Equality before the law – do preprepared statements advance or undermine justice?

Bernard Condon SC[1]

Annual National Prosecutors' Conference 2024

1. In recent years, a practice has developed wherein accused persons who are aware that they are likely to be questioned about an offence, or that there are allegations against them, prepare lengthy statements in advance of attending at the Garda Station to be questioned by Gardaí. Often, these persons will not provide any further information or answer any further questions. The statements are also frequently prepared in conjunction with legal advisors.

2. This presentation considers how this practice has developed, whether such a practice is lawful, the status of admissibility which attaches to such statements, and whether this area of law is in need of reform.

3. Importantly, this practice throws up questions of inequality; is it fair that an accused person who can afford legal advice prior to being questioned by Gardaí should be placed at an advantage at having a full and considered account of their defence put before a jury? Further, the practice of pre-prepared statements appears to be utilised more prominently in sexual offences.

Admissibility

4. In general, exculpatory statements made by an accused outside of Court are not admissible at trial as evidence. Only inculpatory statements, which amount to a declaration against interest and thus are an exception to the general rule against hearsay, are admissible. These rules of admissibility have their basis in the common law requirement of orality in the criminal process, a requirement that

[1] With Gemma McLoughlin-Burke BL

trials are conducted on the basis of viva voce as opposed to documentary evidence. The requirement of orality has been challenged in other circumstances, such as the admission of s16 statements. Such statements have been held to be admissible as a statutory exception.

5. The position of exculpatory statements is therefore thus:
   - They do not amount to an admission against interest;
   - They do not fall into any of the exceptions to the rule against hearsay;
   - They are not provided for by statute.

6. It seems clear therefore, that entirely exculpatory statements are not admissible in evidence. So, how have pre-prepared statements become a common part of the book of evidence in criminal trials?

7. The difficulty seems to emanate from so-called "mixed statements", statements which are both inculpatory and exculpatory.

8. The particular difficulty presented by preprepared statements (that may or may not be the actual words of the suspect) also has consequences for the general rule of orality that applies traditionally to criminal trials.

The development of the admissibility of mixed statements

9. The admissibility of mixed statements finds it's genesis in ***DPP v Clarke*** [1995] 1 ILRM 355. There, O'Flaherty J considered whether statements made to the Gardaí which were both inculpatory and exculpatory are admissible and if so, admissible as what. The Court held that both were admissible as evidence of the facts stated, stating:

   "The true position in law, as established by that case, and which we take this opportunity of reiterating is that once a statement is put in evidence as in this case by the prosecution, it then and thereby becomes evidence in the real sense of the word, not only against the person who made it but for him as to facts contained in it

favourable to his defence, or case. A jury is not bound to accept such favourable facts as true, even if unrefuted by contrary evidence but they should be told to receive, weigh and consider them as evidence."

10. This judgment has subsequently been cited as support for the proposition that exculpatory statements are admissible as evidence as to fact, however, there are a few important points to note from this judgment.

11. First, the Court stated that at the time that this statement was made, it was "at a very early stage before the accused had got any legal advice" and further stated that it "was made spontaneously to the gardai."

12. Second, it is notable that this was not a pre-prepared statement; the statements were made in the context of Garda interviews conducted over several days after the victim was killed.

13. Subsequently, in ***McCormack v. DPP*** [2008] 1 IR 289 the accused contended that the failure by the Gardaí to properly interview him and take down those interviews in writing deprived him of the opportunity to present his defence. Charleton J considered the decision in ***DPP v. Lawless*** (Unreported, Court of Criminal Appeal, 29th November 1985), which considered the admissibility statements made during a search of a premises, and noted that the Court of Criminal Appeal in that case did not comment on the direction of the trial judge to the jury that statements given by the accused to the Gardaí should not be afforded the same weight as evidence given viva voce. He stated that this was correct, observing:

"The rule that statements by an accused person were admissible in evidence was grounded on an exception to the hearsay rule that an admission against interest should be considered by the tribunal of fact. A self-serving statement does not fall within that exception, but the vast majority of cases of this kind, as in Clarke's case, are mixed; proving, if accepted, some facts for the prosecution and asserting a defence for the accused… I would expressly hold that it is not the purpose of a police interview to enable the accused to make a case on video so that it can be played as part of the prosecution case in front of a jury. The accused has, for that purpose, the

option of cross-examining witnesses at trial, of calling evidence or of giving evidence himself or herself. Whether an entirely self-serving statement by an accused, that is repeated again and again, is admissible as to every repetition as an exception to the rule against self-corroboration, is a matter for the trial judge."

14. In ***DPP v. O'Neill*** [2007] 4 IR 564, the prosecution sought to adduce evidence of a conversation which had taken place between the accused and members of AGS in his kitchen in relation to an accusation of rape. The accused had stated that at first, the interview was standard questions and answers but that at some point, the attitude of the Gardaí changed and he was pressurised to give the Gardaí the answers they wanted or he would be put in prison.

15. Subsequent to this application, the trial Judge held that he was not satisfied that the interview was voluntary and he therefore excluded same in its entirety. The accused objected to the interview being excluded entirely and sought to have the first section of the interview, which was exculpatory, put before the jury. The trial Judge refused this application and the matter was appealed.

16. In considering the issue of voluntariness and whether a statement could be severed to reflect voluntary vs involuntary statements, Kearns J stated:

"it must be borne in mind that an interviewee will in many instances endeavour to place an exculpatory account in the balance with an inculpatory account in a self-serving way so that to sever the one from the other within the same process so as to admit only exculpatory portions could lead to a very distorted picture being given to a jury."

The issue of pre-prepared statements

17. In ***DPP v. KM*** [2018] IESC 21, the accused prepared a statement in advance of his attendance at the Garda Station in relation to a complaint of indecent assault. Having read the statement, the Gardaí proceeded to ask the accused questions, however the accused continuously stated in response that he had already answered referred to these matters in his prepared statement and he had nothing further to add. An important fact in this case is that in the first trial of the accused

for this offence, this memorandum was not adduced. This trial resulted in a disagreement and during his the retrial, the prosecution adduced this evidence without first alerting the defence that this different course of action was to be adopted.

18. This approach was objected to by the accused on the basis that it was a violation of his right to silence, however not until the evidence had already been adduced before the jury. Further, the matter was not considered from the perspective of relevance, or whether the probative value outweighed the prejudicial effect of same. The matter was ultimately appealed to the Supreme Court.

19. O'Malley J reviewed the law on the right to silence, and concluded *"The making of a voluntary statement, as in this case, amounts to a clear waiver of the right to silence to that extent, but it does not follow that the suspect thereby waives the right in respect of either a prior or subsequent refusal to answer questions. I consider that the constitutional protection afforded to the right to silence is such that waiver cannot be held to be implied..."*

20. However, she went on to emphasise that in the present case, the manner in which the evidence was adduced, and the view of the trial Judge that it did not amount to a breach of the right to silence, meant that there was no real analysis of the relevance of this evidence and its admissibility outside the context of the right to silence. It therefore appears that this judgment does not go so far as to endorse the practice of pre-prepared statements or the admissibility of same.

21. In ***DPP v. Mahon***, Charleton J effectively repeated the views set out by him in ***McCormack***; that pre-prepared statements can be admitted but the weight which should attach to same is far less than *viva voce* evidence. He stated:

"Confusion can arise in the context of violence and sexual violence cases as to the status of answers by the accused to the gardaí or of a prepared statement handed in by an accused, perhaps drafted with the assistance of a solicitor. Such statements are evidence. Since, however, the jury do not hear from the witness in terms of examination in chief and do not have the benefit of hearing relevant questions put in

cross- examination to test such evidence, and since such statements are not sworn, the trial judge should tell the jury that while the credence to be attached to such a statement is a matter for them, whatever weight they give to these statements, they should be assessed in that light. Other witnesses' evidence is subject to oath or affirmation and to cross-examination before the jury; such statements are not."

22. Interestingly, in ***DPP v. JD*** [2022] IESC 39, the Supreme Court considered whether an accused person is entitled to put their account of events on the record where they have not been detained and questioned in relation to an offence at the outset. There, the Appellant had been arrested and charged with a number of summary road traffic offences. Subsequently, the Appellant was charged with the indictable offence of reckless endangerment. Had the Appellant been arrested on foot of this charge, the Gardaí would have had the power to detain and question him in relation to the offence. There is no such power of arrest and detention for the summary offences with which he was initially charged.

23. The Appellant submitted that he should have been arrested and detained on foot of the indictable charge to give him an opportunity to put his account of events before the jury by way of memorandum of interview. The failure to do so meant that he was in the position of being either compelled to give evidence or else put nothing before the jury at all. It was submitted that this is a breach of the principle of *audi alteram partem* and as such, deprived the Appellant of a trial in due course of law.

24. MacMenamin J stated that the circumstances in which the endangerment charge arose were unusual, though not unheard of, and that the issue before the Court was whether this failure in the investigation stage could amount to a violation of the right to a trial in due course of law. In first considering the role of the Director, the Court affirmed that the Director has no investigative function, nor does she have a duty to direct investigatory procedures. Second, the Court stated that the concept of fair procedures, as it is derived from the Constitution and Convention, is concerned primarily with the trial of a person as opposed to the investigation stage, where the full range of rights could not apply. For example, the Court stated: "*It cannot be suggested that police investigations conducted in accordance with law*

must involve an "impartial and independent court or arbitrator". Nor can an accused person test evidence by cross-examination at that point."

25. MacMenamin J acknowledged that the decision in ***Gormley & White*** recognised the right to fair procedures during the course of questioning and detention, but stated that these rights were directly linked to the impact that a failure to observe such rights may have on a trial. If a person is oppressively questioned by Gardaí and gives a statement on foot of same, the Court reasoned, the admissibility of such a statement at trial would be a breach of the rights of the accused. The Court emphasised that it is the trial itself which must take place "in due course of law" and the investigative stage only comes under scrutiny insofar as it may adversely impact that trial. The investigation stage, it was held, is not governed by the principle of *audi alteram partem*. Although pre-trial questioning must be fair, and the manner in which a person is detained must comply with the statutory framework, the Court held that the right to a trial in due course of law only arises at the stage of the trial itself.

26. The Court further stated that statements made in response to a charge are not automatically admissible at trial and are a matter which must be considered by the trial Judge before they can be admitted in evidence. In this regard, the Court stated that this is an area of law which is "highly fact-specific".

27. Finally, in relation to the right to silence, the Court stated that this right ensures "that an accused person is not obliged to give evidence, nor required to adduce evidence on his own behalf, nor to be questioned against his will". The Court stated that there was no such right to be arrested and detained for the purposes of questioning; the questioning of a suspect in detention was for the purposes of advancing an investigation into an offence, not to give an opportunity to an accused to put their case on the record.

28. In all, the Court held that there was no such right to be questioned.

29. In ***DPP v. RM*** [2024] IECA 75, the Court of Appeal specifically considered the question of admissibility of a statement made by an accused to their solicitor. There, the accused had been arrested in April 2020 for a number of serious offences, including aggravated burglary. On 4 November 2022, the first day of his trial, the accused legal team furnished an exculpatory statement made by the accused to his legal advisors and sought for same to be admitted under the decision in JD. The trial Judge, though stating that there was no right to have such a statement admitted, was satisfied that same was permissible where it was in the interests of fairness. The statement was admitted and this was appealed by the prosecution.

30. Kennedy J considered the rules of evidence insofar as they pertain to hearsay and concluded that entirely exculpatory statements did not fall under any exception to the rules and were therefore inadmissible. She considered MacMenamin's judgment in **JD** and stated that this decision did not concern an out of court statement, but was focused on whether an accused person was entitled to be questioned by Gardaí so as to put their account of events on the record, stating:

"We do not see that the decision is authority for the proposition that a statement made to one's solicitor is admissible per se. Indeed, if one looks carefully to para. 100, the Supreme Court refers to a memorandum of interview when MacMenamin J. says:

> *"If the Circuit Court judge had felt that there was clear identifiable unfairness, then, subject to all else being equal, or being made so, the appellant could, even at a late stage, have been given the opportunity to furnish a written response to the endangerment charge. Whether or not such memorandum of interview would have been admitted in evidence would remain a matter for the judge to determine, in accordance with the general principles outlined earlier.*

53. In our view, a memorandum of interview is clearly different to a statement made to a solicitor. It envisages an interview situation and as it is in a criminal context; this involves interaction with gardaí."

31. She continued:

"55. It is quite clear from the above that JD does not support the respondent's contention. A statement made to a solicitor is not admissible as evidence of the truth of its contents.

56. It remains the position however, that whether a memorandum of interview made at a late stage to a garda is admissible or not is a matter for the trial judge. Factors which may be relevant to such a determination will vary, but may include that an accused did not have an opportunity to respond to an allegation. However, if he/she did have an opportunity and did not do so, or was dissatisfied with what was said, then, we cannot envisage that an out of court statement of that type would be admitted into evidence. A person may make a statement in a garda station on arrest, as in the present case, or if he/she declines to do so or is dissatisfied with what he or she said or feels the version does not properly reflect the reality of the situation, then the option is always open to give evidence. This is not a breach of the right to silence.

57. As stated at para. 78 of JD whether an unsworn statement "should be adduced in evidence is a matter for the trial judge to determine in accordance with constitutional fairness and the rules of evidence."

58. While a response by an accused on an accusation being first put to him or her may be admissible as evidence of consistency should that accused give evidence, this is dependent on an immediate response to the allegation. A statement prepared with legal advice may be furnished to the gardaí, but such a statement is generally deemed inadmissible. In our view, a statement made to a solicitor is generally not admissible even if furnished to the gardaí at the time of arrest. What may happen in those circumstances, is that an accused may be questioned on the statement and that may form part of the body of evidence depending on whether the resulting memorandum of interview is inculpatory or a mixed document..."

32. The issue of pre-prepared statements has also been considered in the UK. In ***R v. Turner*** [2004] 1 All ER 1025, Scott Baker LJ commented:
"The present case is concerned with a slightly difference aspect of the same problem, namely the situation when a defendant hands in a pre-prepared statement to the police and refuses to answer questions. In our experience this is becoming an increasingly common practice. It was considered recently by this court in ***R v. K***

[2003] EWCA Crim 1977, [2003] All ER (D) 490 (Jul), [2003] Crim LR 799. Laws LJ said the court had come to the clear conclusion that the aim of s 34(1)(a) did not include police cross-examination of a suspect on his account over and above the disclosure of that account. The aim of the section was to encourage a suspect to disclose his factual defence. The court in that case made a number of observations about the handing in of pre-prepared statements. First, the law as described in ***R v Pearce*** *(1979) 69 Cr App R 365 still applies. The prosecution cannot be required to adduce as part of their evidence a pre-prepared wholly self-serving statement. As the Lord Chief Justice said in* ***R v. Pearce*** *(at 370):*

> *'Although in practice most statements are given in evidence even when they are largely self-serving, there may be a rare occasion when an accused produces a carefully prepared written statement to the police, with a view to it being made part of the prosecution evidence. The trial judge would plainly exclude such a statement as inadmissible.'*

This court notes a growing practice, no doubt on advice, to submit a pre-prepared statement and decline to answer any questions. This, in our view, may prove to be a dangerous course for an innocent person who subsequently discovers at the trial that something significant has been omitted. No such problems would arise following an interview where the suspect gives appropriate answers to the questions."

33. Of note is that the position in this jurisdiction was influenced by decisions such as those in ***Pearce***, however, ***Pearce*** is not authority for the admission of mixed statements. It is a proposition similar to that in this jurisdiction: that entirely exculpatory statements are inadmissible, and mixed statements are a matter for judicial discretion.

34. It is also of note that the jurisprudence in England is not focused on the position of the prosecution when considering the admission of pre-prepared statements, but is instead focused on the rights of the accused. The Court points out, correctly, that a pre-prepared statement may not capture all of the information required of an accused, and a failure to engage in any further questioning from An Garda Síochána may result in a situation where an accused person has half of their account in writing before the jury, with notable omissions or lacunas which may

cause a jury to conclude that the accused has not given a full account. In England, a recurring theme in this area is whether the prosecution can in fact invite the jury to draw inferences from these omissions which arise. The law here again favours judicial discretion and a case-by-case analysis, however it would certainly appear to be a possibility and may leave an accused person in a dangerous position should they choose to rely entirely on a pre-prepared account with no further engagement with AGS.

Conclusion

35. The following appears to the authors to be an appropriate procedural summary of where we stand:

36. Whether to seek a voluntary engagement or arrest a suspect is an investigative decision to be made by the Gardai.

If a voluntary engagement is preferred:

37. Garda may accept a preprepared statement and have it read out on video but with the proviso that the Gardai cannot vouch for it being put into the Book of Evidence.

38. If such a preprepared statement is presented questions should be asked as to the circumstances in which the statement was taken i.e. whether it was written by the suspect or the solicitor.

39. Gardai can ask questions after the statement is read but if there is no comment that will not be mentioned at trial (see ***DPP v. KM***).

40. It will be for the DPP to decide in each case whether the statement should be included in the Book of Evidence.

41. The decision as to whether or not to then arrest suspect after voluntary engagement is for the Gardai.

If there is an arrest (either in the first place or after a voluntary engagement):

42. If on arrest the accused uses only a pre-prepared statement that can be read on video but again with no guarantee it will be put in the Book of Evidence.

43. If such a statement is presented questions should be asked as to the circumstances in which the statement was taken i.e. whether it was written by the suspect or the solicitor.

44. It will be for the DPP to decide in each case whether the statement should be included.

Finally:

45. If in either case the statement is a 'mixed' preprepared statement then, in my view, it is an open question as to whether or not it should be included in the Book of Evidence bearing in mind ***Clarke*** and ***McCormack.***

46. If the statement is served then the ***Mahon*** warning will apply. In due course, whether the Supreme Court may strengthen that warning is also an open question bearing in mind that the ***Mahon*** warning is obiter.