Human Rights

Self-incrimination and the European Convention

by Victor Tunkel

In *Saunders v UK* (1997) 23 EHRR 313, the European Court of Human Rights (ECHR) decided that Mr Saunders, convicted in the first Guinness prosecution, was denied a fair trial under the European Convention on Human Rights, art. 6. This was because the self-incriminating answers he was legally compelled to give to DTI inspectors were used in evidence against him.

COMMON LAW PRINCIPLE

The privilege of a witness or accused in court, or of a suspect before trial, not to have to incriminate themselves is firmly rooted in common law: nemo debet seipsum accusare. At the time of the Guinness investigations, a suspect was more protected than now. But even after the subsequent erosion by the *Criminal Justice and Public Order Act* 1994 of the privilege of silence, the police caution still begins: 'You do not have to answer ...', and the in-court allocutus says '... you may give evidence ...' *(Practice Direction (Crown Court: Defendant's Evidence)* [1995] 2 All ER 499).

REFORMING THE STATUTORY EXCEPTIONS

However, Saunders was made to self-incriminate by the use of the *Companies Act* 1985, s. 432(2) and 435. This abolishes the privilege in the face of DTI questioning. There are similar provisions in, e.g. the Financial Services, Company Directors Disqualification, and Insolvency Acts. These procedures, now declared repugnant in Strasbourg, remain lawful and unchallengeable in the UK until such time as we reform them specifically, or the convention becomes part of our internal law. This poses a number of questions, notably how should our law be reformed, how are such investigations to be conducted meanwhile and how should criminal courts treat such extracted evidence?

If the remedy is reform, our legislators might take as a model the several statutes which half-abolish the privilege. These include the *Theft Act* 1968, s. 31, the *Criminal Damage Act* 1971, s. 9 and the *Supreme Court Act* 1981, s. 72. These give partial protection in civil cases where questions are asked or discovery ordered which could self-incriminate. The question must be answered and/or the order for disclosure must be complied with; but the incriminating information thus revealed cannot be used in evidence against the witness or party if they are subsequently prosecuted. The courts have extended this approach to cases outside these statutes: see, for example, *A T & T Istel Ltd v Tully* [1993] AC 45, a civil fraud case, where the House of Lords sanctioned a disclosure order with a protective clause:

> *'... no disclosure made in compliance ... shall be used as evidence in the prosecution of an offence alleged to have been committed by the person required to make that disclosure ...'* (p. 59A)

At first sight, this halfway house between total immunity and total compellability would seem to point the way ahead for law reformers in future investigations of the Guinness type. Indeed, there is already such legislation on offer in the *Criminal Justice Act* 1987, s. 2.

The snag is that it might mean that the more a fraudster revealed, the safer he would be. The prosecution would then be driven to find evidence 'independent' (the term used in the *Istel* case) of his statements. This however might be purely circumstantial and even consistent with an innocent explanation, allowing a successful submission; and even if sufficient for a prima facie case, the accused would have the tactical advantage of opening a well-planned defence to the jury not previously foreshadowed and disarmed by prosecution evidence of his statements. But it is difficult to see what other compromise, short of restoring the privilege entirely, is feasible.

Will defence disclosure now called for under the *Criminal Procedure (Investigations) Act* 1996 fill the gap? In exchange for disclosure by the prosecution of all its relevant material, an accused is supposed to give written notice of his defence, specifying what he disputes in the prosecution case, and why. These defence statements will presumably be put in by the prosecution and any departure from them at the trial will bring down on the accused the inevitable comments and inferences. Even so, this falls far short of the compulsive regime of the companies (and other) legislation. Moreover it presupposes that the authorities have enough detailed knowledge of an accused's conduct to require him to provide answers in the same detail. While this will often be true in the more witnessable crimes, it is much less likely in the typical fraudster's machinations; hence the need for compulsion in the first place.

TRANSITIONAL CASES AND THE FUTURE

One might have thought that in cases now coming to trial, the courts would accept the ECHR verdict of unfairness and apply the *Police and Criminal Evidence Act* 1984 ('PACE 1984'), s. 78:

> *'... the court may refuse to allow evidence on which the prosecution proposes to rely ... if ... having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.'*

Yet in *R v Morrissey. R v Staines* (The Times, 1 May 1997), the Court of Appeal upheld the trial judge's decision to admit such evidence – not however on its merits or on the usual ground of not fettering his discretion. The court said that to reject such evidence as unfair would in effect allow the Convention to repeal part of an English statute. Lord Bingham LCJ acknowledged that the situation was unsatisfactory, that the unsuccessful appellant could now follow Mr Saunders to Strasbourg and get compensation against the UK, but said that our courts are bound by our domestic law.

This seems, with respect, to be an over-cautious approach. Our law of criminal evidence has no rule of absolute

admissibility. The *Financial Services Act* 1986 ('FSA 1986'), s. 177(6) says only that these compulsory statements 'may be used in evidence against' their maker. Surely this means that the prosecution is allowed to tender them and the maker knows it. But the overriding duty of the court is to ensure a fair trial. This is a fundamental common law requirement, confirmed by the House of Lords in *R v Sang* [1980] AC 402 and partly restated by PACE 1984, s. 78.

However, Lord Bingham interpreted FSA 1986, s. 177 as a statutory presumption of fairness 'in the absence of special features making the admission of the answers unfair'. It is a pity that the Court of Appeal could not see the ECHR decision (which was admittedly not binding but surely of considerable authority) as such a new special feature, or at least allow trial judges the full exercise of their common law and PACE 1984, s. 78 discretions. If it be argued that a mere discretion cannot be used to disallow evidence made admissible by statute, one may point out that s. 78 has now several times had to be used to prevent the unfair but literal use by prosecutors of s. 74 (making convictions of other persons admissible, which necessarily imply the accused's guilt and put the burden of disproof on him). See also *R v O'Connor* (1986) 85 Cr App R 298 and subsequent cases. There is no suggestion that this has meant an outright repeal of s. 74.

It is true that in *R v Seelig* [1991] BCC 569 the Court of Appeal held that DTI inspectors were not 'persons charged with the duty of investigating offences' such as to be required by PACE 1984 to comply with its Codes. However, that was a Companies Act investigation into 'the affairs of a company' and the court accepted that it would be a question of fact whether an investigation might be regarded as 'investigating offences' within PACE. One would have thought that persons suspected of insider dealing were clearly being investigated as to an offence. Moreover, one of the arguments which persuaded the Court of Appeal in *Seelig* was that the then PACE 1984 Code C caution told a suspect to remain silent, a contradiction of the whole point of compulsory interrogation. But the current Code warns the suspect to tell all, or 'it may harm your defence ...' which is more consonant with the compulsory powers.

STRICTURES OF STRASBOURG AVOIDED

For the present it seems that the DTI inspectors can continue to pressurise people, confident that our courts will convict and that the Strasbourg court will reverse them and compensate fraudsters at the expense of UK taxpayers.

It is hard to imagine a more futile and self-defeating exercise. One hopes that new instructions will be issued by the DTI to its inspectors. After all, even if the courts cannot intervene, the UK government is a signatory of the Convention and it should not henceforth empower its appointed agents deliberately to breach it. If compulsory interrogation is the only way of obtaining vital evidence of, e.g. funds deposited abroad, inspectors should be told to give an undertaking that, notwithstanding the Acts, the statements themselves will not be read at the trial – but used only indirectly – to get 'leads' from them. This might avoid the strictures of Strasbourg while we wait for the Convention to become domestic law.

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