[2017] IEHC 702

THE HIGH COURT

[2014 No. 6531 P]

BETWEEN

MICHAEL SWEENEY

PLAINTIFF

AND

IRELAND

ATTORNEY GENERAL

DIRECTOR OF PUBLIC PROSECUTIONS

DEFENDANTS

JUDGMENT of Ms. Justice Baker delivered on the 23rd day of November, 2017.

1. This judgment is given in a challenge to the constitutionality of s. 9(1)(b) of the Offences Against the State (Amendment) Act, 1998 ("the Act of 1998"). The plaintiff argues that the offence created by that section breaches his right to silence and that the creation of an offence by that section has the effect that an accused may be prosecuted for exercising his constitutionally protected right. The plaintiff also makes the case that the offence created by the section is impermissibly and unconstitutionally vague and uncertain.

Material facts

2. There is no factual dispute in the proceedings. The plaintiff became a suspect in the Garda investigation into the killing of a Mr. Tom Ward Jnr. at Joe McDonnell Drive, Cranmore, Sligo. Mr. Ward died on 13th August, 2007, and, three days later, on 16th August, 2007, the plaintiff was interviewed informally at his home by Gardaí as part of its investigation into a suspected murder. The plaintiff was cautioned in the usual terms, that he had the right to remain silent but that anything that he might say in the course of the interview could be used in the course of a trial.

3. He was interviewed again informally on 14th September, 2007, and similarly cautioned.

4. On both occasions, a memorandum of the interview was recorded and, accordingly, it is fair to say that the plaintiff was being questioned in the course of an investigation, in respect of which he was a suspect.

5. On 30th November, 2007, the plaintiff was arrested on suspicion of having murdered Mr. Ward and was detained in Carrick-on-Shannon Garda Station pursuant to s. 4 of the Criminal Justice Act 1984. He was interrogated during the course of his detention and cautioned again.

6. The plaintiff was not charged with the murder of Mr. Ward.

7. On 30th January, 2014, the plaintiff was sent forward for trial to Sligo Circuit Criminal Court having been charged with an offence of failing to disclose information contrary to s. 9(1)(b) of the Act of 1998. The charge sheet reads as follows:

> "… 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."

8. At no time during interview was the plaintiff told that his failure to respond to questioning could lead to a charge being levied under s. 9(1)(b) of the Act of 1998.

9. The trial had been stayed pending the determination of these proceedings.

The statutory provisions

10. The marginal note at s. 9 of the Act of 1998 reads "Withholding information" and the offence is commonly known by that name.

11. Section 9 provides as follows:

> "(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. Section 8 defines a "serious offence" as including an offence that involves loss of human life. The provisions of s. s. 9(1)(b) are therefore engaged in regard to the investigation of what is believed to be the unlawful killing of Mr. Ward.

13. The constitutional challenge is brought in respect of the second limb of s. 9, s. 9(1)(b).

The question raised
14. The plaintiff argues that he faces prosecution for having remained silent, and for exercising a right which has been recognised as deriving from the Constitution. The plaintiff was cautioned, as was proper, in the course of the interviews that he had a right to remain silent, but he was not at any time during the course of any of the relevant interviews advised of the risk that he took in exercising that right. The proceedings concern the sole question of whether it is constitutionally permissible to create an offence of remaining silent in regard to the possible commission of an offence by another. The issue is not one regarding the admissibility or weight of evidence, nor the lawfulness of drawing an inference from a choice made by a person during interrogation to remain silent.

15. The question could be said to present precisely the dilemma as was explained by *Mustill L. in R. v. Director of Serious Fraud Office Ex p. Smith* [1993] AC 1 at p. 32:

> "…there is the instinct that it is contrary to fair play to put the accused in a position where he is exposed to punishment whatever he does. If he answers, he may condemn himself out of his own mouth; if he refuses he may be punished for his refusal…"

16. The dilemma was noted by Barrington J. giving the judgment of the Supreme Court in *Re National Irish Bank Ltd. (No.1)* [1999] 3 I.R. 145 at p. 177. Barrington J. described the historical and philosophical source of the right to silence and the principle against self-incrimination as follows:

> "It grew out of the revulsion of the judges for forced confessions as being both unjust in their origin and unreliable in practice. Some judges also seemed to have felt that it was unfair to place a man in a position where he was condemned no matter what he did."

17. I will return later to the judgment of the Supreme Court in *Re National Irish Bank Ltd. (No.1).*

The procedural ground of defence: the case is not proved in evidence
18. The plaintiff did not call evidence. The defendant argues therefore that the plaintiff has not established any evidential basis for the claim.

19. The statement of claim is broadly drafted, and pleads sufficient facts regarding the detention and questioning on the relevant dates of the plaintiff and that he has been charged with a breach of the impugned section. The plaintiff seeks a declaration that s. 9(1)(b) of the Act of 1998 "is invalid having regard to the provisions of Bunreacht na hÉireann", or "is in breach of the plaintiff's personal rights guaranteed by Bunreacht na hÉireann". It is pleaded in the alternative that the subsection is incompatible with the State's obligation pursuant to the European Convention on Human Rights.

20. The defence is nine paragraphs long. The first two paragraphs of substance expressly make no denial of the factual pleas in the statement of claim. There is a specific plea that the plaintiff's rights can be vindicated in the course of the trial and that the court should not interfere either with the decision of the Director of Public Prosecutions to prosecute, or with the trial process. There is a general denial of the particulars of the alleged constitutional frailty.

21. The function of pleadings is to identify and define the issues of fact and law between the parties: *A.S.I. Sugar Limited v. Greenore Group plc & Ors.* [2003] IEHC 131, *per* Finnegan P. and the earlier case of *Mahon v. Celbridge Spinning Co. Limited* [1967] I.R. 1 where Fitzgerald J. identified the purpose of pleadings as "to confine the evidence at the trial to the matters relevant to those issues." (p. 3)

22. Order 19, r. 13 of the Rules of the Superior Courts provides that any allegation of fact in any pleading not denied specifically, or by necessary implication, or in some other way stated to be not admitted, is to be taken as admitted. Thus, if a defendant does not put a matter of pleaded fact in issue, it is taken to be admitted by that defendant. None of the factual matters on which the present claim is based were denied by the defendant. Thus, it was not necessary for the plaintiff to call evidence to establish those facts not put in issue.

23. I consider that the plaintiff was entitled to conduct the trial in the manner in which it was done, namely by making submissions and replies to those of the defendant, because the defence did not deny any of the factual matters pleaded in the statement of claim on which the argument was based.

24. For that reason, I reject this ground of defence.

Exhaustion of remedies: a matter for the trail court?
25. The defendant also makes a preliminary argument that the relief sought is more properly a matter for the trial court. It is argued that the essence of the plaintiff's complaint is that he fears that evidence may be admitted against him and that the present proceedings are an attempt to ask the High Court to make findings on evidential issues.

26. The defendant argues in reliance on the judgment of Humphreys J. in *Bita v. DPP & Ors.* [2016] IEHC 288, that the principle of "reaching constitutional issues last" means that an applicant should "generally exhaust his or her remedies in the criminal process before bringing an application for judicial review". (para. 22). As Humphreys J. said, if an applicant is not convicted or is acquitted on appeal, "the issue of constitutionality simply does not arise" and that it would be pointless to engage the constitutionality of a statute when the plaintiff may not come to suffer any damage or injury as a result of the application of that statute.

27. In *Ryan v. Director of Public Prosecutions* [1988] I.R. 232, Barron J. noted the role of judicial review and that there was:

> "… no jurisdiction in this court whether by way of judicial review or otherwise to make rulings in advance upon matters which may or may not arise in a trial before another tribunal." (p. 234)

28. In *Wall v. DPP* [2013] IESC 56, [2013] 4 I.R. 309, O'Donnell J. stated at para. 212 that:

> "Scrutiny by way of judicial review in anticipation of a trial has obvious practical and unhelpful consequences both in terms of the delay of any trial, and the consequential increase in burden upon the Superior Courts. It thus requires to be justified."

29. That general approach in the jurisprudence is not determinative as I am not satisfied that the present case engages those general principles when, as a matter of fact, the plaintiff finds himself charged and sent forward for trial on the precise statutory provision which he seeks to challenge. The Circuit Court cannot protect his rights to not be charged at all and the role of the Circuit Court will be to engage with the factual and evidential matters before it and regulate the conduct of the trial.

30. The first principle advanced in the present case is that there ought not to be a trial because the legislation is unconstitutional. This argument is particularly acute in the context of the present case where the evidence includes the failure to do what the Act of 1998 prescribes. It is possible that the only admissible evidence in the course of the trial will be evidence that the plaintiff failed to answer questions when he was under interrogation when the answers might have assisted in the prosecution of another person. It matters not that there is other evidence in the book of evidence, and what is relevant is that it may transpire that the only evidence which comes before the jury is the evidence of what occurred in the course of questioning.

31. This case is not comparable to *McFarlane v. DPP* (Unreported, Supreme Court, 7th March, 2016) or *McNulty v. DPP* [2009] 3 I.R. 572, where the review court was asked to rule on the admissibility of evidence and the trial judge was perfectly capable of regulating the course of the trial and the means by which the evidence comes before the jury.

32. That case involved failure to obtain fingerprint evidence and the duty of the gardaí to seek out and preserve evidence, as did many of the judgments of the Superior Courts relating to the interplay between judicial review and the respect required to be given to the role of the trial court in the criminal process. The circumstances where an applicant seeks to prevent a trial on account of missing or lost evidence raises a question of a different nature than the question at issue in the present case. The plaintiff seeks in the present case to challenge the first principle upon which he is charged and not the admissibility or otherwise of any evidence. He is not, for example, seeking to challenge the admissibility of anything that occurred in the course of the three dates when he was interviewed. Rather his challenge is to the fact that those interviews could be an element in a crime with which he is charged. The plaintiff challenges the constitutional appropriateness of placing him at the hazard of a conviction in respect of a matter which he argues should not be part of the criminal law. The challenge is not to the process but to the existence of the crime. It does not concern the conduct of the trial but whether trial is to be permitted in respect of a crime which may not be part of Irish law on grounds of unconstitutionality.

33. I am therefore not persuaded by the argument by the defendant that the plaintiff's rights can be protected at trial and that the trial judge can alleviate any concerns regarding the evidence that may be adduced and the fairness of the investigative process.

The right to remain silent under interrogation: the principle against self-incrimination

34. The decision of the Supreme Court of Saorstát Éireann in *The State (McCarthy) v. Lennon* [1936] I.R. 485 is a useful starting point to understand the nature of the right to silence. The principle against self-incrimination was called in aid by Mr. McCarthy in a challenge to the admissibility of evidence which was held to have been lawfully taken in pursuance of the provisions of s. 15 of Article 2A of the Constitution of Saorstát Éireann. At p. 495 of his judgment, Kennedy C.J. in a dissenting judgment, made a statement supported by the majority, and which has found favour in later judgments:

> "The maxim *nemo tenetur se ipsum accusare* may no doubt be derived from the English common law in force in this country by force of statute, recognised, indeed, in some of our own legislation. Whatever be its origin, it contains a sound principle, one, indeed, to which appeal has been made often in the past. It is certainly now firmly established in our practice and one of the best known rules of law amongst the public and generally accepted. If Parliament wishes to suspend the application of that principle I look for an express repeal of it."

35. The majority of the Supreme Court rejected the argument of Mr. McCarthy because it held that the amendment to the Constitution, then capable of being effected by statute, meant that the statements were obtained lawfully. Whether the conclusion of the Court in that judgment might inform thinking in the light of the Constitution adopted in 1937 has been doubted. In his judgment in *Re National Irish Bank Ltd. (No. 1),* Barrington J. thought it was "not a safe guide for any person seeking to establish the rights of the citizen under the Irish Constitution."

36. The judgment however remains a useful guide to the source of the right to remain silent, and roots it firmly in the allied principle against self-incrimination, recognised by all of the judges in the Supreme Court in that case as being one of antiquity and soundness.

37. Because the offence created by s. 9(1)(b) relates to the withholding of information in regard to the commission of an offence by another, the creation of the offence does not readily admit itself to an argument that it offends the right not to self-incriminate.

38. Therefore I turn to analyse whether the right to remain silent may be regarded as a stand-alone right not deriving from the principle against self incrimination.

The right to remain silent: a more broad principle?

39. The Supreme Court considered the nature of the right to remain silent in the case of *Heaney & Anor. v. Ireland* [1996] 1 I.R. 580. It is acknowledged by the plaintiff that I am bound by that decision but, in the course of argument, counsel did draw my attention to the fact that the European Court of Human Rights regarded the decision as not compatible with the European Convention on Human Rights. I will return later to that point. Counsel for the plaintiff seeks to distinguish the judgment of the Supreme Court in the manner that will appear below.

40. *Heaney & Anor. v. Ireland* concerned the challenge to the constitutionality of s. 52 of the Offences Against the State Act 1939 which created the offence of a person failing to give a full account of that person's movements and actions. The offence carried a sentence not exceeding six months. The plaintiff challenged the constitutionality of s. 52 on the grounds, *inter alia*, that it infringed the constitutionally guaranteed right to remain silent and the High Court, and the Supreme Court on appeal, dismissed the case on the grounds, *inter alia*, that the right to remain silent was not an absolute right, albeit the right had a constitutional origin. The Court answered the question posed in the proceedings by reference to Article 40.3.1, and expressly did not reach any conclusion on whether the section infringed the right to a fair trial under Article 38.1 of the Constitution.

41. O'Flaherty J. giving the judgment of the Supreme Court said that the right to silence "is but a corollary of the freedom of expression that is conferred by Article 40 of the Constitution". He did not therefore expressly find that the right to remain silent derived wholly from the principle against self-incrimination. He spoke of "the *prima facie* entitlement of citizens to take such a stand" and to chose to remain silent.

42. The right therefore has an origin in broad constitutional principles and is not wholly founded in the principle against self-incrimination. It may therefore be called in aid in the present challenge.

Not an absolute right
43. That the right to remain silent is not absolute was clear from the decision in *Heaney & Anor. v. Ireland,* and O'Flaherty J. said that, as the freedom of expression was itself qualified, "so must the entitlement to remain silent be qualified." (p.585) O'Flaherty J. noted, as Mustill L. had in *R. v. Director of Serious Fraud Office Ex p. Smith*, that the "statutory interference with the right is almost as old as the right itself." O'Flaherty J. set out a non-exhaustive list of statutes in diverse areas such as the Companies Acts 1963 - 1990, the Bankruptcy Act 1988 and the Social Welfare (Consolidation) Act 1993 where disclosure was required, albeit that the circumstances in which disclosure was to be made might differ from one statutory regime to another, as might the use to which such information may be put, and whether it is admissible in evidence. He went on to say:

> "This short analysis indicates the *ad hoc* and varied manner in which the legislation impinges on the right to silence. These statutes are as diverse as they are many. In light of the inconsistencies between each, it would be idle to engage in summarising or parsing the various statutes any further; however, they each serve to illustrate that in certain circumstances a person may be required to disclose information under threat of penal sanction. They evoke a legislative intent to abrogate, to various extents, the right to silence, in a myriad of contrasting circumstances." (p.588)

Proportionality
44. The extent to which an interference with the right is permissible may to a large extent depend on the protections that are put in place to minimise any loss of the essence of that right. A statutory provision which compels a person to provide information or answer questions in the course of an investigation is not regarded as destroying the right if the procedural protections are sufficient to ensure a proper balance between the right to silence and the right of the State in the common good to investigate crime or protect public peace and order.

45. In *Rock v. Ireland & Anor*. [1997] 3 I.R. 484, the Supreme Court considered the constitutionality of ss. 18 and 19 of the Criminal Justice Act 1984 on the grounds that they infringe the constitutionally guaranteed right to silence. Those sections provided that an inference may be drawn from the refusal of a person to account for the presence of an object, substance or mark or any mark on any such object which a person had on his person, his clothing or footwear or otherwise in his possession. Section 18 provides that, in any proceedings against the person for the offence, such inferences may be drawn from the failure or refusal of a person to give such account "as appear proper".

46. The Supreme Court refused to declare this section unconstitutional. Hamilton C.J. giving the judgment of the Court noted the procedural protections afforded to a person arrested, namely that that person be informed of the belief by the member of An Garda Síochána that the object, substance or mark "may be attributable to his participation in the commission of the offence in respect of which he was arrested" and to then request him to account for it.

47. The section impugned in *Rock v. Ireland & Anor*. did not itself, create the offence of failing to account or of silence. This was explained by Hamilton C.J. as follows:

> "If inferences are properly drawn, such inferences amount to evidence only; they are not to be taken as proof. A person may not be convicted of an offence solely on the basis of inferences that may properly be drawn from his failure to account; such inferences may only be used as corroboration of any other evidence in relation to which the failure or refusal is material. The inferences drawn may be shaken in many ways, by cross-examination, by submission, by evidence or by the circumstances of the case." (p. 498)

48. The Supreme Court determined the question in *Heaney & Anor. v. Ireland* by reference to the question of whether the power given to An Garda Síochána was "proportionate to the objects to be achieved by the legislation", an approach favoured in the modern jurisprudence which calls in aid principles of proportionality as part of the interpretative framework.

49. O'Flaherty J. said the following:

> "…the State is entitled to encroach on the right of the citizen to remain silent in pursuit of its entitlement to maintain public peace and order. Of course, in this pursuit the constitutional rights of the citizen must be affected as little as possible. As already stated, the innocent person has nothing to fear from giving an account of his or her movements, even though on grounds of principle, or in the assertion of constitutional rights, such a person may wish to take a stand. However, the Court holds that the *prima facie* entitlement of citizens to take such a stand must yield to the right of the State to protect itself. *A fortiori*, the entitlement of those with something relevant to disclose concerning the commission of a crime to remain mute must be regarded as of a lesser order." (p. 590)

50. Hamilton C.J. described the principle of proportionality as "by now a well-established tenet of Irish constitutional law" and went on to analyse the interest sought to be protected, the duty and right of the State to defend and protect the life, person and property of its citizens, against the right of the individual to avoid self-incrimination. The Court decided that a balance had been achieved, albeit that the test was not "whether a perfect balance had been achieved". He went on to say as follows:

> "While it is true that ss. 18 and 19 could lead to an accused being convicted of a serious offence in circumstances where he or she might otherwise have been acquitted, there are two important, limiting factors at work. Firstly, an inference cannot form the basis for a conviction in the absence of other evidence. As the learned trial judge pointed out:—
>
> > '…there is no doubt a strengthening of the State's case but in no sense is it final and in neither event is the accused required to exculpate himself.'
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> Secondly, only such inferences "as appear proper" can be drawn: that is to say, an inference adverse to the accused can only be drawn where the court deems it proper to do so. If it does not, then neither judge nor jury will be permitted to draw such inference. Thus, for example, a court could refuse to allow an inference in circumstances where its prejudicial effect would wholly outweigh its probative value as evidence." (p. 501)

51. The Supreme Court concluded that there was proportionality in the provision and refused to make the declaration that the legislation was unconstitutional.

52. The Supreme Court took comfort from the fact that the section was described as "exceptional", and remained in force only insofar as the Dáil has annulled the proclamation of government that the ordinary courts were inadequate to secure the effective administration of justice and the preservation of public peace and order.

53. No such limitation is found in s. 9(1)(b) of the Act of 1998

Application of these principles to s. 9(1)(b)
54. The inference in respect of which the challenge was brought in *Rock v. Ireland & Anor*. was evidential and the inference itself cannot form the basis of a conviction in the absence of other evidence. Further, the making of an inference would not always be permissible in the course of a trial and it is open to an accused to argue that an inference is not appropriately drawn.

55. Section 9(1)(b) of the Act of 1998 on the other hand, provides that silence in itself can form the basis of a conviction, and the section does not permit a nuanced or careful approach by the trial judge with regard to whether the fact of that silence once accepted can lead to conviction. The prosecution of a person under the provisions of s. 9(1)(b) does not engage questions of the admissibility of evidence, or of the weight of such evidence. In essence, it makes silence of itself an offence.

56. The dilemma is apparent. A person is to be told of the right to remain silent but not told that, by exercising that right, a crime may be committed. Thus, a person may not know that there is a real risk that the exercise of the established right to remain silent, of which he or she is expressly required to be informed, could result in a prosecution.

57. The judgment of *Heaney & Anor. v. Ireland* is binding on me and counsel for the plaintiff does not seek to argue that it was decided wrongly. Counsel argues that it may be distinguished by virtue of the fact that the legislation impugned in that case contained a sufficient architecture to protect the person in custody so that that the abrogation of the right to silence was done by a proportionate means. He also points to the fact that an offence challenged in that case was triable summarily and was not, as in the present case, deemed to be an arrestable offence, carrying a maximum penalty of five years' imprisonment.

58. An elaborate structure of protection exists in the context of certain statutory provisions such as the provision considered by the Supreme Court in *Heaney & Anor. v. Ireland*. No statutory or regulatory provisions exist in s. 9(1)(b) by which a person under interrogation may be put on notice of the possibility that, by failing to answer questions or provide information, he or she may be committing an offence. No provision exists, such as was introduced by the Criminal Justice Act 2007, by which a person might be advised that he or she has a right to obtain legal advice.

59. Indeed it is difficult to envisage what advice a solicitor would give to a person under interrogation with regard to s. 9(1)(b) when that person is detained in regard to another offence. How a solicitor is to advise a client that he or she has a right to silence, but should that right be exercised in pursuance of a choice not to speak, the actual exercise of the right could give rise to a separate charge and the commission of a separate criminal offence remains unclear.

60. Under established statutory procedures, and those which have evolved from the authorities, a person under investigation is entitled to be told of the right to silence and that, in an appropriate case, a failure to account for movements, goods in one's possession etc. may form the basis on which the Court may draw an inference. The starting point of the caution is that the person under investigation is told that he or she has a right to silence. There is nothing in s. 9(1)(b) that requires the investigating garda to inform or caution the person under questioning that the exercise of the right to silence can, of itself, lead to a prosecution.

61. Hardiman J. in *DPP v. Gormley & Anor*. [2014] 2 I.R. 591 explained the value of professional advice as follows:

> "[17] It must also be recorded, in my opinion, that the professional service required of a solicitor called to attend a person detained for questioning is a complex and specialised one, requiring not merely a knowledge of the law, but a wide experience in the relevant area. Ever since the passage of ss. 18 and 19 of the Criminal Justice Act 1984 there has been a capacity for a court to "draw inferences" depending on the manner in which a detained person responds to questioning. These inferences can be grossly damaging to the prospects of success at trial, even of an entirely innocent person…. The exercise of reading this article [Law Society Gazette July, 2007] and the statutes, cases and regulations it cites will give some idea of the complexity of the advice required, without any notice at all, of a solicitor advising a detained person.
>
> To this complexity must be added the fact that the solicitor's advice is typically given to a person who has been arrested without notice, perhaps having often been woken up for the purpose, perhaps handcuffed, perhaps subject to search, and locked in a cell. Even a robust person would be greatly prejudiced in his ability immediately to understand complex material and act properly upon it, by this experience. Some of these persons will be juveniles, some will be in need of medication or other medical or quasi-medical, assistance, as well as simple reassurance and stabilisation."

62. As Hardiman J. said, criminal law has become "strikingly complex and specialised in recent years" and that complexity in the area of inferences, with which the Court was dealing in that case, suggested to him that it would be difficult for a solicitor to give advice without that background expertise and experience.

63. The difficulty is compounded when no statutory scheme exists to provide guidance to a person under interrogation regarding the offence of withholding information created by s. 9(1)(b) of the Act of 1998.

64. Assistance can be obtained from the judgment of the High Court, and the Supreme Court on appeal, in *Re National Irish Bank Ltd. (No. 1).* There, what was under consideration were the powers contained in s. 18 of the Companies Act 1990, by which a court-appointed inspector had the power to compel answers and the production of documents from officers and agents of a company whose affairs are under investigation. Section 18 of that Act provided that any answer given by a person to a question put to him in exercise of powers under the section could be used in evidence against that person.

65. The High Court determined that it was not the intention of the Oireachtas to save the privilege against self-incrimination and that ss. 10 and 18 of that Act had a necessary implication that a person may be compelled to give answers or provide documentation to the inspectors notwithstanding the constitutionally-recognised right to silence. Shanley J., having analysed in some detail the history of the right against self-incrimination, rejected the argument that it was an absolute right and accepted that the right could be qualified or restricted provided the restriction went no further than was "necessary to enable to State to fulfil its constitutional obligations." (p. 158)

66. He went on to say that the statutory obligation to answer self-incriminatory questions "is not inconsistent with the right to trial in due course of law" (p. 166), notwithstanding that the statutory provisions did clearly envisage that prosecutions could follow from the answers given to an inspector in the course of an investigation as follows:

> "When asked questions by an inspector, the witness does not stand as an accused person. If he becomes an accused person, having answered incriminating questions, his right to a fair trial may not even at that stage be infringed: it

> depends on whether the compelled testimony is tendered against him at his trial; if it is, he may, of course, object to it and it would be a matter for the trial judge to determine its admissibility. It is at that stage, and no sooner, that adjudication on the admissibility of answers (or the fruits of such answers) is to be made. I therefore see no necessary connection between the occasion of questioning by an inspector and the occasion, at trial, of tendering compelled testimony. No right to a fair trial is infringed at the questioning stage; the use to which the answers are put is a separate matter and where such use threatens to, or does, infringe a constitutional right of the witness that right can be then asserted and vindicated." (p. 166)

67. The Supreme Court agreed with the analysis of Shanley J. but Barrington J. added the *proviso* that a statement obtained by the inspectors as a result of the exercise by them of their powers under s. 10 of that Act:

> "… would not, in general, be admissible at a subsequent criminal trial of such official, unless, in any particular case, the trial judge was satisfied that the confession was voluntary". (p. 189)

68. The analysis of Shanley J. in the High Court and that of the Supreme Court when applied to the dilemma faced by a person charged with the offence of withholding information is instructive. Where the charge is made under s. 9(1)(b), there is a "necessary connection" between the occasion of failing to provide information in the course of questioning and the tendering at trial of the fact of such refusal. The person who gave evidence to an inspector appointed under the Companies Act may legitimately argue in due course that the evidence is inadmissible on account of it not having been voluntarily given. In other criminal contexts, a person held for questioning in the course of a garda investigation may legitimately challenge the admissibility of any statements made in the course of that questioning.

69. But can a person legitimately challenge the admissibility of evidence of the fact that he remained silent? I think not. The offence created by s. 9(1)(b) of the Act of 1998 is of a different nature and the essence of the offence is not to be interrogated by reference to considerations of voluntariness. There is no structure of protection for an accused who may be charged with a crime arising from events when that person was a suspect in a crime.

The Committee to review the Offences Against The State Acts, 1939 - 1998

70. The Committee established to review the Offences Against the State Acts 1939 to 1998 published a report in May, 2002 (the Hederman Report) and part of its deliberations included the provisions of s. 9(1)(b) of the Act of 1998. The Committee considered the old common law offence of misprision of felony, and noted the ambit of that offence "was always unclear." The Committee characterised the offence where "members of the public" might be obliged to assist the gardaí in their law enforcement duties. At para. 6.174, the majority report said as follows:

> "The Committee agrees that it is preferable that there should exist a modern statutory offence which traverses much of the ground here hitherto covered by the offence of misprision of felony and it does not consider it unfair that members of the public should commit an offence where in these circumstances they fail to assist the Gardaí in their law enforcement duties."

71. No change was recommended.

72. Professor Dermot Walsh in a dissenting view argued that the majority position did not "take sufficient cognisance of human right norms". Two paragraphs of his published dissenting view were dedicated to the offence of withholding information created by s. 9(1)(b) of the Act of 1998 which he regarded as "fundamentally objectionable in a society which seeks to strike a fair balance between the autonomy of the individual and the intrusive demands of the State". He went on to say as follows:

> "Just as the State should not use the criminal sanction to compel an individual to provide evidence against himself or herself in a criminal investigation, so also should it not use the criminal sanction to compel the individual's co-operation with a police investigation. I fully accept that citizens have responsibilities as well as rights and that citizens should feel under a moral duty to assist the State in the prevention and detection of crime. It is also my view, however, that the enforcement of this moral duty through the full panoply of the criminal law constitutes both an improper use of the criminal law and an excessive encroachment on the autonomy of the individual."

73. Professor Walsh expressed himself particularly concerned with the fact that a person could be arrested and "threatened with prosecution and a lengthy prison sentence if he or she fails without reasonable excuse to cooperate". He regarded it as objectionable to criminalise an individual particularly in the context of s. 30:

> "… so as to ensure that he or she is amenable to arrest and detention under s. 30 for the purpose of facilitating an investigation into a criminal offence which others are suspected having committed."

74. The analysis of Professor Walsh is compelling if one examines the elements of the crime created by s. 9(1)(b) of the Act of 1998 to which I now turn.

The elements of the crime

75. While the elements of the crime of withholding information involve the fact of silence, that silence must be shown to amount to a failure to provide material evidence. Along with the necessary *mens rea* included as an element in the crime, the action of choosing to remaining silent may constitute the crime.

76. In those circumstances, I consider that the statutory provisions may be offensive to the constitutional protection of the right to remain silent. The offence may be committed by a person not otherwise at risk of prosecution and the facts of the present case show that it may be committed by a person when the evidence wholly or partly relates to the failure to answer questions whilst under interrogation. That in my view is a flaw in the legislation in respect to which no protection exists.

77. The present case shows that s. 9(1)(b) may make a person amenable to a charge arising from the failure to answer questions while being detained.

78. Section s. 9(1)(b) does, in my view, create a compulsion such that a person under questioning is compelled to answer questions, as the failure to do so exposes that person to the risk of conviction of a crime separate from that under investigation. There is no moderating element in the legislation which would enable the garda conducting the investigation, or even the garda conducting the later investigation into the alleged crime of silence, to balance the competing rights of the State to investigate crime and of the person under questioning to remain silent.

79. The wide scope of the legislation seems to me to be the primary source of the constitutional difficulty. It may be desirable, in the interests of the security of the State or the protection of the life or property of persons, that there be a crime of withholding information. It can be understood as somewhat akin to the separate crime of aiding and abetting a crime, although the crime of withholding information can arise when a person is passive and cannot be shown to have directly aided or abetted the commission of a crime. The broad sweep of the legislation, however, means that a person in custody and lawfully being questioned in the course of a criminal investigation may find himself or herself in an irresolvable dilemma to answer questions regarding the crime and possibly incriminate himself or herself or to refuse to answer any questions and thereby commit a criminal offence.

80. In *Rock v. Ireland & Anor*, the Supreme Court considered that s. 18 of the Criminal Justice Act 1984 was not unconstitutional, as the trial court is obliged to act in accordance with the principles of justice in the way in which an inference is drawn at trial and the trial judge has an obligation to ensure that no improper or unfair inferences are drawn. The trial court could ensure that no improper use was made of the inferences.

81. The difficulty with the offence created by s. 9(1)(b) of the Act of 1998 is that the silence itself constitutes the crime, whereas in the case of s. 18 the inference may be an element of the evidence that leads to a conviction. The same may be said of the decision of the Supreme Court in *Re National Irish Bank Ltd. (No. 1)* where it was held that the section could be read and was capable of being applied in a constitutionally permissible fashion. In *People (DPP) v. Finnerty* [1999] 4 I.R. 364, the Supreme Court quashed a conviction for rape where the trial judge permitted the accused to be cross-examined as to why he had remained silent when questioned by gardaí. The Supreme Court held that it was impermissible to draw inference from silence:

> "(2) Under no circumstances should any cross-examination by the prosecution as to the refusal of the defendant, during the course of his detention, to answer any questions, be permitted.
>
> (3) In the case of a trial before a jury, the trial judge in his charge should, in general, make no reference to the fact that the defendant refused to answer questions during the course of his detention. "(p. 381)

82. 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.

83. For these reasons, I consider that the offence created by s. 9(1)(b) does offend the Constitution.

Article 6 of the European Convention on Human Rights

84. Because I consider that the rights under the Irish Constitution are sufficiently broad to answer the question posed in the present case, I do not intend to analyse the present application in the light of the European Convention on Human Rights, as domestic law provides a full answer.

85. But the analysis of the ECtHR is instructive.

86. The ECtHR considered the decision in of *Heaney & McGuinness v. Ireland* [2000] ECHR 684, [2001] 33 EHRR 264 and rejected the argument of the Irish State that Article 6 of the Convention had no application. In particular, the Court expressed itself to be dissatisfied with the protections offered by the Irish legislation because it was not satisfied that it "effectively and sufficiently reduced the degree of compulsion" imposed by the section. The Court considered that the nature of the compulsion could destroy the very essence of the privilege against self-incrimination. The approach taken by the ECtHR was to consider whether the right to silence or the privilege against self-incrimination was sufficiently protected, but the approach of the Court to the issue of compulsion is particularly helpful in the analysis of the legislation under challenge in the present case.

87. The ECtHR said that the privilege against self-incrimination operates on the principle that the prosecution's case does not rely on evidence obtained through coercion or oppression in defiance of the choice of an accused person. The Court linked the privilege against self-incrimination and the presumption of innocence.

88. The ECtHR considered that the degree of compulsion can be mitigated or reduced by protections provided by regulation or statute, but concluded that the special factors at play and the mitigating protections then applicable were insufficient to limit the degree of compulsion imposed by s. 52. The Court found that the State's security and public order concerns could not justify a provision that extinguishes the very essence of the right to remain silent and the right against self-incrimination guaranteed by Article 6.1 of the Convention.

89. The judgment of Clarke J. (as he then was) in *DPP v. Gormley & Anor*. analysed the jurisprudence of the European Court of Human Rights with regard to the factors that might trigger a right under Article 6 of the Convention, and which suggests that the point in time is the point at which the national court can "attach consequences to the attitude of an accused". Clarke J. took the view (at para. 82) that the position in Irish law was the same as that acknowledged by the ECtHR and by the Supreme Court of the United States.

90. The point at which the provisions of s. 9(1)(b) lead to the triggering of Article 6 rights is to my mind the point at which a person remains silent, whether that person is under interrogation or not. The peculiarity of the offence created by s. 9(1)(b) is that silence constitutes the offence. Because silence in interrogation is a right which is part of the existing legal order, any offence that might dilute that right would have to be carefully and proportionately introduced.

91. It is noteworthy too that Clarke J. was persuaded that the approach of the ECtHR and the United States Supreme Court to the placing of significant reliance on admissions made in the course of questioning could lead to a trial being unfair and expressed himself "persuaded that a like position must be found to exist under Bunreacht na hÉireann". While not a direct comment with regard to the lawfulness of the crime of withholding information, the approach identified by Clarke J. in the international jurisprudence and in Bunreacht na hÉireann must, by way of analogy, also inform the lawfulness of securing a conviction arising from silence in the course of questioning of a person in the course of a criminal investigation.

Presumption of constitutionality
92. The legislation enacted since the Constitution was adopted in 1937 and enjoys the benefits of the presumption of constitutionality, as established in *East Donegal Co-Operative Livestock Mart Limited & Ors. v. The Attorney General* [1970] 1 I.R. 317.

93. Section s. 9(1)(b) is capable of being used to charge a person in circumstances arising from a failure to give information in the course of questioning and the legislation does not temper or modify the way in which questioning can occur. There exists no architecture to advise a person who is a suspect in a criminal investigation as to the possible import of s. s. 9(1)(b) where the evidence may be either wholly or partially related to a time when the accused was a suspect and under questioning.

94. The legislation may be saved by the requirement that a person under questioning be afforded a suitable warning, but absent such the presumption of constitutionality does not save the section because of the real dilemma it creates, as explained above.

Is the section void for vagueness or uncertainty?
95. The general proposition 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

96. The test of certainty requires criminal legislation to enable a person to understand by objectively ascertainable standards whether an offence could be committed by an action and 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 arbitrariness in application.

97. The boundary between lawful and unlawful activity must be capable of being discerned.

98. The plaintiff argues that s. 9(1)(b) is vague and uncertain as doubt exist as to how in a practical sense a person may reconcile the obligation created thereby with the right to remain silent. It is argued that the section fails for uncertainty and vagueness in a number of respects.

99. It is argued that it is overly broad as it creates an offence which may not readily be understood having regard to the right to remain silent, so that the operation of the boundary between the constitutionally protected right and the criminal offence created by the section is unclear.

100. The plaintiff relies on the judgment of the Supreme Court in *King v. Attorney General & Anor*. [1981] I.R. 233. That case involved a challenge to the constitutionality of the offence of loitering with the intent to commit a felony, an offence created by s. 4 of the Vagrancy Act 1824. The High Court, and the Supreme Court on appeal, held that the section was inconsistent with the Constitution, in that it infringed the concept of justice, the principle of equality before the law, Article 38, Article 40.4.1, the right to liberty and Article 40 and, the guarantee that the State would defend and vindicate the personal rights of citizens.

101. The leading judgment was given by Henchy J. who, with his hallmark eloquence, identified the ingredients of the offence as being:

> "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." (p. 257)

102. What were impugned were the ingredients of the offence, the mode in which it might be committed and the mode of proof. The Court did not strike down the section because it was potentially arbitrary in its application.

103. It is clear from the judgment of the Supreme Court in *DPP v. Cagney & Anor*. [2007] IESC 46, [2008] 2 I.R. 111 that the absence of clarity can prevent the legitimate creation of criminal offences. The judgment of the Court was given by Hardiman J., who noted the risk inherent in legislation of such breadth that it can create uncertainty:

> "There is however a possibility that the section might be interpreted over broadly so as to cover circumstances which the legislature had not considered, and to criminalise certain things which are not and were not intended to be the subject of prohibition." (para. 31)

104. Hardiman J. described it as a "fundamental value" that a citizen should know or, at least, be able to find out "with some considerable measure of certainty" precisely what is prohibited by a statute and he quoted with authority the judgment of the Court of Criminal Appeal in *Attorney General v. Cunningham* [1932] I.R. 28, that "the criminal law must be certain and specific" (p. 32), and the judgment of Kenny J. in *King v. Attorney General & Anor*. which dealt with the requirement of precision and the risk that uncertain and ambiguous legislation poses to the foundation of a criminal offence.

105. Hardiman J. was clear that the presumption of constitutionality could not save legislation which breached these fundamental principles of law and construction (para. 36).

106. Kearns P. gave judgment in *Dokie v. DPP* [2011] IEHC 110, [2011] 1 I.R. 805. He held s. 11 of the Immigration Act 2004 to be unconstitutional, as the section, which created the offence of failing to give a "satisfactory explanation" for not being in possession of a personal identity document, gave rise to vagueness and uncertainty and had considerable potential for arbitrariness in its application by an individual member of An Garda Síochána.

107. He went on to say, albeit *obiter*, that, had the legislation used more precise language that made it a crime to "without reasonable excuse" not be in possession of such a document, he would not have been persuaded that the section was unconstitutional.

108. Hogan J. in *Douglas v. DPP & Anor*. [2013] IEHC 343, [2014] 1 I.R. 510, held that the offence created by s. 18 of the Criminal Law (Rape) (Amendment) Act 1990, by which an offence could be created by any act which could "cause scandal or injure the morals of the community" were inconsistent with the Constitution by reason of such uncertainty. He identified the section as falling foul of Article 38.1 and Article 40.4.1 of the Constitution, and applied *King v. Attorney General & Anor*. and *DPP v. Cagney & Anor.*

109. He held that the offences created by the statutes:

> "…are hopelessly and irremediably vague; they lack any clear principles and policies in relation to the scope of what conduct is prohibited and they intrinsically lend themselves to arbitrary and inconsistent application. In these circumstances, the conclusion that the offences offend the guarantee of trial in due course of law and Article 38.1 of the Constitution, the guarantee of equality before the law in Article 40.1 thereof and the protection of personal liberty in Article 40.4.1 in escapable." (p. 533)

110. 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.

111. The claim succeeds on this argument also.

112. Therefore for these reasons, I propose making a declaration that section 9(1)(b) of the Offences Against the State (Amendment) Act, 1998 offends the constitutional right to remain silent and is impermissibly vague and uncertain.