The Right to Silence and the Privilege against Self-Incrimination in the Cypriot Legal Order

MARIA THEOCHAROUS

I. Introduction:

The right to silence, for which every suspect is informed immediately after being arrested, is linked to the privilege against self-incrimination. In the Cypriot legal order, the above mentioned rights are considered to arise from the presumption of innocence and constitute the core of fair trial. The well-known presumption of innocence is enshrined in Article 12(4) of the Cypriot Constitution (“Constitution”), where “the accused has the legal right for a court to consider him or her innocent until proved otherwise”. Thus, the accused is not obliged to say anything, and it is his right not to say anything that can be charged against him.

In view of the above, the present article analyses the right to silence and the privilege against self-incrimination. The inspiration behind this study is the proposition that through the development of case law, the choice of the accused to remain silent affects his criminal case negatively. By analysing Cypriot case law, this article will first examine if the evidence collected from the abandoned objects are lawfully collected by the police in order to investigate a crime. Then, it critically discusses why the Cypriot courts dismiss evidence followed by threatening and ill-treating of the accused. It will then proceed to analyse if evidence used by undercover agents in order to build a criminal case against the prospective offender could be accepted. Finally, this study will argue that based on the recent developments in Cypriot Supreme Court

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1 Advocate at Areti Charedimou & Associates LLC.
2 The European Court of Human Rights (“ECHR”) in Funke v. France Application no. 10828/84 (ECHR, 25 February 1993) recognized for the first time, the right to silence and the privilege against self-incrimination of the accused.
3 G Pikis, Criminal Procedure in Cyprus (2nd edn, Proodos Press 2013) 74.
case law, one could even ascertain a significant widening of the scope of admissible evidence that violates both the right of silence and the privilege against self-incrimination of the accused.

II. The Admissibility and Exclusion of Evidence:

The criminal trial is a mechanism “to impose a society's response to a particular crime”\(^4\). However, when the criminal trial turns into an enforcement mechanism, the need to protect the accused by the police, arbitrariness is considered obvious in a democratic and liberal system, while his right to silence and his privilege against self-incrimination are treated as “social” rights. Thus, this Chapter will examine the evidence which is admissible or not to be collected by the police and how the acceptable evidence affects the above mentioned rights.

A. Evidence Collected from the Abandoned Objects:

This sub-Chapter discusses why the accused does not invoke a violation of Article 15 of the Constitution which provides a right to respect one’s “private and family life” when he abandons personal evidence\(^5\) such as: documents secured after legitimate investigation, breath samples, blood samples, urine samples and body tissues to detect genetic material\(^6\), palm prints\(^7\), fingerprints\(^8\), vocal samples and cigarettes\(^9\), that will incriminate him.

Depending on the circumstances of each case, it is possible to violate the right of self-incrimination and the evidence from the abandoned objects by the accused to be rejected. This

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\(^7\) *R v. Matemba* (1941) AD 75.
\(^9\) *PG and JH v. The United Kingdom* Application no. 44787/98 (ECHR, 25 September 2001).
happened in *Psillas Andrea Michalis v. The Republic of Cyprus*\(^{10}\). This case was about house burglaries, where in two houses the same DNA of an unknown person was detected. The police wanted to receive the DNA of the accused to compare. Thus, they managed to collect two straws through which the accused drank in the presence of the authorities.

Without a DNA sample, the accused would not have been condemned for the burglary. Due to the fact that the accused had previously expressed his refusal to provide his DNA, the Supreme Court held that the police exercised incorrect ways of securing his DNA. Indeed, the police’s behavior violated his right of silence and his privilege against self-incrimination, which are derived from the presumption of innocence. This fact rightly led to the exclusion of evidence collected by the police and to the cancellation of the accused’s conviction.

Comparing the above mentioned case with the *Republic of Cyprus v. Avraamidou and Others*, it seems that case law goes against the accused. Based on the decision of the Supreme Court in *Psillas*, the Criminal Court did not accept to collect a cigarette. They held that this evidence violates the privilege against self-incrimination of the accused. Subsequently, according to Article 148(1) of the Criminal Procedure Law, the Attorney General of the Republic requested from the Supreme Court to give an opinion on, *inter alia*, whether the privilege of against self-incrimination, enshrined in Article 12(4) of the Constitution, is limited only to oral evidence or also covers real evidence.

The majority of judges of the Supreme Court, referring to the cases of the ECHR, namely *Sauders v. United Kingdom and Hey*\(^{11}\) and *McGuinness v. Ireland*\(^{12}\) have concluded that the distinction between “oral” and “real” evidence is right, due to the fact that the privilege of against self-incrimination being possible only through an oral speech, not by collecting evidence from other findings, even from the accused. As the Supreme Court stated, the safeguarding of the privilege of self-incrimination is intended to protect the accused from his compulsion or


\(^{11}\) *Sauders v. United Kingdom* (1997) 23 EHRR 313.

oppression to self-incriminate. Since real evidence exists, regardless the will of the accused, then the extension of the privilege against self-incrimination to the real evidence is unfounded\textsuperscript{13}. Thus, the Supreme Court concluded that the above mentioned privilege is limited only to oral evidence that comes from the accused, rather than any other real evidence that comes from his objects.

Article 25 of the Police Law 73(I)/2004 put an end to the collection of cigarettes or other useless objects of the accused for scientific examinations. This article gives the police the right to collect objects in case of non-consensus of the accused. In other words, the police has the legal approval from the court to collect measurements, photographs, fingerprints, palm and tread specimens, pictorial samples, nail clippings, hair samples, saliva samples, foreign matter residues and samples of urine.

The first relevant case that the Supreme Court examined through the prerogative writ certiorari\textsuperscript{14} was the request from the Attorney General\textsuperscript{15}. The First Instance Court dismissed it, following the reasoning of Psillas case, by stressing that the privilege against self-incrimination and the right to respect one’s “private and family life” is not absolute and subsides against the supreme asset of preventing and suppressing a crime\textsuperscript{16}.

Although, the Supreme Court has distinguished Psillas from the Republic of Cyprus v. Avraamidou and Others on the basis that, in the first case, the Court did not have any request to examine if the privilege against self-incrimination covers both oral and real evidence, it

\textsuperscript{13} T Iliadis and N Santis, The Law of Evidence (Hipposus Publishing 2014) 776.
\textsuperscript{14} Certiorari is type of common law writ where the applicant seeks judicial review of a judge's decision by a Higher Court. It can only be issued when the reviewable court has exceeded its jurisdiction or otherwise a breach of the rules of natural justice, fraud, or an error of law so fundamental a character that it constitutes a defect amounting to a failure or excess of jurisdiction.
\textsuperscript{15} Request from the Attorney General (2005) 1 CLR 471.
\textsuperscript{16} Article 25 of the Police Law was used in the context Grigoriou v. Police (2010) 2 CLR 364, in which a buccal swab was obtained with the consent of the accused, who later claimed that the DNA had been taken while he was arrested for other crimes. The court did not accept accused allegations; In the certiorari case in regards to, the Request to Neophytou Konstantinou Political Application no. 28/2013 (2013) the Supreme Court held that the whole procedure was within the scope of Article 25, as interpreted in the Grigoriou case.
seems that over the years, despite the attempts to establish the Police Law 73(I)/2004 in order to avoid self-incrimination of the accused, the Republic of Cyprus v. Avraamidou and others case accepts that the above mentioned privilege is limited only to oral evidence. It is clear that it is so difficult to return to strict adherence to the principle against self-incrimination in favor of the accused.

**B. Unlawfully Obtained Evidence:**

This sub-chapter examines why the court should exclude evidence, if it is established that the accused wanted to keep his silence but because of the police’s threats or mistreatment he gave evidence against his will\(^\text{17}\). The Judges Rules are applicable in Cyprus under Article 8 of Criminal Procedure Law and they determine when a homology is acceptable evidence. In case of derogation from the rules, the court has the discretion not to accept the evidence. In Kokkinos v. The Police\(^\text{18}\), the homology of the accused is considered unacceptable because he was mistreated by the Police.

The ECHR approach is that the National Courts have the duty to support the law enforcement in all circumstances and in particular in cases where the police use methods as described in Article 3 of the European Convention of Human Rights, to collect evidence\(^\text{19}\). In particular, in Gäfgen v. Germany\(^\text{20}\), the ECHR ruled that torture, inhuman or degrading treatment should not be enforced, even in cases where a person’s life is at risk. The ECHR concluded that, neither the protection of human life, nor the assertion of the criminal conviction that may be taken against it endangers the protection of the absolute right of Article 3. Indeed, the police should not under any circumstances be entitled to engage in inhumane treatment either through threats or through physical violence in cases where the accused voluntarily chooses to remain silent.

\(^{17}\) Eftapsoumis v. The Police (1975) 2 CLR 149; C Paraskeva, Cypriot Constitutional Law - Fundamental Rights and Freedoms (Nomiki Bibliothiki 2015) 100.

\(^{18}\) Kokkinos v. The Police (1967) 2 CLR 217.


\(^{20}\) Gäfgen v. Germany Application no. 22978/05 (GC, 1 June 2010) para. 176.
C. Evidence through the Use of Undercover Agents:

It is undoubtedly true that evidence through the use of undercover agents leads to the violation of the right to silence and to the privilege against self-incrimination of the accused. The passive participation of undercover agents, with the aim to collect evidence or giving to the prospective offender the opportunity to fulfill his illicit purposes, is tolerated, but not the incitement of crime, which is unacceptable.\(^{21}\)

The Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters 5(III)/12, in particular Article 19 establishes the possibility of engaging in police investigations of undercover agents, which is provided in the context of mutual assistance, if requested by a Member State of the Convention. In addition, covert action is possible in accordance with the Law on the Suppression of Crime 3(I)/95. Under these laws, such action is permitted in the context of controlled deliveries, monitoring the course of substances or objects for the detection of crimes of trafficking in drugs, weapons, explosives and stolen goods. This investigative act is based on a concerted action of the Chief of Police, the Director of the Customs Department and the Attorney General and the cross-border activity is also allowed in Europe and thus in the territory of the Republic of Cyprus.

In Cyprus, the entrapment is not a defense but mitigates the punishment of the accused. In the Attorney General of the Republic of Cyprus v. Kanari\(^{22}\), the initiative against the accused belonged to the Police. They had information against him for drug trafficking. During the meetings with the police, the accused undertook drug trafficking and, after his arrest, admitted his involvement in the scene of drug trafficking. Although the First Instance Court held that the accused was innocent due to the fact that the police entrapped him, the Supreme Court dismissed this allegation in the reasoning that the police followed their superiors’ orders.\(^{23}\)

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\(^{23}\) In *Djemal Kasapoglou v. The Police* (2005) 2 CLR 301, the Supreme Court follows the same reasoning.
It appears that the Supreme Court follows the approach of the House of Lords case, namely *R v. Looseley*. In this case, they held that the policeman does not get entrapped if he merely provides an opportunity for the "criminal", even if he is "setting up" a whole mechanism that works in the form of bait. The existence of police surveillance by hierarchical higher ranks operates as a minimum prerequisite for a rather flexible action. At the same time, there is recognition of the need to resort to less "passive" penetration methods when it is a seriously organised crime or a crime of that nature, which does not manifest itself without a cause. Finally, police action is avoided by *ex ante* criteria of legality, with only the caution of bizarre cases of average disproportion. It might be argued that this case does not return to the spirit of *R v. Sang*, which was unaware of the way in which the evidence was obtained. Rather, it makes attitudes towards the police more relaxed since provocation is not questioned as unlawful entrapping and police action only has to respect the framework set by the Investigative Authority.

Although in *Kanari* there is no deviation from the landmark decision of the ECHR, *Teixeira de Castro v. Portugal*, it is clear that the latter is not in line with the *Looseley* case. To be more specific, in Teixeira the ECHR held that the right to a fair trial had been violated in accordance with the provision of Article 6(1) of the European Convention on Human Rights. The undercover agents asked the accused to buy heroin. When he did as he was told, he got arrested, and finally he was convicted. The judgment of the ECHR was based on the finding that the police officers shaped the crime. It follows that the public interest cannot justify the use of evidence taken as a result of police incitement.

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25 In *R v. Christou* (1992) 4 All ER 559 the police set up a "supposed jewelery shop" and they were undercover and all the transactions were recorded; D Craig, “The Right to Silence and Undercover Police Operations” (2003) 5 International Journal Police Science & Management 112, 118.
27 Ibid, para. 69.
On the basis of the above, it can be said that the Kanari case reinstates the previous annulment case law\textsuperscript{31} where the entrapment does not mitigate the punishment in the drug scene, unless it is an exceptional persuasion of oppression. This development can be considered crucial in two respects. Firstly, it highlights the emergence of constructive interpretation of the right to silence and the privilege against self-incrimination where modern crime has a networking and cross-border feature so that the above mentioned rights can be tackled flexibly, exhausting the limits of a compatible with the ECHR interpretation\textsuperscript{32}. Secondly it certifies what has long been diagnosed as technicalization and police transmutation of the investigative work.

III. Conclusion:

This study has examined the paramount importance of the right to silence and the privilege against self-incrimination in the Cypriot legal order. This chapter concludes the work by presenting some general observations.

Firstly, the accused can plead the privilege against self-incrimination only in oral evidence and not with the collection of real evidence. Obviously, this approach negatively affects the right of the accused to remain silent. Secondly, evidence following threats or mistreatment should be refused by our Courts, as they are against the privilege against self-incrimination and the right to freedom of opinion and expression which is protected by Article 19 of the Constitution. Thirdly, the evidence through the use of undercover agents shows that if the involvement of the police does not deviate from what usually happens in the “normal life of the prospective offender” and they are acting on instruction and under the supervision of their superiors, not by their own initiative, then this evidence is considered admissible and can be collected. It seems that the Supreme Court have wrongly substituted the entrapment criterion with \textit{bona fide} and the non-arbitrary operation of the police.


\textsuperscript{32} C Papacharalambous, “Use of Illegally Obtained Evidence in Cypriot Criminal Procedure” (2014) 4 Criminal Justice 423, 430.
Finally, it can be submitted that, considering the above developments in Cypriot case law, a flexible approach to the right of silence and the privilege against self-incrimination is apparent. Social justice does not come from inhumane uses of police methods, which undermine the “involuntary” self-incrimination statements by the accused and the evidence obtained despite his will. Thus, in order to ensure less crime and respect of the rights of the accused, it is suggested to strengthen social justice through social cohesion and the institutionalization of solidarity.

**Author:**

Maria Theocharous
Advocate

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