there had been non-compliance of one type or another which had not proved fatal to the prosecution (see AG's Reference No 3; R v Soneji, R v R and R v Clarke and McDaid).

[14] It was submitted by Mr McMahon on behalf of the respondents that the wording of the legislation and its intent are clear, that fingerprints must only be taken by an approved device and in the absence of approval the evidence is excluded. There is nothing to distinguish the Livescan device from the breathalyser devices. Article 76 has no relevance as the evidence is inadmissible by reason of the breach of Article 61(8B). The explanatory notes to section 78 of the Criminal Justice and Police Act 2001 states that approval is required to ensure the device will 'produce images of the appropriate quality and integrity to be used for evidential purposes'. He relied on various Parliamentary and Governments statements and memoranda. Before a Standing Committee of the House of Commons the Minister of State at the Home Office (Charles Clarke) said:

> "It is important that any form of evidence has a proper evidential trail, so when fingerprints are taken electronically, they must be taken in an appropriate manner in line with the recommendations of the House of Lords Select Committee on Science and Technology."

[15] Paragraph 16 of the consultation document published in July 1999:

> "'Proposals for revising legislative measures on fingerprints, footprints and DNA samples' stated -
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> > 'Type approval would permit new technology to be introduced, used and adduced in evidence in criminal proceedings without further amendment to primary legislation'."

[16] A 2001 Memorandum by the Home Office to the Joint Committee on Human Rights stated -

> "Clause 77(7) and 79(4) of the Bill provide for type approval by the Secretary of State of equipment that is used to capture fingerprints or other skin impressions electronically. This is to ensure that the equipment is suitable for use and that the integrity of the evidential chain is maintained. This follows recommendations contained within the House of Lords Select Committee on Science and Technology, which recommended that "consideration be give to measures to reduce the uncertainty over the use of digital images in court".

[17] The Sixteenth Report of a Select Committee on Delegated Powers and Deregulation stated -

> "Clause 79(7) .... provides that where fingerprints are taken electronically the manner of taking them and the device used must be approved by the Secretary of State. The purpose of this provision is to ensure the technical reliability and integrity of prints taken by digital means. It is similar to the provision in section 11(2) of the Road Traffic Act 1988 relating to type approved devices for taking breath tests and section 20 of the Road Traffic Offenders Act 1988 relating to type approved devices for measuring speed. As in relation to those devices, no Parliamentary procedure is regarded as necessary."

[18] It was submitted that this material demonstrated the real purpose behind the requirement for type approval and that without such approval the fingerprint evidence should be inadmissible.

[19] The operation of the Livescan device and the product obtained is in our opinion very different from the type of device used to detect drink driving or speeding offences. In those instances the device provides a calibration either of alcohol in the body or the speed of a passing vehicle at a certain moment in real time. It is the measurement carried out by the device itself which is important and which distinguishes those devices from the Livescan. Therefore the cases to which we have been referred involving such devices provide no assistance to the issue to be determined by the court. It is important to remember what exactly the Livescan device does. It is a digital optical scanning device. In effect it is little different from a photocopier or a document scanner. It performs the same function as a camera – it records what it sees. Police photographers exhibit many photographs and now videos using digital photographic cameras. It would be regarded as slightly absurd to suggest that these cameras should be type-approved before a photograph

is exhibited in court as representing the scene of a crime. In that context the various comments on quality and evidential trails placed before the court by Mr McMahon QC cannot be determinative or of any real assistance.

[20] In Kuruma v The Queen [1955] AC 197 the appellant was charged with unlawful possession of ammunition. He was stopped at a roadblock and later searched by a constable without a warrant. It was alleged that two rounds of ammunition were in his trouser pocket. Regulation 29 of the Emergency Regulations 1952 (Kenya) provided that only an officer of Assistant Inspector or above was empowered to carry out the search. It was contended that the search was illegal and therefore the evidence of what was allegedly found was inadmissible. In dismissing the appeal Lord Goddard LCJ stated –

> "In their Lordships' opinion the test to be applied in considering whether 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 with how the evidence was obtained. While this proposition may not have been stated in so many words in any English case there are decisions which support it, and in their Lordships' opinion it is plainly right in principle. In Reg. v. Leatham, an information for penalties under the Corrupt Practices Act, objection was taken to the production of a better written by the defendant because its existence only became known by answers be had given to the commissioners who held the inquiry under the Act, which provided that answers before that tribunal should not be admissible in evidence against him. The Court of Queen's Bench held that though his answers could not be used against the defendant, yet if a clue was thereby given to other evidence, in that case the letter, which would prove the case it was admissible. Crompton J. said: 'It matters not how you get it; if you steal it even, it would be admissible'."

[21] The remainder of the opinion of the Judicial Committee of the Privy Council is summarised in the headnote –

> "While that proposition may not have been stated in express terms in any English case, it is supported by Reg. v. Leatham (1861) 8 Cox C.C. 498, Lloyd v. Mostyn (1842) 10 M. & W. 478 and Calcraft v. Guest [1898] 1 Q.B. 759; and also by the Scottish cases of Rattray v. Rattray (1897) 25 Rettie 315, Lawrie v. Muir, 1950 S.C.(J.) 19 and Fairley v. Fishmongers of

> London, 1951 S.C. (J.) 14. And in Olmstead v. United States (1928) 277 U.S. 438 the Supreme Court of the United States of America were of opinion that the common law did not reject relevant evidence on the ground that it had been obtained by illegal means."

[22] Other examples of unlawful acts which have not prevented the evidence obtained from being inadmissible include Jeffrey v Black [1978] AB 480 (unlawful search of premises), R v Sang 1980 AC 401 (the use of agents provocateurs), and R v Khan [1997] AC 558 (invasion of privacy involving secret recording of private conversations by an electronic device). In Sang Lord Diplock reviewed extensively the various authorities including Kuruma and expressed the Judge's power to exclude evidence in these terms –

> "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."

[23] AG's Reference No 3 of 1999 [2001] 2 AC 91 involved a saliva sample taken under section 64(1) of the 1984 Act for DNA comparison purposes during an investigation into a burglary. The suspect was acquitted of the burglary and the sample should then have been destroyed. However his DNA profile remained on the National Database. Some months later a DNA profile obtained from swabs taken from a rape victim was found to match that of the defendant. He was arrested and a DNA profile obtained from a hair sample taken at that time also matched that obtained from the swabs. At the defendant's trial for rape, burglary and assault the judge ruled that evidence of the link between the defendant's DNA profile obtained from the hair sample and the profile obtained from the swabs was inadmissible by reason of section 64(3B)(b) of the 1984 Act, as amended, which prohibited the use of information derived from a sample required to have been destroyed under section 64(1) for the purposes of any investigation of an offence, and that if he had a discretion to admit such evidence under section 78 of the 1984 Act he would have exercised it against admitting that evidence. The Crown offered no further evidence and the defendant was acquitted.

[24] The Attorney General referred a question for the opinion of the Court of Appeal as to whether in such circumstances a judge had a discretion to admit the relevant evidence notwithstanding the terms of section 64(3B) of the

Act. The Court of Appeal answered the question in the negative. At the request of the Attorney General the Court of Appeal referred the issue to the House of Lords who reversed the decision of the Court of Appeal. The headnote reads that it was held –

> "Whereas section 64(3B)(a) of the 1984 Act made express prohibition against the use in evidence of a DNA sample which should have been destroyed, section 64(3B)(b), in prohibiting the use of an unlawfully retained sample for the purposes of any investigation, did not amount to a mandatory exclusion of evidence obtained as a result of a failure to comply with that prohibition but, read with section 78 of the Act, left the question of its admissibility to the discretion of the trial judge; that a decision by a judge in the exercise of his discretion to admit such evidence would not amount to an unlawful interference with the defendant's right to private life under article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, nor, in the absence of any principle of Convention law prohibiting the use of unlawfully obtained evidence, would it breach the defendant's right under article 6 of the Convention to a fair hearing; and that, accordingly, the evidence based on information obtained as a result of the failure to destroy the DNA sample taken at the time of the defendant's arrest for burglary ought not to have been rendered inadmissible under section 64(3B)(b)."

[25] Interestingly the requirement under section 64 to destroy samples applies to fingerprints taken from a suspect who is later acquitted. Therefore following AG's Reference No 3 fingerprints evidence based on finger impressions that should have been destroyed would be admissible in evidence, subject to the discretion to exclude contained in Article 76. Section 64(3) provides –

> "Where samples are required to be destroyed under subsections (1), (2) or (3) above, and subsection (3A) above does not apply, information derived from the sample of any person entitled to its destruction under subsection (1), (2) or (3) above shall not be used—
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> (a) in evidence against the person so entitled; or

(b) for the purposes of any investigation of an offence."

[26] Lord Steyn who delivered the leading speech and with whom the other members of the House of Lords agreed, outlined at page 116 the following approach to the question raised -

> "My Lords, I acknowledge at once that reasonable minds may differ as to the correct interpretation of a subsection which has no parallel in PACE or any other statute. Nevertheless, there do seem to be secure footholds which may lead to a tolerably clear answer. It is not along the route adopted by the prosecution of asking whether the relevant provision is mandatory or directory. In London and Clydeside Estates Ltd v Aberdeen District Council [1980] 1 WLR 182, 188-190, Lord Hailsham of St Marylebone LC considered this dichotomy and warned against the approach 'of fitting a particular case into one or other of mutually exclusive and starkly contrasted compartments'. In R v Secretary of State for the Home Department, Ex p Jeyeanthan [2000] 1 WLR 354, 360 Lord Woolf MR, now Lord Chief Justice, echoed this warning and held that it is 'much more important to focus on the consequences of the non-compliance'. This is how I will approach the matter.
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> It is, of course, clear that after the acquittal of the defendant the sample should have been destroyed. In imperative terms section 64(1) provides that it 'must' be destroyed. The existence of the duty to destroy the sample and its breach is merely the starting point. It does not provide the answer to the precise point before the House. The question before us relates to the consequences of the breach of the duty to destroy a sample which should have been destroyed by reason of the provisions of section 64(1). Subsection (3B) is in two parts. Subsection (3B)(a) unambiguously spells out of the legal consequences of a breach of the obligation to destroy a sample: it may not be used in evidence against the person entitled to its destruction. So far the provision is perfectly clear.
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> The problem arises in regard to the second part of subsection (3B), which provides that samples which

are required to be destroyed 'shall not be used … (b) for the purposes of any investigation'. The difference between paragraphs (a) and (b) is striking. Paragraph (a) legislates for the inadmissibility in evidence against the person concerned of the sample that should have been destroyed. By contrast paragraph (b) contains no language to the effect that evidence obtained as a result of the prohibited investigation shall be inadmissible. It does not make provision for the consequences of a breach of the prohibition on investigation. This does not mean that this particular prohibition is toothless. On the contrary, it must be read with section 78(1) of PACE. It 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'. (Emphasis added.)

In other words, there is in the very same statute a discretionary power in the trial judge, in the face of a breach of paragraph (b) of subsection (3B), to exclude the evidence if it would be unfair to admit it.

Counsel for the respondent submitted that paragraphs (a) and (b) of subsection (3B) must stand together. In other words, because (a) provides for the inadmissibility of evidence, (b) must have a like meaning. That is how the Court of Appeal also reasoned. But, with due respect, this is too simplistic. It does not address the critical difference that part (a) expressly provides for the consequences of a breach but that part (b) does not. It also does not meet the point that no verbal manipulation of (b) is required if it is simply read together with section 78.

Counsel for the respondent, like the Court of Appeal, thought that certain paragraphs of the report of the Royal Commission supported the construction that

subsection (3B)(b) creates an absolute bar to the admissibility of the fruits of a prohibited investigation. If it had done so, it could not have prevailed over the plain language of the statute. But the report yields no such support. It does record in emphatic language the recommendation that after an acquittal a sample must be destroyed. But the report does not address the precise point of statutory construction before the House.

Counsel for the respondent was further compelled to concede that the construction adopted by the Court of Appeal leads to absurd consequences. Counsel for the Attorney General gave the following illustration. The police receive information from a forensic laboratory that X appears to have been responsible for a number of serial murders. The source of the information is derived from a sample which ought to have been destroyed pursuant to section 64(1) of PACE. The police can do nothing until a further crime is committed. Even a consequential confession by X or discovery of the murder weapon in the house of X could not be used. But one does not have to resort to hypothetical examples: on the interpretation of the judge and the Court of Appeal a case involving evidence of a very serious rape could never reach the jury and in Weir a conviction for a brutal murder was quashed on the ground that the DNA evidence should not have been placed before the jury. It must be borne in mind that respect for the privacy of defendants is not the only value at stake. The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public. In my view the austere interpretation which the Court of Appeal adopted is not only in conflict with the plain words of the statute but also produces results which are contrary to good sense. A consideration of the public interest reinforces the interpretation which I have adopted.

VII Implication

> Somewhat reluctantly counsel for the respondent sought in the alternative to support the conclusion of the Court of Appeal on the basis of implying words in subsection (3B). The suggested implication involves, as my noble and learned friend, Lord Cooke of Thorndon, elicited, the addition at the end of paragraph (b) of the words "nor shall evidence of the results of any prohibited investigation be admissible". The difficulty in this approach is obvious. If one reads section 64(3B)(b) together with section 78 the statute is entirely workable without any implication. Moreover, the implication would result in a meaning which would be productive of absurd results which are contrary to the public interest. The suggested implication is unnecessary and unwarranted."

Lord Hutton observed at page 122 –

> "My Lords I consider, with respect, that the Court of Appeal erred in accepting this submission. In my opinion section 64(3B)(b) prohibits the sample liable to destruction from being used for the purposes of any investigation of the offences committed on 23 January 1997, but it does not prohibit evidence resulting from such an investigation from being used in criminal proceedings in respect of those offences.
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> The wording of paragraph (a) by its express words does prohibit the use in evidence of information derived from a sample which should have been destroyed but, in contrast, paragraph (b) is silent as to the admissibility of evidence resulting from an investigation which it prohibits. Therefore, in my opinion, the issue which arises in a case such as the present one is whether evidence which has been unlawfully obtained, in that it arises from a line of investigation which has been prohibited, is inadmissible as a matter of law (as opposed to being subject to exclusion in exercise of the trial judge's discretion conferred on him by section 78 of PACE). On that issue the law is clear."

In Kuruma v The Queen [1955] AC 197, 203 Lord Goddard CJ stated:

> "In their Lordships' opinion the test to be applied in considering whether 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 with how the evidence was obtained. While this proposition may not have been stated in so many words in any English case there are decisions which support it, and in their Lordships' opinion it is plainly right in principle."

And in Fox v Chief Constable of Gwent [1986] AC 281, 292 Lord Fraser of Tullybelton stated:

> "It is a well established rule of English law, which was recognised in R v Sang, that (apart from confessions as to which special considerations apply) any evidence which is relevant is admissible even if it has been obtained illegally."

[27] From this case and the quotations above one can derive a number of relevant factors. The solution to a situation of non-compliance with legislation is not to be found in considering whether the words are mandatory or directory. The focus should remain on the consequence of non-compliance and whether the legislation makes clear what the consequences would be. It must be remembered that Article 61 must be read along with Article 76 (in the same statute) which provides that the court may refuse to allow evidence on which the prosecution proposes to rely if it appears to the court that its admission would have such an adverse effect on the fairness of the proceedings that it should not admit it. It remains good law that even if evidence is obtained illegally it is admissible if it is relevant, subject to the application of Article 76 of the 1989 Order (section 78 in England and Wales).

[28] In interpreting section 64(3) the House of Lords contrasted the presence of the consequence in section 64(3)(a) with the absence of such in Section 64(3)(b). That comparison is unavailable in Article 61(8B). However the clear words of Article 61(8B) make no provision for a breach of its imperative terms - "must be taken only in such manner, and using such devices, as the Secretary of State has approved for the purposes of electronic fingerprinting". It is not clear what is intended by the words 'taken only in such manner'. The interpretation adopted by the learned County Court Judge could lead to similar absurd consequences to those detailed by Lord Steyn in the passage quoted above, for example the inadmissibility in evidence of the finger impressions of a person charged with multiple murder, excluded because the particular scanning device had not been approved by a Secretary of State. As Lord Steyn observed criminal justice involves a triangulation of interests which require consideration of interests beyond that

of the defendant. At its heart lies fairness. The issue which arises in a case such as the instant case is whether evidence, which has been unlawfully obtained in that it arises from finger impressions taken with a device which had not been approved, is inadmissible as a matter of law (as opposed to being subject to exclusion in exercise of the trial judge's discretion conferred on him by Article 76 of the 1989 Order). On that issue the law as laid down in Kuruma and successive cases is clear. It is not inadmissible by reason of the manner in which it was obtained.

[29] For all these reasons we shall allow the appeal and answer the question posed in the case stated 'No'.