THE RIGHT TO SILENCE

BY FAYE BREEN BL &
PADDY MACENTEE SC, QC

In light of Deaglan Lavery v The Member-in-Charge, Carrickmacross Garda Station

The Supreme Court in the recent case of *Deaglan Lavery* v *The Member in Charge, Carrickmacross Garda Station*[1] was given the ideal opportunity to consider the rights of those in custody in the context of the Offences Against the State (Amendment) Act, 1998 passed last year in reaction to the bombing at Omagh.

It was hoped that the Court would analyse and eliminate the absurdities which this Act has created, but instead it chose to deliver another blow to the right to silence by enshrining the principle that persons in detention are not entitled to have their solicitors present at Garda interviews, nor are they entitled to insist upon an audio-visual recording of the interviews or to see interview notes before the end of the detention period.

The Provisions of the Offences Against the State (Amendment) Act, 1998.

Those who seek to protect the right to silence have been concerned by the provisions of this Act for a number of reasons, not the least of which are sections 2, 5 and 9 of the Act.

Section 2[2] and 5[3] of the Act allow inferences to be drawn from the failure of an accused to mention facts later relied on his defence when being questioned or charged by the Garda Siochana.

Section 9[4] makes it an offence for a person to stay silent without a reasonable excuse, when he has information which he knows or believes might be of material assistance to the Garda Síochána. This section echoes Section 52 of the Offences Against the State Act 1939 which made it an offence for persons in detention not to account for their movements during a specified period[5].

To consider the situation which pertains when a person is being interviewed in the custody of the Garda Siochana, it is clear that if he fails to answer a question which is put to him, adequately or at all, he is exposing himself a) to prejudice to his defence as interences may be drawn from his decision to remain silent under sections 2 and 5 (of the 1998 Act and b) to prosecution under section 9 (of the 1998 Act) or section 52 (of the 1939 Act)

One would be forgiven for believing that such an extraordinary attack on the constitutional right to silence[6] would surely be tempered by strong safeguards to prevent abuse of the system. The kind of safeguards which have been put into place in England and Wales, and Northern Ireland, include the presence of a solicitor during interviews and audio-visual recording, audio recording or meticulous verbatim note-taking of all questions put and all answers given in all interviews[7].

Safeguards

Warning

In fact, none of these safeguards have been provided for in the legislation. Instead, section 2 and section 5[8] provide for a warning so that the accused must be told by the interviewing Garda in ordinary language, when being questioned, charged or informed, as the case may be, what the effect of a failure to mention a material fact would be. Nowhere does it say who is to deliver this warning nor how often it is to be administered. If there is no solicitor at the station one assumes that the onus will fall upon a Garda to inform the person in custody of the dangers of staying silent and that the Garda will not be expected to warn the person every time that he is asked a question which may expose him.

The appropriate person to advise a detained person of his legal rights and obligations is his lawyer. On the face of it there is a potential conflict of interest between those investigating an offence and a person suspected of having committed that offence or of having information in relation to it. Reference to "ordinary language" in the sections is an implicit acceptance that the wording of the sections is arcane and needs to be interpreted. The appropriate person to advise on the meaning of arcane statutes is the solicitor of the person requiring such advice.

Section 9, which makes it an offence to withhold information of material assistance to the Garda Síochána, does not mention any warning to be given to a person in custody.

Presence of a legal advisor during interview

An accused's defence to a criminal charge is a legal concept. It is not appropriate to impose an obligation upon a person in custody (who may not yet have been charged) to decide what his defence will be and answer questions put to him with that defence in mind. To prevent this unfairness, the accused's right to silence worked so that inferences could not be drawn from his failure to establish his defence during his pre-trial communications with the Garda Siochana.

The significance of an erosion of this right by sections 2 and 5 of the 1998 Act cannot be underestimated and the situation is compounded by the fact that the right of reasonable access to

a solicitor as enshrined in cases such as *DPP v Healy*, does not stretch so far as to provide a right to the presence of one's solicitor during Garda interviews[10].

In addition, section 9 creates the absurd scenario whereby interviewees are expected to analyse the questions posed by the member, assess in a legal fashion whether or not failing to answer adequately or at all any question could amount to an offence under the section and answer accordingly. The presence of a solicitor during the questioning would allow the detained person the opportunity to obtain legal advice in relation to each question.

In England and Wales the Police and Criminal Evidence Act 1984 provides for more ample protection of the position of detained persons. All interviews are tape-recorded in the presence of a solicitor (including those charged under the Prevention of Terrorism Act 1989). If a person in custody does not have legal representation there exists a rota scheme of specially trained "duty solicitors" to attend on the accused person.

Solicitors play a very active role in the detention and questioning of suspects in England and Wales. There is a practice whereby the solicitor is shown witnesses statements, given a summary of the facts by an interviewing officer and given an opportunity to consult privately with the client to advise him on the implications of his exercising his right to stay silent. The solicitor is allowed to remain in the interview room and is given a transcript of the interview on its completion.

In Northern Ireland the position is similar except that section 15 of the Northern Ireland (Emergency Provisions) Act of 1987 allows for a restriction of the right of access to a solicitor in relation to certain terrorist offences[11].

In contrast, in Ireland, in the context of the 1998 Act, solicitors have been denied the opportunity to give their clients real and effective legal advice while in police detention. Only certain Garda stations have the capacity to conduct audio-visual recording of interviews and interviews are never tape-recorded as they are in the UK. The position in relation to note-taking during interviews was dealt with in the 1999 case of *Deaglan Lavery v The Member-in-Charge, Carrickmacross Garda Station*[12]. This case has sought to explore the rights of individuals in custody in the context of the 1998 Act and the effect of that legislation on the right to silence.

Deaglan Lavery v The Member-in-Charge, Carrickmacross Garda Station

Mr Lavery was arrested under Section 30 of the Offences against the State Act, 1939, on suspicion of being a member of an unlawful organisation and was brought to Carrickmackross Garda Station.

An hour after his arrest he spoke on the telephone to his solicitor, Mr MacGuill, who gave him general advice including advice regarding his obligations under the 1998 Act. Mr MacGuill further requested that the interviews with his client be audio-visually recorded, or in the alternative, that complete notes be taken and made available to Mr Lavery and Mr. MacGuill prior to the end of the detention period. Both of these requests were refused.

Mr Lavery was detained for a total period in excess of 60 hours pursuant to Section 30 of the 1939 Act. During that period he met with his solicitor twice. He deposed that during the interviews with Gardai, notes were taken which did not record all the questions put and answers given.

Mr MacGuill sought such notes as were made from the Garda Siochana on a number of occasions so that he could advise his client as to whether or not the questions posed or answers given, exposed him to prosecution under Section 52 of the 1939 Act or Section 5 of the 1998 Act. He was repeatedly refused access to the notes.

"One would be forgiven for believing that such an extraordinary attack on the constitutional right to silence would surely be tempered by strong safeguards to prevent abuse of the system."

The point at issue in the case was whether this refusal rendered the detention of Mr Lavery unlawful. In the High Court, McGuinness J. having heard the application for habeas corpus considered that in the light of the new obligations under the 1998 Act, persons in custody should have access both to legal advice and to notes taken of Garda interviews. This would allow the individual and his solicitor the opportunity to make an informed legal assessment of the information the detained person was obliged to volunteer in light of the questions that have been posed.

The learned judge ordered the release of the Applicant. The decision was appealed to the Supreme Court. O'Flaherty J., delivering the judgement of the Court, overturned the judgment of the High Court and held that the refusal of access to the interview notes did not render unlawful the detention of Mr Lavery.

The Court considered that the right of a detained person to reasonable access to a solicitor was "beyond doubt". At page 9 of his judgement O'Flaherty J. said

"Without any doubt, if a person in custody is denied blanket access to legal advice then that would render his detention unlawful[13]."

However, the court would not go so far as to consider that Gardaí should give solicitors of persons in custody "regular updates and running accounts of the progress of their investigations". Nor are solicitors entitled to prescribe the manner in which interviews may be conducted nor what notes should be taken. Further, the bald statement was made that "The solicitor is not entitled to be present at the interviews[14]".

The Court pointed out that had Mr Lavery been charged following the detention (under section 52 of the 1939 Act or section 9 of the 1998 Act), he and his legal advisors would have been entitled to view all relevant documentation including such interview notes as came into existence. The case of *Paul Ward v Special Criminal Court*[15] was cited to this effect. It is respectfully submitted that the purpose of the request for the notes was to prevent the commission of an

offence under the Acts by failing to disclose a material fact or information. Therefore, it would hardly have benefited Mr. Lavery to view the notes after he had been charged.

The overall effect therefore, of the *Lavery* case, is that while the 1998 Act encroaches seriously upon the right to silence of a person in custody, there is to be no adequate safeguards to protect the person in custody from an abuse of the system.

Compatibility with The European Convention on Human Rights

The Supreme Court judgement in Lavery must be assessed in the light of the ECHR decision in *Murray v United Kingdom*[16]. In that case the provisions of the Criminal Evidence (Northern Ireland) Order 1988 which allowed adverse inferences to be drawn from the silence of the accused was upheld on the basis that they merely created "a formalised system which aims to allow common sense implications to play an open role in the assessment of the evidence"[17]

John Murray was denied access to any legal advice for the first 48 hours of his detention under the 1988 Order. He was interviewed by the police on twelve occasions without the attendance of his solicitor. When he was finally granted access he was advised to remain silent because his solicitor would not be permitted to remain during questioning. At his trial strong inferences adverse to Mr. Murray were drawn by the trial judge.

"The 1998 Act represents a very serious encroachment upon the right to silence."

It was argued before the ECHR that where it was possible to draw inferences from an accused's failure to answer questions put while in custody it was extremely important that such person in custody have the benefit of legal advice at an early stage.

The court considered that notwithstanding that the denial of access to a solicitor was lawful pursuant to Section 15 of the Northern Ireland (Emergency Provisions) Act 1987, it was a breach of fair procedures and denied the accused his right to a fair trial which right is protected by Article 6 of the European Convention of Human Rights.

The court identified (at paragraph 66) the fundamental dilemma which faces a person in custody:

> "If he chooses to remain silent, adverse inferences may be drawn against him. On the other hand, if the accused opts to break his silence during the course of interrogation, he runs the risk of prejudicing his defence without necessarily removing the possibility of inferences being drawn against him."

Without the benefit of legal advice this dilemma becomes a very serious problem. So

> "under such conditions the concept of fairness enshrined in Article 6 requires that the accused has the benefit of the assistance of a lawyer already at the initial stages of police interrogation".

Those who hoped that the *Murray* decision would stem the tide of short-sighted legislation and related case law confirming the erosion of the right to silence, were disappointed. Rather, the decision copper-fastens the compatibility of legislation which either allows inferences to be drawn from a persons silence or which limits a person's access to legal advice, with the Convention. It was only a combination of drawing inferences from an accused's silence and limiting his access to legal advice which would give rise to incompatibility with the Convention. The Court considered that a limited delay of access to a lawyer is permissible provided that the restriction does not deprive the accused of a fair hearing[18]. In the circumstances of *Murray*, the delay did deprive the accused of a fair hearing because of the restriction of the right to silence and the "fundamental dilemma" which the accused faced.

The overall principle which could perhaps be gleaned from *Murray* is that when a person may be exposed as a result of remaining silent, he should at the very least be granted access to legal advice from the initial stages of the questioning. To consider the facts of *Lavery v Members-in-Charge, Carrickmacross Garda Station,* it is clear that Mr Lavery did in fact have legal advice from the early stages of his detention. It could said therefore that the Supreme Court decision falls squarely within the principles of Murray.

However, the *Murray* decision did go a step further than *Lavery* as while in *Murray,* the ECHR was willing to identify the problems which a person in custody faces as a result of the invasion of his right to silence and to consider the circumstances of his detention in light of those problems in *Lavery* the court was not even prepared to recognise the need for any special treatment for those exposed under the new legislation.

Conclusion

The 1998 Act represents a very serious encroachment upon the right to silence. The position of a person in custody in Ireland is quite clear as a result of the decision of the Supreme Court in *Lavery v Member-in-Charge, Carricmacross Garda Station.* The detained person has a right to access to legal advice from an early stage of his period of detention. He does not have a right to have his solicitor present with him during interview or questioning. He does not have a right to demand that the interview or questioning be audio-visually recorded and if notes of the interview are kept they do not have to be comprehensive and certainly do not have to be furnished to the detained person or his legal advisor.

Whilst the law as stated by the Supreme Court in *Lavery* in relation to the role of solicitors during the interview process may not fall foul of the European Convention on Human Rights, it does little to protect the individual in custody faced with the fundamental dilemma identified by the ECHR in *Murray.* The presence of a solicitor and the full recording of interviews would go a long way to protect the Gardaí from accusations of abuses of their powers under the 1998 Act. It would further more counteract the unrealistic burden placed on a person in custody by the 1998 Act. •

1 Unreported decision of O'Flaherty j., for the Supreme Court, of 23rd February 1999

2 Section 2 provides as follows;

(1) Where in any proceedings against a person for an offence under Section 21 of the Act of 1939 evidence is given that the accused at any time before he or she was charged with the offence, on being questioned by a member of the Garda Siochana in relation to the offence, failed to answer any question material to the investigation of the offence, then the court in determining whether to send forward the accused for trial or whether there is a case to answer and the court (or subject to the judge's directions, the jury) in determining whether the accused is guilty of the offence may draw such inferences from the failure as appear proper; and the failure may, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any evidence in relation to the offence, but a person shall not be convicted of the offence solely on an inference drawn from such a failure.

(2) Subsection (1) shall not have effect unless the accused was told in ordinary language when being questioned what the effect of such a failure might be.

(3) Nothing in thus section shall, in any proceedings-

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

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

(4) In this section-

(a) references to any question material to the investigation includes references to any question requesting the accused to give a full account of his or her movements, actions, activities or associations during a given period,

(b) references to a failure to answer include references to the giving of an answer that is false or misleading and references to the silence or other reaction of the accused shall be construed accordingly.

(5) This section shall not apply to the failure to answer a question if the failure occurred before the passing of the act.

3 Section 5 provides as follows:

(1) This section applies to -

(a) an offence under the Acts
(b) an offence that is for the time being a scheduled offences for the purposes of Part V of the Act of 1939,
(c) an offence arising out of the same set of facts as an offence referred to in paragraph (a) or (b), being an offence for which a person of full age and capacity and not previously convicted may, under or by virtue of any enactment, be punished with a term of 5 years or by a more severe penalty.

(2) Where in any proceedings against a person for an offence to which this section applies evidence is given that the accused-
(a) at any time before he or she was charged with the offence, on being questioned by a member of the Garda Siochana in relation to the offence, or

(b) when being charged with the offence or informed by a member of the Garda Siochana that he or she might be prosecuted for it tailed to mention any fact relied on in his or her defence in those proceedings, being a fact which in the circumstances existing at the time he or she could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, then the court, in determining whether to send forward the accused for trial or whether there is a case to answer and the court (or subject to the judge's directions the jury) in determining whether the accused is guilty of the offence charged (or of any other offence of which he or she could lawfully be convicted on that charge) may draw such inferences from the failure as appear proper; and the failure may, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any evidence in relation to which the failure is material, but a person shall not be convicted of an offence solely on an inference drawn from such a failure.

(3) Subsection (2) shall not have effect unless the accused was told in ordinary language when being questioned, charged or informed, as the case may be, what the effect of such a failure might be.

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

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

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

(5) This section shall not apply in relation to a failure to mention a fact if the failure occurred befure the passing of the act.

4 Section 9 provides as follows:

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

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

(b) securing the apprehension, prosecution or conviction of any person for a serious offence and fails without reasonable excuse to disclose that information as soon as is practicable to a member of the Garda Siochana.

(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 in Section 8.

5 This section was upheld in *Heaney and McGuinness v Ireland* [1997] 1 ILRM 117

6 In *Heaney and McGuiness v Ireland* it was held that the locus of the right to silence was Article 40.6.l.i.

7 The Steering Committee on Audio and Audio/Video Recording of Garda Questioning of Detained Persons in its 2nd Interim Report published March 1999 recommended the introduction of audio- and video-recording of all interviews with persons detained in custody in all Garda Stations. It remains to be seen whether such recommendations if implemented would address the underlying problem of the 1998 Act.

8 *Subsection* 2 of section 2 and subsection 3 of section5

9 [1990] 2 IR 73

10 see *Lavery, supra*

11 In material part, Section 15 provides as follows:

(1) a person who is detained under the terrorism provisions and is being held in police custody shall be entitled, if he so requests, to consult a solicitor privately.

(2) A person shall be informed of the right conferred on him by subsection (1) as soon as is practicable after be has become a person to whom the subsection applies

(3) A request made of a person under subsection (1), and the time at which it is made, shall be recorded in writing unless it is made by him while at a court and being charged with an offence.

(4) If a person makes such a request, he must be permitted to consult a solicitor as soon as practicable except to the extent that any delay is permitted by this section.

(8) An officer may only authorise a delay in complying with a request under subsection (1) where he has reasonable grounds for believing that the exercise of the right conferred by that subsection at the time when the detained person desires to exercise it...

(d) will lead to interference with the gathering of the information about the commission, preparation, or instigation of acts of terrorism; or

(e) by alerting any person, will make it more difficult

(1) to prevent an act of terrorism, or

(2) to secure the apprehension, prosecution or conviction of any person in connection with the commission, preparation or instigation of an act of terrorism

12 *supra*

13 The court referred to a number of cases relating to the right of reasonable access to a solicitor; *Re Emergency Powers Bill, 1976* [1977] IR 159; *The People v Shaw* [1982] IR 1 and *The People (D.P.P.); v Pringle & Ors* 2 Frewen 57

14 at page 10 of the judgement

15 [1998] 2 ILRM 493

16 [1996] 22 ECHR 29. See also the case of *Funke v France* [1993] 16 EHRR 297.

17 This is a quote from the Commission decision set out by the ECHR at paragraph 54 of the ECHR judgement.

18 The ECHR in *Funke v France* located the right to silence in Article 6(1) of the European Convention of Human Rights which guarantees a fair trial.