**Supreme Court No.19/21**

**THE SUPREME COURT**

**Between**

**DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**AND**

**J.D.**

**APPELLANT**

**AND**

**IRISH HUMAN RIGHTS AND EQUALITY COMMISSION**

**AMICUS CURIAE**

## SUBMISSIONS ON BEHALF OF THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

Summary of the Irish Human Rights and Equality Commission's arguments

1. Does a suspect have a right to be informed of the allegation against them in advance of being charged, so that they can provide an exculpatory account if theywish? If an accused has been denied the opportunity to give an account during the investigative phase, can that omission be remedied at a later stage? In particular, is it a sufficient remedy that the accused has the option to give evidence during their trial?

2. The *amicus curiae*, Irish Human Rights and Equality Commission ('the Commission') takes the view that there is an onus on investigating authorities, in so far as practicable, to put a suspect on notice of any allegation which may result in a charge. This requirement is an aspect of the fair trial right enshrined in Article 38.1 of the Constitution. A failure by the investigating authorities to secure the account of an accused can hinder the effectiveness of the investigative process and the fairness of a trial.

3. Breach of this requirement should not automatically lead to the prohibition of a trial, however. Determining whether there has been irreparable prejudice to the rights of the defence requires a fact-specific assessment by a trial judge.

4. Contrary to the position advocated for by the Appellant, the Commission submits that the Gardai should not be required to arrest a suspect in order to secure their statement. A voluntary interview process may be the only option as a matter of law; and it is preferrable in any event, unless the investigating authorities consider that detention for questioning is warranted.

5. The onus is on the investigating authorities to ensure that an accused is made aware of the option of providing their account, even after charge, and to facilitate them in providing that account in a way which is conducive to its admissibility at trial.

6. Contrary to the position adopted by the Respondent and the Court of Appeal, it is submitted that it is not a sufficient remedy that the accused has the option to give evidence at trial. A failure to secure the accused's account during the investigative stage should not result in the necessity to give evidence. That outcome would undermine the principle that the accused is under no obligation to give evidence in their own defence.

**Whether it is possible to arrest for the purpose of questioning, after charge**

7. The Appellant has suggested that he should have been detained for questioning in respect of the endangerment offence, so that he could give an account. But, once the endangerment charge had been directed against him, it is far from clear that the Gardaí could have carried out a further arrest and detention of the Appellant for investigative purposes. It is not the Garda practice to do so; and that practice appears to be rooted in a legitimate concern that there is no lawful basis to conduct a further arrest and detention, after a suspect has been charged.

8. Powers of detention are grounded on the reasonable suspicion of the arresting officer, of involvement of the suspect in the offence under investigation. That suspicion is explored during the detention, which terminates within the statutory time period or upon charge, whichever comes first. If a suspect has already been charged with the offence, a detention for the purpose of questioning would appear to fall outside the scope of S.4 of the Criminal Justice Act 1984 and similar detention powers.

9. While there are statutory powers to rearrest, for example under S.4 of the Criminal Justice Act 1984 as amended by S.10(1) of the Criminal Justice (Amendment) Act 2009, rearrest is upon the warrant of a District Court Judge and is confined to situations where the suspect has previously *'been released without charge'*. The High Court has interpreted the section[1] as precluding the rearrest of an accused who has already been charged. Walsh, *on Criminal Procedure*[2], has opined that upon being charged, a suspect *'moves from the investigation stage into the judicial stage'* and that *'there is no scope for the executive to intervene again'*.

10. It is submitted therefore, that a practice of rearrest after charge for questioning would require a clear statutory basis, given that it relates to the liberty of the person and would potentially be capable of abuse.

11. In any event, if the Gardai choose not to arrest a suspect for the purpose of gathering incriminating evidence, it is questionable whether they could restrain the suspect's liberty for the purpose of inviting them to give an exculpatory account. That would be a disproportionate use of a power of detention. For all of these

[1] *Stokes v Governor of Cloverhill Prison* [2010] 1 I.R. 283, People (DPP) v Cooney [1998] 1 I.L.R.M. 321
[2] 2nd Edition, p.227 at 5-96

reasons, it is submitted that in cases where the Gardai do not wish to arrest or where they may lack the power to do so, an accused should instead be invited to attend for a cautioned memo of interview, so that they can provide an account.

12. There are situations where the suspect will necessarily have to be charged without their account being secured in the context of a detention. For example, if the suspect is abroad during the course of the investigation and the authorities wish to pursue their extradition, the decision to prosecute will have to be taken without them ever being detained. It sometimes happens that, after charge, further important evidence is uncovered by Gardai. In the context of complex investigations, analysis of voluminous phone records and CCTV can yield a more complete picture than was available at the time of questioning. Such scenarios may give rise to an unsatisfactory situation from the point of view of both the Gardai and the accused. Both will miss the opportunity to engage in an interview and to address the evidence.

13. The solution to these problems, and also to the type of problem that arises in the instant case, may be to invite the accused to attend for a voluntary cautioned interview, with the intention that the fruits of that interview would form part of the evidence at trial.

**Securing the account of a suspect, prior to a decision to charge**

14. It is necessary to consider the interaction between the Gardai and the DPP when reaching a charging decision. The onus to ensure that an investigative process is fair rests with the Gardai. But, their capacity to ensure that a suspect gives account during the investigative phase can sometimes be dependent on the timing of the prosecutorial decision, as the facts of this case demonstrate.

15. The Trial Judge in the Appellant's trial reasoned that once the DPP had made a decision to charge the Appellant with a serious offence, this necessitated a procedure whereby the Appellant would be able give his account. Facilitating the Appellant in giving an account prior to a charging decision would therefore have involved the DPP ensuring that the decision awaited that account.

16. While it might be argued that the principle of *audi alterem partem* requires that the DPP must await a suspect's account in all cases, the judgment of this Court in *Eviston v. The Director of Public Prosecutions*[3] casts doubt on that proposition. Keane C.J. stated (at p. 290):

> *"I would, with respect, question whether the High Court Judge was altogether correct in describing these functions as "quasi judicial", at least as that expression has generally been understood. It is usually applied to executive functions which involve the exercise of a discretion but require at least part of the decision making process to be conducted in a judicial manner. That would normally involve observance of the two central maxims of natural justice, audi alterem partem and nemo iudex in causa sua. Those*

[3] [2002] 3 I.R. 260

*canons are of limited, if any, application to the respondent who, like other litigants, initiates and conducts a prosecution but does not ultimately decide any of the issues himself and, specifically, has no role in determining the guilt or innocence of an accused person."*

17. While accepting the finding in *Eviston* that a prosecutorial decision of the DPP does not ultimately decide on the issue of criminal liability, the prosecutorial decision is nonetheless a very significant step. The far-reaching consequences of the charging decision for an accused are referred to by the DPP, in her own Guidelines for Prosecutors[4]:

*'4.1 The decision to prosecute or not to prosecute is of great importance. It can have the most far-reaching consequences for an individual. Even where an accused person is acquitted, the consequences resulting from a prosecution can include loss of reputation, disruption of personal relations, loss of employment and financial expense, in addition to the anxiety and trauma caused by being charged with a criminal offence.'*

18. It should be remembered that exculpatory or even mitigating evidence provided by a suspect in advance of a charging decision could result in a decision not to charge at all. Despite the conclusion in *Eviston* that the principle of *audi alterem partem* has limited application to prosecutorial decisions, it is questionable whether the DPP would ever take a prosecutorial decision without having regard to an existing account of the suspect. Such an account would be highly material to the prosecutorial decision. This is acknowledged in the Guidelines, in the context of the assessment of evidence when coming to a prosecutorial decision:

*'4.15 In assessing the evidence, the prosecutor should also have regard to any defences which are plainly open to, or have been indicated by, the accused'*

19. It is desirable that in appropriate cases, the DPP would assess whether the account of a suspect should be obtained. Again, there is an express acknowledgment of the value of this course of action in the Guidelines:

*4.17 … The primary decision to charge will be made by the Director or one of the Director's officers in cases where the file is referred to the Director's Office. At this stage the Director or the Director's officer may request further investigative work from the investigating authorities. For example, this may include requesting the investigator to give an alleged offender an opportunity to answer or comment upon the substance of the allegations or a request for copies of relevant records, statements or other material not included on the file.'*

20. In the course of an investigation into a serious offence, there will usually be an arrest, and questioning of a suspect prior to a recommendation by Gardai in respect of charges. The procedure adopted in this particular investigation was different to the usual sequence. After being charged with summary offences, the Office of the DPP appears to have decided that the existing charges did not sufficiently reflect

[4] 5th Edition, Updated December 2019, at p.12

the nature of the alleged driving and that a further charge of reckless endangerment was merited.

21. There will be cases where it will not be possible to secure a suspect's account before the decision to charge. This may occur, for example, where the suspect is abroad and can only be made amenable to extradition through a decision to charge them. Sometimes, the charges directed against an accused are not the sameoffences as they have been detained in respect of. Later, upon review of a book ofevidence, prosecuting Counsel might advise that additional, more serious chargesare merited.

22. These examples demonstrate that there may be a legitimate basis to charge a suspect without their having had the opportunity to give their account or to address the exact offence under consideration.

23. The Commission does not comment on the appropriateness of the decision taken in the Appellant's case to direct a charge in the absence of his account being sought. This appeal does not involve a challenge to the lawfulness of the actions of the DPP. But, it is submitted that a failure to secure a suspect's account during the investigative stage can lead to significant disadvantage for the defence in the context of a trial. The key question therefore, is whether the failure to secure a suspect's account be remedied after charge or during the trial itself.

**Are there remedies available to an accused, which can mitigate a failure to interview them prior to charge?**

24. The Court of Appeal held that the Appellant could have submitted an account to the Gardai after being charged, and could have argued for its admissibility at trial. It would appear that an issue could be raised at trial over the admissibility of such an account, particularly if proffered as a prepared statement which the Gardai have not had the opportunity to interrogate during interview.

25. The suggestion that it is for an accused to find a way to provide an admissible exculpatory account does not sufficiently acknowledge that it is for the State authorities to ensure the effective exercise of defence rights. It is therefore submitted that an accessible and reliable process for taking an exculpatory account should be provided. The taking of that account should be invited, and facilitated by the State authorities in a way which is conducive to its admissibility at trial.

26. Separately, the Court of Appeal held that the Appellant could have set out his defence in reply, after being charged. In reality, a reply after caution is usually limited to one sentence, if given at all. A detailed account of the type envisaged by the Court of Appeal would suffer from a lack of engagement between the Gardai and an accused.

27. Finally, the Court of Appeal held that the Appellant could have given evidence at trial. It is submitted, however, that in circumstances where there is no obligation on an accused to give evidence at trial, it would significantly undermine that principle to treat the option of giving evidence as a sufficient remedy for the failure to facilitate the taking of an accused's account.

28. Accused persons rarely give evidence, and for legitimate and understandable reasons. Rigorous cross-examination can distort or confuse an honest account. Giving evidence will often be viewed by an accused as an ordeal to be avoided. This is one reason why a solicitor advising a suspect will recommend that the suspect would provide their account during Garda interview, if such an approach is warranted on the facts.

29. In a recently published report on the *'Right to Silence and related rights in pre-trial suspects' interrogation'*, commissioned by the European Union's Justice Programme[5], a number of stakeholders (trial Judges, DPP staff, Counsel, retired Gardai) were interviewed. The ability of an accused to provide a pre-trial account was seen by practitioners as a vital aspect of the defence, particularly in light of the undesirability of an accused giving evidence at trial.

30. That general view is encapsulated in the comments of one practitioner, as follows:

> *'"They're usually just an ordinary person and they're going to be questioned by someone who is very skilled in questioning people, who is very skilled in the law, who is looking to catch you out, who is looking to incriminate you, for you to incriminate yourself or to say something that doesn't make sense and it's not an equal match … it would be just be very rare that you would put someone in a box and it would only be if there was no other rational thing to do."*
>
> *The suspect's silence in garda interviews was also a key consideration, greatly influencing whether a person took the stand or not. Without having advanced an account during these interviews, this could mean that a suspect was in a position of necessarily having to take the stand simply to deliver their own account to the jury. If there is no defence or no account offered either through responding in garda interviews or taking the stand, a vacuum exists in terms of the suspect's position. '*

31. In respect of the value to an accused of providing a pre-trial interview or statement, the report continues:

> *'… pre-trial statements proffered in garda stations have the significant benefit of being a more contemporaneous account of the events in question when compared to evidence given at trial, which can take place years after the alleged offending. Certainly, oaths or affirmations are not administered in garda interviews with suspects, but the seriousness of matters at that point is clear and the potential negative consequences of dishonesty apparent. Moreover, while evidence given in court is tested by cross-examination, an account given in the garda station can be assessed and challenged by the interviewing gardaí (indeed this is a specific aspect of GSIM) and subsequent investigation of the claims made therein may provide the prosecution with*

[5] '*Right to silence and related rights in pre-trial suspects' interrogations in the EU: Legal and empirical study and promoting best practice' EmpRiSe Ireland, 28th June 2021, Authors: Prof Yvonne Daly, Dr Aimée Muirhead, Ciara Dowd BL*

*evidence to contradict such account at trial. As previously highlighted, cross-examination often focuses on undermining credibility by emphasising inconsistencies. However, there are many reasons why an accused, victim, or witness might give inconsistent accounts, such as lapses in memory and poor communication skills.*

*While live evidence and cross-examination can be useful tools for ascertaining the truth of a matter, this is not universally so and an overemphasis on credibility and inconsistencies may obscure fact-finding. In this regard, other forms of evidence can aid fact-finding in different ways. Pre-trial statements, including prepared statements, while not subject to the rigours of cross-examination, are challengeable by gardaí at interview and investigation of the claims made therein may ultimately lead to a guilty plea, a decision not to prosecute, or stronger evidence against the accused at trial. As such, there is a policy value in the continuance of the practice, where appropriate, of allowing such statements to be put to the trier of fact, along with any countervailing evidence, and while it is accurate to note that such statements are not identical to sworn, live trial testimony, it is also appropriate, in our view, that such evidence be presented without suggestion that it is a significantly weaker form of evidence.'*

32. The Commission would find merit in these findings and recommendations.

**What is the value of an out-of-court exculpatory statement?**

33. The practice of adducing the exculpatory account of an accused is a firmly established aspect of the trial process in this jurisdiction. Where available, it is an invaluable aspect of a defence case. The authority traditionally relied on to justify the admissibility of exculpatory, out-of-court statements is *DPP v Clarke*[6], wherein the Court of Criminal Appeal held that a Garda interview containing mixed inculpatory and exculpatory statements should be admitted before the jury in full, and that there could be no question of editing a statement to remove the exculpatory parts.

34. The Court of Appeal and the Respondent have characterised the Appellant's argument as an assertion of a previously unidentified right to adduce an untested and unsworn account at trial, which will be immune from cross-examination. In this regard, the Respondent relies on comments of Charleton J in the High Court case of *DPP v McCormack*[7], addressing the extent to which a purely exculpatory out-of-court statement is admissible (being hearsay in nature, and not the subject of any exception to the hearsay rule). Charleton J noted that it was within the discretion of a trial Judge to exclude such statements.

35. The Respondent goes further and highlights a passage from *R v Pearse*[8] which suggests that a trial judge would inevitably treat a 'carefully prepared written statement' by an accused as inadmissible. The Respondent therefore, while

[6] DPP v Clarke 1994 3 IR 28
[7] [2007] IEHC 123 [2008] 1 I.L.R.M. 49.
[8] (1979) 69 Cr App R 365.

endorsing the suggestion of the Court of Appeal that the accused can supply an account to Gardai and argue for its admissibility, also advocates for a restrictive interpretation of the admissibility of such an account.

36. An example of a prepared statement being admitted into evidence at trial can be found in *DPP v M*[9], a 2018 decision of this Court. In that case, the accused had read out a prepared written statement during interview, but had otherwise refused to answer questions. Such a course of action does appear to be adopted far less frequently than regular engagement in interview. As noted in the European Justice Programme report, trial judges tend to query the value of prepared statements in their charges. Jurors may also be sceptical of a statement that too neatly addresses the allegation.

37. An accused should therefore have the option to engage with an interview process, so that the jury has before them memos of interview in which there was engagement between the Gardai and the accused.

**Relevant ECHR and EU Law on the obligation to provide a suspect with information about the legal classification of the offence alleged.**

38. There is limited relevant European Court of Human Rights ('ECtHR') caselaw on the particular issues raised on this appeal. This may reflect the fact that it is unusual for an accused not to have an opportunity to provide an account, during the investigative stage. Some signatory States to the Convention operate an investigating magistrate system, in which the account of the accused will necessarily be sought during the investigative process.

39. ECtHR caselaw[10] in respect of the requirement to notify an accused of the 'reclassification' of an offence has addressed situations where the reclassification occurs during the trial process at the instigation of the court. The ECtHR has also considered[11] the related issue of whether it is permissible to question a suspect about one offence, and then to rely on admissions made in that context in support of a prosecution for a more serious offence. The general approach of the ECtHR, in respect of the notification of the allegation to the accused, has been to consider the overall fairness of the proceedings to determine whether there has been breach of Article 6 of the Convention.

40. It is worth considering the case of *C v Italy*[12], wherein the European Commission on Human Rights assessed the admissibility of a complaint that a failure to question an accused during the investigative stage rendered a trial process unfair. In finding that the complaint of breach of Article 6 was manifestly ill-founded, the Commission held as follows:

[9] [2018] IESC 21

[10]; Pélissier and Sassi v. France, App. no. 25444/94 (Judgment of 25 March 1999) Mattocia v. Italy, App. no. 23969/94 (Judgment of 25 July 2000)

[11] Čierny v. Slovakia, App no. 29384/12

[12] Decision of 11th May 1988, App 10889/84

*'3. The applicant also complains that he was never questioned personally about the offences with which he was charged and he alleges that he was not, therefore, given a fair hearing…*

*The question which arises in this case is whether this provision may be violated in a case where an accused person who had been put in a position to attend the proceedings refused to do so, on the ground that he had been unable to participate in the investigation process…*

*… the applicant was assisted by three defence lawyers, including the lawyer who had been officially appointed at the investigative stage and whom he confirmed in his functions as a lawyer chosen by him. The applicant was represented by them in the course of the proceedings, and thus clearly manifested his decision not to take part in the hearing.*

*Moreover, throughout the trial, which lasted more than one month and comprised eight hearings, the applicant never asked to appear.*

*The Commission consider that, in the present case, the applicant failed to exercise his right to appear at the hearing which was recognised and guaranteed by Italian Law, and to take advantage of the remedies available to him.*

*… the Commission notes that, under the Italian system of criminal procedure, the investigation is purely preparatory in nature and that the formal presentation of evidence takes place in the presence of the parties in the course of the trial. On that occasion, the applicant could have been questioned by the court, called witnesses, had them examined, produced any documents he considered relevant and made any statement useful for his defence.*

*In as much as the applicant maintains that his non-participation in the preliminary investigation irreparably hampered his defence, the Commission considers that he cannot rely on this circumstance, since he did not make us of the grounds of defence available to him in the subsequent proceedings….*

*Finally, the Commission notes that the applicant's defence counsel took an active part in his defence throughout the proceedings and the applicant himself made known his personal position by means of written statements which he transmitted to the court.'*

41. The findings of law in *C v Italy* reflect the particular facts of that case. There had been an effective waiver by the accused of his right to participate in the trial proceedings, coupled with an attempt to assert that the trial had been unfair. The approach of the European Commission on Human Rights demonstrates that the trial process must be assessed as a whole, in order to determine whether there has been a breach of Article 6 ECHR arising from a failure on the part of the State authorities.

42. In European Union law, the right of a suspect to be notified of the legal classification of the accusation against them receives a high level of protection. Ireland has opted-in to *Directive 2012/13 EU, on the Right to Information in Criminal Proceedings.* It is directly effective in the State, since 2nd June 2014. Article 6 thereof provides:

> *'1. Member States shall ensure that suspects or accused persons are provided with information about the criminal act they are suspected or accused of having committed. That information shall be provided promptly and in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence.*
>
> *2. Member States shall ensure that suspects or accused persons who are arrested or detained are informed of the reasons for their arrest or detention, including the criminal act they are suspected or accused of having committed.*
>
> *3. Member States shall ensure that, at the latest on submission of the merits of the accusation to a court, detailed information is provided on the accusation, including the nature and legal classification of the criminal offence, as well as the nature of participation by the accused person.*
>
> *4. Member States shall ensure that suspects or accused persons are informed promptly of any changes in the information given in accordance with this Article where this is necessary to safeguard the fairness of the proceedings.'*

43. The extent of the obligation to provide information about the accusation is elaborated on, as follows:

> *'(28)The information provided to suspects or accused persons about the criminal act they are suspected or accused of having committed should be given promptly, and at the latest before their first official interview by the police or another competent authority, and without prejudicing the course of ongoing investigations. A description of the facts, including, where known, time and place, relating to the criminal act that the persons are suspected or accused of having committed and the possible legal classification of the alleged offence should be given in sufficient detail, taking into account the stage of the criminal proceedings when such a description is given, to safeguard the fairness of the proceedings and allow for an effective exercise of the rights of the defence.*
>
> *(29)Where, in the course of the criminal proceedings, the details of the accusation change to the extent that the position of suspects or accused persons is substantially affected, this should be communicated to them where necessary to safeguard the fairness of the proceedings and in due time to allow for an effective exercise of the rights of the defence.'*

44. The Directive requires that relevant information in respect of an allegation, including its possible legal classification, will be provided in advance of the *'first*

*official interview'.* While the Directive does not expressly address a situation where there has been no interview of the suspect, it would be consistent with the high level of protection provided therein that such information would be given during the investigative stage, so that the suspect can exercise the rights of the defence appropriate to that stage.

45. The Commission would refer the Court to the views of Fair Trials International, in a report[13] funded by the Criminal Justice Programme of the European Union and addressing the Directive. Fair Trials endorsed the following position:

> *'The 'effective exercise of the rights of defence' at trial may be prejudiced by the failure to provide more detailed information earlier in the proceedings, e.g. by circumventing procedural protections available for more serious offences, inducing cooperation on the basis of a false idea as to the seriousness of the offence. It may also prevent the defence from carrying out or proposing investigative actions to obtain exculpatory evidence.*
>
> *Whilst Article 6(3) requires the provision of detailed information on the accusation and the nature and legal classification of the offence 'at the latest' upon submission of the merits of the accusation to the judgment of a court, this is simply recognising the fact that full information will always have to be provided then in order for a trial to take place. Preserving the fairness of the proceedings and ensuring effective exercise of the rights of defence at trial may require fuller information earlier on.*
>
> *Indeed, Article 6(4) requires that suspects and accused persons are notified 'promptly' of any changes in the accusation where this is necessary to safeguard the fairness of the proceedings. This recognises the fact that changes to the accusation may affect the conduct of the defence, and that withholding such information may prejudice that fairness'.*

46. It may be helpful to consider procedures in other Member States, in respect of providing information on the accusation to a suspect. A report by the European Union Agency for Fundamental Rights[14] summarises the different practices:

> *'Many laws include a very general obligation to provide information on the accusation to all suspects and accused before the initial questioning. These include Austria, Belgium, Croatia, Estonia, Finland, France, Greece, Luxembourg, the Netherlands, Slovenia, and the United Kingdom (England & Wales and Northern Ireland). Some national laws have more specific provisions, which require authorities to provide this information in or together with the official decision or notification about suspicion or accusation (unless the person is arrested before this) – such as Bulgaria, the Czech Republic,*

[13] 'The Right to Information Directive' Fair Trials International, March 2015 https://www.fairtrials.org/wp-content/uploads/Right-to-Info-Toolkit-FINAL1.pdf

[14] *'Rights of suspected and accused persons across the EU: translation, interpretation and information'* FRA, 2016 https://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-right-to-information-translation_en.pdf

*Hungary, Latvia, Lithuania, Poland, Portugal, Romania, Slovakia, Spain, and Sweden.*

*Secondly, there are Member States that introduce this obligation only when the person – be they suspect or accused – is deprived of liberty (upon arrest or shortly thereafter), such as Cyprus, Ireland, Italy, and the United Kingdom (Scotland). This also seems to be the case in Malta, where the law explicitly refers to the provision of information on the accusation through the Letter of Rights upon deprivation of liberty. As for the concrete details about the accusation provided, most laws require authorities to provide to individuals, at the pre-trial phase, information on the act, date and place of commission of the act of which they are suspected. In Croatia, authorities are supposed to give information on the "grounds for the suspicion", while in Portugal they are supposed to provide a "document specifying the particulars of the case". In Slovenia, only a general reference to the events is often provided in practice. The Spanish law states that the "[i]nformation shall be provided witha sufficient degree of detail so as to enable the effective exercise of their rightto a defense."*

*The Latvian law provides more concrete guidance: a suspect has the right to receive a copy of the official decision stating that they are deemed a suspect, and this decision shall indicate, among others, the factual circumstances of the criminal offence to be investigated that determine legal classification, the offence's legal classification, and the grounds for assuming that the offence was likely committed by that person. Authorities in EU Member States generally provide more details on accusations upon submission of the merits of the case to courts.*

*According to Directive 2012/13/EU, Member States have a continuous obligation to provide information on the accusation, and should promptly inform persons about any changes in the information given. In practice, aside from the initial information provided before questioning, or as the case may be together with the official notification of the accusation, as well as when taking a person into custody, authorities usually only provide updates on details of the accusations at the end of investigations, when cases are brought to court, and during court proceedings. For example, practitioners in Germany reported that, during preliminary proceedings, informing accused persons about changes in the details of accusations is not legally prescribed. After an accused's examination, police and the public prosecution office undertake all investigations. They only inform the accused whether public charges are preferred or proceedings are terminated at the conclusion of investigations…*

*There are exceptions to this general rule of providing updates concerning the accusation details only at the end of investigations, once cases are brought to court. In Latvia, for instance, if during an investigation authorities obtain additional evidence or the factual circumstances of the criminal offence change and it becomes necessary to amend the decision on suspicion, the person directing proceedings shall issue a new decision recognising the person as a suspect in the context of changed circumstances and provide a copy thereof to the suspect. In Romania, "a body that ordered the widening of the*

*scope of the criminal investigation or the change of charges is under an obligation to inform the suspect about the new facts that warranted the widening of the scope." In Hungary, when charges change, the investigative authority must inform the suspect before his/her (next) questioning. If no (further) questioning takes place, the person will be informed only at the next stage of the proceedings – indictment. A similar system exists in Lithuania. In Bulgaria, during the pre-trial stage and outside situations involving custody, when details of an accusation change, authorities are to present the charged person with a new decree for bringing charges. This rule applies when a legal provision for a more serious crime has to be applied, the facts of the case have changed significantly, or new crimes or new persons have to be added to the case. A similar system exists in Slovakia.'*

**Conclusion**

47. To determine whether a failure to secure the account of the accused has irreparably prejudiced the rights of the defence, sufficient to render a trial unfair, requires an analysis of whether there are adequate remedies available and also, the facts of the particular case.

48. In respect of potential remedies, it is submitted that the Gardai should offer the accused the option of an interview. The onus is on the investigating authorities to ensure that this interview is facilitated, in a manner which supports its admissibility at trial.

49. Since an accused should be under no obligation to give evidence at trial, that option should not be treated as a sufficient remedy to mitigate an earlier failure to secure an exculpatory account.

50. The distinction drawn by the Learned Trial Judge in the Appellant's own case, between summary and the indictable charges, is consistent with principle. As noted by O'Higgins C.J. in *State (Healy) v Donoghue*[15]:

> *'There are thousands of trivial charges prosecuted in the District Courts throughout the State every day. In respect of all these there must be fairness and fair procedures, but there may be other cases in which more is required and where justice may be a more exacting task-master. The requirements of fairness and of justice must be considered in relation to the seriousness of the charge brought against the person and the consequences involved for him.'*

51. There will be cases where the missing account of the accused, if it had been provided, could have resulted in an acquittal. If the facts of a case disclose that reasonable possibility, and if there has been no adequate remedy available to secure the account, it is legitimate to consider whether irreparable prejudice has been caused and whether the trial process has been rendered unfair.

[15] [1976] IR 325

**12th October 2021**

**(6,105 words)**

**Mark Lynam BL**

**Patrick Gageby SC**