Neutral Citation Number: [2011] IEHC 39

THE HIGH COURT

JUDICIAL REVIEW

[2010 No. 1228 J.R.]

BETWEEN

BERNARD MARKEY

APPLICANT

AND

THE MINISTER FOR JUSTICE AND LAW REFORM, THE DIRECTOR OF PUBLIC PROSECUTIONS, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

THE HUMAN RIGHTS COMMISSION

NOTICE PARTY

JUDGMENT of Kearns P. delivered the 4th day of February, 2011

By order of the High Court (Hanna J.) dated 15th September, 2010 the applicant herein was granted leave to apply for a declaration that s. 34 of the Criminal Procedure Act 2010 is unconstitutional and a further declaration that the same section is incompatible with Article 6 of the European Convention on Human Rights.

Section 34 of the Criminal Procedure Act 2010 is contained in Part V of the Act which contains miscellaneous provisions in relation to the giving of evidence. Section 34 introduces a new provision in relation to the giving of evidence by expert witnesses retained by the defence and provides:-

> "(1) An accused shall not call an expert witness or adduce expert evidence unless leave to do so has been granted under this section.
>
> (2) Where the defence intends to call an expert witness or adduce expert evidence, whether or not in response to such evidence presented by the prosecution, notice of the intention shall be given to the prosecution at least 10 days prior to the scheduled date of the start of the trial.
>
> (3) A notice under *subsection (2)* shall be in writing and shall include –
>
> (a) the name and address of the expert witness, and
>
> (b) any report prepared by the expert witness concerning a matter relevant to the case, including details of any analysis carried out by or on behalf of, or relied upon by, the expert witness, or a summary of the findings of the expert witness.
>
> (4) The court may grant leave to call an expert witness or adduce expert evidence even if no report or summary of the findings are included as required by *subsection (3) (b)*, if the court is satisfied that the accused took all reasonable steps to secure the report or summary before giving the notice.
>
> (5) The court shall grant leave under this section to call an expert witness or adduce expert evidence, on application by the defence, if it is satisfied that the expert evidence to be adduced satisfies the requirements of any enactment or rule of law relating to evidence and that-
>
> (a) *subsections (2)* and *(3)* have been complied with,
>
> (b) where notice was not given at least 10 days prior to the scheduled date of the start of the trial, it would not, in all the circumstances of the case, have been reasonably possible for the defence to have done so, or
>
> (c) where the prosecution has adduced expert evidence, a matter arose from that expert's testimony that was not reasonably possible for the defence to have anticipated and it would be in the interests of justice for that matter to be further examined in order to establish its relevance to the case.
>
> (6) The prosecution shall be heard in an application under *subsection (4)* or *(5).*
>
> (7) A notice required by this section to be given to the prosecution may be given by delivering it to the prosecutor, or by leaving it at his or her office or by sending it by registered post to his or her office.
>
> (8) Where the court grants leave under this section, the prosecution shall be given a reasonable opportunity to consider

the report or summary before the expert witness gives the evidence or the evidence is otherwise adduced.

(9) In this section –

'expert evidence' means evidence of fact or opinion given by an expert witness, and

'expert witness' means a person who appears to the court to possess the appropriate qualifications or experience about the matter to which the witness's evidence relates."

Section 34 of the Criminal Procedure Act 2010 was commenced by way of ministerial order contained in S.I. No. 414 of 2010 on 1st September, 2010.

BACKGROUND

The applicant was involved in a road traffic accident on 21st June, 2009 at Tinakeely, Carrig, Birr in County Offaly. The applicant was the driver of a motor vehicle on that occasion when, at about 6.45 a.m., the vehicle left the roadway and collided with a ditch as a result of which the applicant and two passengers in the vehicle suffered significant injuries.

Arising out of the incident, the applicant was charged with dangerous driving causing serious bodily harm contrary to s. 53 (1) of the Road Traffic Act 1961 (as amended) and with the unlawful use of the motor vehicle on the said occasion without the consent of the owner, contrary to s. 112 of the Road Traffic Act 1961 (as amended). The applicant was further charged with the offence of drunk driving under s. 49 of the Road Traffic Act 1961 (as amended).

A book of evidence was served on the applicant on 2nd June, 2010 pursuant to s. 4B (1) of the Criminal Procedure Act 1967. Thereafter, on 16th November, 2010 the applicant was sent forward for trial to Tullamore Circuit Court.

In his affidavit sworn herein on 15th September, 2010 the applicant's solicitor, Mr. James Sweeney, stated that he advised the applicant that an expert report was required in the conduct of his defence and that he commissioned such a report by way of letter dated 6th September, 2010. It would appear that, as of the date of swearing the affidavit, no expert report had in fact been obtained from any expert. As already noted, the leave application to bring the within proceedings was made on 15th September, 2010.

The essence of the applicant's case appears at paras. 14 and 15 of Mr. Sweeney's affidavit where he deposes as follows:-

"14. I say and am so advised that by virtue of the provisions of s. 34 (1) of the Criminal Procedure Act 2010, the applicant herein shall not call or cause to be called an expert witness or adduce expert evidence unless leave to do so has been granted under s. 34 of the Act of 2010. I say and am so advised that the applicant is therefore precluded from calling an expert witness or adducing expert evidence should he not obtain leave to so do as required by s. 34 of the Act of 2010.

15. I say and am so advised that in circumstances where no such requirement to obtain leave prior to adducing expert evidence is placed on the second named respondent by s. 34 of the Act of 2010 or by any other enactment of Oireachtas Éireann, the said legislative provision unfairly and invidiously discriminates against the applicant herein who is seeking to adduce expert evidence at trial and I say and am so advised that the said provision is contrary to the applicant's rights as derived from Article 38 and Article 40 of Bunreacht na hÉireann 1937 and is incompatible with the applicant's minimum rights pursuant to Article 6 (3)(d) of the European Convention on Human Rights as enacted by the European Convention on Human Rights Act 2003."

While the grounds as set out in the statement grounding the application for judicial review contain multiple and wide-ranging assertions of interference with the applicant's rights, the 25 paragraphs outlining the grounds may be summarised in a fairly simple manner. First, it was contended that s. 34 materially disadvantages and restricts an accused person from testing by cross-examination the prosecution evidence in accordance with established rules of evidence. Second, it was contended that the measures contained in s. 34 of the Act of 2010 encroach upon an accused person's right to silence by requiring him, through his expert, to disclose his defence in advance of the trial hearing. Third, it was contended that the section "invidiously promotes inequality of arms to the prejudice of the weaker party, *viz*. the applicant accused" where the means of adducing evidence consistent with innocence or mitigating culpability were no longer available as of right, but only where leave to do so had been granted on an occasion other than at trial. As no such requirement to seek or obtain leave falls upon the prosecution, it was argued and submitted that any requirement devolving on the defence to seek and obtain such leave represented a "stain" on the entire criminal procedure.

In response, it was contended on behalf of the respondents that the proceedings were premature, hypothetical and moot. However, counsel for the respondents stressed that confirmation of the constitutional soundness of the section was an urgent requirement from the respondents' point of view and the respondents were anxious that the instant case would not be resolved solely by reference to a point on prematurity when it was of particular importance that the main point argued by the applicant be clarified. On that basis, counsel for the respondent proceeded to argue for the constitutional validity of s. 34 of the Act of 2010. Counsel contended that all s. 34 did was to move forward or accelerate a ruling by a trial judge on the admissibility of expert evidence. The section was intended to remove the unfairness of defence by ambush. Furthermore, s. 34 (5) strictly limits the judge's discretion to refuse any such application. The function of determining the admissibility of expert evidence already devolves on the trial judge under existing law, albeit that, prior to the implementation of s. 34, such ruling would in the ordinary course be given during the course of the trial itself rather than before its commencement. However, the underlying logic of moving forward the timing of any such adjudication was clear, fair and proportionate, and it was to ensure that the prosecution would have a reasonable opportunity to consider the proposed evidence of the defence expert witness before that witness gave evidence. The other side of the same coin was to take the view, as the Oireachtas had done, that trial 'by ambush' was both wrong and damaging to the criminal justice system.

In the course of his further submissions in reply, Mr. James O'Reilly S.C., counsel for the applicant, stated that the obligation to make disclosure of the expert evidence upon which the defence proposed to rely was not, *per se*, objectionable. Rather it was the 'unfairness' of s. 34 which was objectionable in that it imposed an obligation on an accused person to seek and obtain leave of the court to call such evidence while no equivalent obligation was imposed on the prosecution. Further, that obligation had to be discharged at a point in time before the commencement of the case rather than at the time chosen by the defence. The run of the case might dictate that such evidence not be called at all. By way of addendum to that argument, Mr. O'Reilly further contended that an adverse ruling in advance of the trial by the trial judge was a ruling which was incapable of being appealed. This in turn offended the spirit of both the Constitution and the European Convention on Human Rights, both of which afforded due weight and recognition to an accused person's right of appeal.

Mr. Paul Anthony McDermott B.L., counsel for the respondents, in further reply to the argument about the supposed unfairness of any right to appeal the judge's ruling, stated that no leave had been granted on this ground. In any event the trial had to be seen as a unitary process and no separate right of appeal on any ruling made by the trial judge was available even within the system as it existed prior to the Act. The only change brought about by the new legislation was to move forward the point at which the trial judge determined the admissibility of certain evidence and counsel argued that the measure in no way handicapped the applicant in the various ways suggested by the applicant.

DISCUSSION AND DECISION

Some consideration must be given at the outset to the contention advanced on behalf of the respondents that the present application, brought as it is by way of judicial review rather than plenary proceedings, is premature, hypothetical and moot. No ruling has yet been made by any court in this case refusing leave to the applicant to adduce expert evidence.

In the instant case it appears that no expert report was available to the applicant at the time of obtaining leave on 15th September, 2010. It seems that the applicant's solicitor commissioned such a report on 6th September, 2010 and that the report (as per the applicant's written submissions dated 29th November, 2010) came to hand on 11th October, 2010. It cannot have been the case therefore that a decision to call the expert as a witness was made at the time of seeking leave, unless, of course, such expert had made his views known other than through his report to the applicant's solicitor at an earlier stage. In an affidavit dated 29th October, 2010 the applicant's solicitor states merely that a "decision as to whether this expert is going to be used for oral testimony is of course provisional and will be reviewed in the course of preparation for trial and will be dependant on a wide variety of factors ….".

As of yet, there is no indication of any sort as to what the expert report of the applicant may have stated, but presumably the report relates to evidence intended to rebut or challenge the evidence proposed to be given by either the PSV inspector or one of the other technical experts whose statements appear in the book of evidence.

The point must, I think, be made that if the report furnished to the applicant's solicitors is not helpful, it obviously follows that no question of calling the author as a witness will arise in this case. It is difficult therefore to understand how it can be said that the applicant has been put in "imminent danger" of some invasion of his constitutional rights in this case. In *Kennedy v. Director of Public Prosecutions* [2007] I.E.H.C. 3, MacMenamin J. refused relief in a case where he was satisfied that the evidential basis upon which the applicant sought relief by way of judicial review had not been established.

Furthermore, it is well established that the continuity of criminal proceedings should not lightly be interrupted by the granting of relief by way of judicial review. As was noted by the Supreme Court in *Director of Public Prosecutions v. Special Criminal Court* [1999] 1 I.R. 60., it is more appropriate to have such matters dealt with as and when they arise by the trial judge who is hearing the case. Thus on this aspect of the case, whilst not expressly deciding the case on this basis, I would be of the view that the present application is premature and hypothetical. However, given the urgency and importance of clarifying the overall issue I will, as requested by counsel for the respondents, consider the main point raised on behalf of the applicant which argues that the requirement to seek leave of the Court impacts unfairly on a defendant in particular ways such as cumulatively breach his constitutional rights.

It is common case that s. 34 of the Criminal Procedure Act 2010 is designed to implement recommendations contained in the Final Report of the Balance in the Criminal Law Review Group dated 15th March, 2007. It is useful therefore to commence by considering the view of the expert group as to where the true balance of fairness lies as between prosecution and defence in criminal cases. The group acknowledged that a "considerable disparity" exists between the advance disclosure required of the prosecution and the defence. At p. 167, the report states:-

> "The prosecution are required to set out details of the precise conclusions that they seek to prove (in the form of statement of and particulars of the offence in the indictment) and to furnish not only copies of exhibits and the statements of witnesses it is intended to call, but also any other material which may be useful to the defence. The defence by contrast – with limited exceptions such as alibi evidence under section 20 of the Criminal Justice Act 1984 and information regarding witnesses required by the Offences against the State (Amendment) Act 1998, or the intention to adduce evidence regarding the mental condition of the accused under section 19 of the Criminal Law (Insanity) Act 2006 – is not required to furnish any such information. There are, however, provisions for defence disclosure in quasi criminal proceedings such as confiscation orders under the Criminal Justice Act 1994 or the Proceeds of Crime Act 1996.
>
> This disparity cannot be explained purely by reference to the onus of proof. After all, assuming that the prosecution overcomes the burden of showing a case to answer, the defence case, if any, must be disclosed in full during the trial.
>
> Last minute disclosure of the defence case can cause major problems for the task of fairly determining the truth, in that such late disclosure can cause confusion as to the issue and leave little time to challenge or check out the version of facts put forward by the defence. One example might be an allegation of mistaken identity, but there could be many other examples where the prosecution is unfairly wrong footed by a late disclosure. Another instance might be last minute scientific, expert or technical evidence where there is inadequate time for the prosecution experts to consider the position and respond.
>
> We note also that the rules of procedure of international criminal tribunals also firmly establish that there is nothing fundamentally inappropriate about compelling the production of a statement of the nature of the defence – for example the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia require the defence to furnish a statement in general terms of the nature of the accused's defence, the matters with which the defence takes issue and why the accused takes issue with each such item. The Rules of Procedure and Evidence of the International Criminal Court require disclosure of information regarding an alibi or a ground for excluding criminal responsibility, and the Regulations of the Court also allow the Court to direct the parties to define the issues they propose to raise during the trial.
>
> The Group after careful consideration is of the view that the current arrangements are imbalanced and unsatisfactory. We have considered a number of options as follows –
>
> > 1. Require the defence to furnish a statement of the defence case, setting out what parts of the prosecution case the defence will challenge (whether on factual or legal grounds including admissibility) and what matters the defence positively intends to prove.

2. Require the defence to furnish only the names and addresses of witnesses.

3. Require the defence to furnish only statements of the proposed expert evidence which is proposed to be relied upon.

4. Require the defence to meet obligations broadly comparable to the obligations on the prosecution, i.e., to furnish statements of evidence from all Defence witnesses.

5. Require full equality, including defence disclosure of material on which it is not proposed to rely."

Having discussed the different options in the ensuing pages of the report, the group confined its recommendations to one whereby an obligation of additional disclosure on a defendant would be limited to the expert or technical reports or witness statement of experts on which the defendant intends to rely. The group suggested that provision be made that, following such disclosure, the prosecution would not be entitled to call any witness making such a report without the consent of the defendant. The group likewise considered that it should not be open to the prosecution to require the defence to tender a witness where a report or witness statement has been furnished, but the defence does not, in any event, wish to call the witness at the trial. The principal recommendation of the group, however, was that expert reports obtained by the defence should be disclosed well in advance of the trial.

It will be noted that while s. 34 of the Act of 2010 gives legal effect to that principal recommendation, it incorporates the further requirement on a defendant that he shall not be in a position to call an expert witness or adduce expert evidence unless leave to do so has been granted by the court.

As stated above, this is the requirement of the section to which ultimately the main objection in this case was addressed.

Other contentions to the effect that the disclosure requirements of s. 34 create an inequality of arms between the defendant and the prosecution, and a further contention that the effect of s. 34 was to compromise or limit the right of cross-examination on behalf of a defendant, were contentions which were not pursued to any significant extent in argument before the Court and which may therefore be dealt with in brief terms.

With regard to the former consideration, the main authority relied upon by the applicant was *J.F. v. Director of Public Prosecutions* [2005] 2 I.R. 174 which was a sexual abuse case in which a defendant was denied the right to have the complainant examined or assessed by his own psychiatrist, notwithstanding that the complainant had been so assessed by an expert witness on behalf of the prosecution.

While the Supreme Court in that case recognised the importance of the concept of equality of arms in criminal proceedings, the facts of that case bear no relation to the facts of the instant case and the views of the Court were expressed in a context whereby the defence was being denied the opportunity to call its own expert evidence in an attempt to rebut the evidence of the expert retained on behalf of the prosecution. The Court found that this imbalance contributed to an inequality of arms. However the difficulty in that case arose from the unwillingness of the complainant to be assessed by the accused's psychological expert and the difficulty for effective cross-examination derived from this fact and nothing else.

Equally any suggestion by the applicant that the obligation imposed by s.34 on a defendant limits the right to cross-examination finds no support, in my view, from the decision of the Supreme Court in *O'Callaghan v. Mahon* [2006] 2 I.R. 32. In that case, also relied upon by the applicant, the focus of the Court's concern lay more with the Tribunal's failure to make full disclosure of statements and other materials which would have formed a useful basis for the cross-examination of a particular witness before that Tribunal. No such consideration arises here and I fail to see how that particular decision of the Supreme Court has any particular relevance to the circumstances which may arise under s. 34 of the Criminal Procedure Act 2010.

However, the applicant nonetheless argues that he is procedurally disadvantaged by the requirement of applying for leave and is uniquely disadvantaged given that no similar obligation to seek leave falls on the prosecution. Second, it is claimed that no right of appeal from any adverse ruling on such an application under s. 34 could ever be made prior to the conclusion of the trial. Third, it is claimed that the prosecution might avail of the report of the defence expert to call additional evidence destructive of that evidence, even in circumstances where a decision might later be made by the defence not to call or rely on the evidence of their own expert.

I believe the first point may be quickly dealt with. Quite different obligations devolve on the two sides to a criminal trial. To the prosecution falls the obligation to make disclosure of all materials gathered in the course of the investigation which might be of assistance to the defence and the further obligation to furnish to the defence in a timely manner all statements of the proposed evidence upon which it intends to rely at trial, including the statements of experts. Hitherto – with the statutory exceptions referred to later in this judgment – no such obligations fall on the defence. The defendant need not say anything, need not reveal his defence or assist or contribute to the process in any way. The prosecution must prove its case beyond reasonable doubt whereas a person accused of a criminal offence need only raise a reasonable doubt to secure his acquittal. With a few statutory exceptions there is nothing to prevent the defence from lying in wait to ambush the prosecution, perhaps on some point of technical proof, as recently occurred in *Director of Public Prosecutions v. Mackin* (Unreported, Court of Criminal Appeal, Hardiman J., 19th July, 2010). To characterise the obligations imposed on the different sides to a criminal trial as an evenly balanced see-saw which becomes totally unbalanced by the imposition of a requirement to notify the prosecution and seek leave in respect of expert evidence upon which the defence proposes to rely strikes me as astonishing and unreal. As the report of the expert group makes clear, it was the disadvantage and inequality being suffered by the prosecution (and, by extension, the public interest in the successful prosecution of crime) which required to be addressed in new legislation. The recognition that trial by ambush is inherently unfair and damaging to the justice system has been recognised in most jurisdictions outside our own. In *Williams v. Florida* 399 U.S. 78 (1970) the U.S. Supreme Court upheld an alibi notice requirement and White J. stated at p. 83 that the adversarial system of trial "…is not yet a poker game in which the players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as 'due process' is concerned, for the instant Florida rule, which is designed to enhance the search for truth in the criminal trial by ensuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence".

While the immediate inspiration for s. 34 may have come from the report of the expert group, it is evident that the authors of the report were aware of the defence disclosure regime which operates in England and Wales. Section 6D of the Criminal Procedure and Investigation Act 1996 (inserted by s. 35 of the Criminal Justice Act 2003) requires an accused to disclose the name and address of any expert instructed by him "with a view to his providing any expert opinion for possible use as evidence at the trial of the accused" – a requirement which goes considerably further than section 34. The case of *Writtle v. Director of Public Prosecutions* [2009] EWHC 236 (Admin) provides an instance of where an accused was not permitted to adduce certain expert evidence because of his failure to

give notice of his intention to do so in accordance with the applicable rules. The Court stated:

> "…the present regime of case management should in general ensure that the issues in the case are identified well before a hearing. There will, of course, be cases where something occurs in the course of a trial which may properly give rise to a new issue, but this was not such a case. The days when the defence can assume that they will be able successfully to ambush the prosecution are over."

I find myself very much in agreement with the views expressed by Stanley Burnton J. (as he then was) in *Malcolm v. Director of Public Prosecutions* [2007] 1 W.L.R. 1230 where he stated at p. 1239:

> "Criminal trials are no longer to be treated as a game, in which each move is final and any omission by the prosecution leads to its failure. It is the duty of the defence to make its defence and the issues it raises clear to the prosecution and to the court at an early stage. That duty is implicit in rule 3.3 of the Criminal Procedure Rules 2005, which requires the parties actively to assist the exercise by the court of its case management powers, the exercise of which requires early identification of the real issues. Even in a relatively straightforward trial such as the present, in the magistrates' court (where there is not yet any requirement of a defence statement or a pre-trial review), it is the duty of the defence to make the real issues clear at the latest before the prosecution closes its case."

The fact that such requirements of fairness are largely absent from our own criminal justice system may in part explain the burgeoning number of groups agitating for victims' rights when prosecutions are perceived to founder on mere technical grounds. An approach to our criminal justice system which trips up the prosecution at every turn must inevitably have a chilling effect on the willingness of brave and courageous citizens who are prepared to give evidence on behalf of the prosecution in criminal trials where they or their families may be targeted for threats and intimidation.

I have already addressed the argument that the requirement imposed by the section on a defendant to apply for leave somehow tilts a 'level playing field' in favour of the prosecution. To those observations I would add that there is no rule of law or requirement in the Constitution that the procedures available to an accused person must be identical to those available to the prosecution. This was expressly recognised by the Supreme Court in *Fitzgerald v. Director of Public Prosecutions* [2003] 3 I.R. 247 in which the Court rejected a challenge to the constitutionality of s.4 of the Summary Jurisdiction Act 1857 which gave an automatic right to the prosecution (unlike the defence) to appeal by way of case stated.

Part of the objection to the constitutionality of s. 34 appears to be directed to the involvement of the trial judge (for it could be no other judge) in the procedures provided for by section 34. However, I fail to see how the involvement of a judge can be seen as invasive or destructive of a constitutional right. It must be assumed that any trial judge, ruling on an application brought under s. 34, will do so in a manner which accords with his declaration of office under the Constitution and which fully respects all the rights of the accused person, including, most particularly, the presumption of innocence.

While contentions were also advanced on behalf of the applicant to the effect that a decision as to whether or not to call an expert witness might be better made "in the heat of battle", the contrary proposition is equally valid, *i.e*. that by virtue of the requirement created by s. 34 a defendant will know in advance that his expert's testimony will be admissible, can thus rely upon it in cross-examination and/or either call or not call the particular witness as circumstances at trial might require.

In this context it was also suggested that the prosecution might comment adversely on the failure to call an expert in respect of whom leave under s. 34 had been granted. Again, it would seem obvious to me that any unfairness which might arise in any such hypothetical situation could readily be dealt with by the trial judge, either by warning or discharging the jury and by making an appropriate costs order.

Unless, therefore, one takes the view that the involvement of the trial judge in the process is, *per se*, objectionable and unfair, I find it impossible to conclude that this fact, without more, invalidates the section by reference to any particular provision of the Constitution. Furthermore, the discretion exercised by the judge under s. 34 is a limited one and his primary duty and obligation is to grant leave except in those limited circumstances provided for by the section.

I am equally satisfied that the section does not, as contended, abolish the right of an accused to abstain from testifying at trial and any use by the prosecution of any expert report or reports disclosed pursuant to s. 34 could only be used by the prosecution subject to the control of the trial judge and it must be assumed that the trial judge will exercise his or her powers in such a manner as to ensure a fair trial and to avoid unfairness to the accused. This requirement on a trial judge was emphasised in *The People (Director of Public Prosecutions) v. Cahill* [2001] 3 I.R. 494 in which it was held by the Court of Criminal Appeal that the trial judge should not have allowed the prosecutor to lead evidence in respect of an alibi where no leave had been sought on behalf of the applicant to adduce evidence of an alibi. The court was satisfied that the prejudicial effect of such evidence outweighed its probative value and that the jury could have drawn unfavourable conclusions from the fact that the evidence was led. The Court stated at p. 509:

> "Counsel submitted that, at the stage at which the trial judge ruled that the evidence could be adduced by the prosecution, no application had been made on behalf of the second accused for leave to adduce evidence in support of the alibi. The trial judge, accordingly, should not have permitted the prosecution to lead evidence which might have left the jury under the impression that the second accused was relying in his defence on an alibi which he in fact would not have been in a position to prove. That evidence was of no probative value whatever, in the absence of any application for leave to adduce evidence in support of the alibi, and could only have been prejudicial to the second accused. The court is satisfied that this submission is well founded. … This ground of appeal has, accordingly, been made out."

Equally I am satisfied that there is no substance in the contention that expert reports disclosed pursuant to s. 34 would be admissible as admissions against interest made by an accused or his "agent or referee". Section 34 only applies to expert reports and/or expert evidence which an accused person desires to adduce in evidence. In such circumstances, it must be presumed that such evidence will be exculpatory rather than inculpatory.

The argument that s. 34 may adversely affect legal professional privilege is similarly without substance. Counsel for the applicant drew a comparison between s.34 and the disclosure requirements in personal injuries litigation in the High Court and Circuit Court introduced by s. 45 of the Courts and Court Officers Act 1995. It was argued that Order 39, rule 46 (8) of the Rules of the Superior Courts originally merely provided that an expert report may be withdrawn. This was subsequently elaborated upon by a further statutory instrument which provided that, upon the withdrawal of such a report, legal professional privilege would be reapplied to it.

Contrary to the applicant's contention that this comparison proves instructive, it is this Court's view, that such a comparison is unhelpful and in fact unfounded. It is the case that legal professional privilege rarely arises as a contentious issue in the context of criminal prosecutions. There are two generally recognised sub-categories of legal professional privilege; (i) legal advice privilege and (ii) litigation privilege. It is apt to note that counsels' usage of the term 'legal professional privilege' is something of a misnomer in this instance. It is clear that counsels' arguments concern what is more precisely termed, and noted above as sub-category (ii), as litigation privilege. Litigation privilege protects such communications between the litigant and/or his lawyer and a third party. In order to claim this privilege, litigation must be pending or contemplated when the document is prepared or the communication made. A document will only be protected by litigation privilege if it was prepared for the dominant purpose of the pending or contemplated litigation. In relation to the precise interaction between litigation privilege and expert witnesses and/or expert opinions, *Archbold Criminal Pleading Evidence and Practice*, (Sweet & Maxwell, London, 2011) states at p. 1408 that "[l]itigation privilege attaches to confidential communications between solicitors and expert witnesses but not to an expert's opinion based upon non-privileged material, nor to the non-privileged chattels or documents upon which the opinion was based…. Where the expert's opinion is, at least to a significant extent, based upon privileged material, the opinion itself is also privileged. Consequently the defence can object if the prosecution seek to elicit evidence from an expert who has been abandoned and not relied upon by the defence". That privilege remains intact and s. 34 does nothing to erode its efficacy. Section 34 is operational only in respect of expert reports which the defence wish to adduce in evidence at trial.

Overall, I am satisfied that any interference caused by s. 34, to the extent that it may be said to interfere with any constitutionally protected right of the applicant under Article 34 or Article 40 of the Constitution, is limited and proportionate having regard to the nature, scope and effect of s. 34 when placed in balance with the public interest in an effective and balanced prosecution system.

In considering the concept of proportionality in the context of any supposed interference with the defendant's rights, it is important to bear in mind that the criminal law system contains a number of legislative provisions which either require or encourage some measure of pre-trial disclosure on the part of the defence.

Since 1984, there has been a statutory requirement to give notice of an alibi under s. 20 of the Criminal Justice Act 1984. Section 19 of the Criminal Law (Insanity) Act 2006 requires that notice of an intention to adduce evidence as to the mental condition of the accused must be given to the prosecution. In the context of prosecutions for membership of an unlawful organisation, s. 3 (1) of the Offences Against the State (Amendment) Act 1998 provides that:-

> "In proceedings for an offence under section 21 of the Act of 1939 the accused shall not without the leave of the court call any other person to give evidence on his or her behalf unless, before the end of the prescribed period, he or she gives notice of his or her intention to do so."

In addition, various statutory provisions permit adverse inferences to be drawn from a failure to account for certain matters to the gardai. These provisions may be said to encourage disclosure of the defence in advance of any trial and these provisions have not been the subject of any successful constitutional challenge. Indeed challenges were rejected in a trilogy of cases that concerned the drawing of inferences and presumptions from conduct and/or silence in *Hardy v. Ireland* [1994] 2 I.R. 550; *O'Leary v. Attorney General* [1995] 1 I.R. 254; and *Rock v. Ireland* [1997] 3 I.R. 484. In all of these cases the court took the view that the right to silence is not absolute and that legislative modification is permissible provided it is proportionate.

Finally, it was submitted that s. 34 was incompatible with Article 6 of the European Convention on Human Rights. In this regard the applicant relied on the decision of the European Court in *Bonisch v. Austria* [1985] 9 E.H.R.R. 191. This was a case in which the accused was convicted of having adulterated smoked meat on the basis of evidence from an expert appointed by the court. The particular expert came from the body which had lodged the complaint. Although the accused had a defence witness who disputed the court's expert, the evidence of the court's expert was accepted because, under Austrian law, it was conclusive. In the unique circumstances of this case, it was hardly surprising that the court concluded there had been a breach of the accused's right to a fair hearing. In truth I do not believe this case sheds any light on the issues before this Court other than to illustrate the different criminal procedures adopted in continental systems.

A number of decisions of the European Court of Human Rights (*Murray v. U.K.* [1996] 22 E.H.R.R. 29; *Averill v. U.K.* [2001] 31 E.H.R.R. 36; and *Salabiaku v. France* [1991] 13 E.H.R.R. 379) make clear that the primary concern of the court is to enquire if the accused has obtained a fair trial. The Court has rejected challenges in various cases that concerned the drawing of inferences and presumptions from conduct or silence, taking the view that the right to silence is not absolute and that legislative modification is permissible provided it is proportional.

In all these circumstances I refuse the relief sought in this case.