Mr Hans TH 9/9/92 A copy for your inf. following my speaking to you on 8/9 - asking that you obtain a copy of the report & provide briefing material accordingly to Mr Whysall. Thanks TH 8/9.

FROM: J M LYON
AUS (CRIMINAL JUSTICE)
8 SEPTEMBER 1992

CONFIDENTIAL

cc: Mr Whysall
Mr Duncan

Miss Mills

UPHOLDING THE RULE OF LAW: THE HALDANE SOCIETY

The Secretary of State wishes shortly to hold a meeting with officials on the Haldane Society document "Upholding the rule of law?".

2. I should be grateful if you would co-ordinate preparation of the necessary briefing for those officials who will attend. This will require us to secure briefing on the following four main areas:

(i) the interrogation process - could you get a contribution from SPOB on the use of the Emergency Provisions legislation and from POB on the points made about the ICPC?

(ii) Diplock courts - I am not sure whether this is for POB or CJPB, but a commentary would be helpful;

(iii) the right to silence - this is for your Division to brief on;

(iv) the Casement Park trials - this again is for your Division. I see from other papers that you were expecting to put up advice on these cases in early September so I assume that you will be able to provide reasonably substantive briefing on this.

4. It would be helpful to have the relevant briefing material on these points by 11 September - assuming the Secretary of State's proposed meeting is not called earlier.

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CONFIDENTIAL

Upholding the rule of law?

NORTHERN IRELAND: criminal justice under the "emergency powers" in the 1990s

The Haldane Society of Socialist Lawyers

1992

THE RIGHT TO SILENCE

Introduction

The "right to silence" was for many years embedded as a fundamental safeguard for the rights of the suspect and the defendant, in the law of the United Kingdom. As a principle it sounds stronger than it is. All it really means is that if a suspect chooses not to answer questions put to him or her (usually by the police), no inference shall be drawn with respect to his or her guilt or innocence from such "silence". As for its rationale, various propositions are advanced. The most compelling are: (a) that it reflects the appropriate balance of power between state and individual - if inferences of guilt can be drawn from a suspects refusal to answer questions, the rule that the state must both bring and prove the case becomes a nonsense, as does the presumption of innocence and the privilege against self-incrimination; (b) historical experience, both in the UK and abroad, shows that to compel answers to questions leads to injustice, repression and, in some instances, to tyranny.

In November 1988 (by statutory instrument) the "right to silence" was abolished in Northern Ireland.[1] It is instructive to consider briefly the history of that abolition. Since the 1970's, three bodies, appointed by Parliament have reviewed the "right to silence". The first was the Criminal Law Review Committee which proposed its abolition. The Committee was made up as follows: three Lord Justices of Appeal, two High Court Judges, the Common Sergeant (the Chief Judge at the Old Bailey), the Chief Metropolitan Stipendiary Magistrate, the Recorder of Southend, the DPP, the legal adviser to the Home Office, three Professors of Law and one practising solicitor). Moreover, this body received no evidence from civil liberties or voluntary organisations. Nor did it commission or consider any empirical research.

The second body to review the "right to silence" was the Royal Commission on Criminal Procedure. It started its work in 1977 and reported in 1981. The members of the Commission were drawn from a wide base and included: the judiciary, the legal professions, the magistracy, the church and the trade union movement. It commissioned and subsequently published large quantities of empirical research on the subject. It recommended, by a majority, the retention of the "right to silence".

The third and last body to review the "right to silence" was a working group set up in May 1988 by the then Home Secretary, Douglas Hurd. Its terms of reference were not to consider the merits of the right, but to formulate the changes in the law necessary to abolish it. Before the working group had even received evidence, or reported in any way, the law was changed in November 1988 by the Criminal Evidence (Northern Ireland) Order 1988. The Government appointed Standing Advisory Commission on Human Rights (SACHR) first learnt of the order through the media and put on record in its 14th Annual Report its concern and disappointment.

The terms of the Order

The Criminal Evidence (Northern Ireland) Order 1988 is not an emergency measure. It is part of the general criminal law, i.e. it applies in proceedings in Northern Ireland in relation to any offence, whether under the "emergency" legislation or not.

The Order provides that the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences from the accused's silence as appear proper and, on the basis of such inferences, treat the silence as, or as capable of amounting to, corroboration of any evidence against the accused which is material. For the purposes of the Order, "silence" is: (1) a failure to mention particular facts when questioned, charged, etc (Article 3 of the Order); or (2) a refusal to be sworn in court or, having been sworn, to answer questions without good cause (Article 4); or (3) a failure or refusal to account for objects, marks on person, clothing, etc (Article 5); or (4) a failure or refusal to account for presence at a particular place (Article 6).

The Order provides certain "safeguards": (1) that the accused cannot be convicted of an offence solely on an inference from silence (Article 2(4)); (2) that a fact not mentioned when questioned, charged, etc. must be one which the accused could reasonably have been expected to mention (Article 3(1); and (3) that the accused cannot be compelled to give evidence in court on his own behalf and accordingly, in the event that he refuses to be sworn, he is not guilty of contempt (Article 4(5)).

The above stated provisions permit wide discretion. Judges and magistrates have to decide as a matter of law what inferences may properly be drawn and whether such inferences may constitute corroboration. Further, the tribunal of fact, ie a jury or judges and magistrates, have to decide whether or not to actually draw the inferences and whether or not the inference actually amounts to corroboration. It is noteworthy that despite the advice of the Home Secretary's working group (which eventually reported in part in 1989), no statutory guidance has been given in respect of this wide discretion.

The Operation of the Order.

The Criminal Evidence (Northern Ireland) Order 1988 came into effect on the 15th December 1988. After a cautious start, judges in Northern Ireland are becoming more and more willing to act on the terms of the Order. It was reported "that at the time of the implementation of the Order, that the judges were unhappy about the additional burden of deciding what inferences to draw from silence and to state and elaborate on these inferences", in their judgements. However, others, such as the Committee on the Administration of Justice explain, in part, the reluctance, as an indication of the judge's opposition to the manner in which the Order was introduced, virtually roughshod over the Northern Ireland establishment, including the judiciary.

This view was in fact born out in the delegation meeting with the Diplock judges. In particular Kelly LJ indicated that it had been accepted on the understanding that it would also be introduced on the mainland, and there was a clear sense of a feeling of betrayal on this issue amongst the judges. Over time, however, this has been replaced with the recognition of the usefulness of the Order in securing convictions, which (after all) was the intention of the government.

In fact it was not until October 1989 that the Order was first evoked to support a conviction (R v Gambel, Douglas, McKay, Boyd and others (27 October 1989). Before that, both LJ Nicholson and LJ Kelly had set themselves guidelines which perhaps reflects their initial concerns. In R v MacDonald, LJ Nicholson held that an inference should not be drawn under the Order unless the other evidence in a case "at least" amounted to evidence of "probable" guilt. LJ Kelly went further. In his judgment in R v Smith 20 October 1989), he stated that an inference under the Order should only be taken into account where the standard of evidence adduced by the prosecution without the inference rested on the brink of being "beyond reasonable doubt". In other words, in the early days, the inference was used as the final "weight" in an otherwise finely balanced case.

It is noteworthy that in R v Gambel, HHJ Caswell, drew an inference not from the defendant's refusal to answer police questions (he had done so), but from his decision not to testify in court. There was a strong body of opinion when the Order was introduced that, given the historical importance of the right not to testify, inferences in such circumstances would be lees readily drawn than when an accused person refused to answer police questions. Article 4 was again invoked in the case of R v O'Neil (17th May 1990). However, in that case Judge Shiel had already formed the view that there was a strong case against the defendant, and, although drawing an inference form his decision not to testify, the issue was very much an afterthought.

LJ Kelly used another "strong" case as an opportunity to make general remarks about the use of inferences. In R v Murray (18th January 1991; 28 October 1991 in the Court of Appeal), thumb-prints of the defendant and fibres from his clothing had allegedly been found on the car of a murder victim. LJ Kelly formed the view that at common law an inference could be drawn, relying on the case of R v Mutch (1972) 57 Cr App R 196. He went on to say that the Order was not limited to situations of "confess and avoid" (i.e. whether an explanation was clearly called for on the evidence), but that it might be used, and Parliament had intended it to be used, more generally. In the later case of R v McClernan (20 December 1990), LJ Kelly completed his turn-about from his earlier comments in R v Smith (above).. There the defendant, charged with possession of a fire-arm had refused to answer police questions for 6 days before making a partial confession on the 7th. In allowing an inference to be drawn, LJ Kelly said that he had never intended his judgment in R v Smith to limit the application of the Order - a refusal to

answer questions may be taken into account where it merely adds weight to the prosecution case.

The case of R v Morrison, Martin and others (8 May 1991) demonstrates very well the current thinking of the judiciary in Northern Ireland. The defendant had been charged with an offence of false imprisonment and conspiracy to murder. The evidence against him was that he had been arrested in the house next door to the house in which the victim had been held and had visited that house whilst the victim was being held there. The defendant refused to answer police questions. He did give evidence during the trial. His reason for refusing to answer questions was that, as a councillor, he had repeatedly advised suspects not to answer questions and that it was at the least hypocritical if he then went and did so. His counsel urged that where an innocent explanation is put forward no adverse inference should be drawn at all. On appeal the Lord Chief Justice refused to accept this proposition stating that Parliament had intended judges using the Order to apply their own common sense and that this was the only fetter on the discretion to be exercised.

The case of R v Morrison highlights a very real problem in Northern Ireland. Many people who are arrested refuse to speak to the police as a matter of principle. If charged, some refuse to testify in court, again as a matter of principle. Whether the principle is valid or not should be irrelevant. If it provides the reason for "silence" no adverse inference should be drawn. In a case observed by the Haldane Society whilst in Belfast, counsel was permitted to advance such a proposition. Since the judge reserved both his decision and reasons, we are unable to comment on the judicial reaction. However, it seems to us that it is at least open to a judge, and after R v Morrison likely, that a trial judge will reject the proposition on the grounds that counsel cannot give evidence and therefore no "reason" for "silence" is before the court and "common-sense" therefore prevails. In a region where political feeling runs high, we cannot emphasis strongly enough the potential injustice of such an approach.

Recommendations

The Haldane Society has always held the view that the "right to silence" should be preserved in England and Wales and re-instated in Northern Ireland, without regard to other "safeguards" of the system. Hence, for example, we reject the argument that the "right to silence" can be dispensed with in circumstances where a suspect has both a solicitor with him or her during interview and that interview is tape-recorded. However, without derogating from that view, the delegation wishes to highlight particular areas of concern drawn to our attention.

(i) Seamus Treacy, a barrister, argues that the introduction of the Order, through a Statutory Instrument, "under the guise of amending the general criminal law, the government in effect unconstitutionally introduced

provisions for dealing with "terrorism". It thereby avoided a full parliamentary debate. That is to say, the Ireland Constitution Act 1973, states that any provision which contains Emergency Powers, can only be introduced by an Act of Parliament and not an order in council.
In light of these features the willingness of the trial courts and the Court of Appeal to draw any inferences according to the Criminal Evidence (Northern Ireland) Order 1988 give us great cause for concern

(ii) The CAJ pointed out the particular disadvantage to the suspect who is arrested under s.11 of the Northern Ireland (Emergency Provisions) Act. This is a general power of arrest, under which the arresting officer is not obliged to tell the person details of why she or he is being arrested. Without this knowledge, the suspect is then expected to provide details of particular facts and account for objects, marks on the person, clothing etc, otherwise adverse inferences can be drawn at trial.

(iii) There was widespread concern amongst the organisations and lawyers that were visited that the Order has strengthened and given greater range to the powers of the security forces to extract confessions. This will inevitably disproportionately effect the weak and vulnerable, for whom silence was a real protection. It is therefore, not surprising that it was the view of Peter Madden, that most defence solicitors in Northern Ireland, when they had the opportunity, are still advising their clients to remain silent.

(iv) Another general concern was that the Order has strengthened the Prevention of Terrorism legislation as a means of gathering information. This is a purpose which is now hardly disguised, ie in 1986-87, 70% of those arrested under it's provisions were released without charge.

The introduction of the Order and the willingness of the trial judges and the Court of Appeal to draw inferences and find corroboration in silence was seen by the delegation as a major area of concern, in particular, that it should be used to bolster otherwise unsustainable convictions.

Finally it is the view of the delegation, that the abolition of the right to silence is a breach of Article 6(1) and 6(2) of the European Convention on Human Rights which guarantees respectively the right to fair trial and the presumption of innocence. It also violates the generally recognised principle that an accused person cannot be required to incriminate him or herself. This is expressly contained in the International Covenant on Civil and Political Rights, whch also states that a person shall have the right not to be co-erced into confessing (Article 14(3)(g)).

Postscript
Since the visit of the delegation, two alleged miscarriages of justice have come to the attention of the Haldane Society.

In the case of R v Kevin Sean Murray[2], an appeal against conviction for attempted murder and possession of a firearm with intent was dismissed. The Court of Appeal upheld the trial judge's approach of using the fact that Murray did not give evidence on his own behalf to bolster weak circumstantial forensic evidence in convicting him of the charge

The court held that "it is proper in an appropriate case for the court to draw the inference from the refusal of the accused to give evidence that there is no reasonable possibility of an innocent explanation to rebut the prime facie case established by the evidence adduced by the Crown and for drawing the inference ... that the accused is guilty".[3]

Brian McLernon has written from the Maze Prison detailing how his decision to remain silent during interrogation and trial contributed to his conviction for possession of a weapon with intent to endanger life and his subsequent sentence of 18 years. Ronan McCarten has also written from prison giving details of his conviction. At his trial there was no forensic evidence linking him to an arms find, but his use of his right to silence was used to corroborate an inference of joint enterprise.

Notes

1. The Criminal Evidence (Northern Ireland) Order 1988.

2. Northern Ireland Court of Appeal, 24th October 1991, currently under consideration by the House of Lords).

3. At p.69 of the judgement.