

Considering the definition of conscious and deliberate

[Law](#), [Justice](#)



With regards to the supposed redundancy of creating an exception derived from DPP v Kenny wherein instances of unconstitutional breaches of the rights of the accused are committed accidentally are not subject to the same scrutiny with regards to the evidence that can be availed of, I am not certain that the rule is as absurd as it is made out to be, and instead represents the broadest interpretation of reasonably permissive, if still unpreferable, conduct on the part of law enforcement, ensuring that they can perform their duties with an important awareness as to their actions while not inhibiting cases where administrative errors form the only barrier between the accused and an appropriate punishment or enforced compensation. My thinking centers on the definition of acts.

The common interpretation and understanding of the flaws of the “Conscious and Deliberate” test is best laid out by Oran Doyle in Constitutional Law: Text, Cases and Materials, where he notes that “One is left wondering what unconscious and non-deliberate act could be a violation of a citizens rights: a Garda accidentally falling into a building and searching it, perhaps?” Nevermind that a version of this hyperbolic hypothetical did in fact occur in DPP v Delaney, where Garda, on a task unrelated to the search of a house they had been ordered to defend the inhabitants of from local aggression, happened upon a cache of weapons without intent or deliberation, I feel that the primary issue with this dismissiveness is its narrow interpretation of the concept of “acts” on the part of law enforcement.

The judgement in Kenny cites DPP v Quillagan in stating its definition that “The only other ground upon which the statements could be rejected is if it could be held that they were the fruit of an arrest which was a conscious and deliberate violation of the prisoners’ constitutional right to personal liberty. “The action on the part of the Gardai, here described as the arrest, does not, I feel, begin and end at a battered down door or an overextended detention. The process of an arrest begins long before that, and includes much paperwork and effort on the part of the bureaucracy of An Garda Siochana to ensure the procedure is proper and the arrest can be undertaken in due course of law, as is provided in the constitution. They do not do this for their own amusement or health, they do it because it is imperative on them to ensure that the innocent do not get drawn into a criminal procedure, or, heaven forbid, a criminal sentence, and that their rights are protected. An action on the part of a Garda during an arrest, whether intentional or otherwise, can be said to be a constituent part of the overall arrest if it is taken at any point in the process. In this way, the clerical errors in DPP v O’Brien can be said to be a part of the effort to arrest the defendant, and it is undeniable that this error, which did by technicality result in the breaching of the defendant’s constitutional rights, can be said to have been an unconscious and non-deliberate violation, and was hence legal under this understanding of the law. In one sense, this understanding mirrors the differences between substantive and formal errors in legal procedure, and serves the same role. That said, I feel the original “Conscious and Deliberate” definition is more all encompassing, not only being related to administrative error, but including

those instances during the entire process of an arrest where a Garda makes a legitimate mistake.

An overextended interrogation for example can be the product of overzealous policing or bad timekeeping, and distinguishing the latter from the former is far more serious than a punchline about falling into a building may initially indicate. It is worth noting that this depends on a broad definition of arrests and the criminal process which is not that which is adopted by the case law which proceeded after *DPP v Kenny*, nor that which legal scholars have accepted as the understood meaning. The importance of this is that the law enforcement must not act in a fashion repugnant to the constitution, however without proper enforcement of this there is no way to ensure they will. Without the power to exclude evidence in this fashion, no matter the phase in the investigation at which a right was breached that contributed to their eventual prosecution, it is a matter of simple incentives for the Gardai to push the envelope in pursuit of the admittedly noble pursuit of justice at the cost of the rights of the individual.

The ruling in *DPP v Kenny*, in my mind, served a healthy balance. To be ignorant of the Constitution as an agent of the state is not a valid excuse for failing to act on it, however there is a reasonable debate between accidental breaches wherein there was no understanding or awareness of the act, regardless of any understanding or awareness of its rightness or wrongness, and breaches wherein the decision to act was made with the intention of finding evidence against the defendant, again with no respect to awareness of the illegality of the act itself. This ensures that insofar as they are aware

of their acts, that Gardai are compelled to be cautious in their prosecution of justice, while not being subject to the unfair blame for miscarriages of justice in the case of genuine mistakes. In conclusion, I feel that the criticisms lobbed at Kenny for its narrow exclusionary clauses fail to appreciate the broad nature of the criminal procedure and how mistakes or malicious miscarriages of constitutional justice can occur long before any contact is made by the Garda with the defendant, while still being reasonably considered to be part of the overall arrest and evidence gathering process. An unconscious and non-deliberate miscarriage of justice during an investigation is easily imaginable if one broadens the range of time during which the miscarriage can occur while still being part of the infringement of the rights of the defendant with regards to that specific case.