Detained Suspects, Prepared Statements and the Right to Silence:

DPP v M [2018] IESC 21

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Introduction

The right to silence, or privilege against self-incrimination, which is protected by the common law, the Constitution, and the European Convention on Human Rights, requires that a jury in a criminal case should not usually be told about any failure or refusal of a detained suspect to answer garda questions or provide information to gardaí at the time of questioning. Exceptions to this general rule exist, in the form of specific statutory provisions which allow for the jury to be told about, and invited to draw inferences from, specific failures of the detainee. Outside of the circumstances delineated by statute, however, no inferences are to be drawn from an accused's exercise of his right to silence. Indeed, no attention should generally be drawn at trial to the pre-trial exercise of the right, unless covered by the statutory inference-drawing provisions.[1]

The very practical question which arose for consideration before the Supreme Court in the 2018 case of *DPP v M*[2] was whether a detained suspect who gave a prepared statement to gardaí was exercising his right to silence when he responded to subsequent garda questions by referring to the statement given and stating that he had nothing further to say, or, whether such responses should be viewed as relevant and probative evidence at trial. In this paper I outline the factual circumstances which gave rise to the case, the relevant principles and precedents which were engaged, the decisions at trial and in the Court of Appeal, along with the ultimate Supreme Court ruling. I provide some comparative context, looking specifically at the case of *R v Knight*[3] from the English Court of Appeal, and I highlight some emerging patterns and practical realities of the modern criminal process. I conclude by looking to the future and to related areas of the criminal process which would benefit from clearer regulation.

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[1] *DPP v Finnerty* [1999] 4 IR 364.
[2] [2018] IESC 21, 21 March 2018.
[3] [2003] EWCA Crim 1977.

***DPP v M*: The Facts**

The appellant in *DPP v M* was a medical doctor who was convicted of one count of indecent assault and sentenced to a term of imprisonment of two years (reduced to twelve months on appeal). In October 2010, a complaint was made to gardaí by Ms H. She claimed that while visiting her home in order to provide palliative care to her terminally ill mother in December 1989, the appellant performed a medical examination of the complainant, which in fact amounted to an indecent assault. The appellant was arrested and detained for questioning on June 22 2011. It appears that he had already been aware of the allegation as he brought with him a prepared statement. Following caution, and a number of preliminary questions, which he answered, about his personal and family life, professional background and so on, he proffered the prepared statement, stating "I have a statement here in relation to [M.H.]. Other than that I have nothing to say". The interviewing gardaí asked him to read the statement aloud, which he did.

According to this statement, the appellant did not retain medical records for patients which dated in excess of ten years, but he did recall the complainant attending him in or around the time of her mother's death. He recalled attending the home, several times a week, to provide palliative care to the complainant's mother up to her death. He did not recall examining the complainant in her home, or prescribing her any particular medication. He stated that, to the best of his recollection, the complainant had attended him as a patient on a few occasions around the time of her Leaving Certificate. Her attendances lasted no longer than 10 minutes or so and he did not recall having physically examined her on any occasion. He said that he was "deeply shocked and greatly distressed" that a patient would make allegations against him that were "blatantly false and extremely damaging".

Having read and then signed the statement, the appellant was asked a number of questions by the interviewing gardaí. To each question he gave a response such as "I have nothing to say other than what's written in my statement".

At trial, the appellant's statement was adduced before the jury and the prosecution went on to lead evidence of the questions and answers which followed. The appellant, who gave evidence in his own defence at trial, was not asked about the interview, either in evidence in chief or under cross-examination; neither prosecution nor defence counsel referenced the interview in their closing speeches; and in charging the jury the judge referred only to the appellant's

prepared statement and his sworn evidence, not the contentious aspects of the interview. However, the jury was provided with a complete memo of the entire interview.

Defence counsel sought a discharge of the jury on the basis that the appellant's right to silence had been breached by the prosecution introducing evidence of his failure to answer garda questions. However, this was rejected by the trial judge and the appellant was convicted. This conviction was upheld by the Court of Appeal, but ultimately overturned by the Supreme Court.

While the trial judge and the Court of Appeal appeared to view the answers to garda questions as relevant and probative evidence, O'Malley J, giving the Supreme Court judgment, held that they in fact amounted to an exercise of the right to silence. Revealing these answers to the jury accordingly constituted a breach of that constitutional right, and there was a real possibility that this had influenced the jury's view of the appellant's evidence, and their decision to find him guilty. The nuances of the superior court judgments are examined further below, after an exploration of the central principles and precedents which underpin them.

Principles and Precedents

In Ireland, the right to silence is protected under Art 40.6 of the Constitution, as a corollary of the right to freedom of expression,[4] though its protection has also been linked to the right to a fair trial under Art. 38.1.[5] The right applies both at trial and in the pre-trial process.[6] The right is protected under Art 6 of the European Convention on Human Rights and under the provisions of other international agreements.[7] On both a national and an international basis it is accurate to say that the right to silence is a long-seated, well-established right.

It is not an absolute right, however, and it has been curtailed by the legislature in this and other jurisdictions. In fact, Ireland may have been the first common law jurisdiction to interfere with the right to silence in modern times.[8] This came by way of s 52 of the Offences Against the

[4] *Heaney and McGuinness v Ireland* (2001) 33 EHRR 334.
[5] See, for example, *Re National Irish Bank (under investigation) (No.1)* [1999] 3 IR 145 and *People (DPP) v AMcD* [2016] 3 IR 123; [2016] IESC 71.
[6] The trial-based right to silence, effectively the right not to testify, was established first. A pre-trial equivalent was later recognised in order to protect the trial-based right: McGrath, D *Evidence* 2nd Edition 2014 Thomson Round Hall, Dublin, para 11.91. See also *R v Director of Serious Fraud Office, ex parte Smith* [1993] AC 1, 32.
[7] For example, Art 14 of the International Covenant on Civil and Political Rights 1966; Art 20 of the Statute of the International Tribunal for Rwanda, 1994; Art 21 of the Statute of the International Tribunal for the Former Yugoslavia 1993; and Art 55 of the Rome Statute of the International Criminal Court 1998.
[8] The first modern Irish incursion on the right to silence came within the Offences Against the State Act 1939. As to other jurisdictions, inferences from silence were introduced in Singapore in 1976 under an amendment to the Criminal Procedure Code (Spore); in Northern Ireland, inference-drawing provisions were first enacted in

State Act 1939 which sought to criminalise a detained suspect's failure to account for his movements and actions during a specified period and to give all the information which he possessed in regard to the commission or intended commission by another person of a specific offence. The operation of s 52 was challenged before both the Irish courts and the European Court of Human Rights (ECtHR) in *Heaney and McGuinness v Ireland*.[9] Its constitutionality was upheld domestically,[10] but, at a European level, it was held to breach Art 6 of the European Convention on Human Rights, the right to a fair trial.

Undeterred from curtailing the pre-trial right to silence, the Oireachtas has created a significant number of inference-drawing provisions. These do not directly criminalise silence in the face of garda questioning, but rather attach potential adverse consequences at trial for such silence. While the ECtHR found in *Heaney* that the existence of a separate offence based on pre-trial silence "destroyed the very essence of [the suspects'] privilege against self-incrimination and their right to remain silent",[11] that Court has viewed inference-drawing provisions as having a lesser impact on the right. In *Murray v United Kingdom*, for example, the inference-drawing provisions of the Criminal Evidence (Northern Ireland) Order 1988 were upheld. In that case the ECtHR held that the right to silence is not absolute and that the decision as to whether or not the drawing of adverse inferences from a suspect's pre-trial silence was in violation of his rights under Art 6 should be determined in light of all the circumstances of a given case, having particular regard to the situations where inferences may be drawn, the weight to be attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation.[12] The Court did emphasise, however, that where inference-drawing provisions were engaged, a suspect should normally be allowed to benefit from legal advice in the initial stages of police interrogation.[13]

1988 under the Criminal Evidence (Northern Ireland) Order 1988; in England and Wales, inferences from silence have been allowed since 1994 under the Criminal Justice and Public Order Act 1994; and in New South Wales, Australia, inferences from pre-trial silence have been allowed since the insertion of s 89A into the Evidence Act 1995 by the Evidence Amendment (Evidence of Silence) Act 2013 - see Daly, Yvonne Marie "The Right to Silence: Inferences and Interference" (2014) 47(1) *Australian and New Zealand Journal of Criminology* 59.

[9] (2001) 33 EHRR 334.

[10] [1996] 1 IR 580.

[11] (2001) 33 EHRR 334 para 55.

[12] (2001) 33 EHRR 334 para 47.

[13] (2001) 33 EHRR 334 para 63.

We now have an array of inference-drawing provisions on the statute-books in Ireland[14] and while these have been accepted by the domestic courts as an allowable curtailment of the right to silence under Art. 40.6,[15] there have been a number of important precedents relating to their operation. First and foremost among these, particularly in the context of *DPP v M* is the holding in *People (DPP) v Finnerty*,[16] to the effect that no inferences should be drawn from an accused's failure to answer garda questions unless such matter is covered by the statutory provisions. In relation to a trial which follows a detention wherein the accused failed/refused to answer questions put to him, outside of the statutory inference-drawing context, Keane J set out three important principles to safeguard the right to silence:

> "(1) Where nothing of probative value has emerged as a result of such a detention, but it is thought desirable that the court should be aware that the defendant was so detained, the court should be simply informed that he was so detained but that nothing of probative value emerged.
>
> (2) Under no circumstances should any cross-examination by the prosecution as to the refusal of the defendant, during the course of his detention, to answer any questions, be permitted.
>
> (3) In the case of a trial before jury, the trial judge in his charge should, in general, make no reference to the fact that the defendant refused to answer questions during the course of his detention."[17]

A number of precedents have flowed from the *Finnerty* principles and are relevant to the decision in *DPP v M* also. The first three discussed hereunder were heard in the Court of Criminal Appeal between 2002 and 2009, while the final two are more recent Supreme Court precedents, from 2016 and 2017.

In *People (DPP) v Brazil*,[18] the Court of Criminal Appeal noted that, on the basis of *Finnerty*, the trial judge had been correct to insist that when the notes of pre-trial garda interview with the accused were put before the jury they excluded those aspects which merely recorded the

[14] ss 18, 19 and 19A of the Criminal Justice Act 1984, as amended; s 2 of the Offences Against the State (Amendment) Act 1998; and, s 72A of the Criminal Justice Act 2006, as inserted by the Criminal Justice (Amendment) Act 2009.
[15] For more on this see Daly, Yvonne Marie "Is Silence Golden?: The Legislative and Judicial Treatment of Pre-Trial Silence in Ireland" (2009) 31 *Dublin University Law Journal* 35.
[16] [1999] 4 IR 364.
[17] [1999] 4 I.R. 364, 381.
[18] [2002] 3 JIC 2211 (Unreported, Court of Criminal Appeal, 22nd March, 2002).

accused as exercising his right to silence. Keane CJ stated that only the part of the notes which recorded statements made which were either incriminatory or exculpatory of the applicant should be before the jury.

In *People (DPP) v McCowan*,[19] it was suggested that even if there had been a breach of the *Finnerty* principles where the jury had been made aware of an exercise of pre-trial silence which was not covered by the legislative inference-drawing provisions, nothing of import arose from it in the case. Speaking about the importance of respecting those principles Hardiman J said:

> "The authority of the Court and the judgment of the Chief Justice in *Director of Public Prosecutions v. Finnerty* [1999] 4 I.R. 364 is very clear. That authority is also very simple to observe and we would be gravely perturbed if it were thought that it could be departed from at the expense of a rebuke or a comment, by the Court of Criminal Appeal but that it would not be taken seriously beyond that."[20]

The conviction in *McCowan* was quashed on the basis of cumulative deficiencies, the reference to the appellant's pre-trial silence being just one. On that issue, again, however Hardiman J, ever a defender of due process rights, stated that

> "…if *Director of Public Prosecutions v. Finnerty* is to be taken seriously, the Court should be slow to accept an argument that the *Finnerty* rules were breached but nothing really turns on it. We are certainly slow to accept it in the circumstances of this case because we feel that *Finnerty* was well established at the time that this trial took place and that this was a pretty clear breach of what is laid down in *Finnerty*."[21]

In *DPP v O'Reilly*[22] the appellant claimed, before the Court of Criminal Appeal, that the manner in which the memo of interview was presented to the jury indirectly suggested that the accused had exercised his right to silence in the pre-trial process. The memo included the start and end times of the interviews, but the contents of the memo were rather brief as, following the precedents of *Finnerty* and *Brazil,* it contained only statements made by the detainee and not any instance of his exercise of the right to silence. The argument was that by presenting the memo in this way it was in fact made clear to the jury that the detainee must have remained

[19] [2003] 4 IR 349.
[20] [2003] 4 IR 349, 353.
[21] [2003] 4 IR 349, 353.
[22] [2009] IECCA 18.

silent for much of the time under questioning. This argument was rejected by the Court, which held that the giving of the start and end times of an interview was important as providing a framework, that there was nothing in the case which suggested that the jury had been led to believe that they could draw any inferences from the pre-trial silence of the accused, and that the charge to the jury had been clear in relation to the burden of proof falling solely on the prosecution.

These decisions of the Court of Criminal Appeal clarified the practical operation of the *Finnerty* principles. The Supreme Court cases discussed hereunder focused on the practical operation of one of the statutory inference-drawing provisions; s 19 of the Criminal Justice Act 1984, as amended. Section 19, essentially, allows for an inference to be drawn at trial from the failure or refusal of a detained suspect to account for his presence at a particular place, when requested by a garda so to do.[23] While *DPP v M* did not involve such provisions these precedents are relevant and worthy of discussion in the context of that Court's approach to the protection of the right to silence more generally.

In December 2016, in *People (DPP) v A.McD*,[24] the Supreme Court quashed an acquittal on charges of burglary, endangerment, and arson, and ordered a retrial pursuant to s 23 of the Criminal Procedure Act 2010, due to erroneous trial judge decisions on the admissibility of certain items of evidence in the case. One such decision related to a statement made by the accused after the gardaí had invoked s 19 of the 1984 Act. Counsel for the respondent accused in this case contended that the statement made following the invocation of s 19 had been properly excluded by the trial judge as s 19 ought not to have been invoked in circumstances where the accused had already given an account of his presence in a particular place. The suspect had, during police questioning, stated that his reason for being in the car park where a car was later found burned out was simply that he had followed some kids in there. The Court considered the meaning of s 19 and whether or not an account of any kind would suffice to fulfil its terms. McKechnie J observed that the Oireachtas had not included within s 19 a proviso to the effect that accounts that are false or misleading would be construed as failures/refusals to account. Such a caveat is included in s 2(4)(b) of the Offences Against the

[23] Under s 19(1)(b) the garda who requests the relevant information must hold a reasonable belief that the suspect's presence at a particular place, may be attributable to the suspect's participation in the commission of the offence for which he has been arrested (which must be an "arrestable offence", i.e. any offence which is potentially punishable by at least five years imprisonment: Criminal Law Act 1997, s 2(1) as amended).
[24] [2016] 3 IR 123; [2016] IESC 71.

State (Amendment) Act 1998, for example, and in s 52(2) of the Offence Against the State Act 1939.

McKechnie J noted the case of *People (DPP) v Devlin*[25] and the apparent suggestion therein that an account does not necessarily have to be coherent or rational in order to avoid the drawing of inferences at trial. However, the Court in *AMcD* was of the view that a "minimum level of plausible engagement"[26] is necessary in order to satisfy the requirements of s 19.

> "It surely cannot be the case that a person being investigated in respect of an arrestable offence can nullify the operability of this statutory provision by simply giving any manner of account, however plainly unrelated or potentially farcical it may be. To hold otherwise would be to enable such a person apprised of this fact to void the provision of its utility."[27]

It was held by the Court that the account given by the accused in this case met the minimum threshold required to amount to "an account" under s 19. However, between the giving of said account and the invocation of s 19 the gardaí had obtained CCTV evidence, which grounded a successful application for the accused's re-arrest. On the wording of s 19 McKechnie J observed, as per ss 18 and 19A also, that there is a temporal aspect to the section, requiring that an account (not) given should be one which "in the circumstances existing at the time clearly called for an explanation." He further noted that there is nothing in the wording of s 19 (or ss 18 or 19A) which suggests that it can only be invoked on one occasion. Accordingly, it was held that s 19 had been appropriately invoked during the third interview as part of the second detention of the accused, following an authorised re-arrest and two interviews in which he gave uninformative answers in relation to the newly-acquired CCTV evidence. The trial judge had been wrong in law, it was held, to conclude that the gardaí had no jurisdiction to invoke s 19 when they did.

On the importance of the pre-trial right to silence more broadly, McKechnie J observed that if it becomes an issue at the later trial of the accused the right "is firmly anchored in Article 38.1 of the Constitution."[28] This aligns with the earlier precedent of *Re National Irish Bank*, but also

[25] [2012] IECCA 70, (Unreported, Court of Criminal Appeal, 6 July 2012).
[26] [2016] 3 IR 123, 162; [2016] IESC 71 para 103.
[27] [2016] 3 IR 123, 161-162; [2016] IESC 71 para 103.
[28] [2016] 3 IR 123, 154; [2016] IESC 71 para 81.

with a growing Supreme Court tendency, discussed further below, to view the pre-trial stage as a part of the overall criminal trial process.

The final case which falls to be examined here is *DPP v Wilson*.[29] The central question in the case was whether s 19 of the Criminal Justice Act 1984 may be utilised in a trial for an offence other than the offence about which the accused was questioned when the section was invoked. The appellant was arrested pursuant to s 30 of the Offences against the State Act, 1939, as amended, on suspicion of having been involved in the unlawful discharge of a firearm. While he was being interviewed in custody, members of An Garda Síochána invoked s 19. The appellant was subsequently charged with the offence of burglary, including an aspect of assault. The assault in question did not involve the use of a firearm. At trial, counsel for the prosecution sought to rely on s 19 and to have inferences drawn against the accused for his failure to account for his presence at the relevant property. This was allowed by the trial judge and upheld by the Court of Appeal. The Supreme Court, however, reversed this decision and held that the inference-drawing provisions can only be relied upon at trial where the offence charged is the same as that in relation to which the accused was questioned when the section was invoked. McKechnie J highlighted the need for any legislative incursion on the right to silence to be clear, stating that

> "The right to silence and the privilege against self-incrimination are enshrined at the highest level of our legal order and the Constitution will not abide any greater encroachment thereon than the words of the section expressly and unambiguously sanction."[30]

This statement sums up well what can be drawn together from all of the emerging precedents and principles. It seems fair to say that the right to silence is viewed by the Irish courts as a very important right, worthy of protection, and that they will allow incursions on the right only so far as this is expressly provided for by statute. Any ambiguity in the incursionary statute will be read in favour of the accused. Furthermore, any failure to protect the right to silence will be taken seriously and a consequence greater than a mere judicial rebuke ought to be expected.

[29] [2017] IESC 53.
[30] [2017] IESC 53 para 33.

***DPP v M*: The Judgments**

Returning to the case of *DPP v M*, the distinction between the decisions of the trial court and the Court of Appeal on the one hand and the Supreme Court on the other, centred on their view of what was really happening when the appellant said in response to garda questions that he had nothing to say other than what was in his prepared statement. Before the Supreme Court counsel for the appellant suggested that what the appellant was saying in those responses was, in effect, "I have nothing to say in this interview other than what is written in my statement", and, accordingly, his responses were an exercise of his right to silence. He had given his statement, which, obviously, involved a waiver of his right to silence, but thereafter he was seeking to reassert his right to silence and not give any further information. On the other hand, counsel for the appellant suggested that what both the trial judge and the Court of Appeal considered the appellant to be saying in his responses to garda questions was, in effect, "I have nothing to say in response to this particular question other than what is written in my statement". That is to say that the understanding of the trial judge and the Court of Appeal was that the responses he gave involved a further assertion of the content of his statement in response to particular questions (e.g. that the allegations contained in the particular questions were "blatantly false"), and thus amounted to relevant and probative evidence which could, and should, be admitted to the jury.

Counsel for the appellant argued that, as the appellant's responses were in fact an exercise of his right to silence, they ought not to have been brought before the jury. Rather, on the basis of the first *Finnerty* principle, the jury should simply have been told that nothing further of evidential value had emerged during the remainder of the interview.

It was submitted by the respondent that there was nothing of self-incrimination involved and no infringement of any right to silence, the appellant having expressly elected not to maintain silence but rather to present a statement on which he intended to rely. In *McCowan* the respondent state had argued that while there had been a breach of the *Finnerty* principles, nothing turned on it; in the instant case the argument was that the *Finnerty* principles were not engaged at all.

In relation to these juxtaposed standpoints, Edwards J, in the Court of Appeal, held in favour of the respondent, stating:

> "There is a great deal of difference between saying "*No comment*" or *"I don't wish to say anything",* on the one hand, and saying, having already in fact commented, that *"I have nothing to add to what I have said already"*, on the other hand… he had

> voluntarily commented at length in a pre-prepared statement which he had proffered to the Gardaí, and indeed had characterised the complainant's allegations as being "blatantly false". In responding as he did when confronted with the specifics of the allegations he was simply confirming that he had nothing to add to what he had already said, and that he was still relying on his statement, i.e., still contending that the allegations were "blatantly false". That is not the assertion of the right to silence, it is far from it indeed. It is the assertion of a definite position in response to the questions asked. Moreover, the evidence was probative in the sense of demonstrating that, when confronted with the specifics of the complainant's allegations, the appellant's answer was to continue to rely on his pre-prepared statement in which he had expressly said that the allegations against him were "blatantly false"."

The Supreme Court, however, took a different view, allowed the appeal, and overturned the decisions of trial judge and the Court of Appeal. O'Malley J, who delivered the decision of the Court (*nem diss*), began her analysis with an acknowledgement of the importance of the right to silence, as a constitutional right, a common law right, and a right protected by the ECHR. She noted that it ought not to be lightly assumed that the waiver of a constitutional right has taken place, and in cases of dispute on this matter it must be proven by the prosecution, beyond reasonable doubt, that such waiver has occurred.[31]

At a practical level, O'Malley J accepted that suspects, as they are entitled to do, often respond to certain questions at interview, and not to others. She noted that practitioners and trial judges are used to the concept of editing interview memoranda for production to the jury so as to avoid mention of aspects of interviews where the suspect exercised his right to silence, as seen, for example, in the *Brazil* case. Following on from this O'Malley J stated that

> "The making of a voluntary statement, as in this case, amounts to a clear waiver of the right to silence to that extent, but it does not follow that the suspect thereby waives the right in respect of either a prior or subsequent refusal to answer questions. I consider that the constitutional protection afforded to the right to silence is such that waiver cannot be held to be implied by ambiguous words."[32]

O'Malley J rejected the suggestion in the judgment at trial that *Finnerty* could be distinguished from the instant case simply on the grounds that the appellant had not used the "no comment" formula of words in his responses to garda questions. She stated that it was "not appropriate to

[31] [2017] IESC 53 para 65.
[32] [2017] IESC 53 para 66.

parse the words used as if they were the words of a parliamentary draughtsman."[33] Rather, a consideration of the context was necessary.

O'Malley J then expressed her own view of the evidence, looking at the transcript, and said that

> "on the face of it the probability is that the course of action intended and adhered to by the appellant during the interview was to answer questions about himself that did not involve discussion of the allegation made against him, and then, when the allegation was specifically raised, to state that he would say nothing other than what was in his prepared statement. He was not thereby implying that each and every detail contained in the complainant's statement was untrue…If that view is correct, then the correct interpretation of what happened would be that the appellant was refusing to answer questions put to him by the gardaí about the allegation. That is an exercise of the right to silence."[34]

With deference to Edwards J in the Court of Appeal O'Malley J stated that "…it may be that this serves only to demonstrate that it is possible for different judges reading the interview notes to reach different interpretations of the words used by the appellant…"[35]

The learned judge then further observed that if, as must be the case, the trial judge viewed the evidence as both relevant and probative, and not unduly prejudicial, he ought to have given the jury some guidance as to how it should be treated.

> "Juries are entitled to assume that evidence presented to them is relevant and probative, and if they are not instructed as to the drawing of inferences may well feel further entitled to draw any inferences that appear to them to be appropriate."[36]

In *DPP v M*, the interview notes were read out in full before the jury and were given to them unedited as an exhibit. This was contrasted with *O'Reilly*, wherein there was only a "passing reference" in the evidence to the silence of the accused.

In *DPP v M*, because the trial judge did not believe that there had been a pre-trial exercise of the right to silence, he made no reference in his charge to the jury to the appellant's entitlement to rely on such a right, nor did he tell the jury that they ought not to draw any adverse inferences

[33] [2017] IESC 53 para 66.
[34] [2017] IESC 53 para 68.
[35] [2017] IESC 53 para 69.
[36] [2017] IESC 53 para 71.

from this silence. O'Malley J thought it possible that, in the absence of any guidance, the jury may have drawn an inference favourable to the appellant in that he had maintained a consistent position throughout. However, she went on to state that the Court could not discount the real possibility that the jury may have drawn an adverse inference to the effect that the deliberate refusal of the appellant to engage with the specific questions reflected adversely on the credibility of his sworn evidence.[37]

No statutory inference-drawing provisions were invoked by the gardaí during *M*'s interview, and accordingly none of the statutory safeguards relating to those provisions had been applied. The accused had not been told, for example, that his failure to mention any fact which he later relied on might be used against him at later trial.[38] The traditional caution, on the other hand, had been relayed to the appellant and was still in operation. On this O'Malley J quoted from Cory J. in the Canadian case of *R v Chambers*[39]:

> "It has as well been recognised that since there is a right to silence, it would be a snare and a delusion to caution the accused that he need not say anything in response to a police officer's question but nonetheless put in evidence that the accused clearly exercised his right and remained silent in the face of a question which suggested his guilt."[40]

Given the finding of O'Malley J that the relevant answers to the garda questions were an assertion of the right to silence, their revelation to the jury was in breach of that important right, and there was a real possibility that this had impacted on the view of the appellant's evidence that was taken by the jury, and on the ultimate verdict at trial.

Comparative Case-Law: *R v Knight*

The circumstances of *DPP v M* are somewhat similar to the English case of *R v Knight*, at least in relation to the giving of a prepared statement and refusal to be further drawn on questioning, although the "no comment" form of words was used in *Knight*. Interestingly this case was not cited in the judgments of either the Court of Appeal or the Supreme Court.

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[37] [2017] IESC 53 para 72.
[38] s 19A(3) requires that, for an inference to be properly drawn, the accused must have been told in ordinary language when being questioned what the effect of the failure to mention a relevant fact might be, and he must have been afforded a reasonable opportunity to consult a solicitor before the relevant failure occurred.
[39] [1990] 2 SCR 1293.
[40] Quoted by O'Malley J [2017] IESC 53 para 74.

The appellant in *R v Knight*[41] was convicted of two counts of indecent assault on a young girl, and sentenced to two concurrent terms of 12 months' imprisonment. When arrested and questioned in relation to the alleged offence the appellant read out a prepared statement, which was wholly in line with the sworn testimony he would later provide at trial. When asked further questions by the police he replied only "no comment", stating that he did so on the advice of his solicitor. At trial, the judge suggested to the jury that they might draw adverse inferences against the appellant, pursuant to s 34 of the Criminal Evidence and Public Order Act 1994,[42] for his refusal to answer the police questions which followed the reading of the prepared statement. He suggested that this might be the case because the jury might "draw the conclusion from his failure that he did not want to allow the police to scrutinise the account given in the prepared statement with their own questions."

Two main questions arose in *Knight* for consideration by the Court of Appeal: (i) whether a suspect's silence at a police interview is rendered immune from adverse inferences at trial if it is based on legal advice; and (ii) whether the purpose of the statutory inference-drawing provision[43] is to encourage a suspect to give a full account to the police in response to the accusation made against him, or is it also to have that account subject to testing questions – in effect cross-examination – by the police in interview.

As to the first question, all comments on this were *obiter* given the findings on the second question (discussed below), but the Court essentially suggested that the mere receipt of advice to remain silent from one's solicitor would not be enough to immunise a suspect from the drawing of adverse inferences at trial.[44]

The second question is more important from the perspective of *DPP v M*. While the jury in *M* were not invited to draw inferences against the appellant, O'Malley J held that in the absence of some direction as to what they could do with the evidence of silence it could not be discounted that the jury may in fact have drawn inferences adverse to the appellant therefrom.

[41] [2003] EWCA Crim 1977.
[42] Which is largely equivalent to s 19A of the Criminal Justice Act 1984, as amended, in Ireland.
[43] s 34 of the Criminal Evidence and Public Order Act 1994.
[44] See also later English case-law on this matter, e.g. *R v Hoare and Pierce* [2005] 1 WLR 1804; [2005] 1 Cr App R 22; [2004] EWCA Crim. 784, and Daly, Yvonne Marie "Silence and Solicitors: Lessons Learned from England and Wales?" (2007) 17 (2) *Irish Criminal Law Journal* 2.

In *R v Knight*, it was held by the Court of Appeal that the aim of the inference-drawing provision (s 34) did not distinctly include police cross-examination of a suspect upon his account over and above the disclosure of that account.[45] The Court held that

> "[a] requirement to submit to police cross-examination (so long as the questions are proper), or at any rate an encouragement to do so on pain of later adverse inferences being drawn, is a significantly greater intrusion into a suspect's general right of silence than is a requirement, or encouragement, upon the suspect to disclose his factual defence."[46]

Accordingly, if such was the intent of the legislature in s 34 it ought to have been expressed much more clearly. As highlighted earlier, the need for incursions on the right to silence to be clearly and unambiguously expressed is a motif in the judgments of the Irish superior courts also.

The English Court of Appeal went on to hypothetically consider what possible inference could be drawn against an accused person who has given a pre-prepared statement and refuses to answer supplementary questions. The inference which might be drawn at trial, the Court observed, could not be recent fabrication of his defence, as the defence has been stated in full before or at the beginning of the interview.[47] The only real possible inference would be that the defence ought not to be believed, or was of doubtful veracity. However, even in that case the Court was not sure how this inference could properly be drawn within a criminal case. If the accused gave evidence at his own trial then the jury could observe and determine the veracity of his claims at that juncture, and it would be "neither realistic nor fair" for them to consider then his failure to subject himself to police cross-examination in interview. If he did not give evidence at his trial then inferences could be drawn, in England and Wales, under s 35 of the 1994 Act. The Court held that in such circumstances there would surely be "no sensible room" for further inferences under s 34.

No inferences may be drawn in Ireland from an accused's failure to give evidence in his own defence.[48] However, if the accused has given an account to gardaí, this will have been available to the prosecution in advance of trial, which will have given them the opportunity to investigate and prepare evidence attempting to prove that the defence should be disbelieved, if this is the

[45] *R v Knight* [2003] EWCA Crim 1977 para 11.
[46] [2003] EWCA Crim 1977 para 11.
[47] [2003] EWCA Crim 1977 para 12.
[48] See for example the judgment of Keane J in *People (DPP) v Finnerty* [1999] 4 IR 364 at 376.

case. Obviously, it is always for the jury to be persuaded of guilt by the prosecution, not of innocence by the defendant. A benefit accrues to the prosecution through the obtaining of an early defence on the basis of the fear of inferences being drawn at trial. It would seem unfair if a double benefit could in fact arise such that they had access to an early defence, plus an inference could be drawn from failure to answer questions after the giving of the statement containing that defence. It seems likely that the Irish courts would follow the view in *Knight* that if the legislature wanted to encourage detained suspects to submit to police cross-examination, rather than merely encouraging early revelation of the defence, then this would need to be clearly expressed.

Having said that, in *R v Knight,* the Court sought to make "crystal clear" that the making of a pre-prepared statement does not of itself give automatic immunity against adverse inferences under s 34[49]:

> "The making of a pre-prepared statement is not of itself an inevitable antidote to later adverse inferences. The pre-prepared statement may be incomplete in comparison with the defendant's later account at trial, or it may be, to whatever degree, inconsistent with that account. One may envisage many situations in which a pre-prepared statement in some form has been put forward, but yet there is a proper case for an adverse inference arising out of the suspect's failure "on being questioned under caution… to mention any fact relied on in his defence…"."[50]

If the accused's pre-trial account is not comprehensive enough, for example, it may be open to the drawing of inferences. In the instant case, however, the appellant, as in *DPP v M,* by way of his prepared statement, disclosed to the police his full defence, just as it was later put to the jury. Therefore, there was no legitimate room for an adverse inference to be drawn against him under s 34. The trial judge's error in suggesting to the jury that such a defence was available rendered the appellant's conviction unsafe and the Court of Appeal accordingly quashed it.

Patterns and Practicalities

[49] [2003] EWCA Crim 1977 para 13.
[50] [2003] EWCA Crim 1977 para 13. See further Easton, Susan, *Silence and Confessions: The Suspect as the Source of Evidence,* Palgrave Macmillan, 2014 pp 55-56.

O'Malley J in the Supreme Court in *DPP v M* referenced that Court's decision in *DPP v Gormley and White*[51] wherein it held the right to consult a solicitor prior to questioning by gardaí was designed to support the right not to incriminate oneself, amongst other rights, and was, accordingly, of high legal value. That right, it was held, was part of the protection afforded by the Constitution to fair trial rights, as arrest and detention for the purposes of investigation should be regarded as a stage of the criminal trial process.[52] Of course, soon after the decision in *Gormley and White* was handed down, the DPP issued a circular to gardaí to the effect that they should now agree to any requests from suspects to have their solicitor with them *during* garda interview. While the case of *People (DPP) v Doyle*[53] poured some cold water on hopes that this aspect of the right to pre-trial legal advice would soon be put on a constitutional footing, the practice continues, and was in fact referenced by members of the Supreme Court bench in *Doyle*.

The fact that solicitors are now remaining in garda interviews with their clients may increase the likelihood of prepared statements being proffered. It is therefore extremely important that the case of *DPP v M* went as far as the Supreme Court and achieved a reversal of the decisions of the trial judge and the Court of Appeal. Clearly the inference-drawing provisions place a suspect under some pressure to produce a defence at a relatively early point in the criminal process, but the main factor, it seems to me, which is likely to encourage early revelation of defence is the strength of the evidence against the suspect. A related issue is the question of disclosure at this stage of proceedings. There is no statutory regulation of this aspect of the pre-trial process, in terms of the amount of disclosure which gardaí should provide to detainees and their legal advisors in advance of an interview.

Gardaí, understandably perhaps, may prefer to give little pre-interview disclosure so as to capture a spontaneous reaction from a detained suspect. However, it seems logical that the more disclosure that is given in advance of an interview, the better legal advices a solicitor can give. Furthermore, it seems logical to me that in the face of very little disclosure the most likely advice from a solicitor to his/her detained client will be to say nothing, at least until the evidence begins to emerge in the course of an interview, or a number of interviews. If disclosure of a large volume of evidence or evidence of a very strong character occurs prior to an interview, it seems more likely that a suspect, and his/her solicitor, will consider the value of

[51] [2014] 2 IR 591.
[52] O'Malley J in *DPP v M* [2017] IESC 53 para 39.
[53] [2017] IESC 1.

making a statement, either in the hopes of avoiding prosecution at all, or in order to provide consistency in the defence.

In the Garda Code of Practice on Access to a Solicitor by Persons in Garda Custody, there is some general reference to pre-interview disclosure of a fairly basic standard,[54] and a more specific provision relating to a briefing prior to the invocation of inference-drawing provisions. In this latter scenario, the Code suggests that gardaí should provide the solicitor with "certain basic facts that contextualises the matters to which the questions are going to relate in order for the solicitor to advise appropriately in relation to the suspect's decision to answer or remain silent.".[55] This, at least, recognises the link between adequate disclosure and appropriate legal advice, though the meaning of "basic facts" could be interpreted in quite a narrow fashion.

Jackson has written about the shift in focus of the modern criminal process, across many jurisdictions, from the public arena of the courtroom backwards into the private confines of the police station. He suggests that states are "increasingly 'front-loading' the forensic enterprise [of fact-finding] into the pre-trial phase in order to expedite proceedings'".[56] He further suggests that there is no reason why this should not be done, so long as, importantly, there are suitable safeguards in place. If the police station is becoming more like a courtroom on the prosecution side, then courtroom-like protections should exist on the defence side also. To some extent this is what we see in the decision in *Gormley and White* – the right to access legal advice prior to interrogation is added by the courts due to the increased legislative incursions on the pre-trial right to silence. In terms of disclosure and the decision on whether or not to provide information to police at interview, Jackson suggests that there should be a threshold in terms of the evidence which should be reached before the suspect is invited to respond:

> "At a point when there are allegations based on evidence that call for an answer, suspects should…be given an opportunity to respond under conditions that allow for informed and fair participation."[57]

Where inference-drawing provisions currently mention that the account should "clearly call for an explanation" at the time of the questioning, the nature of this threshold is unclear. It is unclear for all parties, and perhaps will await a future case for clarification. Can an inference

[54] Garda Code of Practice on Access to a Solicitor by Persons in Garda Custody, Section 6.
[55] Garda Code of Practice on Access to a Solicitor by Persons in Garda Custody, Section 7.3.
[56] Jackson, John "Re-conceptualizing the right to silence as an effective fair trial standard" (2009) 58 *International and Comparative Law Quarterly* 835, 851.
[57] Jackson, John "Re-conceptualizing the right to silence as an effective fair trial standard" (2009) 58 *International and Comparative Law Quarterly* 835, 853-854.

be drawn at trial from a suspect's failure to provide an account in the total absence of disclosure? Where there was very little disclosure? Or only when the gardaí had set out a *prima facie* case against him on the basis of evidence produced to him and his solicitor? It seems that statutory regulation of pre-trial disclosure is becoming increasingly important and it would be of value, in my view, to all parties.

Conclusion

DPP v M was an important and necessary clarification by the Supreme Court that the giving of a prepared statement at garda interview does not deprive a suspect of the further exercise of his right to silence; a recognition of the realities of garda interviews where suspects can and do answer certain questions but not others; and the latest case in a series of superior court cases which have sought to protect the right to silence where any ambiguity of meaning or of circumstances arises. The courts have been pragmatic, for example in not allowing farcical accounts to defeat the ends of inference-drawing provisions, while also upholding the well-established practice of strictly construing criminal statutes.

I will conclude by saying that, in my view, the entire pre-trial process would benefit from greater regulation, in the form of legislation which mirrors, at least in terms of breadth and depth, the Police and Criminal Evidence Act in England and Wales, and its related Codes. The right to have your solicitor present *during* interrogation needs to be set out; we need enhanced oversight of detention in custody; disclosure in the garda station could and should be regulated to a greater extent; provision should be made for suspects with additional vulnerabilities, such as creating an Appropriate Adult Scheme, or having access to mental health professionals in garda stations; the inference provisions themselves could be reviewed, so as to include, for example, a threshold requirement in terms of the evidence prior to inviting a response from a detained suspect; the need for contemporaneous note-taking ought to be removed to increase the pace of garda interviews, to the benefit of all parties; and the caution urgently needs to be updated to take account of the allowable incursions on the right to silence.

The courts appear to now view the pre-trial process as an important part of the overall criminal trial process. The legislature should provide greater clarity on and regulation of the practical operation of the process.