

1. FUNDAMENTAL PRINCIPLES AND CONCEPTS OF CRIMINAL LAW

A) CRIMINAL V. CIVIL LAW

Article 38 of the Constitution provides:

1. *No person shall be tried on any criminal charge save in due course of law*
2. *Minor offences may be tried by courts of summary jurisdiction*
3. *Save in the case of trial of offences under section 2 no person shall be tried on any criminal charge without a jury*

The effect of this is that when it is determined that a matter is of a criminal nature it must be tried before the courts with a jury unless the matter is minor. And the criminal trial must be carried out in due course of law. So how do you determine if the matter is of a criminal or civil nature?

What is a crime? People generally have no difficulty understanding in general terms what a crime is, however it can be quite difficult to define in a formal sense.

Melling v. O Mathghamhna (1962)

The accused was accused of smuggling butter the sanction imposed was either £100 or three times the price of the goods. The court had to determine if this amounted to a criminal charge.

The Supreme Court held it did. Kingsmill Moore J. held that a criminal charge could be identified by three elements:-

- a) its nature as an offence against the public at large
- b) the punitive nature of the sanction
- c) the requirement of *mens rea*

a) a Crime is a Wrongdoing against the Public at Large

Criminal actions concern conduct against the community at large not just one individual as a result enforcement is not left to the victim but to the State. With Civil law any breach of it is purely a matter for the injured party. They may decide to sue, settle or discontinue the proceedings. With criminal law whether the prosecution of an accused is to go ahead or not is determined by the State. The prosecution of a crime involves a public prosecutor, usually the Director of Public Prosecutions. The DPP conducts criminal prosecutions on behalf of the State, in the public interest.

b) a Crime is a Wrongdoing that attracts Punishment

An important feature of criminal law is that it attracts a punishment or sanction. With civil law damages are imposed with the aim to compensate the injured party for loss suffered whereas with criminal law the aim is to punish the offender and deter others from carrying out the same acts.

c) a Crime requires *Mens Rea*

Mens rea means that the offence must be committed knowingly and with an intent to evade the prohibition or restriction.

Kingsmill Moore J. in *Melling v. O Mathghamhna* stated that: "where *mens rea* is made an element of an offence it is generally an indication of criminality."

Mens rea is generally an essential ingredient of a crime however there are exceptions where offences do not require *mens rea*.

Goodman v. Hamilton (No. 1) (1992)

This case arose out of the Beef Tribunal, an investigation into alleged criminal activity within the beef industry. Goodman argued that in essence he was undergoing a criminal trial, and therefore, entitled to all the constitutional safeguards that go with such a trial.

Finlay CJ. concentrating on the procedure applicable at the tribunal rejected his argument:-

"The essential ingredient of a trial of a criminal offence in our law, which is indivisible from any other ingredient, is that it is had before a court or judge which has got the power to punish in the event of a verdict of guilty. It is of the essence of a trial on a criminal charge or a trial on a criminal offence that the proceedings are accusatorial, involving a prosecutor and an accused, and that the sole purpose and object of the verdict, be it one of acquittal or of conviction, is to form the basis for either a discharge of the accused from the jeopardy in which he stood, in the case of an acquittal, or for his punishment for the crime which he has committed, in the case of a conviction."

He went on to hold that a tribunal has none of these features. It has no jurisdiction to impose a penalty or punishment, its finding can have no basis for either the conviction or acquittal of the party concerned if criminal charges are brought, nor can it form a basis for punishment of that person.

B) PRESUMPTION OF INNOCENCE

The presumption of innocence is not explicitly stated in the Constitution but it is implicit in the requirement of Article 31.1 that "no person shall be tried on any criminal charge save in due course of law". The concept of presumption of innocence is fundamental to the Irish legal system and is internationally recognised as an essential safeguard. It is the cornerstone of the criminal justice system. An accused person is presumed innocent until proved guilty. The burden of proving this guilt is on the prosecution and it must be proved beyond a reasonable doubt.

Woolmington v. DPP (1935)

The accused admitted killing his wife but claimed that the gun had gone off accidentally. The trial judge directed the jury that once the prosecution had shown

that the accused had killed his wife the burden of proof shifted to the accused to show that it was accidental i.e. to prove his defence.

The House of Lords held that this was incorrect. The burden of proof always lies with the prosecution and once a defence is raised the accused is entitled to be acquitted unless the prosecution disproves that defence. In giving judgment the court explained the presumption of innocence.

Viscount Sankey stated:-

"it is not for the prisoner to establish his innocence, but for the prosecution to establish his guilt... while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence... Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt ... the principle ... is part of the common law of England and no attempt to whittle it down can be entertained"

DPP v. D O'T (2003)

Hardiman J. stated that:-

"the presumption of innocence is a vital, constitutionally guaranteed, right of a person accused in a criminal trial and that the right has been expressly recognised in all of the major international human rights instruments currently in force"

In fact Article 6(2) of the European Convention on Human Rights states that "everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law".

C) BURDEN OF PROOF

One of the consequences of the presumption of innocence is the placing of the burden of proof on the prosecution. It is the responsibility of the prosecution to establish the guilt of the accused. As a result if the accused raises a defence then it is the responsibility of the prosecution to disprove the defence, not the responsibility of the accused to prove his defence.

There are exceptions to the rule that the prosecution bears the burden of proof in relation to every issue arising in the course of a criminal trial.

a) Common Law

If an accused argues that he is unfit to plead then he must prove that unfitness on the balance of probabilities. If an accused raises the defence of insanity or diminished responsibility he must prove, on the balance of probabilities that he was insane at the time of committing the offence. These defences will be considered later in the course.

b) Statute

The second exception is where the accused raises as statutory defence and the statute provides for the accused to prove this defence on the balance of probabilities.

People (DPP) v. Byrne (1998)

Section 29(2) of the Misuse of Drugs Act 1977 provides that:-

"Where it is proved that the defendant had in his possession a controlled drug ... it shall be a defence to prove that –

- (i) He did not know and had no reasonable grounds for suspecting that
- (ii) That what he had in his possession was a controlled drug ... or

that he was in possession of a controlled drug..."

In this case the defendants were arrested in possession of packets containing drugs but claimed not to be aware of their contents. It was held, however that once possession of the packages was proved the onus shifted to the accused to prove lack of knowledge of the contents of the packages. The prosecution was obliged to prove that an accused had, and knew he had a package in his control and that package contained something. The prosecution must also prove that the package contained the controlled substance alleged. However the burden of proof then rested with the accused to bring themselves within the defence in s.29(2).

D) RIGHT TO SILENCE

The right to silence which includes a privilege against self-incrimination is closely related to the presumption of innocence. If it is the role of the prosecution to prove that an offence has been committed then flowing from that it should not be the responsibility of the accused person to facilitate the prosecution by being forced to speak.

a) Pre-trial Right to Silence

The right to silence at pre-trial stage is the right not to answer questions when the crime is being investigated but before anyone is charged with a crime. At common law it was clear that suspects enjoyed a right to refuse to answer police questions. However the right to silence is not absolute. Legislation has increasingly required suspects to answer questions in specific circumstances or to allow the court to draw an adverse inference from the failure to give answers.

Heaney v. Ireland (1996)

The accused had failed to answer questions pursuant to s.52(1) of the Offences Against the State Act 1939 while in custody having been detained under Part IV of that Act. Section 52 requires suspects to give an account of their movements around the time at which a crime is alleged to have taken place, failure to account amounts to an offence. The two accused in this case challenged the constitutionality of this provision arguing that it infringed their constitutional right to silence.

The Supreme Court held that there was a constitutional right to silence at pre-trial stage as a corollary of the right to freedom of expression under Article 40 of the Constitution. However the court held that this right was not absolute and that the State was entitled to encroach on it in the interests of maintaining public peace and order, provided that encroachment was proportionate to the purpose of the legislation. The Court held in this case that s.52 was an acceptable balance between any infringement of the citizen's rights with the entitlement of the State to defend itself and therefore the section was constitutional.

Rock v. Ireland (1997)

In this case the validity of sections 18 and 19 of the Criminal Justice Act 1984 were challenged. These sections permit a court to draw adverse inferences from a failure by that person to account for their possession of any object, or the presence of any mark on their person or their presence at a particular place which a Garda believes may be related to the offence for which they have been arrested. These inferences may amount to corroboration of other evidence, however a person may not be convicted solely on the basis of such an inference. The result of this section is that the person's refusal to answer questions when arrested may be used as evidence against that person at trial. The accused challenged these sections on the basis that they infringed his right to silence and that they contravened the presumption of innocence. In this case the accused had been arrested for possessing a number of forged banknotes and while in custody he had been asked to account for his possession of these which he refused to do.

The Supreme Court held that the right to silence was not absolute. The court pointed out that the right to silence was limited and in particular it emphasised that an adverse inference could not form the basis for the conviction without other evidence being present, an adverse inference could only be drawn where the court held it proper to do so and the weight of any inference drawn could be challenged by the accused. Therefore the court held that the restriction on the right to silence was justified.

People (DPP) v. Finnerty (1999)

The accused in this case was accused of rape and put forward an alternative account of the events that night in question. The prosecution sought to put it to the defendant that he had not give this account when arrested and questioned. The implication of this would be that the accused had made up the account.

The trial judge allowed this line of questioning and the accused was convicted. On appeal the Court of Appeal upheld this decision. On further appeal to the Supreme Court the conviction was overturned. The Court stated that while the legislation might validly allow adverse inferences to be drawn from silence, in this case no such legislation existed and since there was no statutory provision allowing adverse inferences to be drawn the accused's constitutional right to silence applied.

What this case showed was that when there is no legislation limiting the accused's right to silence then that right to silence cannot be restricted in any way.

The Criminal Justice Act 2007 has severely restricted an accused's right to silence. Section 39 of the Act has inserted s.19A into the Criminal Justice Act 1984. Under

s.19A where a person is arrested for an arrestable offence and fails to mention a fact that is later relied on in court as a defence to the crime alleged the court may draw inferences from the fact that the accused failed to mention it when questioned. Again this inferences may amount to corroboration of other evidence and a person may not be convicted solely on the basis of such an inference.

This has severe repercussions on the right to silence as it means that if an accused is arrested for an arrestable offence (punishment of 5 or more years if convicted) stays silent or fails to mention some particular fact while being questioned and then makes assertions in his defence at the trial the court can draw inferences from the fact that he did not mention those assertions when questioned. The result of this is that the right to silence has been restricted in all circumstance where the person is accused of an arrestable offence. In the case of *DPP v. Finnerty* the court made it clear that the right to silence could only be limited when the legislature had provided for it in a statute. Up until the 2007 the limitation on the right to silence only applied with a handful of offences however now the limitation has been legislated for in relation to all arrestable offences.

b) At-trial Right to Silence

At the trial itself there is a constitutional right of an accused person not to testify. This arises from Article 38.1. However when an accused person chooses to testify then this right is waived and he must answer all questions put to him by the prosecution and cannot decline to do so on the basis that the answers may incriminate him.

c) Privilege against Self-Incrimination

Legislation may require a person to answer questions in relation to a criminal investigation however when a person is compelled to answer a question can the information provided be used as evidence against them at trial or will the privilege against self-incrimination prevent it from being used?

Re National Bank (1999)

Section 10 of the Companies Act 1990 imposes an obligation on company officers and agents to co-operate with inspectors investigating a company. This includes answering any questions the inspector may have. In this case the National Irish Bank was being investigated in relation to a number of criminal offences including tax evasion and fraudulent charges on customer accounts. The employees refused to answer the questions put to them on the basis that the questions amounted to an infringement of their right to silence and potentially required them to incriminate themselves.

The Supreme Court held that the employees did enjoy a right to silence, however the powers given to the inspectors were proportional and no more than was required by the public interest. Therefore the right to silence had been validly restricted. The question then became whether the answers to these questions could be used in evidence against the employees. The court looked at the case law dealing with this area in particular whether involuntary confessions could be admitted as evidence against an accused. Barrington J stated:-

"It appears to me that the better opinion is that a trial in due course of law requires that any confession admitted against an accused person in a criminal trial should be a voluntary confession and that any trial at which an alleged confession other than a voluntary confession were admitted in evidence against the accused person would not be a trial in due course of law within the meaning of Article 38 of the Constitution and that it is immaterial whether the compulsion or inducement used to extract the confession came from the Executive or from the Legislature."

As a result of this case it became clear that while legislation may validly restrict the right to silence it may not limit the privilege against self-incrimination, therefore an accused who may be required to answer questions before the trial cannot have the answers to those questions used as evidence against him at the trial.

E) STANDARD OF PROOF

The standard of proof is the threshold that the prosecution must meet in order to secure a conviction against the accused. The standard in a civil case is on the balance of probabilities. That is that the plaintiff can only succeed if he shows that his version of events is more likely than not. The standard in criminal law is higher than on the balance of probabilities, guilt must be shown beyond reasonable doubt. The standard of proof was explained by Denning J. in the following case

Miller v. Minister for Pensions (1947)

"Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence "of course it is possible, but not in the least probably," the case is proved beyond reasonable doubt, but nothing short of that will suffice."

What this means is that if there is any doubt in the minds at all then the accused is entitled to the benefit of that doubt and must be found not guilty. In Ireland this was explained by Kenny J. in

The People (AG) v. Byrne (1974)

"The correct charge to a jury is that they must be satisfied beyond reasonable doubt of the guilt of the accused, and it is helpful if that degree of proof is contrasted with that in a civil case. It is also essential, however, that the jury should be told that the accused is entitled to the benefit of the doubt and that when two views on any part of the case are possible on the evidence, they should adopt that which is favourable to the accused unless the State has established the other beyond reasonable doubt."

F) CLASSIFICATION OF CRIMES

a) Treason, Felony and Misdemeanour

At common law there were three classes of crime, treason, felony and misdemeanour. Treason is also a felony but in Ireland it is in a class of its own – it is the gravest felony that can be committed. Article 39 of the Constitution defines treason as:-

"Treason shall consist only in levying war against the State, or assisting any State or person or inciting or conspiring with any person to levy war against the State, or attempting by force of arms or other violent means to overthrow the organs of government established by this Constitution, or taking part or being concerned in or inciting or conspiring with any person to make or to take part or be concerned in any such attempt."

Basically all serious crimes are a felony. Traditionally all crimes were a felony and the punishment was death or forfeiture. Over time common law developed a less serious class of offences, misdemeanours which were punishable by imprisonment or fine.

A person suspected of a felony could be arrested without an arrest warrant, whereas an arrest warrant was required if a person was suspected of a misdemeanour.

The distinction between felony and misdemeanour was abolished in section 3 of the Criminal Law Act 1997.

b) Arrestable Offences

The Criminal Law Act 1997 created the class of offences known as arrestable offences. Section 2(1) of the Act defines an arrestable offence as

"an offence for which a person of full capacity and not previously convicted may, under or by virtue of any enactment, be punished by imprisonment for a term of five years or by a more severe penalty and includes an attempt to commit any such offence."

The significance of an offence being an "arrestable offence" is that a suspect may be arrested without an arrest warrant.

c) Minor and Non-minor Offences

The distinction between minor and non-minor offences is important having regard to Article 38.2 of the Constitution which provides that minor offences may be tried without a jury.

Essentially two factors can be considered when determining whether or not an offence is 'minor' or not.

(i) Severity of Punishment

Generally if an offence carries a term of imprisonment not exceeding 12 months or a fine not exceeding €1,270 then it is considered minor. When determining the severity

of a penalty it is important to consider whether or not the penalty would have been regarded as severe at the time when the legislation was enacted. This is particularly important in relation to fines.

(ii) Moral Quality of the Alleged Offence

'Minor' offences are those that would not be seriously condemned.

O'Sullivan v. Hartnett (1981)

The court had to determine whether the unlawful possession of 900 salmon was minor or not.

McWilliam J. stated that the moral guilt in catching one salmon whilst fishing was negligible whereas the moral guilt in catching 900 salmon in a net was considerable.

d) Indictable and Summary Offences

If an offence is tried summarily, it is disposed of by a judge without a jury in the District Court. If an offence is tried on indictment, the guilt or innocence of an accused is determined by a jury. Some offences may only be tried summarily and some may only be tried on indictment, however, most offences may be tried either summarily or on indictment. If an offence may be tried either way then two conditions must be satisfied before it can be tried summarily:-

- The DPP must consent to a summary trial;
- The District Court Judge must be satisfied that the offence is minor for the purposes of Article 38.2 of the Constitution.

If either of these conditions are not satisfied then the offence must be tried on indictment.

It should also be noted that some indictable offences may be tried summarily, e.g. s.2 of the Larceny Act 1916. If an indictable offence is to be tried summarily then three conditions must be satisfied before the trial can proceed in the District Court:-

- The DPP must consent to a summary trial;
- The District Court Judge must be satisfied that the offence is minor for the purposes of Article 38.2 of the Constitution;
- The accused must waive his right to a trial by jury.

e) Serious and Non-serious Offences

A new category of offences was introduced into Irish criminal law after the bail referendum in 1996. Article 40.7 of the Constitution provides that provision may be made by law for refusing to grant bail if such refusal is reasonably considered necessary to prevent the commission of a serious offence. According to s.1(1) of the Bail Act 1997 a serious offence is one of a number of specified offences laid out in the Schedule to the Act for which a person if convicted faces five or more years' imprisonment.