

THE RIGHT TO REMAIN SILENT

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Preface

The primary purpose of the study is to analyse the operation of the right to silence which is available to accused persons during pre-trial and trial stage, and to determine whether the exercise of such right entitled the courts to comment and draw adverse common sense inferences as consent or implied admission to the accusation, consciousness of guilt or strengthens the inferences from the opposing case.

The scope of the study includes the situations in Malaysia, England and particularly in Singapore in which this right has been diminished by a recent amendments to their Criminal Procedure Code in the hope that accused persons testify more often.

Finally, the paper will also deal with the recommendations made by the Criminal Law Revision Committee (U.K.) to abolish such right during pre-trial and the criticisms followed thereafter.

I wish to thank Mr. Valentine Manuel for being my supervisor and my sincere thanks also goes to my sister and my colleagues for their moral support, advice and kind assistance in dealing with the subject-matter of this paper.

The errors and omissions in expressing my view are mine. The law is discussed as it stands as from the date of the paper.

May, 1966

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List of Statutes

- I. Criminal Procedure Code (FMS Cap 6 with annotations of amendments 1970 - 1976 as at 15th. March 1983)
2. Criminal Procedure (Amendment & Extension) Act, 1976 - (Malaysia)
3. Minor Offences Ordinance, 1955.
4. Criminal Procedure Code (Amendment) Act, 1976 - (Singapore)

RIGHT TO SILENCE

I. Definition

The so-called right to silence is a two-fold : in relation to the pre-trial stage (out-of-court) silence, where it means that the accused is entitled to abstain from making any statement or comment when interrogated by the police or other investigating authority.

In relation to the trial stage (in-court) silence, the right to silence means that the prosecution have the onus of establishing his guilt, that he can decline to give evidence and that the prosecution may not comment on his so doing. An accused person who raises a plea of alibi for the first time does, however run serious risk. In such cases, the judge may, in the summing up (if it a jury trial) invite the jury to take into consideration the omission of the accused to disclose his defence at the preliminary enquiry in the Magistrate's court. It would however be a misdirection for the judge to infer or to invite the jury as the case may be to infer guilt by reason of such omission on the part of the accused.<sup>1</sup> In this respect, the law in Malaysia follows the English law as enunciated in various cases decided there.<sup>2</sup>

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1 Fazal Din v P.P. (1949) M.L.J. 123

2 Naylor 23 Cr. App R117, Littleboy 24 Cr. App.R.192; Leckey (1943) 2 All E.R. 665, Hoare 50 Cr. App R.166 and Sullivan 51 Cr. App R.102

The same principle would apply to cases under the Prevention of Corruption Act, the Internal Security Act and the Kidnapping Act when cautioned statement made by the accused are tendered in evidence.<sup>3</sup>

## 2. The Right As Derived From The Privilege Against Self-Incrimination

The right to silence is derived from the privilege against self-incrimination, which is "based on our unwillingness to subject those suspected of crime to the cruel dilemma of self-accusation the perjury or contemplation."<sup>4</sup>

The privilege against self-incrimination operates in favour of every witness and it states that a suspect has a right to silence when questioned about an offence, nemo tenetur prodere seipsum - no one is obliged to give himself away. The rule was stated by Lord Goddard L.J. in the following terms<sup>5</sup> :-

"...no one is bound to answer any question if the answer thereto would, in the opinion of the judge have the tendency to expose the deponent to any criminal charge, penalty or (in a criminal case) forfeiture which the judge regard as reasonably likely to be preferred or sued for".

It is also based on the idea that a suspect or accused should not be constrained to choose between either lying or incriminating himself.

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3 Rattan Singh v P.P. (1971) 1 M.L.J. at p.166

4 per Golberg J. in Murphy v Water Front Commissioners, 378 U.S. 52 at p.55

5 Blunt v Park Hotel ltd. (1942) 2 K.B. 253