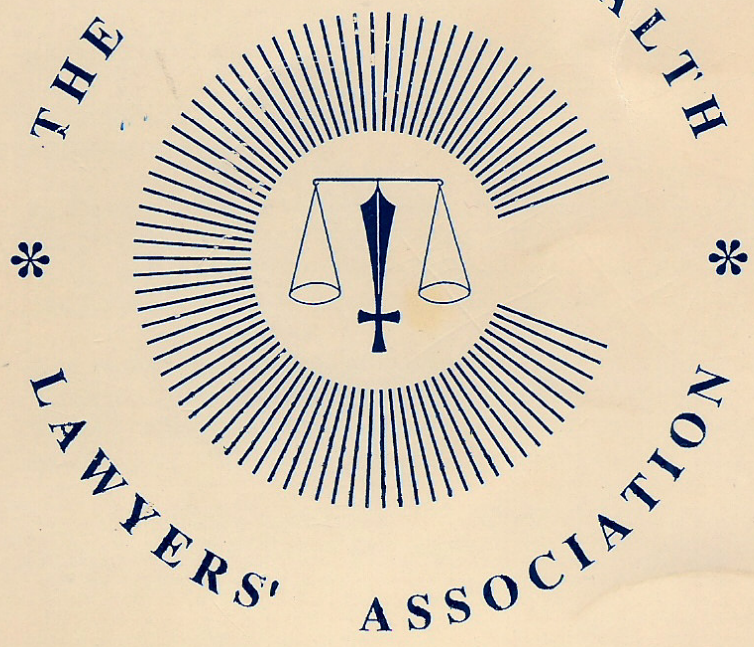
the Commonwealth Lawyer

THE JOURNAL OF THE COMMONWEALTH LAWYERS ASSOCIATION



VOLUME SEVEN, NUMBER ONE, JUNE 1995

THE RIGHT TO SILENCE IN THE UNITED KINGDON AND MALAYSIA

by
Jerald Allen Gomez

The author practises as an advocate in Kuala Lumpur, Malaysia, and took part in the 1994 Commonwealth Young Lawyers Course. The position in England and Wales described in this article is that which existed prior to the Criminal Justice Act 1994.

INTRODUCTION

The right to silence can be viewed from various perspectives, as it envelops other legal principles which are intertwined into the fabric of the whole criminal justice system.

The right to silence encompasses two major basic principles of law: the privilege against self-incrimination and the presumption of innocence. The former means that "no man will be forced to give incriminating evidence against himself". Lord Mustill has however, in the recent House of Lords decision of R v Director of Serious Fraud Office exparte Smith, held the view that the right to silence historically was never linked to the privilege against self incrimination but was rather a development of law relating to admissibility of confessions. Though there may appear to be a dichotomy between the two as to its development, for our purpose it is sufficient to say that at the present time the right to silence encompasses the privilege against self-incrimination.

The presumption of innocence is that the accused starts off with a presumption in his favour that he is innocent until proven guilty. It needs no further explanation. Having that in mind, if we look at the whole issue of abolishing the right to silence we find that it boils down to one fact "Who must prove what". As regards the burden of proof, in the words of Lord Sankey in DPP v Woolmington:
"Throughout the web of the English Criminal Law, one golden thread is always seen, that it is for the prosecution to prove the prisoner's guilt beyond reasonable doubt."

The abolition of the right to silence by whatever means is, in reality, a shifting of the burden of proof; a tipping of the delicate balance of the scales of justice in favour of the prosecution. Arguing that it is not the abolition of the right to silence, but a curtailing of that right which is presently sought, is indulging in intellectual gymnastics and is of no practical significance. It is my view that once the court is allowed to infer guilt from silence, the right no longer exists.

Even if we take the proposal of the Lord Chief Justice of England, Lord Taylor, that similar provisions to those of Northern Ireland be adopted, curtailing the right to silence in certain circumstances, it would still be forcing the accused (as stated by Roger Ede, Secretary to the Criminal Law Committee of the Law Society of England and Wales) to play Russian roulette. An accused will not know which questions to answer and which not. Since similar provisions to those in Northern Ireland received the most support from the House of Commons and the House of Lords, let us examine these provisions and how they came about.

THE RIGHT TO SILENCE IN NORTHERN IRELAND

Basically this involves two stages: the first being a pre-trial stage, i.e. the police investigation stage, and the second being the trial stage, meaning that the prosecution has proved a prima facie case and the accused is called to make his defence.

Pursuant to the Criminal Evidence (NI) Order 1988, the Northern Ireland position is that under four different situations, an adverse inference can be drawn against the accused if he chooses to remain silent, three of which involves the pre-trial stage:

1. When an accused fails to mention any fact relied on in his or her defence, when he or she could reasonably have been expected to mention it when questioned by the police. (This presumably was to take care of the ambush defence problem which is dealt with later in this paper).

2. When an accused fails to account to the police for the presence of certain specified marks found on his or her person or clothing.

3. When the accused refuses to account for his presence at at particular place when an offence is suspected of being committed.

4. At the trial stage, when an accused remains silent at his or her trial after a case to answer has been made out.

These provisions may seem specific at a glance, but upon proper consideration what is reasonable, or what constitutes an account, covers a very wide area which I shall attempt to highlight.

This provision in Northern Ireland came into being by an Order in Council, a piece of subsidiary legislation brought about by the then Secretary of State, Mr Tom King, and not by an Act of Parliament which would have subjected it to vigorous debate and

scrutiny. It was passed because there was an urgent need to deal with the problem of those charged with terrorist activities relying on their right to silence.

The police and security forces claimed that they could not gather sufficient evidence to warrant conviction without abolishing the right. They wanted those accused of terrorism to give them evidence by confession or information, or to allow an adverse inference to be drawn from their silence, to prove guilt. That was the basis and excuse; that these terrorists were so well trained in exercising their right to silence. The question to be asked is, "What good is a right if you are not allowed to exercise it?" Furthermore, although the legislation was targetted at a specific group of people charged with terrorist offences, it had general application in all criminal cases (whether or not there wase any connection with acts of terrorism). The abolition of the right in respect of members of the public in general was not justified.

This Order in Council has been in force for over six years and has been the subject of a report in "Jusyice" which has been summarised as follows:

> "Restrictions on Criminal suspects' right to silence for the last six years in Northern Ireland are unsafe and inefficient according to a research report by "Justice". The report states that the order is used to put pressure on suspects to speak and this has an unfair impact on the vulnerable as well as those who may have reasons for not speaking, such as being suspicious of the police, wishing to protect family members or fearing intimidation. Ulster solicitors commenting to researchers broadly came down against the right to silence restrictions. "The police are using the order to frighten the daylights out of people", said one."

Thus people fear that if they do not answer the questions put by the police an adverse inference may be drawn against them.

When we speak of the right to silence it does not just mean that an accused is under no legal obligation to speak to the police or to give evidence in court, but it implies that no disadvantages will be attached to the accused's refusal to co-operate with the police or to testify. In other words, it means that no tribunal of fact, whether juries, judges or magistrates, should be allowed or encouraged to conclude that an accused is guilty merely because he refused to respond to allegations or refused to testify. This is not the case in Northern Ireland.

ENGLAND AND WALES

As for England and Wales, though there have been a few inroads to the Woolmington Principle, the law on the right to silence and burden of proof remained the same.

In a case decided in April 1990, the Court of Appeal quashed convictions of the Winchester 3 (Marina Shanahan, Finbar Cullen and John McCann) found guilty of a conspiracy to murder Mr Tom King, the then Secretary of State for Northern Ireland, at his home. Two of the accused remained silent and refused to answer the police and all refused to testify in court. The Court of Appeal held that the trial judge should have discharged the jury and ordered a retrial because of the risk that widely broadcast remarks by Mr King and Lord Denning that "Silence is the refuge of the guilty", could have prejudiced the proceedings.

If we take a look at the United States of America, which also has an adversarial system, we find that these principles are even more strictly applied. The silence of an accused cannot be the subject of adverse comment.

The right to silence was and is a major constitutional landmark in the USA, as opposed to the English common law where this right slowly crept in. There are a number of theories as to how the right to silence crept into English Law.

First, we have Wigmore's theory that the right to silence gained acceptance in the early 17th Century in response to forced interrogation and arbitrary power of the courts like the "Star Chamber" and Ecclesiastical courts. Methods used by these courts included torture, mutilations, forfeiture and imprisonment. These courts were the source of censorship by the monarch of any political works or any unorthodox religious ideas until their abolition in 1641.

It was in these circumstances that the right to silence emerged to protect the accused, as one of the most significant features of these courts were that interrogation constituted a fishing expedition. Instead of being confronted with a particular charge by a complainant, the accused was compelled to speak on oath before being charged in the hope that he would come forth with an incriminating statement. The principle "nemo debet", meaning that no man should be compelled to give evidence against himself, emerged as a protection against such courts and improper procedures, and was eventually extended to and adopted by the Common Law courts, which had established their supremacy by 1660.

Another theory is that of MacNair, who is of the view that Wigmore had put the cart before the horse. MacNair states that this right originated from Roman Canon Law, applying first to allegations of crime in civil proceedings before being extended to the accused in criminal trials. This came about through Roman Canon Law tradition and religious objections to compulsory testimony.

The Criminal Law Revision Committee in their Eleventh Report stated that the right to silence in Common Law did not fully emerge until the early 19th Century, when courts attempted to offset the disadvantage to the accused caused by the prohibition against defendant's testimony, poor quality of juries, magistrates and legal representation and the haste in which cases were concluded. There was judicial recognition that a balance had to be struck between the power of the State and the rights of individuals.

Whatever theory one may be inclined to believe, it appears that the right to silence is an essential safeguard against state power and ensures a fair trial in the context of an adversarial system.

ARGUMENTS FOR ABOLITION OF RIGHT TO SILENCE

There are many arguments advanced for abolishing the right to silence. I have limited this paper to three arguments which I believe are the most persuasive, though I am not in agreement with them. These three arguments all relate to the pre-trial stage. At the trial stage, in a Court room atmosphere, in full public view, after legal advice, before judges, juries, etc, I find less difficulty in accepting a curtailment of the right to silence if there must be one.

Now for the three arguments, stated, not in the order of importance but for the purpose of clarity.

The first argument is that the right to silence evolved as a protection against courts like the Star Chamber and methods used by them to extract evidence or confessions which became the basis of conviction. Today, it is said, torture and compulsion no longer exist; therefore the right to silence no longer serves its purpose and can be abolished. In fact the Chief Justice of England, Lord Taylor, when asked at a public meeting at Gray's Inn, "What was the preponderance of judicial reasoning and jurisprudence that warranted the abolition of the right to silence?", answered that it was safer now for the accused, the whole interview will be tape recorded, etc.

It is argued that, now that there is tape recording of police interviews, opportunities for the police to bring excessive presusre to bear on the accused no longer occur, as Lord Taylor would like to believe. I doubt so. The police have a very wide discretion on how investigations are carried out and have various means and tactics available, though these may not always be used, to get the suspect or accused to say exactly what they want to hear. Often the nature of the charge will be used as an inducement for the accused to co-operate. Normally the accused will co-operate and opt for a lesser charge.

The length of time of detention, threats that family members will be involved in the investigations if they do not co-operate, and improvements of the conditions of detention as the suspect/accused cooperates are other means of securing information and evidence from a suspect. There is a psychological pressure to speak. Most people feel a social pressure to speak when asked questions. It takes a very strong will to remain silent in the face of sustained questioning. There is also considerable pressure to speak by the structure of police interrogations, the apprehension of the charge and sentence, the embarrassment of continued detention, etc. There are various other means and tactics used by the police that no tape recorder can prevent if the police choose to do so.

The second argument is that of "ambush defences". These are defences which take the prosecution by surprise during trial, allowing insufficient time for the preparation of the prosecution's case and consequently, it is argued, leads to wrongful acquittals. It is argued that alibi defences, consent to rape, innocent associations, belief that the goods were not stolen (on a charge of handling stolen property) and self-defence in a robbery are all ambush defences. Alibi defence may be an ambush defence. It does take the prosecution by surprise but statute has already dealt with these problems in that there are procedural changes making it necessary for the accused to give the prosecution sufficient notice if an alibi defence is to be relied on. I am of the view that the others cannot be termed ambush defences. Anyone investigating a rape case (excluding statutory rape) would most certainly ensure and confirm from the complainant and forensic evidence that her consent was not obtained. Most cases of rape are decided on this issue of whether there was consent. To say that the defence of consent comes as a surprise is unacceptable.

Innocent association is the same. Normally in a charge of indecent assault on a child he or she is taken to a private place. The issue again is "for what purpose?". Normally the defence is innocent association, "I was helping him/her find a toy etc.".

On the charge of handling stolen property, again it cannot be said that the defence of having no knowledge that the goods were stolen is an ambush defence. The same goes for the others. The prosecution and police know the ingredients of the offences and mostly the defences are obvious and cannot be said to be an ambush defence. I see no merit in this argument for the abolition of the right to silence.

The third argument is actually the real basis for this move by the authorities to change the status quo. There has been a change of view or thinking by some quarters from what used to be the view and thinking of our predecessors. To put it simply in a nutshell, it is the view taken by Bentham when he states that:

"Innocence claims the right to speak as guilt invokes the right to silence".

Lord Denning echoes this as stated earlier:

"Silence is the refuge of the guilty".

This view is based on the premise that there can be no other reason why a person remains silent, other than guilt. To put it another way, in stronger terms, once a person remains silent in the face of accusations, he is guilty.

I cannot accept that those accused and who choose to remain silent do so only because they are guilty. There are various examples in history and in hindsight we can see that many people remain silent for various other reasons when faced with a charge and not because they are guilty.

The best example was that of Jesus Christ himself. When charged before the governor Pontius Pilate, He chose to remain silent. I quote Matthew 27 verses 11 to 14:

> "Now Jesus stood before the governor and the governor asked Him, "Are you the King of the Jews?". Jesus said, "You said so,". But when he was accused by the Chief Priest and elders he made no answer. Then Pilate said to him, "Do you not hear how many things they testify against you?". But he gave no answer, not even to a single charge; so that the Governor wondered greatly."

He was exercising His right to silence and there can be no question as to His innocence.

I have attempted to list below some of the reasons why an accused charged with an offence may choose to remain silent.

- He may remain silent because his lawyer advised him to.
- He may be emotional and not in a proper frame of mind to speak.
- He may feel guilty and confess to an offence he really did not commit.
- He may be ignorant of vital facts or evidence which explain away otherwise suspicious circumstances.
- He may be silent because he has done something morally wrong and does not want that to come to light.
- He may be silent to protect others.
- He may remain silent so as not to be stigmatised as an informer which may have dire consequences in his neighbourhood, especially a situation like the one in Northern Ireland (terrorist cases).

- He may remain silent during a formal interview because his explanations given earlier were not accepted by the police at the scene or in the car.
- He may not have heard or understood what the police have asked.
- He simply does not know or understand what happened and how it happened.

There are many more reasons why a person remains silent and it is certainly not true to say that only the guilty will seek the refuge of silence or invoke the right to silence. All three arguments which seemed to be the most persuasive are insufficient to warrant the abolishing of right to silence.

MALAYSIA

Now I will touch briefly on the Malaysian position. This is similar to that of England with a few variations. The accused has the right to silence from the police investigation stage and throughout the trial. No adverse inference can be drawn against him for exercising his right to silence. The Miranda warning is used and the courts will not admit as evidence any statement made by the accused to the police if there is a doubt as to its voluntariness. If there is any inducement, threat or promise of any nature and, more recently, oppressive behaviour by the police of any kind, the whole statement or confession of the accused is ruled inadmissible. There is, however, one exception which is that if the statement, though extracted illegally, leads to the discovery of a weapon or subject matter of the crime, the court would permit so much of that statement only to be admitted as evidence against the accused. Other than that, the right to silence is safely intact at the pre-trial stage and protected by the rules of admissibility of evidence.

At the trial stage, however, we have had some interesting developments. The law, prior to Privy Council's decision in the Haw Tua Tua case in 1981, had been that the prosecution must prove the guilt of the accused beyond reasonable doubt before the defence is called. Lord Diplock, however, in that case, while interpreting the provision of the Criminal Procedure Code, stated that:

> "... so long as there is some evidence not inherently incredible, like the cow jumped over the moon, pointing towards the guilt of the accused, ... the accused must be called to make his defence. If he elects to remain silent, then the Court must consider the evidence again as a whole and determine whether the case has been proven beyond reasonable doubt."

There was much confusion in Malaysia after this decision. The Supreme Court of Malaysia in Khoo Hi Chiang v Public Prosecutor, 1994 Malaysia Law Reports, had

been referred this question of law. Supreme Court Judge Edgar Joseph held that the duty of the Court at the close of the prosecution's case is to undertake not a minimal evaluation of evidence tendered by the prosecution in order to determine whether or not the prosecution evidence is inherently incredible, i.e. the Haw Tua Tua test, but a maximum evaluation of such evidence to determine whether or not the prosecution had established the charge against the accused beyond all reasonable doubt. The court's view was based on the construction of Section 180 of our Criminal Procedure Act which reads:

> "When the case for the prosecution is concluded, the court, if it finds that no case against the accused has been made out which if unrebutted would warrant his conviction, shall record an order for acquittal or, if it does not so find, shall call on the accused to make his defence."

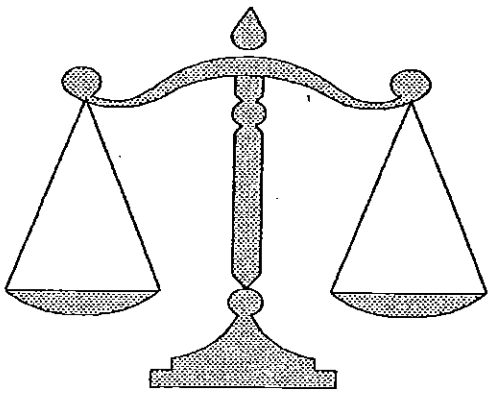
The Supreme Court held that the words "if unrebutted would warrant a conviction" mean a burden of beyond reasonable doubt at the stage of the prosecution itself.

The question is, what has that to do with the right to silence? In a way nothing and yet in another way everything. The right to silence during trial, after the close of the prosecution case and once called upon to make his defence, no longer exists. Should the accused remain silent, he will be convicted. He would have to speak or tender some evidence to raise a doubt in order to secure an acquittal. And yet the accused need not say anything, and simply wait for the prosecution to prove its case beyond reasonable doubt, at what is know in Malaysia as the prima facie stage.

CONCLUSION

I am of the view that one cannot look at the right to silence in isolation as it is so intertwined with the fabric of criminal law and the adversarial system. It is the adversarial process which brings about a confrontational attitude between the police and prosecution against the suspect and defence counsel. There is a mutual lack of trust and mutual non-disclosure. In reality, the police use their authority which the law provides, and discretion in areas not specified by law, to secure evidence which is useful only for the prosecution. The defence has to work and investigate on its own. This is evident in any jurisdiction with the adversarial system. It is hoped that, in the contest between the prosecution and the defence, the truth will emerge.

Thus the right to silence and the adversarial system go hand in hand to maintain a delicate balance of the scales of justice, defining the limits of state power vis-à-vis the citizen and ensuring a fair trial and a conviction based on evidence. Abolishing one or the other would leave us with an unbalanced system. Some may prefer an unbalanced

system; their view is decided by a philosophy that the guilty must be punished at whatever cost.

After all is said and done, the right to silence revolves around this philosophical question: whether you believe that it is better to allow ten guilty persons to go free than to punish one innocent person. The law so far has been based on that premise. That is why we have the right to silence, the presumption of innocence and the burden of proof beyond reasonable doubt. On this premise it is true to say the burden on the prosecution is a heavy one and the law favours the accused in the sense that the right to silence does not make the investigative process of the police any easier or improve the certainty of all criminals being brought to justice. But it does try to ensure that the innocent will not be punished along with the guilty.