S39

Supreme Court of Ireland Decisions

Judgment

Title:	Sweeney v Ireland
Neutral Citation:	[2019] IESC 39
Supreme Court Record Number:	79/2018
High Court Record Number :	2014 6531 P
Date of Delivery:	28/05/2019
Court:	Supreme Court
Composition of Court:	O'Donnell Donal J., MacMenamin J., Dunne J., Charleton J., Finlay Geoghegan J.
Judgment by:	Charleton J.
Status:	Approved
Result:	Other

An Chúirt Uachtarach

The Supreme Court

O'Donnell J
MacMenamin J
Dunne J
Charleton J
Finlay Geoghegan J

Supreme Court appeal number: S:AP:IE:2018:000079

[2019] IESC 039

High Court record number: 2014 6531 P

[2017] IEHC 702

Between

Michael Sweeney

Plaintiff/Respondent

- and -

Ireland, the Attorney General and the Director of Public Prosecutions

Defendant/Appellant

- and intervening by leave of the Court -

The Irish Human Rights and Equality Commission

Judgment of Mr Justice Peter Charleton delivered on Tuesday 28 May 2019

1. By order dated 21 February 2018, the High Court declared unconstitutional section 9(1)(b) of the Offences Against the State (Amendment) Act 1998. The section imposes an obligation on those who are aware of evidence about certain defined and very serious crimes to come forward and help the authorities. The serious crime here in question was the murder of Thomas Ward at his residence in Joe McDonnell Drive, Cranmore, County Sligo on Monday 13 August 2007. In the judgment of the High Court of 23 November 2017, Baker J found the section to be incompatible with the Constitution. She, firstly, found that it infringed the right to silence. Secondly, she reasoned that it infringed the certainty principle. She held that it imposed obligations which were impermissibly vague but nonetheless were subject to penal sanction. By determination dated 24 October 2018, this Court granted leave to the State to directly appeal the High Court decision on the basis that "there were exceptional circumstances warranting a direct appeal" under Article 34.5.4Â° of the Constitution and also gave leave to extend the time for bringing the appeal.

Absence of evidence

2. This was a plenary action seeking declaratory relief. While not a judicial review, it was an attempt to pre-empt a criminal trial by seeking a ruling outside of the court of trial and in the High Court that the offence which the plaintiff Michael Sweeney faced was inconsistent with the Constitution. It is unsatisfactory that the factual circumstances were not the subject of any proper evidence or analysis in the High Court. That was not in any way the fault of Baker J. No evidence was called by either side. The plaintiff was facing a criminal charge under section 9(1)(b) of the 1998 Act. On such a charge, a book of the evidence against an accused is prepared and served on him or her, the plaintiff in this case. The High Court was expected to determine such a serious issue as

the compatibility of a section of a criminal statute with the fundamental rights provisions of the Constitution in the absence of any clear analysis of what the circumstances leading to the charge were and what exactly the evidence proposed against the person accused was to be. It should be clearly stated that any issue as to whether a charge was capable of being dealt with in a constitutional fashion and as to whether there had in fact been any trammelling on the right to silence or undermining of the privilege against self-incrimination could only be analysed in the context of the nature of the evidence which the State proposed to lead against Michael Sweeney. Instead, facts were agreed by the State on the basis of a statement of claim from the plaintiff. The full facts, however, as to how the prosecution might construct such a charge were not put before the High Court, or on appeal before this Court. Since the case was about the right to silence, in the sense of not obliging a citizen to incriminate himself or herself, the central issue was whether the State was proposing to rely on any statement generated in consequence of a statutory compulsion. It is agreed, however, that the plaintiff Michael Sweeney never made any statement incriminating himself; neither when arrested nor before his arrest and, furthermore, that he never offered any assistance to the authorities as to the circumstances leading to the murder of Thomas Ward or as to those who may have been responsible.

3. Properly, the forum to adjudicate the interpretation of any criminal offence and the admissibility of any evidence in support of it is the court of trial. Within that forum, the trial judge has the advantage of access to the entirety of the book of evidence and may also call for any other statement or correspondence that is relevant to such adjudication. In some European criminal law systems, statements taken by police officers from witnesses and the results of relevant enquiries are referred to as the file. Our common heritage is the access by any judge adjudicating on a criminal charge to that file. Both the High Court and this Court on appeal were deprived of such access. Central to the role of a trial judge is hearing submissions on the nature of a charge and ruling on the ingredients of an offence: what conduct constitutes the crime, both as to its external element and its mental element. Based upon that analysis, the trial judge is in a position to adjudicate on the admissibility of evidence in the context of whatever case being brought by the prosecution. This is set out in our system in the book of evidence, and in kindred systems, in the investigation file. If a claim is made, for instance, that a particular item of evidence should not be admitted, that can be seen within the setting of the case being made, and, if an answer to that case is then forthcoming from the accused, any relevant response can also be considered by the trial judge.

4. In *CC v Ireland* [2006] 4 IR 1, two persons who had not yet been returned for trial, and against whom no indictment had been laid, challenged the constitutionality of sections of the Criminal Law (Amendment) Act 1935 relating to offences with which they had been charged of under-age sexual relations, including with a girl of 14 years. The accused persons wished to raise a defence that they were mistaken as to the age of the girls and asserted that a mistake made in good faith that the girls were of full age for consent to sexual relations entitled them to an acquittal. Absent such a defence of genuine mistake, they claimed that the relevant legislation was contrary to the Constitution. The majority of the Supreme Court were clear that the function of the trial judge was to interpret legislation and to rule on the admissibility, or otherwise, of any defence evidence as to the state of mind of the accused. Nonetheless, the High Court, in the context of a judicial review, and not as the court of trial, had adjudicated on the matter and held that knowledge as to the age of the victims in the context of under-age sexual relations offences was not an element of the offence. In the Supreme Court, Geoghegan J felt constrained to entertain an appeal, but stated at paragraph 95 that he felt "great sympathy with" the proposition that any such "substantive issue should be raised at the trial and not in judicial review proceedings." Fennelly J expressed this view at paragraph 134 as follows:

> It is, of course, commonplace for applications to be made to prohibit criminal trials. Such applications are brought by way of Judicial Review. It is, however, quite inappropriate and a usurpation of the function of the court of trial for an accused person-or the prosecution, for that matter- to seek advance rulings from the High Court as to how any legal provisions should be interpreted in the course of a pending trial. It happens that the present case concerns a trial pending in the Circuit Criminal Court. Judicial Review is not available at all in respect of a trial pending in the Central Criminal Court (the High Court). The proper forum for the determination of legal matters arising in the course of trial is the trial court itself, subject to appeal to the Court of Criminal Appeal. The learned trial judge has, however, ruled on those matters. He has delivered a considered judgment on the interpretation of the relevant sections. As Geoghegan J says in his judgment, the Circuit Court may feel bound by the views of Smyth J. They may also be considered binding, rightly or wrongly, not only in this but in other cases. It may be a long time before this Court has an opportunity to consider the substance of the matter. In the ordinary way, decisions of the High Court are open to appeal to this Court. In these exceptional circumstances, I am satisfied that the Court must entertain the appeal.

5. This Court is in the same position. It can be that the case made is that legislation is so clearly unconstitutional that the particular factual matrix of the person challenging the legislation is not relevant beyond establishing their standing to bring the case. That would be a rare circumstance and it is not so here. Background facts to the murder are set out neither in the statement of claim or in the defence. All that is pleaded is that the plaintiff Michael Sweeney is facing the impugned charge. What is, in any event, capable of inference from what has been furnished to the Court, is that the plaintiff was suspected in the sense of having either some involvement in the commission of the offence or, in the alternative, that his connection with the motor vehicle that may have been used in the murder led to the gardaí having issues as to why he had not passed on information which they suspected that he had. There are factual gaps which could have been, and should have been, filled by evidence. Faced, however, with a situation where legislation passed by the Oireachtas has been declared by the High Court to be incompatible with the Constitution, there is no option for this Court but to adjudicate on the appeal. Since it is not the function of the courts under our Constitution to entertain either academic issues or to try cases where the applicant for relief is not personally affected by legislation, despite this grave departure from established law, such facts as may be pieced together from the submissions on both sides are necessary to any further analysis. It is always required of those who seek to claim that legislation is unconstitutional to establish that not simply as a matter of abstract legal reasoning but by evidence, not just with a view to establishing standing to challenge the law, but also to enable a court to look at the particular circumstances as part of its analysis as to whether any particular criminal statute infringes fundamental rights. Particular facts thus matter. Part of the duty on the High Court in considering a constitutional challenge is the extent to which the terms of legislation are inflexible or may, instead, be met by a construction which accords with the Constitution and which disposes of the complaint made as to infringement of rights. There is a duty to engage with the evidence; *Nash v Director of Public Prosecutions* [2015] IESC 32 at paragraphs 14-15. Hardiman J emphasised the need to engage with the evidence on multiple occasions, such as in *Scully v DPP* [2005] 1 IR 242, where he stated that all the applicant in that case had done was merely "invoke the possibility that exculpatory evidence at one time existed". Citing Finlay CJ in *Z v Director of Public Prosecutions* [1994] 2 IR 476 at 507, he stated that an applicant must instead actually "establish a real risk of an unfair trial".

Background facts

6. The late Thomas Ward was brutally killed at his residence in County Sligo in the early hours of 13 August 2007. He had been attacked with an instrument which left injuries suggesting the use of a hatchet or a slash hook; and witnesses apparently described the latter as having been deployed by the assailants. Witnesses to the events leading to this murder identified a Ford Focus motorcar as being the means of transport for those involved to the scene of the crime. Apparently, on retreating from the scene of the murder, this car collided with a wall and then the attackers, as the State submissions put it, made good their escape. It seems that the State hopes to prove that trace elements, possibly layers of paint, will establish the itinerary of the relevant vehicle and its contact with the collision site. At some date, the State submissions merely state that "shortly after the murder", the gardaí stopped a Ford Transit van in which was the plaintiff Michael Sweeney. The submissions do not say if he was driving. In that van, according to the State, was a set of keys. These were tested on the Ford Focus car and found to fit it.

7. Cautioned that he "was not obliged to say anything unless" he wished to do so but that "anything said may be used in evidence" against him, Michael Sweeney was interviewed by gardaí on 16 August and 14 September 2007. He made no relevant comments. He was arrested on 30 November 2007 and interviewed on four occasions subject to the same caution. He said nothing about the murder or any involvement in it or anything that might be known to him about the murder of Thomas Ward or about the Ford Focus car apparently involved.

8. On behalf of Michael Sweeney, it was pleaded before the High Court on this constitutional challenge that he was a suspect in the murder investigation and was arrested and cautioned that he could exercise his right to silence. It was pleaded that at "no time during the course of his detention … following his arrest … or at any other time was [he] told [by the gardaí] that he was obliged by law to answer any question or provide any information to" to the authorities.

9. Ultimately, there was not any evidence, it seems, for the authorities to charge Michael Sweeney with murder. Instead, a book of evidence was served on him and he was charged with failing to disclose information about a very serious crime. He was returned for trial on this charge to Sligo Circuit Criminal Court on 30 January 2014. The charge read:

> [That you Michael Sweeney] on the dates between 13/08/2007 and the 01/12/2007 in the State did fail without reasonable excuse to disclose as soon as practicable to a member of An Garda Síochána information which [he] knew or believed might be of material assistance in securing the apprehension, prosecution or conviction of any other person for a serious offence to wit an offence that involved the loss of human life, namely the killing of Tom Ward.

10. The plenary summons challenging the constitutionality of section 9(1)(b) was issued on 25 July 2014 and a statement of claim followed on 28 January 2015. The State filed a short defence denying unconstitutionality on 20 March 2015. The delay in bringing the matter to trial by the State is unexplained.

The legislation

11. Section 9 of the Offences Against the State (Amendment) Act 1998 provides:

(1) A person shall be guilty of an offence if he or she has information which he or she knows or believes might be of material assistance in—

> (a) preventing the commission by any other person of a serious offence, or
>
> (b) securing the apprehension, prosecution or conviction of any other person for a serious offence

and fails without reasonable excuse to disclose that information as soon as it is practicable to a member of the Garda Síochána.

(2) A person guilty of an offence under this section shall be liable on conviction on indictment to a fine or imprisonment for a term not exceeding five years or both.

(3) In this section "serious offence" has the same meaning as it has in section 8.

12. A serious offence, pursuant to section 8, is one "for which a person of full age and capacity and not previously convicted may, under or by virtue of any enactment, be punished by imprisonment for a term of 5 years or by a more severe penalty" and which "involves loss of human life, serious personal injury (other than injury that constitutes an offence of a sexual nature), false imprisonment or serious loss of or damage to property or a serious risk of any such loss, injury, imprisonment or damage". This includes any "act or omission done or made outside the State that would be a serious offence if done or made in the State." The only aspect of the definition, however, in relation to which the plaintiff Michael Sweeney has standing to challenge is that related to murder or manslaughter. Both have clear definitions. Both forms of homicide carry life imprisonment and for an unlawful killing where the accused intended to kill the victim or to cause the victim serious harm, the penalty is a mandatory sentence of life imprisonment; Criminal Justice Act 1964, section 4.

13. Properly construed, it is an offence for someone who realises, either through knowing or believing, that he or she has information that might be of material assistance in preventing any other person committing a serious offence, or that he or she has information that might be of assistance in apprehending, prosecuting or convicting any other person for such a serious offence, not to disclose that information in a timely fashion to the police. A person does not have to disclose such information if they have a reasonable excuse.

14. In terms of the construction of the offence on the second limb, sub-subsection (b), "securing the apprehension, prosecution or conviction of any other person for a serious offence", the prosecution must prove precise and clearly defined elements. These are: firstly, that a serious offence was committed, secondly that it was committed by a person or persons other than the accused, thirdly that the accused had information which was of material assistance to apprehending or proceeding against that person or persons, fourthly that the accused was aware that he or she had such information in the sense that they both had the information and knew or believed that it might be of assistance to the authorities, fifthly that the accused made no disclosure of that information to the authorities, and sixthly that the accused had no reasonable excuse for not so disclosing. The mental element in this offence is subjective. It is not what a reasonable person would know or believe, it is not reasonably believing that information may assist, but instead depends on the perception of the accused. Thus, a person who does not reason out that the information they have might be of material assistance is not guilty where a person who came to that realisation would infringe the section by not coming forward.

15. While ostensibly appearing as capable of being construed as a defence, in fact it is an element of the offence requiring to be proven by the prosecution that the accused, as a person in possession of information of material assistance in the investigation of a serious offence, had no reasonable excuse for not assisting the authorities. Even were it a defence, once the accused can point to any evidence upon which a defence can be based, either on the prosecution case or by calling testimony, the burden of disproving it is on the prosecution. Explaining that burden of adducing evidence in the context of the justificatory defence of the lawful use of self-defence in *The People (AG) v Quinn* [1965] IR 366 at 382, Walsh J stated:

> When the evidence in a case, whether it be the evidence offered by the prosecution or by the defence, discloses a possible defence of self-defence the onus remains throughout upon the prosecution to establish that the accused is guilty of the offence charged. The onus is never upon the accused to raise a doubt in the minds of the jury. In such case the burden rests on the prosecution to negative the possible defence of self-defence which has arisen and if, having considered the whole of the evidence, the jury is either convinced of the innocence of the prisoner or left in doubt whether or not he was acting in necessary self-defence they must acquit.

16. On a search of irishstatutebook.ie for comparable legislation in Ireland, the phrase "without reasonable excuse" engages over 200 sections of primary legislation and 300 sections of secondary legislation.

Participation in a crime

17. It is not an offence at common law to be present at the scene of a crime. To be a witness is not an offence; whether a person is in a position to later give evidence about witnessing the crime actually being carried out or merely to helpfully testify as to some aspect of fact that is part of the jigsaw that links in a perpetrator to the commission of a crime. Those who may have "information which he or she knows or believes might be of material assistance in … securing the apprehension, prosecution or conviction of any other person for a serious offence" would include those who saw the Ford Focus car at the scene of the murder, or who may have seen the plaintiff Michael Sweeney exiting it when it crashed, or the police investigators, or others who happen on facts that may build a case. The leading case of *R v Coney* (1882) 8 QBD 534 is authority for the proposition that merely being at the scene where others are committing an offence does not constitute an offence. As Hawkins J stated in that case at page 557-8: "It is no criminal offence to stand by, a mere passive spectator of a crime, even of a murder." This statement was recently endorsed in this jurisdiction by the Court of Appeal in *DPP v Collopy* [2016] IECA 149. It is also rare for the common law to require those who witness the commission of an offence to intervene. Absent statutory intervention, no one is ordinarily obliged to take on the role of Good Samaritan. A close connection to others can mean that an obligation of intervention, or of care, can arise. This extends to a situation where a man hires a prostitute for a party, and subsequently fails to come to her aid when she falls ill. In such a case, he may be guilty of manslaughter. On this point see *R v Russell* [1933] VLR 59, *Ex P Parker* [1957] SR 326, *R v Clarke and Wilton* [1959] VR 645 and *R v Nixon* (1990) 57 CCC (3d) 97. It is unnecessary to provide any fuller analysis in the context of this appeal.

18. Participation in a crime requires that some aid be given in the commission of a crime through supplying some facility for its perpetration, which is the external element, while realising that this is the purpose of giving that aid, which is the mental element. Assistance in the commission of a crime can range from participation as a principal, such as being the person who drives a getaway car from the scene of a robbery committed in concert with others, to supplying that car in the awareness that it is to be used to that end, to disposing of the car afterwards in order to frustrate an investigation, to assisting

the perpetrators to escape. It can sometimes happen that a difficult question can emerge as to who may be given the status of accomplice to a crime. In cases where some witness to a crime is sought to be called by the prosecution, and especially where a witness is a relative by blood or affection to the perpetrator, in order to achieve a warning about the danger of acting on the uncorroborated evidence of an accomplice, the defence in criminal trials will sometimes argue for such a person to be regarded as an accomplice and that the jury be warned by the trial judge that it is dangerous to rely on the uncorroborated evidence of an accomplice witness; thus perhaps weakening the prosecution case. In essence, an accomplice, and hence a participant in a crime, is someone who gives some positive assistance, coupled with the realisation that such assistance will aid in the commission of that crime; see the analysis by Eichelbaum CJ for the New Zealand Court of Appeal in *R v Schreiek* [1997] 2 NZLR 139 at 153 and *People (DPP) v Madden* [1977] IR 336 at 352 per O'Higgins CJ and *The People (DPP) v FitzGerald* [2018] IESC 58 at paragraphs 11-29.

Similar legislation

19. In the submissions before the High Court, attention was drawn to cognate national legislation. Furthermore, it was also pointed out that this kind of offence has its origin in the common law concept of misprision of felony. The definitional elements of that crime closely reflect the elements of the section which the High Court was being asked to condemn. On further analysis, comparative and antecedent formulations of the duty in very serious crimes of citizens to assist investigations also assume an importance in the analysis of the section. In addition to the offence challenged, there are other offences whereby persons in Ireland are required to disclose information. Most obviously, the abuse of children for perverted sexual gratification, by which they are the victims of sexual violence, has been a serious problem in this and in other countries. It is an offence that results in a lifelong blight for many victims. Experience has shown that the nature of perpetrators very often leads to multiple reoffending and the ensnaring of several other victims. Hence, it is appropriately within the scope of a legislative obligation to require those to whom such an offence is disclosed to report it. The effect may be predicted to be the prevention of further similar crimes taking place. Section 2 of the Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Act 2012 penalises those who, inter alia, know or believe that murder, manslaughter and sexual offences have been committed but fail without reasonable excuse to report information that might be of material assistance to the authorities. Section 3 casts identical obligations in relation to sexual offences against vulnerable persons. Unlike section 9 of the 1998 Act, these sections each contain the following provisos, here quoting part of section 2:

> (4) This section is without prejudice to any right or privilege that may arise in any criminal proceedings by virtue of any rule of law or other enactment entitling a person to refuse to disclose information.
>
> (5) For the avoidance of doubt it is hereby declared that the obligation imposed on a person by subsection (1) to disclose information that he or she has to a member of the Garda Síochána is in addition to, and not in substitution for, any other obligation that the person has to disclose that information to the Garda Síochána or any other person, but that subsection shall not require the first-mentioned person to disclose that information to the Garda Síochána more than once.

20. Depending upon the serious need to require the assistance of those in the State, legislation tends to be cast in different terms. Section 15 of the Criminal Justice Act 1984 as amended addresses the necessity to control firearms. It provides:

> (1) Where a member of the Garda Síochána—

(a) finds a person in possession of any firearm or ammunition,

(b) has reasonable grounds for believing that the person is in possession of the firearm or ammunition in contravention of the criminal law, and

(c) informs that person of his belief,

he may require that person to give him any information which is in his possession, or which he can obtain by taking reasonable steps, as to how he came by the firearm or ammunition and as to any previous dealings with it, whether by himself or by any other person.

(2) If that person fails or refuses, without reasonable excuse, to give the information or gives information that he knows to be false or misleading, he shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding € 5,000 or to imprisonment for a term not exceeding twelve months or to both.

(3) Subsection (2) shall not have effect unless the accused when required to give the information was told in ordinary language by the member of the Garda Síochána what the effect of his failure or refusal might be.

(4) Any information given by a person in compliance with a requirement under subsection (1) shall not be admissible in evidence against that person or his spouse in any proceedings, civil or criminal, other than proceedings for an offence under subsection (2).

21. A similar obligation to disclose information exists in the context of financial crime under section 19 of the Criminal Justice Act 2011. This provision is almost identical in wording to section 9 of the 1998 Act and does not provide for any defence:

(1) A person shall be guilty of an offence if he or she has information which he or she knows or believes might be of material assistance in—

(a) preventing the commission by any other person of a relevant offence, or

(b) securing the apprehension, prosecution or conviction of any other person for a relevant offence,

and fails without reasonable excuse to disclose that information as soon as it is practicable to do so to a member of the Garda Síochána.

22. Section 19 of the Criminal Justice (Theft and Fraud Offences) Act 2001 also provides that:

(1) Where a member of the Garda Síochána—

(a) has reasonable grounds for believing that an offence consisting of stealing property or of handling stolen property has been committed,

(b) finds any person in possession of any property,

(c) has reasonable grounds for believing that the property referred to in paragraph (b) includes, or may include, property referred to in paragraph (a) or part of it, or the

whole or any part of the proceeds of that property or part, and

(d) informs the person of his or her belief, the member may require the person to give an account of how he or she came by the property.

(2) If the person fails or refuses, without reasonable excuse, to give such account or gives information that the person knows to be false or misleading, he or she is guilty of an offence and is liable on summary conviction to a fine not exceeding €5,000 or imprisonment for a term not exceeding 12 months or both.

23. Section 52 of the Offences Against the State Act 1939 provides for the giving of information by suspects in custody. For that reason, and by reason of the potential later use of such information in proceedings against that person, it raises the problems that are specifically referenced later in this judgment. Here, it must be remembered, Michael Sweeney said nothing relevant to the authorities. It states:

(1) Whenever a person is detained in custody under the provisions in that behalf contained in Part IV of this Act, any member of the Garda Síochána may demand of such person, at any time while he is so detained, a full account of such person's movements and actions during any specified period and all information in his possession in relation to the commission or intended commission by another person of any offence under any section or sub-section of this Act or any scheduled offence.

(2) If any person, of whom any such account or information as is mentioned in the foregoing sub-section of this section is demanded under that sub-section by a member of the Garda Síochána, fails or refuses to give to such member such account or any such information or gives to such member any account or information which is false or misleading, he shall be guilty of an offence under this section and shall be liable on summary conviction thereof to imprisonment for a term not exceeding six months.

24. Other legislation enables inferences to be drawn from marks on a person's body or items in their possession, coupled with their failure to offer an explanation when challenged. Thus section 18 of the Criminal Justice Act 1984 provides:

(1) Where in any proceedings against a person for an arrestable offence evidence is given that the accused —

(a) at any time before he or she was charged with the offence, on being questioned by a member of the Garda Síochána in relation to the offence, or

(b) when being charged with the offence or informed by a member of the Garda Síochána that he or she might be prosecuted for it,

was requested by the member to account for any object, substance or mark, or any mark on any such object, that was —

(i) on his or her person,

(ii) in or on his or her clothing or footwear,

(iii) otherwise in his or her possession, or

(iv) in any place in which he or she was during any specified period,

and which the member reasonably believes may be attributable to the participation of the accused in the commission of the offence and the member informed the accused that he or she so believes, and the accused failed or refused to give an account, being an account which in the circumstances at the time clearly called for an explanation from him or her when so questioned, charged or informed, as the case may be, then, the court, in determining whether a charge should be dismissed under Part IA of the Criminal Procedure Act 1967 or whether there is a case to answer and the court (or, subject to the judge's directions, the jury) in determining whether the accused is guilty of the offence charged (or of any other offence of which he or she could lawfully be convicted on that charge) may draw such inferences from the failure or refusal as appear proper; and the failure or refusal may, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any evidence in relation to which the failure or refusal is material.

(2) A person shall not be convicted of an offence solely or mainly on an inference drawn from a failure or refusal to account for a matter to which subsection (1) applies.

(3) Subsection (1) shall not have effect unless —

(a) the accused was told in ordinary language when being questioned, charged or informed, as the case may be, what the effect of the failure or refusal to account for a matter to which that subsection applies might be, and

(b) the accused was afforded a reasonable opportunity to consult a solicitor before such failure or refusal occurred.

(4) Nothing in this section shall, in any proceedings —

(a) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his or her presence relating to the conduct in respect of which he or she is charged in so far as evidence thereof would be admissible apart from this section,

(b) be taken to preclude the drawing of any inference from the silence or other reaction of the accused which could properly be drawn apart from this section, or

(c) be taken to preclude the drawing of any inference from a failure or refusal to account for the presence of an object, substance or mark or for the condition of clothing or footwear which could properly be drawn apart from this section.

(5) The court (or, subject to the judge's directions, the jury) shall, for the purposes of drawing an inference under this section, have regard to whenever, if appropriate, the account of the matter concerned was first given by the accused.

(6) This section shall not apply in relation to the questioning of a person by a member of the Garda Síochána unless it is recorded by electronic or similar means or the person consents in writing to it not being so recorded.

(7) Subsection (1) shall apply to the condition of clothing or footwear as it applies to a substance or mark thereon.

(8) References in subsection (1) to evidence shall, in relation to the hearing of an application under Part IA of the Criminal Procedure Act 1967 for the dismissal of a charge, be taken to include a statement of the evidence to be given by a witness at the trial.

(9) In this section 'arrestable offence' has the meaning it has in section 2 (as amended by section 8 of the Criminal Justice Act 2006) of the Criminal Law Act 1997.

25. In a similar way to section 18, just quoted, section 19 of the 1984 Act enables inferences to be drawn from a person's presence at what may be described as the scene of a crime, while section 19A enables inferences to be drawn from failure to mention a fact while being interviewed that is subsequently relied on in a criminal trial. A proper construction of these provisions requires that an inference may only be drawn, firstly, if it is proper to do so, and, secondly, it is clear that silence of itself in the context of such mark or the possession of such an implement as may give rise to such inference is insufficient for conviction; *Rock v Ireland* [1997] 3 IR 484. What these provisions as to inference thus have in common is that they are only evidence and are insufficient of themselves to provide sufficient proof for a conviction.

26. While these sections are put within a comparative context, no comment is made as to any analysis of any of this legislation from the point of view of the Constitution or compatibility therewith.

Other jurisdictions

27. Our Constitution declares at Article 9.3 that: "Fidelity to the nation and loyalty to the State are fundamental political duties of all citizens." Every nation is required to rely on the cooperation of its people to ensure that the law is upheld. In practical terms, this translates to the fact that any citizen who is competent to give evidence can be compelled to give evidence in court proceedings; although in most cases witnesses who come forward with information are doing so voluntarily. Criminal litigation is a coercive exercise of State power. Witnesses are obliged to testify and to tell the truth. Knowing deceit on oath or affirmation as to a material fact constitutes the crime of perjury. All litigation is about uncovering the truth within a forum where, as Immanuel Kant puts it, the duty to tell the truth "is unconditional and the supreme juridical condition in testimony"; Critique of Practical Reason (Chicago, 1949), 347. Hence, the court is entitled to the evidence of every man and every woman who can assist it in the determination of issues before it; see *DPP v JT* (1988) 3 Frewen 141 in relation to the compellability of a spouse to give evidence for the prosecution against another spouse in a criminal trial where the charge was sexual violence against their child.

28. Balancing on the opposite fide of the scales to the principles of civic fidelity and cooperation to ensure legal order is the requirement that harassment, control and

invasion of privacy of citizens by national authorities do not characterise our society. The European Convention of Human Rights at Article 8 provides for the right to respect for private and family life of all persons. Such rights are however not absolute, as Article 8 clearly envisages certain situations in which the right to privacy can be interfered with. Article 8(2) provides that public authority can interfere where this is:

> in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

29. In cases where an interference with Article 8 rights is being alleged, the Court first considers whether a measure is in accordance with the law. In this context, it is the quality of the law which is important; *Halford v United Kingdom* [1997] 24 EHRR 523 at paragraph 49. The relevant provision of domestic law must be clear, foreseeable, and adequately accessible; *Silver v United Kingdom* (1991) 13 EHRR 582 at paragraph 87. Foreseeability does not equal certainty, but instead foreseeability to a reasonable degree; *Slivenko v Latvia* [2004] 39 EHRR 24 and *Dubská and Krejzová v Czech Republic* [2016] 42 BHRC 654. A finding that a measure is not in accordance with the law suffices for the Court to hold that there has been a violation of Article 8, and any further examination as to whether the interference in question pursued a "legitimate aim" or was "necessary in a democratic society" is not required in such circumstances; see *MM v Netherlands* [2004] 39 EHRR 19 at paragraph 46 and see also *Solska and Rybicka v Poland* ECHR case 30491/20 (09) at paragraph 129. If a measure is found to be in accordance with law, then the State must show that the interference pursued a legitimate aim; *Mozer v Republic of Moldova and Russia* ECHR case 11138/1023/02/2016 at paragraph 194. In *Hatton v United Kingdom* (2003) 37 EHRR 28, for example, the Court found at paragraph 121 that economic well-being and the protection of the rights and freedom of others was a legitimate aim in the context of a large government project to expand an airport.

30. In determining whether an interference with Article 8 rights is "necessary in a democratic society", the Court conducts a balancing exercise between the interests of the member State and the applicant's contended-for Convention right. Any restriction must be proportionate to the legitimate aim pursued if it is to be considered necessary in a democratic society; *Dudgeon v United Kingdom* [1981] 4 EHRR 149 at paragraphs 51-53. The Court must also look at whether the reasons given to justify an interference with Article 8 rights are relevant and sufficient; *Z v Finland* [1997] 25 EHRR 371 at paragraph 94. The Court also considers the margin of appreciation afforded to the State authorities in implementing Convention rights, but States are required to demonstrate that there is a pressing social need for the interference; *Piechowicz v Poland* (2015) 60 EHRR 24 at paragraph 212. For example, it is clear that the prevention of terrorism comes within the scope of Article 8(2) as it concerns the pursuit of the legitimate aims of protecting national security and preventing "disorder or crime"; *Erdem v Germany* [2002] 35 EHRR 15.

31. The Court has referred to the duty to give evidence at criminal trials as something which "is ordinarily a normal civic duty in a democratic society governed by the rule of law"; *Voskuil v Netherlands* (2007) 24 BHRC 306 at paragraph 86. This case also cited the decision of the Commission in *British Broadcasting Corporation v United Kingdom* , no 25798/94, Commission decision of 18 January 1996 in which it was stated that:

> any person may be called on to give evidence as to matters witnessed by him, and, at least to the extent that he is not required to say anything which may incriminate himself, may be compelled to give evidence in the interests of the fair and proper administration of justice. The order

> requiring the giving of such evidence does not involve the determination of any civil obligations of the witness.

32. It is clear that there can be exceptions to such civic duty; *Van der Heijden v Netherlands* [2013] 57 EHRR 13. A suspect in a crime, to take the most obvious example, enjoys under Article 6 a right to silence and the privilege against self-incrimination. This requires further consideration as to its interaction with any obligation of cooperation with the criminal justice system.

33. In the context of civic duties, some crimes, such as the murder in this case, may be so grave and the nature of their commission may be such as to engage the population beyond the ordinary run of a criminal conspiracy. To fail to assist in the prevention of or the detection of serious crime may subvert the very nature of the legal order. To require cooperation in such circumstances can constitute a proportionate response to a threat to the national order. The principle behind laws which require citizens to cooperate with their nation in such circumstances is perhaps that it is not enough to stand by and fail to report what is known about the commission of truly grave offences which violate the human rights of others or which undermine national stability.

34. The facts of *R v Donnelly* [1986] NI 54 illustrate that principle. The accused lived with his mother on a farm near Omagh in Northern Ireland. In July 1983, his mother noticed some beer barrels in an outhouse and drew these to his attention. Seeing them, he knew that they were part of an explosive device. He contacted a member of a terrorist group and was told that the barrels would be removed shortly. The next day four members of the security forces were murdered on a roadway by an explosion carried out by members of the terrorist group using the barrels. Section 5(1) of the Criminal Law Act (Northern Ireland) 1967 provided:

> Subject to the succeeding provisions of this section, where a person has committed an arrestable offence, it shall be the duty of every other person, who knows or believes -
>
> > (a) that the offence or some other arrestable offence has been committed; and
> >
> > (b) that he has information which is likely to secure, or be of material assistance in securing, the apprehension, prosecution or conviction of any person for that offence;
>
> to give that information, within a reasonable time, to a constable and if, without reasonable excuse, he fails to do so he shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment according to the gravity of the offence about what he does not give that information.

35. In *Donnelly* , the accused was charged with possession of the explosives and with an offence of failing to give information contrary to the 1967 Act. The limitation in the legislation now at issue is that a person is only guilty under the section who "without reasonable excuse" does not come forward "to disclose that information as soon as it is practicable to a member of the Garda Síochána". A limitation read into the legislation by Hutton J was that a person could not be guilty of the offence under the 1967 Act where such person had a reasonable excuse for not coming forward. That would include a situation where, by coming forward, the accused would render themselves liable to prosecution due to participation in the offence. There was no obligation within the section to incriminate oneself. The burden of proving an absence of reasonable excuse was on the prosecuting authorities. It was not a defence, however, for an accused

person to raise a strained interpretation of participation with a view to excusing the fact that he or she had not come forward. At page 59 Hutton J stated:

> However I make it clear that in my opinion the defence of reasonable excuse based upon the principle that a man is not bound to incriminate himself will only be valid where there is a genuine risk that the information would tend to incriminate the person and make liable to prosecution. A person should not be able to raise the defence of reasonable excuse successfully where the possibility of his being prosecuted by reason of the information he might give is fanciful and artificial.

36. An example may help elucidate this approach. A person is not obliged to come forward and to state that he or she was involved in a shooting in which a suspected drug dealer was killed. To construct such a compulsion would infringe the entitlement to silence as a shield against self-incrimination. Nor is a person required to disclose that he or she supplied the gun used in the offence. In ordinary litigation of a civil or a criminal kind, in this jurisdiction judges are astute to warn witnesses who are asked a question the result of an answer to which may involve an admission that they had committed a crime that they are not obliged to answer any question which may incriminate them. A witness has a reasonable excuse in this context not only by being involved in the murder or in the supply of the gun for the murder, hence as a participant, but would also not be obliged to answer a question which would reveal that they were a drug dealer. To elucidate: they are not obliged to come forward, and would have a "reasonable excuse" if the information they supply reveals them as engaging in another crime by reason of which they were witness to the murder in issue. A telling illustration is the film Absolute Power (Eastwood, 1967) where a concealed burglar unexpectedly witnesses a murder. But, the excuse must be reasonable; it cannot as Hutton J implies, be falsely invoked. The circumstances in which a witness is entitled to refuse to answer a question on grounds that he or she fears the answer may incriminate him or her are well established. Any such circumstances would, following the approach of Hutton J, be a reasonable excuse, which, moreover, the prosecution would have to exclude beyond reasonable doubt. Section 11(1) of the Prevention of Terrorism (Temporary Provisions) Act 1976 made it an offence in Great Britain to fail without reasonable excuse to disclose information which a person knows or believes might be of material assistance in securing the apprehension, prosecution or conviction of any person for an offence involving the commission, preparation or instigation of an act of terrorism. What constituted terrorism received a statutory definition. This provision, in contrast to that under consideration on this appeal, enabled a prosecution even though the accused had gained information in consequence of being a participant in the crime; see Smith and Hogan - Criminal Law (5th edition, London, 1984) at page 799. A further contrast with the legislation at issue on this appeal particularly arises as regards the burden cast on the prosecution of proving the absence of a reasonable excuse. This provision under the 1976 Act was revived through the insertion of section 38B into the Terrorism Act 2000 by section 117 of the Anti-Terrorism Crime and Security Act 2001, and remains in force. Section 38B criminalises a failure to disclose information that would be of material assistance in the prevention of an act of terrorism, or in securing the apprehension of a perpetrator involved in the "commission, preparation or instigation of an act of terrorism."

37. In *R v Sherif* [2008] EWCA Crim 2653, the accused was found to have known that the London bombings of 2005 were going to take place, but failed to forewarn the authorities. In interpreting section 38B, the Court of Appeal noted at paragraph 27 that

> it was not sufficient for the prosecution to establish that a defendant had closed his eyes, but that the jury was entitled to conclude, if satisfied that that he had deliberately closed his eyes to the obvious because he did not wish to be told the truth, that that fact was capable of being evidence to

support a conclusion that that defendant either knew or believed the fact in question.

38. Furthermore, it was held that it is the seriousness of the terrorist activity about which the defendant has failed to give information, rather than the amount of information that could have been provided, that determines the level of criminality and impacts the sentence imposed.

39. There is debate in Britain as to whether a suspect's privilege against self-incrimination provides a reasonable excuse to non-disclosure under the current legislation. This contrasts with the exclusion of participants by the wording of the section at issue on this appeal. The wording of section 38B of the English legislation makes clear that suppressed information must concern terrorist involvement by "another person." However, it is not yet established what the position of the law is where a person's evidence relates both to themselves as well as to that of another person. Given a similar legislative provision in the case of *HM Advocate v Von* 1979 SLT (Notes) 62 HCJ, Lord Ross reasoned at page 64 that "if Parliament had intended to make statements of suspects admissible against them in the event of their being subsequently charged I would have expected parliament to have made that clear." This can be contrasted with cases such as *Brown v Stott (Procurator Fiscal, Dumfermline*) [2000] UKPC J1205-1 which suggest that a qualification of the privilege against self-incrimination is permissible where necessary to achieve a legitimate aim in the public interest. In relation to drawing inferences from silence in response to police questioning, it appears that where a suspect has committed an offence and remains silent, there is no infringement of section 38B, but where a suspect is silent as to another's wrongdoing, but is not personally implicated, this fits within the definition of the offence; see Clive Walker, "Conscripting the Public in Terrorism Policing: Towards Safer Communities or a Police State?" (2010) 6 Crim LR 441.

40. In Canada, section 83.28 of the Canadian Criminal Code (as reinstated and amended by the Combating Terrorism Act 2013) provides for investigative hearings in the context of terrorist offences. Subsection (8) of this section requires that any person named in an order for the gathering of information "shall answer questions put to them… and shall produce to the presiding judge things that the person was ordered to bring", however they "may refuse if answering a question or producing a thing would disclose information that is protected by any law relating to privilege or to disclosure of information." In addition to this protection, subsection (10) provides for both "use" and "derivative use" immunity. It states at part (a) that answers to questions could not be used against that person, with the exception of subsequent perjury prosecutions, and at part (b) that "no evidence derived from the evidence obtained from the person shall be used or received against the person in any criminal proceedings against them." In *Re Application under s 83.28 of the Criminal Code* [2004] 2 SCR 248, the Supreme Court of Canada considered and upheld the constitutionality of this legislation, and considered its compatibility with the right to silence under section 7 of the Canadian Charter of Rights and Freedom at paragraphs 69 to 79. The Court noted at paragraph 72 that part (b) in fact "goes beyond the requirements in the jurisprudence, and provides absolute derivative use immunity"; meaning that even if it could be proved that the same evidence could have been obtained through alternative means, the evidence may not be used against the witness. In recognition of the international context of terrorist investigations, the Court extended at paragraph 79 the use and derivative use immunity to subsequent extradition and immigration procedures.

41. The analogous legislation in force in Australia, on its face, offers less protection of the right to silence. A general right to silence was codified in Australian law in section 23S of the Crimes Act 1914. Nonetheless, a number of Australian criminal statutes enable coercive questioning powers. Of relevance here is section 34G of the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003. This section requires, under penalty of five years' imprisonment, that a person before a

prescribed authority for questioning under a warrant must not fail to give any information requested and must not fail to produce any record or thing that the person is requested to produce. The Act asserts at s 34G(8) that a person may not refuse in this regard "on the ground that the information, or the production of the record or thing, might tend to incriminate the person or make the person liable to a penalty." However, section 34G(9) provides that information given and records or things produced "are not admissible in evidence against the person in criminal proceedings other than proceedings for an offence against this section." Burton, McGarrity & Williams, in The Extraordinary Questioning and Detention Powers of the Australian Security Intelligence Organisation [2012] 36(2) MULR 415, make a number of observations as to how this legislation differs from its Canadian counterpart. They reason that the legislation only provides for a "use" immunity and not a "derivative use" immunity, which means that information obtained during questioning may be used to gather other evidence that could give rise to criminal proceedings. This use immunity applies only to criminal proceedings, leaving open the possibility that information obtained can be relied on in civil proceedings, such as in cases of deportation or of obtaining a control order. A possible reason for the divergence in the extent of the immunity provided under Canadian and Australian law lies in the existence in Canada of a constitutional bill of rights, the Charter, of which there is no equivalent in Australian law.

42. Legislation imposing reporting obligations on citizens in relation to serious crime can also be found in other jurisdictions. In South Africa, section 54(1)(a) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007 requires any person who has knowledge that a sexual offence has been committed against a child to immediately report this to a police official. The penalty for failing to do so is a fine, imprisonment for up to five years, or both. In France, Article 434-3 of the Penal Code requires any person with "knowledge of maltreatment, deprivations, or sexual assaults inflicted upon a minor under fifteen years of age" to report this to the administrative or judicial authorities. Failure to do so is punishable by three years' imprisonment and a fine of €45,000.

Antecedent offence

43. In the past, countries with their origin in the Anglo-American system of common law could rely on the offence of misprision of felony to require those aware of significant information about the commission of crime to come forward. Misprision of a felony was an offence in all common law jurisdictions. The tendency in recent decades has been to abolish the distinction between felonies and misdemeanours which differentiated offences as to their seriousness and the circumstances under which an arrest could be effected. That distinction has been replaced in this and in other jurisdictions with a distinction instead made between serious offences which carry powers of arrest, sometimes even for citizens, or which have other consequences, such as mode of trial, and other offences. Hence, misprision of a felony has either been abolished explicitly, as in England and Wales in 1967, or has fallen into misuse or implied repeal. Why such an offence might be required is explained together with its definitional elements as of the date of Irish independence in Archbold - Criminal Pleading, Evidence and Practice (26th edition, London, 1922) at page 1456:

> Misprision of a felony consists in concealing or procuring the concealment of a felony known to have been committed. 1 Hawk. Cc. 20 59; 1 Chit. Cr. L. 3. The offence is a misdemeanor at common law … punishable by fine and imprisonment … There do not appear to be any authorities as to what will constitute concealment; but the offence appears to be founded on a duty to inform the King's officers of the commission of a felony, and to differ from that of an accessory after the fact in that no actual assistance to the felon need be proved, and from that an accessory before the fact in that no privity to the commission of the felony need be proved. See 3 Co.

> Inst. 140; 1 Hale, 373. Prosecutions for misprision of felony have not been instituted of recent years.

44. The references to Pleas of the Crown by Matthew Hawkins, first published in 1716, and Matthew Hale's book Historia Placitorum CoronÃ¦, first published in 1736, indicate an ancient origin to the offence. Particularly the latter, since the work was published after its author had died in 1676. By section 1 of the Criminal Law Act 1967, the offence was abolished in England and Wales. The edition of Archbold most proximate to the introduction of that legislation, (36th edition, London, 1966), indicates a refinement of the law. At pages 4165-6, this states:

> Misprision of felony consists in concealing or procuring the concealment of a felony known to have been committed… The only ingredients of the offence are (i) knowledge that a felony has been committed and (ii) concealment of such knowledge. Act of concealment need not be proved. A person is bound by law to disclose to proper authority all material facts relative to a felony of the commission of which he has definite knowledge, such as the name of the felon, if he knows it; the place where it was committed, etc. If he fails to perform this duty when there is a reasonable opportunity available to him to do so, he is guilty of misprision of a felony. The duty can be performed by reporting to the police, or magistrate anyone else in lawful authority. It is unnecessary to prove that the person charged converted his knowledge of the felony to the benefit of himself… Non-disclosure of felony due to a claim of Right that it is not in the public interest that the felony should be disclosed will afford the defence in the case of communication by the client to his lawyer, a patient to his doctor, or a parishioner to his clergyman. Other relationships, such as that of master and servant, or master and pupil, may give rise to a defence based on a similar claim of right, but close family or personal ties will not suffice in this respect where the offence is of such a serious character that ought to be reported… Non-disclosure is excused also disclosure would tend to incriminate the prisoner. Mere silence, at any rate after a prisoner has been cautioned cannot amount to misprision, and a person questioned about a felony is not bound to answer if his answer would tend to incriminate him with regards to that or some other offence. Misprision may, however, consisting act of as well as passive concealment. If a person after being cautioned makes allying statement to the police, that may amount to an active concealment.

45. This analysis followed two then recent authorities. Firstly, it relied on the judgment of Lord Denning in *R v Sykes* [1961] 2 WLR 392, that only what the accused perceived as a truly serious offence had been committed obliged disclosure; the test being subjective as to the accused's state of mind. Secondly, it relied on *R v King* [1965] 1 WLR 706, which makes it clear that to be a participant in the offence means that it is not misprision of felony not to come forward. Hence, the offence referred, as does the section in issue on this appeal, to those who have knowledge of the commission of a serious offence, who have not participated and who have no reasonable excuse for not coming forward, but nonetheless do not disclose that knowledge to the police. See also Kenny's Outlines of Criminal Law (19th edition, Turner, 1966) at page 405.

46. The offence of misprision of felony continues in existence as an alternative to the kind of offence in modern statutory models which requires cooperation with national authorities in the prevention or detection of certain very serious crimes, such as terrorism or sexual violence against children. For instance, misprision is codified under the Federal Criminal Code of the United States of America in the following form under 18 USC section 4:

> Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon

> as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.

47. The distinction between misdemeanours and felonies thus still exists under US law, while the offence of misprision of felony appears to have elsewhere been replaced by the kind of statute under consideration on this appeal. The conflict between the protections of the Fifth Amendment to the US Constitution and the statutory provision above has been considered by the US courts. In *United States v Kuh* 541 F.2d 672 (7th Cir 1976), the defendants were in possession of the proceeds of a bank robbery committed by other bank robbers, and concealed the crime by clandestinely possessing the money. The Court noted at page 677:

> we cannot accept the argument that, although a person who fails to disclose a felony in which he might be implicated is protected from punishment by the Fifth Amendment, his failure to make known the felony, when coupled with an act of concealment, makes him susceptible to prosecution, conviction, and punishment under 18 USC [section] 4.

48. In some US states, an offence similar to misprision of felony, although not using that term, and often carrying a significant penalty, continues to exist. For example, in Florida (Fla Stat Ann Â§794.027); Massachusetts (Mass Gen Laws Ch. 38 Â§ 3); Rhode Island (RI Gen Laws, Â§ 11-1-5.1); Washington (Wash Rev Code Ann Â§ 9.69.100) and Wisconsin (Wis Stat Ann Â§ 940.34). See also Christopher Mark Curenton - The Past, Present, and Future of 18 USC 4: An Exploration of the Federal Misprision of Felony Statute (2003) 55 Alabama Law Review 183.

49. A difficulty with the law requiring that those aware of felonies should assist in their detection and prosecution was that while felonies and misdemeanours once had meaning as a classification of crimes, more serious misdemeanours such as fraud outstripped the seriousness of such felonies as simple theft. In *R v Wilde* [1960] Crim LR 116, in England, the High Court ruled that misprision of a felony only occurred where a reasonable person became aware of a felony that he or she would regard as so serious that it should be reported to the police. This approach was upheld by Lord Denning in Sykes. Glanville Williams in Criminal Law: the General Part (2nd edition, London, 1961) criticises this development as adding uncertainty to the offence even after legal advice; see paragraph 141. It is precisely because of the uncertainty and apparently random development of the offence of misprision of a felony, and the lack of clarity in putting serious crimes into the category of misdemeanours, that has led the offence into disuse. The section at issue on this appeal, however, rests on the commission of a clearly defined offence of which the accused becomes aware. This in itself, however, was argued on appeal on behalf of the plaintiff Michael Sweeney to be impermissibly vague. This argument was accepted by Baker J in the High Court but further analysis of the section, in the context of a wider range of authorities, does not support the proposition of vagueness and neither does the exposition of the definitional elements of this offence as stated earlier in this judgment.

Vagueness

50. The trial judge was of the opinion that section 9(1)(b) of the Offences Against the State (Amendment) Act 1998 was unconstitutional because it was vague. The trial judge correctly posited at paragraphs 95 to 97 that boundaries "between lawful and unlawful activity must be capable of being discerned." Thus, "as a general proposition", she unexceptionally stated that "a criminal offence must be sufficiently clear to enable a person to understand what is demanded by the law and the consequences of a breach is not in dispute." Legislation must be certain, she held, because a person ought to be able "to understand by objectively ascertainable standards whether an offence could be committed by an action" or by an omission, and also "to enable members of An Garda

Síochána to sufficiently understand the offence and the circumstances giving rise to a suspicion so as not to give rise to arbitrariness in application."

51. According to the trial judge, the section at issue on this appeal was unconstitutional for this reason:

> Whilst s. 9(1)(b) requires that the information be of objectively material assistance and the essential mens rea in the offence means that the offence is committed only when the accused person knows or believes the information might of material assistance, I consider the offence created by s. 9(1)(b) is impermissibly uncertain as, in the absence of statutory protection, it can result in a person being unable to discern the relationship between the right to remain silent and the consequences of so doing.

52. Language strives for certainty. The principle of legal certainty requires that those who are the subject of the law should be able to ascertain their statutory obligations. With the complexity of modern life, and the concomitant necessity for legislation to precisely cover several bases, in some instances certainty of definition may be available to the modern citizen only upon taking advice. The European Court of Human Rights recognises that absolute precision in criminal statutes may be unattainable and that "interpretation and application are questions of practice"; *Sunday Times v United Kingdom (No 1)* [1979] 2 EHRR 245. The Court explained at paragraph 49 the twin rationale for the certainty requirement of the "quality of law test", which was to enable citizens to know the boundaries of permissible conduct:

> First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

53. In several cases, the Court has held that common law, accessible only to those with access to text books as opposed to a civil or criminal code, may constitute properly legally defined law. Further, in *Vogt v Germany* [1995] 21 EHRR 205, the Court found at paragraph 48 that the level of precision required "depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed." In *Ternovsky v Hungary* [2015] 61 EHRR 35, the lawfulness of health professionals assisting with home births was found to be uncertain under Hungarian law. The Court concluded at paragraph 26 that this situation was thus "incompatible with the notion of "foreseeability" and hence with that of "lawfulness"".

54. Two further cases against the United Kingdom illustrate the application of the requirement of identifiability, accessibility and foreseeability in determining whether an interference with Convention rights is "prescribed by law." *Steel and others v United Kingdom* [1999] 28 EHRR 603 concerned the requirement to "keep the peace" and to "be of good behaviour" for those charged with breaches of the peace. While the orders were described as "rather vague", in the context of the finding that the applicant had breached the peace, the Court was satisfied at paragraph 76 that the order was "sufficiently clear". The Court reached a different conclusion on a similar fact pattern in *Hashman and Harrup v United Kingdom* [2000] 30 EHRR 241. Here, the applicants had been involved in activities designed to disrupt a fox hunt and were placed under an obligation to "keep the peace" and be of "good behaviour" by the magistrates' court. The Court found at paragraph 40 that the notion of conduct *contra bonos* mores was too vague to meet the requirement of predictability of application. More recently, in *Vyerentsov v Ukraine* [2014] 58 EHRR 9 the Court considered the application of Soviet

legislation on the procedure for holding peaceful demonstrations by Ukrainian authorities in the absence of a domestic legislative framework to implement its constitutional rules on freedom of assembly. The Court held at paragraph 54 that the procedure being relied upon by the authorities was not formulated with sufficient precision to enable the applicant to foresee the consequences of his actions "to a degree that was reasonable in the circumstances".

55. These decisions were to a large extent concerned with criminal codes. A common law system differs from civil jurisdictions in regard to the binding nature of precedent. Under the common law, decisions as to the interpretation of statutes are binding on a lower court when so declared by the High Court or by an appellate court; *State (Quinn) v Ryan* [1965] IR 70 and *Attorney General v Ryan's Car Hire Ltd* [1965] IR 642. Even on the same level, such as decisions of the High Court dealing with the same issue, a judge is not entitled to depart from the decision of a colleague unless it is manifestly necessary to reach a fresh interpretation; see *Attorney General v Ryan's Car Hire Ltd* at page 654 and *Mogul of Ireland v Tipperary (NR) (CC)* [1976] IR 260 at page 272. Hence, the test is indeed that the law should be adequately accessible and that norms should be defined, but in the common law tradition, meanings harden into certainty as decisions are made. Hence, the test is not simply that something is difficult to define, or that at first blush, a statutory definition seems to be vague. Rather, the test which must be satisfied in order to condemn a section is a finding that it is impermissibly vague. Precedent through judicial decision-making may make what was ambiguous utterly clear.

56. In the United States of America, the basic policy proclaims that for the due process clause in the Fifth Amendment to the US Constitution to operate, statutes must be clear as to what conduct is forbidden; *Connally v General Construction Co* , 269 US 385 (1926). Thus "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law"; *Connally* at page 391. This may be divided into two principles: firstly, it is required that criminal laws state explicitly and definitely what conduct is punishable; and, secondly, that is so because it demands that legislation give fair notice of what is punishable. It is a check against any arbitrary enforcement of law according to analysis in this jurisdiction, which broadly conforms to these principles; see Kelly: The Irish Constitution (5th edition, Dublin, 2018) from paragraph 6.5.11. What the prohibition against uncertainty is centrally concerned with is the adoption of unclear laws which leave enforcement to authorities who may either interpret them against those who are political foes, or otherwise in bad standing with the authorities, or in favour of those whom they like.

57. In *Johnson v United States* 576 US (2015) 1, the Supreme Court was concerned with a three strikes sentencing statute. This required a person found in possession of a firearm who had three prior convictions for a "violent felony" to be sentenced to a particular term. As to what a violent felony was, a definition was given in the legislation that such prior offences had to involve "conduct which presents a serious potential risk of physical injury to another." Identified as problematic was the inability of the words used to lead to a uniform interpretation of the characteristics of the prior convictions which could be said with certainty to meet the statutory conditions. For that reason, the statute failed to meet the standards of the due process clause. The underlying principle is set out at page 3 of the majority judgment of Scalia J:

> The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." Our cases establish that the Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement. *Kolender v. Lawson* , 461 U. S. 352 -

> 358 (1983). The prohibition of vagueness in criminal statutes "is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law," and a statute that flouts it "violates the first essential of due process." *Connally v. General Constr. Co.* , 269 U. S. 385, 391 (1926). These principles apply not only to statutes defining elements of crimes, but also to statutes fixing sentences. *United States v. Batchelder* , 442 U. S. 114, 123 (1979).

58. In *King v Attorney General [1981] IR 233, Kenny J expressed a similar view to the principles familiar from American* constitutional analysis. His approach at page 264 accords in principle with the analysis which the trial judge in this case was bound to follow:

> Article 38, s. 1, of the Constitution provides:- "No person shall be tried on any criminal charge save in due course of law." If the ingredients of the offence charged are vague and uncertain, the trial of the alleged offence based on those ingredients is not in due course of law.

59. A law may diverge in its definition from common speech. Thus, prior to the reforms which made rape gender neutral, it was common to speak of a man having been raped even though at that time a man could be the victim only of the offence of sexual assault. Similarly, people often refer to being robbed when what has happened is that their money was stolen from a bank account or a theft took place from their shop premises. A robbery requires the threat of violence or the use of violence as well as theft but common language does not always reflect such legal differences. Thus, as Hardiman J put the requirement of fairness in the framing of offences in *The People (Director of Public Prosecutions) v Cagney* [2008] 2 IR 111 at pages 121-122, it was "a fundamental value that a citizen should know, or at least be able to find out, with some considerable measure of certainty, what precisely is prohibited and what is lawful." Hence, it may be necessary to have advice as to the law; but that requirement in no sense renders the law uncertain simply for that reason. No court sets out to find vagueness in a criminal statute. Every court is mindful of the duty to explain the law in decisions and in charging a jury in such a way as to be comprehensible. Leading criminal text books approach what may at first sight be the apparent obscurities of the law with a view to elucidation and structuring. What therefore is the test for vagueness? Even after analysis, through the breaking down of an offence into definitional elements, if the result is obscurity of application to fact or impossibility of interpretation so as to find a consistent solution, then a criminal statute may be said to be vague. Where a law may be interpreted one way for those in favour of the police or other authorities and another for those in disfavour, there is impermissible vagueness. Ambiguity which defies definition through interpretation and the application of precedent undermines legal certainty. Such an approach is borne out by the case law. The prime difficulties lie in the use of imprecise words or in the distinction between different apparent categories of persons which are productive of arbitrary and unfair results.

60. *King v Attorney General* was a case which embraced both impossible to define words and a distinction based on prior conduct that was likely to lead to an unjust result. Where a person had prior convictions, he was classifiable under the Vagrancy Act 1824 and for the purposes of a prosecution under the Prevention of Crimes Act 1871 as a "suspected person or reputed thief." Where such a person was found "frequenting" certain places, he could be "deemed to be a rogue and a vagabond". In contrast to the inherent uncertainty of these elements of the offence of "loitering with intent", the statute defined the places which it was unlawful for such a person to haunt as being:

> any river, canal, or navigable stream, dock or basin, or any quay, wharf or warehouse near of adjoining thereto, or any street, highway or avenue leading thereto, or any place of public resort, or any avenue leading

> thereto, or any street, or any highway or place adjacent to a street or highway.

61. Under the 1871 Act, proof of an intention to commit a felony under the 1824 Act was supplied as being proven from "his known character". Thus, a person with no previous criminal convictions wandering by a warehouse who had just come from a lecturing job in a technical college would not be likely convicted, but a person with a criminal record who had stepped away from a life of crime and had a job was open to arbitrary adjudication for that fact that he was "a rogue and a vagabond", which was punishable accordingly. In striking down the statute, Henchy J stated at 257:

> In my opinion, the ingredients of the offence and the mode by which its commission may be proved are so arbitrary, so vague, so difficult to rebut, so related to rumour or ill-repute or past conduct, so ambiguous in failing to distinguish between apparent and real behaviour of a criminal nature, so prone to make a man's lawful occasions become unlawful and criminal by the breadth and arbitrariness of the discretion that is vested in both the prosecutor and the judge, so indiscriminately contrived to mark as criminal conduct committed by one person in certain circumstances when the same conduct, when engaged in by another person in similar circumstances, would be free of the taint of criminality, so out of keeping with the basic concept inherent in our legal system that a man may walk abroad in the secure knowledge that he will not be singled out from his fellow-citizens and branded and punished as a criminal unless it has been established beyond reasonable doubt that he has deviated from a clearly prescribed standard of conduct, and generally so singularly at variance with both the explicit and implicit characteristics and limitations of the criminal law as to the onus of proof and mode of proof, that it is not so much a question of ruling unconstitutional the type of offence we are now considering as identifying the particular constitutional provisions with which such an offence is at variance.

62. Since the decision in *King v Attorney General* , the principles enunciated have tended to be applied to statutory definitions which lapse into slack and imprecise language. Thus, in *Douglas v DPP* [2014] 1 IR 510, and subsequently in the joined cases of *McInerney v DPP* and *Curtis v DPP* [2014] 1 IR 536, the High Court condemned section 18 of the Criminal Law Amendment Act 1935 and held it to be constitutionally invalid. There the offences proscribed "causing public scandal" and "offending public modesty". No one reading the section could, in the words of Hogan J, know "what conduct is prohibited", thus enabling "arbitrary and inconsistent application." *Dokie v DPP* [2011] 1 IR 805 concerned a requirement for non-nationals to present a passport or immigration document on demand "unless he or she gives a satisfactory explanation". As to what that might be, redolent of lateness at school and excuses that might be accepted, no one might fathom in advance. By times, an apparently vague word can save a statutory definition through the precision of the legislative elements surrounding it, thereby informing certainty into its construction. Thus in *Cox v DPP* [2015] 3 IR 601, McDermott J held that the offence of "wilfully, openly, lewdly and obscenely exposing" by a man of "his person" in a public place "with intent to insult any female" was not vague. The nature of the conduct was of a male exposing his penis, but in a sexual or lewd way, as opposed to having for example an urgent necessity to relieve himself, while having at the same time the purpose of insulting womenfolk. In narrowing the conduct to a particular action with a defined intent, the offence was capable of consistent construction.

63. Similar reasoning may be found in the United States of America, where such offences as failing to pay workmen at least the "current rate of per diem wages in the locality where the work is performed" and fraudulent deprivation of "the intangible right of honest services" have failed the certainty test; see *Connally* , which voided statutory provision in the Oklahoma Comp Stat 1921, Â§Â§ 7255, 7257 and *Skilling v US* 561 US

358 (2010), which voided Â§ 1346 of Title 18 of the United States Code. To adapt a phrase from the American approach to the construction of legislation, it is for the courts to construe, and not condemn statutes, but only where a constitutional construction is reasonably possible; Blaisdell - Selected Federalist Papers: Alexander Hamilton, James Madison, and John Jay (Dover, New York, 2001, reprint of The Federalist or the New Constitution, 1911) at 186. These principles of construction are directed towards certainty and away from any softness in the definitional elements of a crime that would enable arbitrary enforcement.

64. Here, section 9(1)(b) of the Offences Against the State (Amendment) Act 1998 is capable of clear construction. It is necessary in that regard to repeat the elements of the offence in issue. Section 9(1)(b) requires the prosecution to prove that a particular serious offence as defined within the legislation was committed, that someone other than the accused committed it, that the accused had information which was of material assistance to apprehending or proceeding against that person or persons, that the accused was aware that he or she had such information in the sense of having the information and knew or believed that it might be of assistance to the authorities, that the accused made no disclosure of that information to the authorities, and, finally, that the accused had no reasonable excuse for not so disclosing. What a person knew or believed must be proved from the standpoint of the particular accused; not that of a reasonable man or woman. What is or is not a serious offence has no element of vagueness as illustrated by the Irish and American examples. It is also clear from existing decisions on the commonplace phrase "without reasonable excuse" that exposure of the accused to revealing his or her own participation in the crime, as in *Donnelly* , is covered.

Privilege against self-incrimination

65. An interpretation of section 9(1)(b) of the 1998 Act which is distinctly at variance with that of the Human Rights and Equality Commission has been argued on behalf of the plaintiff. That construction which the accused put forward is to require that the section demand that anyone involved in a crime would be obliged to confess their participation to the authorities. The Human Rights and Equality Commission, on the other hand, expressly do not agree. Their approach is that those who commit a crime are not to be prosecuted for not coming forward to help the authorities. This conforms to the principle of constitutional construction. Thus, that submission is clearly correct. While the comparative legislation quoted above can often provide for an express saver which excludes self-incrimination, the absence of such a clause, when seen against the backdrop of the existing law and constitutional obligations, does not put any duty on a suspect to reveal participation in a crime. The section is expressly aimed at witnesses to crime or those who have information about a crime and is aimed at nothing else.

66. Even were that construction not compelling by reason of the existing protection at common law against self-incrimination, as well as the protection of that right by both the Constitution and the European Convention on Human Rights, the courts must always assume that the Oireachtas did not intend to violate the Constitution through legislation. A modern statement of that now time-honoured rule was given by O'Donnell J in *Jordan v Minister for Children and Youth Affairs* [2015] 4 IR 232 at paragraph 199, where he said that a court must always:

> [a]ddress the effect of the double construction rule and consider if the Constitution requires that the interpretation advanced by the petitioner while less likely, should nevertheless be accepted because the more likely interpretation of the words to require a showing of material effect, would be unconstitutional.

67. Thus, in *Croke v Smith (No 2)* [1998] 1 IR 101, legislation as to the treatment of mentally ill patients was upheld by this Court on the presumption that it would be

applied in a manner which adequately respected the constitutional rights of those detained for health reasons. Here, however, resort to the double construction rule is not required. The entitlement to remain silent in the face of criminal suspicion is an entrenched feature of law. The legislative examples set out earlier in this judgment indicate a complete awareness of the entitlement to silence in preference to self-incrimination, and every legislative intervention has essayed an attempt to achieve proportion and balance in the context of the community's entitlement to investigate crime. Hence, in the examples given, while either marks or possession of items connected to the commission of a crime may give rise to inferences, a failure to explain these cannot on its own prove guilt of itself; Criminal Justice Act 1984, section 15. Furthermore, inferences can only be drawn in criminal cases where these are compelling; that is such inferences as can be drawn on the criminal standard of proof beyond reasonable doubt. It is therefore evident that an interference with any right to silence where communication would reveal participation in a criminal enterprise is both an existing backdrop to legislation and also one which would require to be expressly dealt with by clear words within the statutory framework. There are no such words.

68. The question then arises as to whether there is an infringement of the right not to self-incriminate. On behalf of the plaintiff Michael Sweeney it is argued that the section undermines the right to silence by enabling information compelled under potential threat of criminal prosecution to be admitted against him. Specifically, it is claimed at paragraph 36 of the plaintiff's submissions that the decision in *Heaney and McGuinness v Ireland* [1994] 3 IR 593 and [1996] 1 IR 580 was incorrectly decided:

> Various rationales have been put forward for the ancient pre-trial right to silence: personal autonomy and the dignity of the individual, including the right to privacy; the protection of the individual from cruel choices; the presumption of innocence and the protection of police abuse of power. It is submitted that the right may more correctly be grounded, in Irish constitutional law, in Article 38.1 rather than exclusively as a corollary to the freedom of expression guarantee in Article 40.6.1 as set out in the ratio of O'Flaherty J in *Heaney* . That, it is submitted, is the clear effect of the reasoning adopted in subsequent decisions, in particular, *Re National Irish Bank Ltd* ., *Finnerty* and *Gormley* and *White* .

69. *Heaney and McGuinness* concerned individuals arrested in the aftermath of a vicious terrorist incident where a man was compelled to drive to a border checkpoint and his vehicle was then exploded remotely, killing him and five British soldiers. Essentially concerned was the degree to which the requirement under section 52 of the Offences Against the State Act 1939, quoted above, whereby it was an offence not to give an account of a suspect's movements, was a proportionate interference with the right to self-expression guaranteed under the Constitution through choosing to remain silent. That, however, is not the point at issue here. The section under scrutiny on this appeal is entirely different. Those giving an account of their movements under section 52 were not exempted, as in the section at issue, from answering should such an account incriminate themselves as to the commission of the murders. Here, specifically, what is at issue is not what the suspect did or did not do by way of participation in a crime or what he or she witnessed in the course of committing a different crime. Instead, the section is about what was done by another. Participation by the accused in the crime means that the section does not apply.

70. It is then claimed that answers implicating the accused are compellable under threat of penal sanction and are admissible against him or her. Since the Irish Human Rights and Equality Commission construe the section as concerning the activities of other people, and since it is impossible to analyse the section in any other way than that the compulsion to speak only arises in respect of events to which a person is a witness, and

not a participant, the line of authority as to compelled statements being admissible against the accused is not relevant. It simply does not arise in this statutory context.

71. Where a tribunal of inquiry is set up under the Tribunals of Inquiry (Evidence) Act 1921, a person giving evidence as to a matter of public moment is not exempt from answering if the result may be to reveal his or her participation in a crime. Such an answer, however is circumscribed by the bar on any such self-condemnation ever being used as evidence against such a person in the event that a prosecution is ever brought against that person in respect of the act or acts on which they were compelled to speak; section 1(3) of the 1921 Act stating that witnesses before tribunals "shall be entitled to the same immunities and privileges as if [he or she] were a witness before the High Court."

72. While this is specific to the legislation, and is stated on behalf of the plaintiff Michael Sweeney to be absent in the section under consideration on this appeal, the principle of the inadmissibility of coerced answers in criminal proceedings is necessarily to be read into the legislation as part of the necessary background. It is, moreover, presumed that all legislation passed since 1937 is in conformity with the Constitution. Where two possible constructions are open in interpreting legislation, it is the duty of the courts not to strike down legislation through adopting an unconstitutional construction; rather, the interpretation consistent with the Constitution should be given where this is open; *McDonald v Bord na gCon* [1965] IR 217. It is also to be presumed that powers of administration conferred by legislation will be applied in a constitutional manner; *East Donegal Cooperative v Attorney General* [1970] 1 IR 317.

73. Because of the fact-free zone in which the case was presented, the trial judge appears to have not had clear information as to whether any fact elicited from the plaintiff Michael Sweeney might be used against him in prosecuting him. It now emerges that there is no such evidence and that he never incriminated himself. Complaint has also been made on behalf of the plaintiff Michael Sweeney that there is no procedural safeguard built into the legislation in question. By that is meant some declaration that a participant is not to be compelled to reveal the extent of his or her own involvement in the commission of the serious crime in question. That, however, is not the point. Protection under the Constitution and under the European Convention on Human Rights of the privilege against self-incrimination is such that it would only be in such instances where a statute declares a specific intrusion on that right that any such construction would arise. An example arises from sections 10 and 18 of the Companies Act 1990. Section 10 provided that where inspectors were appointed by the relevant Minister to look into the affairs of a corporate entity, such inspectors had the power to require company officers and others to both answer questions and to produce relevant data. Under the same section, answers given were expressly provided by section 18 as being admissible in evidence in any subsequent civil or criminal litigation. The stark and simple language permitting that intrusion into the right not to self-incriminate is in contrast to its complete absence in section 9(1)(b) of the 1998 Act here under consideration. Section 18 provided:

> An answer given by a person to a question put to him in exercise of powers conferred by-
>
> (a) section 10;
>
> (b) section 10 as applied by sections 14 and 17, or

> (c) rules made in respect of the winding-up of companies whether by the court or voluntarily under section 68 of the Courts of Justice Act, 1936, as extended by section 312 of the Principal Act;
>
> may be used in evidence against him, and a statement required by section 224 of the Principal Act may be used in evidence against any person making or concurring in making it.

74. In *re National Irish Bank* [1999] 3 IR 145, this Court affirmed that the "general right to silence" derives "from the right to freedom of expression guaranteed to citizens by Article 40.6" of the Constitution; and see *Saunders v United Kingdom* [1996] 23 ECHR 313. While the *Heaney and McGuinness* case concerned the investigation of multiple murders, at issue in *National Irish Bank* was suspicion of commercial fraud through bank interest overcharging. Core to the precedential value of this decision is that what the Constitution did not permit was the extraction of a forced confession from a suspect. Guaranteed, according to the judgment of Barrington J at page 187, was the "right not to have involuntary confessions accepted in evidence at a criminal trial", a right "reinforced by the general provisions of Article 40.3 of the Constitution", guaranteeing respect for the personal rights of the citizen and protection from any "unjust attack" on such rights. In *National Irish Bank* , Barrington J thus concluded that section 18 of the 1990 Act could not be interpreted so as to enable the admission into evidence of a confession statement compelled from an accused under threat that failure to reveal information would in itself be a criminal offence. At page 188, he stated:

> The judgment in this case follows the decision in *Heaney v. Ireland* [1996] 1 I.R. 580, insofar as that case decided that there may be circumstances in which the right of the citizen to remain silent may have to yield to the right of the State authorities to obtain information. It is not inconsistent with the decision *Rock v. Ireland* [1997] 3 I.R. 484, that there may be circumstances in which a court is entitled to draw fair inferences from the accused having remained silent when he could have spoken. It follows *The People (Attorney General) v. Cummins* [1972] I.R. 312, insofar as that case decided that for a confession to be admissible in a criminal trial it must be voluntary.
>
> In the course of submissions the question arose of what would be the position of evidence discovered by the inspectors as a result of information uncovered by them following the exercise by them of their powers under s. 10. It is proper therefore to make clear that what is objectionable under Article 38 of the Constitution is compelling a person to confess and then convicting him on the basis of his compelled confession. The courts have always accepted that evidence obtained on foot of a legal search warrant is admissible. So also is objective evidence obtained by legal compulsion under, for example, the drink driving laws. The inspectors have the power to demand answers under section 10. These answers are in no way tainted and further information which the inspectors may discover as a result of these answers is not tainted either. The case of *The People (Attorney General) v. O'Brien* [1965] I.R. 142, which deals with evidence obtained in breach of the accused's constitutional rights has no bearing on the present case. In the final analysis however, it will be for the trial judge to decide whether, in all the circumstances of the case, it would be just or fair to admit any particular piece of evidence, including any evidence obtained as a result or in consequence of the compelled confession.

75. Because of the absence of evidence, some confusion arose in consequence as to whether any demand was ever made of the plaintiff Michael Sweeney in the context of either pre-arrest or post-arrest interviews with the gardaí. At paragraph 82 of the judgment of the High Court, it seems as if it had been assumed that answers to questions might form part of the prosecution case:

> The defendant argues that the charges levied against the plaintiff in the present case do not "currently depend" on the answers he gave or did not give to the questions posed to him. It is not said that the plaintiff was obliged by law to answer any of the questions put to him. It is argued, therefore, that the charge is not that he failed to answer questions but he did not give information. That argument might be attractive were it not for the fact that the charge made against the plaintiff is that he failed to give information at or around the time when on three separate occasions when he was being questioned under caution. It is said that the plaintiff could have given information at any time irrespective of whether he was questioned or not, and while that is undoubtedly true, the fact remains that s. 9(1)(b) is capable of being used, as it was actually used in the present case, to charge a person arising from the fact that he or she failed to give information in relation to a crime by another person when the crime is alleged to have been committed in the course of questioning.

76. In that context, it is worth recollecting, firstly, that it is now an agreed fact that at all times Michael Sweeney was warned by the gardaí that he was not obliged to say anything unless he wished to do so. Secondly, he said absolutely nothing; incriminating or exculpatory or otherwise. Furthermore, he is not being prosecuted for not saying anything in a police context. He is being prosecuted for awareness of this murder and not assisting the authorities in accordance with the statutory definition. There is nothing in the legislation which would enable any aspect of any such interview to be used in evidence against an accused person. Furthermore, as a general proposition, the law does not permit the prosecution to question an accused person at trial as to why, or for what reason, he chose not to answer a particular question; *The People (DPP) v Finnerty* [1999] 4 IR 364 and, most recently, *The People (DPP) v KM* [2018] 1 IR 810 which affirms the relationship between the right to silence and the right to a fair trial as protected under Article 38.1 of the Constitution. Finally, in that context it is worth mentioning that section 9(1)(b) of the 1998 Act could in no rational way be construed as enabling a conviction merely because a person when officially questioned remained silent.

77. A suspect who is arrested and whom it is proposed to question has a right to legal advice in advance of any question being put to him; *DPP v Gormley* , *DPP v White* [2014] 2 IR 591. The requirement for legal advice arises from the time of arrest for questioning; Gormley, White, *Murray v United Kingdom* (1996) 22 EHRR 29, *Salduz v Turkey* (2008) 49 EHRR 421, *Panovits v Cyprus* (Application 4268/04 (First Section) 11th December 2008) and *Doyle v Ireland* (Application no 51979/17) 23 May 2019. This right of an arrested person to legal advice, as noted in *Gormley and White* at paragraph 9.14 of the judgment of Clarke J, is of "high legal value" and any exceptions to it are to be recognised only in wholly exceptional circumstances; an example of which would be a pressing and compelling need to protect other major constitutional rights such as the human rights of a kidnapped person or other victim in peril. Fundamental to our system is the entitlement of every arrested person to know what power of arrest is being exercised. The caution administered to every arrested person states the basic principle of the right to not self-incriminate, to the effect that they are not obliged to speak, but it is also part of the caution that whatever they say may be used in evidence against them. That is not what the section at issue on this appeal is about. It is about those with knowledge of a serious offence, in this case the murder of Thomas Ward, and the duty cast on those who have such information to assist where, by such assistance, they are

not revealing participation in the crime. It is not about compelling participants in the offence to break their right to remain silent and to not incriminate themselves. Other sections from other jurisdictions, as analysed above, may take a different viewpoint, but section 9(1)(b) expressly preserves the right to silence.

78. That accords with the analysis of the European Court of Human Rights in *Heaney and McGuinness v Ireland* (2001) 33 EHRR 12. The facts arose out of this Court's decision in the *Heaney and McGuinness* case. There, while it was accepted by the European Court of Human Rights that the right to silence and the right not to incriminate oneself were guaranteed by Article 6(1) of the European Convention on Human Rights which protects the right to "a fair … hearing" and the right to be "presumed innocent until proved guilty", such rights were not absolute rights. The operative text of that judgment is not in conflict with the application of the section at issue on this appeal in the particular circumstances of this case. In *Heaney and McGuinness* , the Court reiterated from paragraph 40 its important statements from *Saunders* , in which it had found that the right to silence and the right not to incriminate oneself were essential elements of Article 6:

> The Court recalls its established case-law that, although not specifically mentioned in Article 6 of the Convention, the rights relied on by the applicants, the right to silence and the right not to incriminate oneself, are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6. The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right in question is closely linked to the presumption of innocence contained in Article 6 Â§ 2 of the Convention. … The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. The Court would note, in this context, that the present case does not concern a request, through the use of compulsory powers, of material which had an existence independent of the will of the applicants, such as documents or blood samples … The Court observes that the applicants complained under Article 6 of the Convention about having been punished, through the application of section 52 of the 1939 Act, for relying on their rights to silence, against self incrimination and to be presumed innocent during police questioning in the course of a serious criminal investigation.

79. The Court recently reiterated the non-absolute nature of the right in *Ibrahim v United Kingdom* ECHR case 50541/0813/09/2016 at paragraph 269:

> [T]he right not to incriminate oneself is not absolute … The degree of compulsion applied will be incompatible with Article 6 where it destroys the very essence of the privilege against self-incrimination … But not all direct compulsion will destroy the very essence of the privilege against self-incrimination and thus lead to a violation of Article 6.

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80. While the right to silence and the right not to self-incriminate are not specifically mentioned in Article 6, these important rights have been described by the Court as contributing to avoiding miscarriages of justice and to securing the aims of Article 6; see

Murray at paragraph 45 and *Bykov v Russia* [2010] 5 Crim LR 413 at paragraph 92. The right to silence is not confined to direct admissions of wrongdoing, but applies to any statement which may later be used by the prosecution in support of its case at a criminal trial; *Aleksandr Zaichenko v Russia* ECHR case 39660/0218/02/2010.

81. The non-absolute nature of these rights is demonstrated by the case law of the European Court. In *Murray* , it was found that it was compatible with Article 6(1) for a trial judge sitting alone without a jury to draw an inference of guilt from the fact that the applicant had remained silent under police questioning and throughout the proceedings. In that case, legislation was in place which stated that an accused could not be convicted solely on the basis of adverse inferences drawn from the exercise of his right to silence, but also provided that the court could draw inferences from, for example, a person's failure to explain their presence at a particular place. While the Court stated that it was self-evident that it was incompatible with Article 6 to "base a conviction solely or mainly on the accused's silence or on a refusal to answer questions or to give evidence himself", it found at paragraph 47:

> It cannot be said … that an accused's decision to remain silent throughout criminal proceedings should necessarily have no implications when the trial court seeks to evaluate the evidence against him. … Whether the drawing of adverse inferences from an accused's silence infringes Article 6 is a matter to be determined in the light of all the circumstances of the case, having particular regard to the situations where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation.

82. Jacobs, White and Ovey - The European Convention on Human Rights (6th edition, Oxford University Press, 2014) thus note at pages 284-285 that the drawing of inferences from an accused's exercise of their right to silence can be compatible with Article 6 "as long as judicial safeguards operate to ensure fairness", with the Court assessing the overall fairness of proceedings as opposed to formulating rigid procedural rules. In order to determine whether there has been a violation of Article 6 rights in this context, the Court summarised the factors to which it must have regard in *Jalloh v Germany* [2007] 44 EHRR 667 at paragraph 117 as follows:

> the nature and degree of compulsion used to obtain the evidence; the weight of the public interest in the investigation and punishment of the offence at issue; the existence of relevant safeguards in the procedure; and the use to which any material obtained is put.

83. In this context, the right to silence is considered in the context of the privilege against self-incrimination. The Court in *Ibrahim* emphasised that what is "crucial" in these cases was "the use to which evidence obtained under compulsion is put in the course of the criminal trial." It referred to *Heaney and McGuinness* in which the Court observed at paragraph 57 that the public interest "cannot be relied on to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings." Similarly in *Jalloh* , the Court stated at paragraph 97 that "public interest concerns cannot justify measures which extinguish the very essence" of the rights guaranteed by Article 6, including the privilege against self-incrimination. In *Funke v France* [1993] 1 CMLR 897, for example, it was found that the very essence of the privilege against self-incrimination was destroyed where criminal proceedings were brought against the applicant by customs authorities in an attempt to compel him to provide evidence of offences allegedly committed by him.

84. Furthermore, the Court has identified at least three kinds of situations which can lead to a finding of a breach by a Member State of the right not to self-incriminate. The first is where a suspect is obliged to testify under threat of sanctions and testifies as a result, such as in *Saunders* where evidence which had been obtained under compulsion from the applicant in company insolvency procedures was used against him in a

prosecution; see also *Brusco v France* [2010] ECHR 1 621. A breach may also be found where an applicant refuses to give information against themselves and is subsequently sanctioned; such as in *Heaney and McGuinness* and *Weh v Austria* (2004) 40 EHRR 37. The second situation is where physical or psychological pressure, which may also lead the Court finding a breach of Article 3 which prohibits torture and inhuman or degrading treatment or punishment, is exerted on the applicant in order to obtain a statement or evidence; see *Jalloh* and *GÃ¤fgen v Germany* [2009] 48 EHRR 253. The third type of case is where the authorities resort to subterfuge to get the information that they were unable to obtain during questioning; *Allan v United Kingdom* (2003) 36 EHRR 12. An example of that would be a statement by interviewing police officers who falsely state that the arrested person's fingerprint has been found at the scene or untruthfully claim that another participant in the offence has confessed and placed the suspect as acting in concert with him or her.

85. None of any of these three situations so clearly identified by the relevant analysis has any application here.

Conclusion

86. Section 9(1)(b) of the Offences Against the State (Amendment) Act 1998 applies only to those who have information about the commission of a serious offence. Those who have such information, who know or believe that disclosing this information might be of material assistance to securing the apprehension, prosecution or conviction of any other person are obliged to so disclose that information to the police. The section specifically rules out those who have a reasonable excuse for not coming forward. Thus, the requirement to cooperate applies to witnesses to crime: that means those who are non-participants or who otherwise lack such reasonable excuse as earlier explained. Witnessing a crime is not an offence. Being at the scene of a crime or having information about a crime is not an offence. Where a serious crime, in this case murder, has been committed, those who have relevant information are obliged by the section to come forward and to communicate with the gardaí.

87. The section in question on this appeal has not been impossible to define in such a way as to make clear its inherent obligations. There is nothing in the elements of the offence that are beyond clear exposition. Furthermore, the section as it applies to this offence, the commission by another of murder, is not productive of inconsistent application and nor is it likely to lead to arbitrary enforcement. Thus, the definitional elements of the crime are clear and do not consequently infringe the constitutional prohibition against vagueness.

88. Section 9(1)(b) of the 1998 Act protects the right to silence of any person who does not wish to speak about their own involvement in a crime. The section protects the right to silence where to speak would incriminate that person. It does not change the principle that unless a participant wishes to speak of their own volition, the law should not compel them to self-incriminate as to their commission of a crime.

89. Thus the order of the Court should simply be to reverse the order of the High Court whereby Section 9(1)(b) of the Offences Against the State Act 1998 was declared to be incompatible with Bunreacht na hÉireann.