IN THE KOWLOON CITY
MAGISTRACY

CASE NO.:
KCS 33295 OF 2007

HKSAR

against

LATKER, Richard Ethan
(American male aged 44)

VERDICT.

Before:	D.I. Thomas Esq.;
Date of Hearing:	21st & 22nd February 2008;
Date of Verdict:	8th May 2008;
Prosecution:	Mr. David LEUNG, senior government counsel;
Defence:	Defendant in person.

SUMMONS.

1. The defendant, LATKER Richard Ethan, aged 44 years, faces the following summons.

> INFORMATION has been laid THAT whereas the driver of a vehicle displaying registration mark JY 9387 was suspected of having committed an offence, namely 'failing to comply with traffic signal' under this ordinance on 30th July 2007 at Sau Mau Ping Road (northwest bound) at junction with Sau Ming Road, YOU being the registered owner of the said vehicle during the alleged offence, did on 24th August 2007, fail on demand made by means of a notice served on you by post on 2nd August 2007 to furnish a signed

written statement in the form specified in the notice giving the name, address and driving licence number of he driver of the said vehicle at the time of the alleged offence and your relationship, if any, to such driver, within 21 days after to the specified officer, namely Police Constable 55413.

CONTRARY TO: sections 63(1)(a) and (6)(a) *Road Traffic Ordinance, Cap.374.*

2. The appellant has pleaded not guilty to the offence in the summons and I have conducted a trial. The factual basis for the prosecution case is not in dispute. The issues between the prosecution and the defendant, therefore, are entirely based upon questions of law and upon the way in which I should resolve them.

INTRODUCTION.

3. The case for the prosecution is that the provisions of the ordinance under which the information was laid and the summons issued are entirely clear and unambiguous. Furthermore, the prosecution says that there is clear authority binding upon me that requires me to convict the defendant. That authority is the Hong Kong case of ***Attorney General v. TSANG Wai-keung*** (1996) 7 HKPLR 163 HC. The prosecution also says that there are abundant authorities from the respective jurisdictions of England and Wales and of the European Court of Human Rights that support the decision of the Hong Kong High Court.

4. The case for the defendant is that the requirements set out in the relevant section of the ordinance in question offend against the *Bill of Rights Ordinance, Cap.383.* The defendant argues that the penal consequences of the demand that the relevant section permits offend against his rights to silence and to refuse to incriminate himself. In the context of the *Bill of Rights Ordinance* the defendant says that the provisions of section 63 of *Cap.374* are 'Bill-inconsistent'. The defendant submits that the provisions of section 63 of *Cap.374* are directly 'Bill-inconsistent', arguing that the case of ***Attorney General v. TSANG Wai-keung*** (*supra*) has been impliedly overruled by subsequent decisions of the Court of

Appeal and of the Court of Final Appeal. The defendant further submits that, if the provisions of 63 of *Cap.374* survive direct attack, such provisions are rendered 'Bill-inconsistent' indirectly because the penalties that attach to an infringement of such provisions are not a rational and proportionate response to the situation against which such provisions are targeted.

THE ADVOCATES.

5. The prosecution has been represented by Mr. David Leung, senior government counsel. Mr. Leung submitted his arguments with his usual incision and lucidity. He was also scrupulously fair to the defendant in advancing his case. I was most grateful for his assistance and for the materials that with which he supplied me. The defendant has appeared in person. Usually, that would be an indication that a defendant is at a disadvantage, particularly when opposed by an advocate of Mr. Leung's ability and experience. However, the cogent and logical way in which the defendant has put his case has meant that the opposing arguments have been put on an entirely equal footing. Indeed, the abilities that the defendant has displayed, particularly bearing in mind that his background is the jurisprudence of the United States of America rather than that of the English common law system, would have put many professional advocates to shame. I am grateful to the defendant for his assistance and for the materials with which he has supplied me.

EVIDENCE.

6. The prosecution and the defendant signed an admission in English under the provisions of section 65C of the *Criminal Procedure Ordinance, Cap.221*. This admitted into evidence the prosecution case. The agreed facts were that a police officer had installed a digital red light camera at the location more particularly described in the summons. On 1st August 2007, the same officer retrieved a magneto–optical disc from the camera and subsequently

downloaded the data contained thereon to a computer system. Another officer, that is the officer whose service number is set out more particularly in the summons, examined the data in question, finding that that data showed a private car, JY 9389 travelling through the junction against the direction of a red traffic signal. Two photographs were exhibited to the admission showing this. On 2nd August 2007, the officer sent by post a notice setting out the requirements of the provisions of 63 of *Cap.374* and making the appropriate demands ('the notice'). The prosecution produced a certificate in the appropriate form from the Transport Department that showed that the defendant was the registered owner of the private car in question (admissible without further proof under the provisions of the *Road Traffic (Registration and Licensing of Vehicles) Regulations, Cap.374*), and the notice was addressed to the defendant at his proper address. The notice was also exhibited in evidence. No reply having been received within twenty-one days of the demand, the officer sent a 'final reminder' to the defendant. On 5th October 2007, the officer telephoned the defendant, who confirmed that he had received the notice. The defendant told the officer that the police should prosecute him for failing to provide the information. The defendant expressed his willingness to co-operate, willingly and in full, with any investigation into the matter, provided that he was not compelled to forfeit rights that were protected by the Basic Law.

7. I found that there was a case that the defendant had to answer and he chose to give evidence. The defendant told me that he regarded the matter as one of principle and that he regarded it as a matter of civic cowardice if he were to agree to give the particulars demanded. The case dealt with matters that he held dear.

THE LEGISLATION.

8. The *Road Traffic Ordinance, Cap.374* provides as follows.

63. Obligation to give certain information

(1) Where the driver of a vehicle is suspected of having committed an offence under this Ordinance or, where owing to the presence of a vehicle on a road an accident occurs, any person, including both the registered owner and the person suspected of being the driver of the vehicle, shall on demand made within six months after the date of the alleged offence or accident give to a police officer in the manner prescribed in this section the name, address and driving licence number—

(a) in the case of an alleged offence, of the driver of the vehicle at the time of the alleged offence;

(b) in the case of an accident, of the driver of the vehicle at the time of the accident or of the last driver of the vehicle prior to the accident,

and his relationship, if any, to any such driver.

(2) A demand under subsection (1) may be made orally or by means of a notice served personally or by post on the person on whom it is made.

(3) ...

(4) A notice served under subsection (2) shall require the person to whom it is addressed—

(a) to furnish, within 21 days after the date of the notice, to a police officer specified therein, a written statement in such form as may be specified in the notice, giving the name, address and driving licence number—

(i) in the case of an alleged offence, of the driver of the vehicle at the time of the alleged offence;

(ii) in the case of an accident, of the driver of the vehicle at the time of the accident or of the last driver of the vehicle prior to the accident,

and his relationship, if any, to any such driver; and

(b) to sign the said statement.

(5) In proceedings for an offence under subsection (6)(a), it shall be a defence for the defendant to show that he did not know, and could not with reasonable diligence have ascertained, the name or address or driving licence number of the driver of the vehicle at the time of the alleged offence or accident or of the last driver of the vehicle prior to the accident, as the case may be.

(6) Subject to subsection (5), any person who—

(a) contravenes subsection (1); or

(b) knowingly makes a false statement in supplying particulars required under subsection (1),

commits an offence and is liable to a fine of $10,000 and to imprisonment for 6 months.

64. Proof in summary proceedings of identity of driver

if, in any summary proceedings for an offence under this Ordinance, there is produced to the court a statement which—

(a) purports to have been signed by the defendant;

(b) was furnished in accordance with a notice served on him under section 63(2); and

(c) states that the defendant was the driver of the vehicle at he time of the offence,

the court shall admit the statement as prima facie evidence that the defendant was the driver of the vehicle at the time of the offence.

9. The *Basic Law of the Hong Kong Special Administrative Region* provides as follows.

Article 39

The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.

10. Section 8 of the *Bill of Rights Ordinance, Cap.383* incorporates the International Covenant on Civil and Political Rights (1966) ('the ICCPR') into Hong Kong domestic law as follows.

PART II

THE HONG KONG BILL OF RIGHTS

The Hong Kong Bill of Rights is as follows.

Articles 1 – 9 ...

Article 10

Equality before courts and right to fair and public hearing

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law ...

Article 11

Rights of persons charged with or convicted of criminal offence

(1) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

(2) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality—

(a) to be informed promptly and in detail in a language he understands of the nature and cause of the charge against him;

(b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) to be tried without undue delay;

(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does note have legal assistance, of this right; and to have legal

assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) to have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) not to be compelled to testify against himself or to confess guilt.

(3) - (6) ...

Articles 12 - 23 ...

THE AUTHORIES AND THE ARGUMENTS OF THE PARTIES.

11. The prosecution, as I have indicated, relies heavily upon the case of ***Attorney General v. TSANG Wai-keung*** (*supra*). The appellant in that case was the registered owner of a motor vehicle, the rider of which was alleged to have committed offences at the Cross Harbour Tunnel. The then appellant was prosecuted under the provisions of section 62A of the *Cross Harbour Tunnel Ordinance, Cap.203* inasmuch as it was said that he had failed to reply to a notice demanding that he supply details of the rider of the vehicle at the time of the alleged offences. **Patrick Chan J.** (as he then was) held that the relevant section of the Cross Harbour Tunnel Ordinance was 'almost in identical terms as section 63 of the *Road Traffic Ordinance (Cap.374)*. It is in effect an extension of that section. It enables the Cross Harbour Tunnel authority to detect and investigate traffic offences committed inside the tunnel by users of the road who get into and make use of the tunnel.' (167H). The then appellant had responded to the notice in question not by supplying the details demanded but by sending to the relevant officer a copy of article 11 of the Hong Kong *Bill of Rights Ordinance*. The then appellant advanced a number of arguments against his conviction by the trial magistrate, one of which was that the relevant sections of the ordinance in

question were inconsistent with article 11(2)(g) of the Bill of Rights in that the statutory provisions compelled him to disclose who the rider was and if he should be the rider, he would in effect be compelled to confess guilt.

12. The then appellant argued that the statutory demand for information was, in itself, 'in the determination of any criminal charge' (paragraph 2 of article 11), as opposed to being requested merely for investigation.

13. His Lordship broke down the process of the demand for information into its component parts, then saying, at 167H,

14. 'I agree with counsel for the Attorney General that section 62A is a very important weapon for the prevention and detection of traffic offences ... It enables the Cross Harbour Tunnel authority to detect and investigate traffic offences committed inside the tunnel by users of the road who get into and make use of the tunnel. Without the scheme requiring the supply of information by the registered owner of the vehicle about the identity of the driver at the material time of the suspected offence, it would be most difficult if not impossible to detect and investigate hit and run cases.'

15. His Lordship stated (at 168F) that the guarantees set out in article 11(2) were all rights closely connect with a criminal trial. None of the rights refer to the time before the accused was charged with an offence. His Lordship accepted that there were two guarantees in article 11(2)(g), firstly a right not to be compelled to 'testify against himself', and also a right not to be compelled 'to confess guilt'. His Lordship pointed out that a person could only testify at a criminal trial but accepted that '[o]n the face of it, the right not to be compelled to "confess guilt" may be exercised when a person is brought before a police officer or [a] person in ... authority during the investigation process and it may also be exercised when he is asked to plead to a charge in court.'

16. However, his Lordship considered the fact that the right not to confess guilt is stated in article 11(2)(g) immediately after the right not to be compelled to testify. He therefore

agreed with counsel for the Attorney General that the right not to confess guilt was one that arose at trial (1681). His Lordship went on, 'if it were intended to refer to the right not to be compelled to confess guilt before the trial, i.e. to an officer or person in authority and not in court, it would be out of place *and incompatible* with the other guaranteed rights in the same article ... Counsel for the Attorney General submitted that the right to silence has many aspects and that the right set out in paragraph (g) refers to the right of silence *in court*. I agree.' (169B). (Emphasis added).

17. His Lordship approved the observations of Jones J. in the case of ***R. v. Allen, ex p. Ronald TSE Chu-fai*** (1992) 2 HKPLR 266 at 277, [1993] 2 HKLR 453 at 462, HC, '[t]he words in article 11(2)(g) are unequivocal for they are clearly restricted to the rights of a person charged or convicted of a criminal charge'.

18. His Lordship (at 169D) stated, '[i]n my view, paragraph (g) clearly refers to a situation after a person has been charged with an offence and the right of an accused person not to be compelled to confess guilt at the trial. It does not purport to deal with the right of a person at the investigation stage'. His Lordship continued that that the then appellant was only required to provide information about the identity of the driver at the material time of the alleged or suspected offence. His Lordship said that the effect of the section in question did not go beyond the investigation stage. It was not anywhere near a court proceeding.

19. His Lordship then went on to consider the position were he to be wrong in his decision that article 11(2)(g) was not engaged. He said (at 169g),

20. 'Even if I am wrong in holding that article 11(2)(g) does not apply to (the relevant section of) the Cross Harbour Tunnel Ordinance, it can be said that requiring the registered owner to disclose the identity of the driver at the material time of an alleged offence is not compelling him to testify against himself or to confess guilt. There are quite a number of tunnel offences (similarly quite a number of offences under the Road Traffic Ordinance). Each of these offences requires proof of certain ingredients. What are required depend

on the particular offence of which a person is suspected of having committed. If the registered owner was not the driver, in responding to the demand, he is not testifying against himself or confessing guilt. It is only when he was also the driver that it can be said that he is revealing something which connects him to the alleged offence. While I accept that the information to be supplied by a registered owner about the identity of the driver at the material time may be used as evidence in court, this applies to all evidence obtained during investigation. His identity at a particular time is only one ingredient of any tunnel offence. It would then depend on whether the other ingredients of the suspected offence are also proved. Further, it is only prima facie evidence against him and he is not prohibited from adducing evidence to the contrary. Hence, I do not think that the requirement under (the relevant section of) the Cross Harbour Tunnel Ordinance contravenes article 11(2)(g) even if it could be said to be applicable.

21. 'Furthermore, even if [the relevant section of the Cross Harbour Tunnel Ordinance] is inconsistent with article 11(2)(g), I take the view that it is a rational and proportionate response to a serious problem. This provision is an extension of the equivalent provision section 63 of the Road Traffic Ordinance to the tunnel area in connection with tunnel offences. The purpose behind this provision is quite clear. If the provision is not effective, a driver would be able to avoid or escape responsibility by hit and run. There would then be little or no way in which the police or the authority [the Cross Harbour Tunnel Company] can detect the real culprit of such a crime. This would result in the police being helpless to deal with such irresponsible drivers. Victims of traffic accidents would find themselves without any hope of claiming against the real culprit. They can of course pursue the registered owner but their chances would be weakened because of the inability to locate or identity the driver. In these circumstances, I should think that it is necessary for the police or the relevant authority, such as the Cross Harbour Tunnel Company to retain such power. In my view, it is a reasonable and sensible provision. Even if it has the effect of curtailing part of the right of silence, I shall think that this is amply justified in view of the serious consequences arising from this social problem.'

22. Patrick Chan J. dismissed the appeal of the appellant.

23. The matter was visited in a number of cases in the United Kingdom. The first is that of ***Brown v. Stott (Procurator Fiscal, Dunfermline) and anor.*** [2003] 1 AC 681, [2001] 2 WLR 817 (PC). In that case, the facts (as taken from the head-note) are that the staff of a shop suspected that the defendant had committed an offence of theft and called the police. On arrival, police officers noticed that the defendant appeared to have been drinking and asked her how she had come to the shop. The defendant said that she had travelled by car and pointed to a car that she said was hers. She was arrested and taken to the police station where, pursuant to section 172(2)(a) of the *Road Traffic Act 1988*, she was required to say who been driving the car at the time when she would have travelled to the shop. She admitted that she had been the driver. The defendant was then required to provide a specimen of breath for analysis. The test was positive and the defendant was charged with driving while her blood alcohol level was above the prescribed limit, contrary to section 5(1)(a) of the *1988 Act*. The defendant gave notice under [the legislation setting up the Scottish Parliament] that she intended to raise an issue as to whether it would be compatible with her right to a fair trial under article 6(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms (1953)* ['the Convention'] for the procurator fiscal [the local prosecuting officer] to rely, at her trial, on the defendant's admission compulsorily obtained under section 172(2)(a).

24. The sheriff [the judge hearing the trial] held that there was no jurisdiction allowing the issue to be raised and made part of the defendant's case. However, he gave leave to appeal and the appeal was heard before the High Court of Justiciary [the appellate court in Scotland]. That court held that, not only was the defendant entitled to raise the Convention issue but also the procurator fiscal had no power to lead and rely upon the admission that the defendant had been compelled to make under section 172(2)(a).

25. The prosecution appealed to the Privy Council. Their Lordships upheld the decision that the defendant was entitled to raise the Convention issue but overturned the High Court of Justiciary in that they held that the prosecutor was entitled to lead and rely upon the admission that the defendant had been compelled to make under section 172(2)(a). At 692C *et seq*, Lord Bingham of Cornhill sets out article 6 of the Convention. The rights therein are in terms similar to those set out in article 11 of section 8 of the Bill of Rights Ordinance, save that there is no specific equivalent to paragraph (g) of article 11.

26. At 691C *et seq*, Lord Bingham set out the material provisions of section 172. As set out by his Lordship, these are as follows.

> (1) This section applies—(a) to any offence under the preceding provisions of this Act except—(i) an offence under part V, or (ii) an offence under section 13, 16, 51(2), 61(4), 67(9), 68(4), 96 or 120, and to an offence under section 178 of this Act, (b) to any offence under sections 25, 26 and 27 of the *Road Traffic Offenders Act 1988*, (c) to any offence against any other enactment relating to the use of vehicles on roads, except an offence under paragraph 8 of Schedule 1 to the *Road Traffic (Driver Licensing and Information Systems) Act 1989*, and (d) to manslaughter, or in Scotland culpable homicide, by the driver of a motor vehicle.
>
> (2) Where the driver of a vehicle is alleged to be guilty of an offence to which this section applies—(a) the person keeping the vehicle shall give such information as to the identity of the driver as he may be required to give by or on behalf of a chief officer of police, and (b) any other person shall if required as stated above give any information which it is in his power to give and may lead to the identification of the driver.
>
> (3) Subject to the following provisions, a person who fails to comply with a requirement under subsection (2) above shall be guilty of an offence.

(4) A person shall not be guilty of an offence by virtue of paragraph (a) of subsection (2) above if he shows that he did not know and could not with reasonable diligence have ascertained who the driver of the vehicle was ....

27. His Lordship continued (691H), '[i]t is evident the power of the police to require information to be given as to the identity of the driver of a vehicle only arises where the driver is alleged to be guilty of an offence to which the section applies. Those offences include the most serious of driving offences, such as manslaughter or culpable homicide, causing death by dangerous driving, dangerous and careless driving, causing death by careless driving when under the influence of drugs or drink, and driving a vehicle after consuming alcohol above the prescribed limit. They also include the offence, in Scotland, of taking and driving away a vehicle without consent or lawful authority. The offences excluded are of a less serious and more regulatory nature. They include offences in relation to driving instruction, the holding of motoring events on public ways, the wearing of protective headgear, driving with uncorrected defective eyesight and offences pertaining to the testing, design, inspection and licensing of vehicles. The penalty for failing to comply with a requirement under subsection (2) is a fine of (currently) not more than £1,000: in the case of an individual, disqualification from driving discretionary but endorsement of the licence is mandatory. The requirement to supply information under subsection (2) may be made of "the person keeping the vehicle" or "any other person", irrespective of whether either of them is suspected of being the driver alleged to have committed the relevant offence. In this case it is clear that the defendant, when required to give information, was suspected of committing the offence for which she was later prosecuted.'

28. Lord Bingham pointed out (692E) that section 172 was by no means the only provision in the United Kingdom road traffic legislation that requires information to be given even though the giving of the information may contribute to proof of an offence against the giver. Quoting the details of the actual legislation, his Lordship gave the examples of the duty to report an accident, the duty to give information about insurance cover and the duties under various road traffic regulations. His Lordship concluded that, if complied with,

such requirements and duties may all have the incidental effect of facilitating proof of a criminal offence committed by the giver of the information.

29. His Lordship then considered the effects on domestic law of the provisions of the Convention and of cases arising thereunder. Having set out the provisions of article 6, his Lordship stated (693D) that the article had more in common with such articles as 3 and 4 that permit no restrictions by national authorities than with such articles as 8 and 9 that permitted a measure of restriction if certain stringent and closely prescribed conditions are satisfied. Lord Bingham went on that the right to be presumed innocent of a criminal offence until proved guilty according to law appeared on its face to be an absolute requirement. However, there were many instances where a transfer of a burden to a defendant to establish a defence was approved, subject to the requirement that the overall burden of proof remains on the prosecution. Further, the article does not prohibit presumptions of law and fact, provided that they are within reasonable limits. Lord Bingham cites a number of cases in the European jurisdiction where such restrictions on the rights of the individual to be regarded as innocent unless proved otherwise according to law have been accepted.

30. Indeed, I understand the defendant in the present case to say that he accepts that in some cases a reverse onus of proof is logical, reasonable and proportionate.

31. After reviewing the other rights in article 6 and analysing the cases concerning such rights in the European Court of Human Rights, Lord Bingham came to the right of silence and the right not to incriminate oneself. His Lordship dealt with the two rights together. Indeed, such rights might be regarded as the observe and reverse of the same coin. He said (697F) '[t]he right not to incriminate oneself and the right to silence, although distinct rights, are closely

related, as acknowledged by the House of Lords in *R. v. Director of Serious Fraud Office, ex p Smith* [1993] AC 1, 40 where Lord Mustill said:

"That there is strong presumption against interpreting a statute as taking away the right of silence, at least in some of its forms, cannot in my view be doubted. Recently, Lord Griffiths (delivering the opinion in the Privy Council in *LAM Chi-ming v. The Queen* [1991] 2 AC 212, 222) described the privilege against self-incrimination as 'deep rooted in English law', and I would not wish to minimise its importance in any way."

It is convenient for present purposes to consider these two rights together.'

32. Lord Bingham quoted from the case of *Murray v. United Kingdom* (1996) 22 EHRR 29 in which the European Court of Human Rights held (60 – 61):

'45. Although not specifically mentioned in article 6 of the Convention, there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under article 6. By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aim of article 6.

'46. The court does not consider that it is called upon to give an abstract analysis of the scope of these immunities and, in particular, of what constitutes in this context 'improper compulsion'. What is at stake in the present case is whether these immunities are absolute in the sense that the exercise by an accused of the right to silence cannot under any circumstances be used against him at trial or, alternatively, whether informing him in advance that, under certain conditions, his silence may be used, is always to be regarded as 'improper compulsion'.

'47. On the other hand, it is self-evident that [it] is incompatible with the immunities under consideration to base a conviction solely or mainly on the accused's silence or on a refusal to answer questions or to give evidence himself. On the other hand, the court deems it equally obvious that these immunities cannot and should not prevent that the accused's silence, in situations that clearly call for an explanation from

him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution. Wherever the line between these two extremes is to be drawn, it follows from this understanding of 'the right to silence' that the question whether the right is absolute must be answered in the negative. It cannot be said therefore that an accused's decision to remain silent throughout criminal proceedings should necessarily have no implications when the trial court seeks to evaluate the evidence against him. In particular, as the Government has pointed out, established international standards in this area, while providing for the right to silence and the privilege against self-incrimination, are silent on this point. Whether the drawing of adverse inferences from an accused's silence infringes article 6 is a matter to be determined in the light of all the circumstances of the case, having particular regard to the situations where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation.'

33. The European Court of Human Rights ruled in favour of the defendant in ***Murray*** (*supra*), the case having involved the question of whether the judge domestic court in question could comment adversely on the defendant's silence in the face of police questioning in the subsequent criminal trial. John Murray was one of eight people arrested on 7th January, 1990 in Belfast, Northern Ireland under the *Prevention of Terrorism (Temporary Provisions) Act 1989*. He was cautioned as specified in the *Criminal Evidence (Northern Ireland) Order 1988*. Following his arrest and over twelve interviews at Castlereagh (a high-security place of detention), totalling over twenty-one hours in the next two days, Mr Murray refused to answer any questions despite being warned each time that 'a court might draw such [common sense] inference[s] as appeared proper from his failure or refusal to do so.' At the trial in May 1991 before the Lord Chief Justice of Northern Ireland, sitting without a jury (a 'Diplock Court'), Mr Murray chose not to give evidence. As part of his decision the judge drew adverse inferences against the defendant under Articles 4 and 6 of the 1988 Order. Mr Murray was found guilty of aiding and abetting the false imprisonment of a police informer and sentenced to eight years' imprisonment.

However, it should be noted that the case involved the special procedures of these so-called 'Diplock Courts' in Northern Ireland at the height of the campaign of violence and intimidation waged by the Irish Republican Army. A judge sat alone to reduce the possibility of jury intimidation. The European court accepted that such perilous times allowed for procedures that would not have been accepted in more pacific times. The court held that the right not to incriminate oneself was not an absolute one. The decision of the European Court in favour of the defendant was not based on the use of silence in the face of police questioning to found guilt, but rather on the refusal of the police to allow the defendant access to legal advice and representation. It was said that because of the complexities of the issues surrounding the drawing of inferences, it would be unfair to draw inferences unless the person being questioned had had access to his lawyer at the beginning of his questioning.

34. The decision in ***Murray*** (*supra*) was shortly followed by that in ***Saunders v. United Kingdom*** 23 EHRR 313. This was a decision particularly relied upon by the defendant in ***Brown v. Stott*** (*supra*). In that case, it was suspected that there had been an unlawful share support operation in connection with the shares of a publically-listed company. The defendant in that case was a director of the company and its chief executive at the time of the suspected operation. Following intense public interest in the matter, inspectors were appointed to examine the defendant's conduct and actions in relation to his roles as director and chief executive. The inspectors stated that they had found evidence of criminal activity on the part of the defendant and questioned the defendant on a number of occasions. The legislative powers under which the inspectors were appointed provided that the defendant was obliged to answer the questions of the inspectors under penalty of sanctions, including imprisonment for two years, in the event of non-compliance. The defendant was then charged with numerous criminal offences and the prosecution sought, at his trial, to adduce evidence of the interviews conducted by the inspectors. The

prosecution was successful in this regard and the defendant was convicted. The defendant's appeals were largely unsuccessful and he applied to the European court. The court ruled in the defendant's favour.

35. It is right to say that the decision in ***Saunders*** (*supra*) was not well received by the courts in England and Wales. Lord Bingham in ***Stott v. Brown*** (*supra*) said that '[i]n the present case the High Court [of Justiciary] came very close to treating the right not to incriminate oneself as absolute, describing it as a "central right" ... which permitted no gradations of fairness depending on the seriousness of the charge or the circumstances of the case. The High Court interpreted the decision in ***Saunders*** as laying down more absolute a standard than I think the European court intended, and nowhere in the High Court judgments does one find any recognition of the need to balance the general interests of the community against the interests of the individual or to ask whether section 172 represents a proportionate response to what is undoubtedly a serious social problem.' (706C)

36. Lord Steyn in ***Stott v. Brown*** (*supra*) went further and said '[w]ith due respect I have to say that the reasoning in ***Saunders*** is unsatisfactory and less than clear' (711C). His Lordship continued '[i]n my view the observations in ***Saunders*** do not support an absolutist view of the privilege against self-incrimination. It may be that the observations in ***Saunders*** will have to be clarified in a further case by the European court'. (712G) Finally, having quoted a number of what he termed 'observations', Lord Steyn said '[a]s things stand, however, I consider that the High Court of Justiciary put too great weight on these observations. In my view they were never intended to apply to a case such as the present.' (712G)

37. Lord Bingham set out (at 699B) the parts of the ruling in ***Saunders*** (*supra*) (337 *et seq.*), that deal with the question of self-incrimination, parts of which ruling appear in the opinion of Lord Steyn and to which he applies the term 'observations'.

'68. The court recalls that, although not specifically mentioned in article 6 of the Convention, the right to silence and the right not to incriminate oneself, are generally recognised international standards which lie at the heart of the notion of a fair procedure under article 6. Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of article 6. The right not incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in article 6(2) of he Convention.

'69. The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the contracting parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing. In the present case the court is only called upon to decide whether the use made by the prosecution of the statements obtained from the applicant by the inspectors amounted to an unjustifiable infringement of the right. This question must be examined by the court in the light of all the circumstances of the case. In particular, it must be determined whether the applicant has been subject to compulsion to give evidence and whether the use made of the resulting testimony at his trial offended the basic principles of a fair procedure inherent in article 6(1) of which the right not to incriminate oneself is a constituent element.

'70 ...

'71. ... [B]earing in mind the concept of fairness in article 6, the right not to incriminate oneself cannot reasonably be confined to statements of admission or wrongdoing or to remarks which are directly incriminating. Testimony obtained under compulsion which appears on its face to be of a non–incriminating nature – such as exculpatory remarks or mere information on questions of fact - may later

be deployed in criminal proceedings in support of the prosecution case, for example to contradict or cast doubt upon other statements of the accused or evidence given by him during the trial or to otherwise undermine his credibility. Where the credibility of an accused must be assessed by a jury the use of such testimony may be especially harmful. It follows that what is of the essence in this context is the use to which evidence obtained under compulsion is made in the course of the criminal trial ...

'72 - 73 ...

'74. Nor does the court find it necessary, having regard to the above assessment as to the use of the interviews during the trial, to decide whether the right not to incriminate oneself is absolute or whether infringements of it may be justified in particular circumstances. It does accept the Government's argument that the complexity of corporate fraud and the vital public interest in the investigation of such fraud and the punishment of those responsible could justify such a marked departure as that which occurred in the present case from one of the basic principles of a fair procedure. Like the Commission, it considers that the general requirements of fairness contained in article 6, including the right not to incriminate oneself, apply to criminal proceedings in respect of all types of criminal offences without distinction, from the most simple to the most complex. The public interest cannot be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings. It is noteworthy in this respect that under the relevant legislation statements obtained under compulsory powers by the Serious Fraud Office cannot, as a general rule, be adduced in evidence at the subsequent trial of the person concerned. Moreover the fact that statements were made by the applicant prior registered owner his being charged does not prevent their later use in criminal proceedings from constituting an infringement of the right.'

38. His Lordship also cited three decisions of the Commission from which the lower court had stated that it derived no assistance. In *JP, KR and GH v. Austria*, Applications numbers 15135/89, 15136/89 and 15137/89 (unreported), the registered owner of a car was obliged to inform the authorities at their request who had last driven or parked the car. The applicants failed to do so and the authorities penalised them. The Commission was

prepared to assume that Article 6 applied in the circumstances but was not persuaded that the domestic proceedings infringed their rights under that article. In terms reminiscent of the judgment in ***Attorney General v. TSANG Wai-keung*** (*supra*), the Commission ruled that the person concerned was not under all circumstances obliged to incriminate himself or a close relative but may also show that he is not connected with the offence committed by the driver. The example was given of a vehicle taken without consent. In ***Tora Tolmos v. Spain***, Applications number 23816/94 (unreported), the applicant was driving his car when a police radar device detected that it was travelling in excess of the speed limit. A notice was served on the applicant requiring him to disclose the name and address of the driver on the occasion in question on penalty of committing a serious summary offence if he failed to answer. The applicant answered, falsely, that he could not identify the driver and was fined. The applicant complained that the imposition of the fine breached his right not to be obliged to confess. The Commission considered that the Spanish provision in question did not disclose any appearance of violating article 6. His Lordship considered that the two cited applications and the third application showed that, like the defendant in question, the choice that effectively faced the individuals concerned was to answer the question and be prosecuted for the substantive offence, or refuse to answer it and be penalised for that refusal.

39. It should be pointed out, of course, that the three applications cited by **Lord Bingham** were only rulings by the Commission and had not been dealt with by the full court. However, his Lordship's succinct summary of the choice facing those receiving demands for the identity of a particular driver, in my respectful opinion, neatly encapsulates the issues in the present case.

40. His Lordship concluded that the European Convention was 'concerned with rights and freedoms which are of real importance in a modern democracy governed by the rule of law.

It does not, as is sometimes mistakenly thought, offer relief from "The heart-ache and the thousand natural shocks That flesh is heir to."' (703D) He summed up the situation in a number of jurisdictions. He pointed out (703H *et seq.*) that the fifth amendment to the Constitution of the United States provides that no person shall be compelled in any criminal case to be a witness against himself. The Indian Constitution provides that no person accused of any offence shall be compelled to be a witness against himself. The ICCPR provides certain minimum guarantees to a person in the determination of any criminal charge including a right not to be compelled to testify against himself or to confess guilt. The Canadian Charter of Rights and Freedoms confers on a person charge with an offence the right not to be compelled to be a witness to proceedings against himself in respect of that offence. The New Zealand *Bill of Rights Act 1990* grants to everyone who is charged with an offence, in relation to the determination of the charge, certain minimum rights that include the right not to be compelled to be a witness or to confess guilt. The Constitution of South Africa grants rights to a suspect on arrest to remain silent and not to be compelled to give self-incriminating evidence. His Lordship then pointed out that, by contrast, the Universal Declaration of Human Rights 1948 grants a right to a fair trial in terms similar to the European Convention, but, like the Convention, contains no express guarantee of a 'privilege' against self-incrimination.

41. **Lord Bingham** stated (704C): '[t]hus the right we have to consider in this case is an implied right. While it cannot be doubted that such a right must be implied, there is no treaty provision which expressly governs the effect or extent of what is to be implied.' He went on that the jurisprudence of the European Court very clearly establishes that the overall fairness of a criminal trial cannot be compromised, the constituent rights comprised, whether expressly or implicitly, within the article in question are not themselves absolute. His Lordship went on: '[l]imited qualification of these rights is acceptable if reasonably directed by national

authorities towards a clear and proper public objective and if representing no greater qualification than the situation calls for.' (704D).

42. His Lordship said that the Convention could have led to the formulation of 'hard-edged and inflexible statements of principle from which no departure could be sanctioned whatever the background or the circumstances'. However, 'this approach has been consistently eschewed by the [European] Court throughout its history. The case law shows that the court has paid very close attention to the facts of particular cases coming before it, giving effect to factual differences and recognising differences of degree. *Ex facto oritur jus.* The court has also recognised the need for a fair balance between the general interest of the community and the personal rights of the individual ...' (704F).

43. His Lordship then stated (704G). that '[t]he high incidence of death and injury on the roads caused by the misuse of motor vehicles is a very serious problem common to almost all developed societies. The need to address it in an effective way, for the benefit of the public, cannot be doubted. Among other ways in which democratic governments have sought to address it is by subjecting the use of motor vehicles to a regime of regulation and making provision for enforcement by identifying, prosecuting and punishing offending drivers.' **Lord Bingham** then posed the following question to himself (705A): '[t]here being a clear public interest in enforcement of road traffic legislation the crucial question in the present case is whether section 172 represents a disproportionate response, or one that undermines a defendant's right to a fair trial, if an admission of being the driver is relied on at trial.'

44. His Lordship came to the conclusion that the section did not represent a disproportionate response nor did it undermine the defendant's right to a fair trial. He came to these conclusions for three reasons. Firstly, the section provided only for the putting of a single, simple question. He said that the answer cannot of itself incriminate the suspect, since it is

not without more an offence to drive a car. He accepted that an admission of driving may, of course, provide proof of a fact necessary to convict, but the section does not sanction prolonged questioning about the facts alleged to give rise to criminal offences. His Lordship understood that the continued questioning in ***Saunders*** (*supra*) was a major factor in the decision of the European court. Further, **Lord Bingham** pointed out that 'the penalty for declining to answer under the section is *moderate and non-custodial.*' (705C) (Emphasis added).

45. Secondly, his Lordship could see no difference in principle between a requirement that the defendant in the instant case provide an answer as to the identity of the driver and the requirement to provide a specimen for analysis to determine whether she was driving when the proportion of alcohol in her breath exceeded the prescribed level.

46. Lastly, his Lordship referred to the position of the motorist in a modern and developed society. He said (at 705G):

47. 'All who own or drive motor cars know that by doing so they subject themselves to a regulatory regime which does not apply to members of the public who do neither. Section 172 forms part of that regulatory regime. This regime is imposed not because owning or driving cars is a privilege or indulgence granted by the state but because the possession and use of cars (like, for example, shotguns, the possession of which is very closely regulated) are recognised to have the potential to cause grave injury. ... If, viewing this situation in the round, one asks whether section 172 represents a disproportionate legislative response to the problem of maintaining road safety, whether the balance between the interests of the community at large and the interests of the individual is struck in a manner unduly prejudicial to the individual, whether (in short) the leading of this evidence would infringe a basic human right of the defendant, I would feel bound to give negative answers.'

48. The decision of **Lord Bingham** was that he would allow the appeal and quash the declaration of the lower court.

49. Lord Steyn, also allowing the appeal, held that the privilege against self-incrimination was not absolute. As set out above, he was fiercely critical of the decision of the European Court in ***Saunders*** (*supra*). He was equally scathing of the interpretation of that case by the High Court of Justiciary. His Lordship also pointed out that the penalty for the offence in section 172 was a fine, discretionary disqualification from holding or obtaining a licence to drive and the mandatory endorsement of the driving licence. His Lordship continued (at 709H): '[t]he subject of section 172(2) is the driving of vehicles. It is a notorious fact that vehicles are potentially instruments of death and injury. The statistics placed before the Board show a high rate of fatal and other serious accidents involving vehicles in Great Britain. The relevant statistics are as follows:

	1996	1997	1998
Fatal and serious accidents	40,601	39,628	37,770

50. 'The effective prosecution of drivers causing serious offences is a matter of public interest. But such police station are often hampered by the difficulty of identifying the drivers of the vehicles at the time of, say, an accident causing loss of life or serious injury or potential danger to others. The tackling of this social problem seems in principle a legitimate aim for a legislature to pursue.'

51. His Lordship said that, in order to combat the social problem that he foresaw with regard to recalcitrant drivers, three solutions were possible. The law enforcement and prosecution agencies could have been exhorted by the legislature to redouble their efforts to apprehend and prosecute such drivers. Secondly, the legislature could have introduced a reverse burden of proof clause that placed the burden on the registered owner to prove that he was not the driver of the vehicle at a given time when it is alleged that an offence was committed. Thirdly, the legislature could, as it did, introduce a requirement to provide details of the actual driver concerned. His Lordship said that the impact on the citizen of a reverse onus burden and a requirement to provide details were not widely different. Indeed,

the defence had conceded, rightly in his Lordship's view, that a properly drafted reverse burden of proof provision would have been lawful. That, indeed, appears to be the position of the defendant in the present case.

52. **Lord Steyn** also directed attention (at 710E) to the narrowness of the interference with the rights of the citizen. He pointed out that the section in question does not authorise general questioning by the police to secure a confession of an offence. The section does authorise a police officer to invite the owner to make an admission of one element in a driving offence. It would be an abuse of the power under the section in question for the police officer to employ improper or overbearing methods of obtaining the info. 'He may go no further than to ask who the driver was at the given time.'

53. **Lord Hope of Craighead** considered that the weakness of the decision in ***Saunders*** (*supra*) was that the court failed to nail its colours to the mast and to determine whether the rights or privileges being claimed by the defendant/applicant were absolute or not. He considered the general approach which is revealed by the judgment 'appears to be out of keeping with the mainstream of the jurisprudence which the court itself has developed as to the nature and application of the rights which it ahs read into article 6(1). Although it possible ... to find indications in the judgment that the court did not regard the right of silence and the right against self-incrimination as absolute, it is not easy to find any clear guidance to that effect.' (721F)

54. His Lordship said (at 720D) that he 'would hold therefore that the jurisprudence of the European court tells us that the questions that should be address when issues are raised about an alleged incompatibility with a right under article 6 of the Convention are the following: (1) is the right which is in question an absolute right, or is it a right which is open to modification or restriction because it is not absolute? (2) if it is not absolute, does the modification or restriction which is contended for have a legitimate aim in the public interest? (3) if so, is there a reasonable relationship of proportionality between the means employed and the

aim sought to be realised? The answer to the question whether the right is or is absolute is to be found by examining the terms of the article in the light of the judgments of the court. The question whether a legitimate aim is being pursued enables account to be taken of the public interest in the rule of law. The principle of proportionality directs attention to the question whether a fair balance has been struck between the general interest of the community in the realisation of that aim and the protection of the fundamental rights of the individual.'

55. His Lordship held that, as the rights contended for in the case in question had not been specifically mentioned in article 6 but were rights the had been read into that article by the court, they plainly did not have the status of rights that are expressed in the Convention as absolute rights. That conclusion dealt with the first question that his Lordship had set himself. In dealing with the second question, his Lordship then dealt with the nature of the road traffic legislation and the aims that it was designed to satisfy. His Lordship said (at 722C *et seq.*):

56. 'Public safety is at the heart of the matter. Ever since use began to be made on our roads of fast-moving motor vehicles it has been appreciated that the use of this means of transport has to be regulated. The risk of injury to the drivers of these vehicles, to passengers, to people in other vehicles on the same road and to members of the public generally led to the introduction of legislation to control the construction and use of motor vehicles and the manner in which they could be driven when they were on the highway and other places to which the public has access. This was combined with a system of registration which served a fiscal purpose but had the added benefit that it enabled both the vehicles and their keepers to be identified. Although there are differences in detail, all countries that are members of the Council of Europe employ similar systems to regulate the construction and use of motor vehicles in the interests of public safety.

57. 'I do not think that that it can be doubted against this background, that the system of regulation and the provisions which the legislation contains for the detection and prosecution of road traffic offences serve a

legitimate aim. As for section 172 of the 1988 [Road Traffic] Act in particular, its purpose is to enable the driver of a vehicle alleged to be guilty of an offence to which that section applies to be identified. *The offences to which the section applies are the result of a process of selection which has eliminated various minor offences and reserved its application to offences which can properly be regarded as serious.* The system which the legislation has laid down for the prosecution of these offences requires the prosecution to prove that the accused was driving the vehicle at the time when the offence was committed. The purpose which these offences are designed to serve would be at risk of being defeated if no means were available to enable the police to trace the driver of a vehicle who, as so often happens, had departed from the place where the offence was committed before he or she could be identified. Here too, it seems to me that a legitimate aim is being pursued.' (Emphasis added).

58. **Lord Hope** then went on to consider the third question he had posed himself. He said (at 722H), '... there is the question whether the means which [the section in question] employs are proportionate to that aim and are compatible with the right of the accused to a fair trial. Has a fair balance been achieved?' His Lordship went on to analyse the provisions of section 172. Firstly, he said that there were restrictions written into the section itself. The provision could be operated only when it is alleged that an offence has been committed of the kind to which the section applies. In other words, the section applied only to those offences specified in the section itself. Secondly, the requirement to give information may be addressed only to the person keeping the vehicle. That term was not otherwise defined, but his Lordship took it to mean that it referred to a 'registered keeper' as defined in the *Vehicle Excise and Registration Act 1994*. His Lordship went on (at 723C), '[a] person who submits to registration as the keeper of a motor vehicle must be taken to have accepted responsibility for its use and the corresponding obligation to provide the information when required to do so. Furthermore, the requirement for which provision is made is directed to one issue only, the identity of the driver of the vehicle. It is proper to recognise that the identity of the driver is likely to be an important and indeed crucial issue at any trial. But the provision does not permit open-ended questioning of the person keeping the vehicle in order to secure an admission of guilt as

to the offence. It seems to me that, bearing in mind the difficulties that may arise in tracing the driver of a vehicle after the event, this limited incursion into the right of silence and the right of the driver who is alleged to have committed an offence not to incriminate himself is proportionate.' Lord Hope also pointed out that, not only was there the requirement for there to be other evidence to show beyond reasonable doubt that the driver committed the offence with which he is charged, but also the requirement under Scots law for the admission of the driver to be corroborated.

59. His Lordship held, therefore, that section 172 made a limited modification to the right to silence and to the right not to incriminate oneself. He held, however, that, in pursuance of a legitimate aim in the public interest, the section had achieved a fair balance between competing public and personal rights.

60. It is worthy of note that that **Lord Hope** added two points by way of a footnote. Firstly, he cautioned against drawing too heavily or closely on Canadian jurisprudence. He pointed out that, although Canada has built up an impressive body of case law in relation to challenges under the provisions of the Canadian Charter to demands by official bodies for information, care needs to be taken in the context of the European Convention to ensure that the analysis by the Canadian courts proceeds upon the same principles as those which have been developed by the European Commission and the European court. Secondly, he drew attention to the fact that there was inconsistency between European countries as to how the problem of the identification of offending drivers was to be overcome. In Ireland, a statement from an owner of a vehicle when asked who was the driver cannot be used against him in evidence (***People (Attorney General) v. Gilbert*** [1973] IR 383). In Belgium, there exists a presumption that the owner of the vehicle has committed the offence complained of unless he proves the contrary. The same applies in France in relation to offence relating to parking, speed limits and traffic lights. The presumption is, of course, rebuttable. Spain and Austria, as set out in the judgment of **Lord Bingham**, have an

approach similar to that in the United Kingdom. That is also the situation in the Netherlands. However, his Lordship concluded that '[t]hese examples show that the social problems associated with the use on public roads of motor vehicles have been addressed by these countries in a manner which restricts to some extent the presumption of innocence. But the restriction is regarded as having a legitimate aim and as striking the right balance between the general interest of the community and the fundamental rights of the individual.'

61. Lord Clyde accepted that the right not to incriminate oneself had for a long time been recognised as a basic ingredient in the concept of a fair trial in Scotland. He had no difficulty in holding it to be implied in article 6 and no difficulty in recognising that right as wholly consonant with the tradition of Scottish criminal law and practice. He remarked that in England, the right had been described as one of the basic freedoms secured by English law (*In re Arrows Limited (No. 4)* [1995] 2AC 75, 95D per Lord Browne-Wilkinson). Indeed, his Lordship said that, at common law, the admission by the defendant in the case would be held to be inadmissible. His Lordship stated (at 727F) that '[t]he Convention ... is plainly a living instrument. The Convention rights may be open to new applications as society develops and changes and the applications may differ between different member states of the Convention. But it is also to be remembered that it is dealing with the realities of life and it is not to be applied in ways which run counter to reason and common sense. The Convention is intended to guarantee, "not rights that are theoretical or illusory but rights that are practical and effective" (*Airey v. Ireland* (1979) 2EHRR 305, 314, paragraph 24). If the Convention was to be applied by the courts in ways which would seem absurd to ordinary people then the courts would be doing disservice to the aims and purposes of the Convention and the result would simply be to prejudice public respect for an international treaty which seeks to express the basic rights and freedoms of a democratic society. The single them which runs through the whole of article 6 is the right of a litigant or an accused to have a fair trial. That theme is of course nothing new in the history of civil or criminal proceedings in the United Kingdom. But while there can be no doubt that the right to a fair trial is an absolute right, precisely what is comprised in the concept of fairness

my be open to a varied analysis. It is not the be supposed that the content of the right is necessarily composed of rigid rules which provide an absolute protection for an accused person under every circumstance. The right presently under discussion is not expressly set out in article 6 but is to be implied as an element in a fair trial. The jurisprudence of the European Court of Human Rights demonstrates that several of the particular rights which similarly by implication fall within the scope of article 6 are not absolute rights.'

62. Lord Clyde said that he had little difficulty in saying that the statutory exception contained in section 172 to the rights in question was justified. He said (at 728D), '[s]ection 172 provides a means for the police to ascertain the identity of a driver where the driver is alleged to be guilty of an offence *to which the section relates*. The purpose of the provision is plainly a legitimate one in the context of the importance in the public interest in securing the prosecution of offenders such as drunk drivers and enabling the identification of drivers to be discovered where it can be often difficult to do so. The importance of securing safety on the roads and of minimising the risks of accidents and injuries caused by motor vehicles is too obvious to require elaboration. *While the statutory power to require an answer is fortified by a criminal sanction, the penalty is relatively light, not involving imprisonment* except in the failure to pay the fine which may be imposed.' (Emphasis added).

63. The Rt. Hon Ian Kirkwood agreed with the other members of the Board with regard to the fact that article 6 guaranteed the right to a fair trial, that being an absolute right, but that the rights to silence and not to incriminate oneself were implied as being part of that right to a fair trial. His Lordship also agreed that it was a legitimate aim to identify and apprehend drivers who had allegedly transgressed the road traffic legislation. In dealing with the question of proportionality, his Lordship said (at 731H *et seq.*) that '... while [the defendant] was compelled provide the information required of her under [the section in question], and her failure the comply with that requirement would have meant that she would be guilty of an offence under [the same section], it has to be borne in mind that the offence is a summary one and that the maximum sentence is a level three fine (at present £1,000), disqualification being discretionary and endorsement obligatory. *A*

custodial sentence cannot be imposed. It was submitted by counsel for the defendant at one stage that a more proportionate measure would have been to create a statutory presumption that the registered keeper had been driving the vehicle at the time of the alleged offence. But it does not seem to me that that could be regarded as a more proportionate measure as, if the keeper wished to challenge the presumption, he or she would require to go into the witness box and would be open to cross-examination not only as to whether he or she was the driver but also in relation to the circumstances in which the offence was committed. In a case where a person admits under [the section in question] to having been the driver of the car at the material time, and evidence of that admission is led at the trial, it will still be for the court to decide ... whether or not to accept that evidence and what weight should be placed on it. It would, for example, be open to an accused person to give evidence that the alleged admission was never made or that, while an admission of being he driver had been made, the admission had been made in error.' (Emphasis added).

64. His Lordship considered that the provisions of the section in question were a proportionate reaction to the mischief identified by the legislature and that the defendant's right to a fair trial had not been compromised. His Lordship agreed that the appeal should be allowed and the decision of the High Court of Justiciary be quashed.

65. The defendant in ***Stott v. Brown*** (*supra*) did not appeal to the European Court of Human Rights, despite, apparently, being given favourable advice by her lawyers. However, the opportunity for the European Court to deal with matters of the compulsory demand for information presented itself in the conjoined application of ***O'Halloran and anor. v. United Kingdom*** (Application numbers 15809/02 and 25624/02). Mr. Gerard O'Halloran was the registered keeper of a vehicle that was photographed by a speed camera travelling at a speed of 69 miles per hour on the M11 motorway in southern England. A temporary speed limit of 40 miles per hour had been imposed at the location in question. The police issued a notice of intention to prosecute the driver and required the registered keeper to provide information as to the identity of that driver. Mr. O'Halloran was

informed that a failure to provide such information would constitute an offence under section 172 of the *Road Traffic Act 1988*. Mr. O'Halloran replied to the letter from the police confirming that he was the driver of the vehicle at the relevant time. He was subsequently prosecuted for driving at a speed in excess of the limit. Prior to his trial, Mr. O'Halloran had sought to exclude his response to the demand for information. The magistrates' court refused the application, holding that the court was bound by the decisions in ***Stott v. Brown*** (*supra*) and ***Director of Public Prosecutions v. Wilson*** [2001] EWHC Admin 198 (an English decision that had followed the decision of the Privy Council in ***Stott v. Brown*** (*supra*)).

66. The co-applicant, Mr. Idris Francis, was the registered keeper of a car (apparently a 1938 Alvis Speed 25) that had been photographed by a speed camera travelling at 47 miles per hour in a 30 miles per hour limit. The police in due course sent Mr. Francis a demand for information as to the identity of the driver of the car, informing him that failure to comply was an offence under section 172. Mr. Francis refused to supply the information requested and was duly prosecuted. Eventually, Mr. Francis was convicted after trial and was fined £750 with £250 costs. His driving licence was endorsed with three penalty points. Mr. Francis was of the opinion that the fine was substantially heavier than that which would have been imposed if he had pleaded guilty to the speeding offence. There is some justification for this view; Mr. O'Halloran, albeit that he had appeared in a different magistrates' court, had been fined the sum of £100 with £150 costs. Mr. O'Halloran, however, had his driving licence endorsed with six penalty points.

67. Both applications reached the European Court of Human Rights. The government of the United Kingdom did not suggest that article 6 of the Convention was not applicable to the cases and the Court held that it was so applicable. The government, however, argued, as had been argued in ***Stott v. Brown*** (*supra*), that the use of the power under section 172

was compatible with article 6. The government contended that driving offences in general are intended to deter dangerous conduct that causes risk to the public and deterrence depended on effective enforcement. Figures were produced to the Court showing that speed cameras had reduced the incidence of road traffic accidents by a quantifiable amount. Mr. Francis apparently took considerable issue with those figures. The government rehearsed the various matters advanced by the prosecution in ***Stott v. Brown*** (*supra*) and further argued that the use of section 172 was more limited in its effect on drivers than alternatives such as the drawing of adverse inferences from a failure on the part of a registered keeper to provide the name of the driver when required to do so, or a statutory presumption of fact that the registered driver was the driver at the material time unless he showed otherwise. The applicants argued that such other measures were less intrusive of the rights of the accused.

68. The Court quoted relevant parts of the judgment of **Lord Bingham** in ***Stott v. Brown*** (*supra*).

69. The Court stated that the case of Mr. O'Halloran appeared at first sight to resemble the case of ***Saunders*** (*supra*), inasmuch as that applicant complained of the use in criminal proceedings of evidence that, he claimed, had been obtained in breach of article 6. Mr. Francis' case was more similar to cases considered by the Court in each of which the applicant was fined for not providing information. In each of the cited cases the court considered the fine independently of the existence or outcome of underlying proceedings. The cases cited were those of ***Funke v. France*** (1993) 16 EHRR 297, ***Quinn v. Ireland***, Application number 36887/1997, ~~***Quinn v. Ireland***, Application number 36887/1997,~~ ***Heaney and McGuinness v. Ireland***, Application number 34720/1997, 33 EHRR 264, ***J.B. v. Switzerland***, Application number 31827/1996, ECHR 2001 – III,

[2001] Crim. L.R. 748, and ***Shannon v. United Kingdom***, Application number 6563/2003.

70. In the case of ***Funke*** (*supra*), the applicant had been convicted of an offence of failing to produce bank statements relevant to investigations into customs offences that might have been committed by him. The court held that by attempting to compel him to produce incriminating evidence the state had infringed his right to remain silent. The right to a fair trial in criminal cases was held to include 'the right of anyone charged with a criminal offence ... to remain silent and not to contribute to incriminating himself'. In the cases of ***Quinn*** and ***Heaney and McGuinness*** (*supra*), the applicants had refused to answer questions when being questioned under section 52 of the *Offences Against the State Act, 1939*, such a refusal amounting to an offence in itself. The European Court of Human Rights rejected the Irish Supreme Court's upholding of the legislation as constitutionally valid in the interests of a community's entitlement to have crime properly investigated when it held that 'the right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seeks to prove their case against the accused without resort to evidence obtained by methods of coercion or oppression in defiance of the will of the accused'. In the case of ***Shannon*** (*supra*), the applicant was required to give information to an investigator into allegations of theft and false accounting under the *Proceeds of Crime (Northern Ireland) Order 1996*. He did not attend an interview to give the information and was fined. The applicant was acquitted in the underlying proceedings against him for false accounting and conspiracy to defraud arising from the same set of facts. The Court concluded that it was open to the applicant to complain of an interference with his right not to incriminate himself. The Court found that neither the security context nor the available procedural protection could justify the measures in the case.

71. Indeed, whilst the domestic approach to self-incrimination, at least in England and Wales, as exemplified by ***Brown v. Stott*** (*supra*), involves a balancing exercise between the

interests of the state and the individual, the European Court of Human Rights in these cases has confirmed that no balancing exercise arises where measures destroy the very essence of a Convention right. In ***Funke*** (*supra*), the Court said (at para. 49) that the degree of compulsion had, in effect, 'destroyed the very essence of the privilege against self-incrimination'. In ***Heaney and McGuinness*** (*supra*) the Court said (at paras. 47 – 58, with reference back to para. 24) that the degree of compulsion had, 'in effect, destroyed the very essence of their privilege against self-incrimination and their right to remain silent'.

72. To return to ***O'Halloran*** (*supra*), the Court in the end thought that the two types of case in effect represented a difference without a distinction and held (at paragraph 44), that 'the central issue in each case, however, is whether the coercion of a person who is the subject of a charge of speeding under section 172 of the Road Traffic Act 1988 to make statements which incriminate him or might lead to his incrimination is compatible with article 6 of the Convention'. The Court therefore dealt with both cases together.

73. The Court, having set out authorities that favoured the cases for the applicants then dealt with cases that were adverse to them. In the case of ***Weh v. Austria*** Application number 38544/97, the *Bezirkshauptmannschaft* or Bregenz District Authority, served an *anonymverfügung* or anonymous order on the applicant in the sum of 800 Austrian schillings. The order stated that a car, registered in the name of the applicant had exceeded the city area speed limit of 50 kilometres per hour by some 21 kilometres per hour. The applicant did not pay the amount and the District Authority opened criminal proceedings against unknown offenders for exceeding the speed limit. The Authority ordered the applicant as the registered car owner to disclose who had been driving his car. The demand was issued under the authority of section 103(2) of the *Kraftfahrgesetz* or *Motor Vehicles Act*. The applicant replied that 'C.K.' (first and family name in full) living in 'USA/University of Texas' was the person who had used the car. This information was, at

best, inaccurate. The Court noted that an appeal panel in the domestic proceedings had found as a fact that the University of Texas was to be found in fourteen different locations. After various stages of the domestic judicial and administrative process had been exhausted, the applicant was fined 900 Austrian schillings with imprisonment for 24 hours in default of payment. The maximum fine for the offence was 30,000 Austrian schillings. The applicant was never charged with the offence of speeding. The *Verwaltungsgerichshof* or Constitutional Court refused to deal with the complaint of the applicant for lack of prospects of success. The case then made its way to the European Court.

74. Section 103(2) of the Austrian Motor Vehicles Act does not differ markedly from section 172 of the *Road Traffic Act 1988* in the United Kingdom or, in broad terms, from section 63 of the *Road Traffic Ordinance, Cap.374*. It is noteworthy, however, that the final sentence of the sub-section states that *'[t]he authority's right to require such information shall take precedence over the right to refuse to give such information'*. This sentence was enacted as a provision of constitutional rank after the Constitutional Court had, in judgments in 1984 and 1985, quashed previous similar provisions on the ground that they were contrary to article 90(2) of the federal constitution, which prohibits, *inter alia*, a suspect being obliged on pain of a fine to incriminate himself. Indeed, the applicant pointed out to the Court that the Austrian Constitutional Court had quashed two previous versions of section 103(2) of the *Motor Vehicles Act* on the ground that the registered owner's obligation to disclose who had been driving the car at a specific time, violated the right not to incriminate oneself. The applicant argued that the then current version of the section equally violated the article of the constitution in question. However the legislature had exempted the then current section from review by the Constitutional Court by enacting the last sentence as a provision of constitutional rank.

75. The 1987 amendment of the *Verwaltungsstrafgesetz* or *Law on Administrative Offences* introduced the anonymous order for cases of minor administrative criminal offence. According to section 49(a) of the *Law on Administrative Offences*, the competent authority may determine by decree which are the minor offences for which it may serve an anonymous order. If the person who has committed a minor administrative criminal offence is unknown to the competent authorities, the latter may serve an anonymous order on the person who is supposed to know the offender. The fine imposed at this stage may not exceed 1,000 Austrian schillings and may not be converted into a prison term in default. The anonymous order is not regarded as an act of prosecution. No remedy lies against it. If the fine imposed is not paid within four weeks, the anonymous order automatically become invalid and a normal prosecution against unknown offenders is commenced. If the fine imposed is paid within four weeks, no prosecution takes place. The anonymous order is not entered into any register and may not be taken into account when determining the sentence for other administrative criminal offences.

76. The government of Austria relied upon the three decisions of the Commission as set out in paragraph 38 *supra*, as supporting the actions taken against the applicant. These decisions had also been dealt with in the domestic proceedings in question under section 103(2) of the *Motor Vehicles Act*. The government also relied upon the case of ***Duschel v. Austria***, Application number 15226/89, a Commission decision that had found that a sentence imposed under a similar provision of the *Vienna Parking Fees Act* did not violate article 6. The Commission had found that there was also no violation of article 6 in the other three applications. The applicant argued that the decision of the Commission in relation to those four cases was no longer relevant as they had been dealt with before the decision of the Court in ***Funke*** (*supra*) and, in any event, had only examined whether the obligation of the owner of the car to divulge the identity of the driver of the car in question violated the presumption of innocence.

77. The Court agreed that the 'Austrian' decisions of the Commission, together with the decision of the Commission in ***Tora Tolmos v. Spain*** (supra), were not to be relied upon as the Commission had 'simply followed its previous approach without examining the possible implications of the ***Funke*** judgment' (paragraph 48). The Court decided that it would examine the issue in the light of the ***Funke*** judgment and its subsequent case-law.

78. Citing the cases of ***Funke*** and ***Heaney and McGuiness*** (*supra*), the Court said, in the case of ***O'Halloran*** (*supra*) (at paragraph 35), that 'article 6 of the Convention can be applicable to cases of compulsion to give evidence even in the absence of any other proceedings or where an applicant is acquitted in the underlying proceedings'.

79. The précis of the case of ***Weh*** (*supra*) in the case of ***O'Halloran*** (*supra*) (at paragraph 50) is somewhat misleading as it may be taken to mean that the Court disagreed with the 'Austrian' decisions and that of ***Tora Tolmos*** (supra). In fact the Court merely reconsidered the matter afresh as explained herein in paragraph 77 (*supra*).

80. In ***Weh*** (*supra*) the Court said that the heart of the applicant's complaint was that he was punished for failure to give information that may have incriminated him in the context of criminal proceedings for speeding. The Court said that, however, neither at the time when the applicant was requested to disclose the identity of the driver of his car nor thereafter were these proceedings conducted against him. With respect, such an approach seems disingenuous. As **Lord Bingham** in ***Brown v. Stott*** (*supra*) realised, the choice facing the applicant was stark (see paragraph 38 *supra*). Somewhat naively, in my respectful judgment, the Court proceeded to say that the case was not, therefore, one that was concerned with the use of compulsorily obtained information in subsequent criminal proceedings. The Court said that when the demand for information was made, there were no proceedings for speeding pending against the applicant and 'it cannot even be said that they

were anticipated as the authorities did not have any element of suspicion against him' (paragraph 53). The Court said that, although it was not 'a decisive element in itself', it noted that the applicant did not refuse to give info, but exonerated himself in that he informed the authorities that a third person had been driving at the relevant time. The Court said that the applicant had been punished 'only' on account of the fact that he had given inaccurate information as he had failed to indicate the person's complete address. With respect, such logic seems dubious. Whether the applicant had been either less than frank in responding to the authority in question or, indeed, whether he had been dishonest seems to be irrelevant to the question of whether he was properly obliged in the first place to provide the information requested. No doubt there are offences in Austrian law concerning dishonest responses to official enquires, but that is a separate matter to the question of the validity of the initial request.

81. The Court in ***Weh*** (*supra*) concluded that it was not called upon to pronounce on the existence or otherwise of 'potential violations of the Convention' (paragraph 56). It concluded that the link between the applicant's obligation under the Motor Vehicles Act to disclose the identity of the driver of his car and possible criminal proceedings for speeding against him remained remote and hypothetical. With a sufficiently concrete link with these criminal proceedings, the use of compulsory powers (that is the imposition of a fine) to obtain information did not raise an issue with regard to the right of the applicant to remain silent and with regard to the privilege against self-incrimination. Accordingly, the Court held that there had been no violation of article 6.

82. It is noteworthy that, of the seven judges sitting in ***Weh*** (*supra*), three dissented and delivered a joint opinion. The dissenting judges said that '[l]ooking behind the appearances at the reality of the situation, criminal proceedings for speeding were with some probability contemplated against the applicant' (paragraph 1). The dissenters stated that, in their opinion, the request for

information was 'no more than a preliminary to such proceedings against the applicant' (*ibid.*) This opinion is in line with the observations of Lord Bingham in ***Brown v. Stott*** (*supra*). The dissenting judges said (*ibid.*) that '[t]he fact that eventually no criminal proceedings for speeding were brought against the applicant, does not remove his victim status'.

83. The dissenters expanded on this opinion. They continued (*ibid.*):

84. 'When the applicant was requested to disclose who had been the driver of his car at a specific time when it had been speeding, he was in a situation in which he was compelled on pain of a fine up to 30,000 Austrian schillings to give potentially incriminating information or to be punished for remaining silent. There is little doubt that the proceedings for speeding which were so far conducted against unknown offenders would have been turned into proceedings against the applicant had he admitted to having driven the car and, thus, furnished the prosecution with a major element of the case against him. In these circumstances the applicant was in our opinion "substantially affected" and therefore "charged" within the autonomous meaning of article 6(1) [the judges cited ***Heaney and McGuinness*** (*supra*) with a reference to ***Serves v. France*** Reports 1997-VI, pp. 2173-74, paragraph 46, as authority for these terms] with the offence of speeding, once the request to divulge the identity of the driver of the car was made.'

85. In words that echo those of Lord Bingham in ***Brown v. Stott*** (*supra*), the dissenters said (paragraph 2), '[w]hat is decisive for the finding of a violation is that the accused had no other choice than either to break his silence and to provide possibly incriminating information or to have a fine or term of imprisonment imposed on him for failure to do so'.

86. The dissenting judges considered that the fine and period in default were not negligible. They therefore disagreed with the arguments of the government that the degree of compulsion and the sanctions were minor.

87. Finally, the dissenters stated that they were not convinced by the arguments of the government that the requirement to provide information was a proportionate response,

which outweighed the interest of a car owner in not being compelled to incriminate himself. They said (paragraph 4):

88. 'The general requirements of fairness contained in article 6 including the right not to incriminate oneself, apply to criminal proceedings in respect of all types of criminal offences without distinction from the most simple to the most complex [Saunders (supra) cited]. It certainly should not be overlooked that the prosecution of traffic offences like speeding, though they are in themselves often of a minor nature, serves to prevent traffic accidents and thus to prevent injury and loss of life. Nevertheless, a provision like section 103(2) of the *Motor Vehicles Act* possibly obliges the registered car owner, on pain of a fine to admit to having driven the car at the time a specific offence was committed. He will thus have to provide the prosecution with a major element of evidence, being left with limited possibilities of defence in the subsequent criminal proceedings. Seen in this light the infringement of the right to remain silent does not appear proportionate. Consequently, the vital public interest in the prosecution of traffic offences cannot in our opinion justify the departure from one of the basic principles of a fair procedure.'

89. The dissenting judges held that there had been a violation of the right of the applicant to remain silent and his right not to incriminate himself guaranteed by article 6(1) of the Convention.

90. I return to the case of ***O'Halloran*** (*supra*). The court was greatly influenced by, and quoted extensively from, its own case of ***Jalloh v. Germany*** Application number 54810/2000, which dealt with the use of evidence in the form of drugs swallowed by the applicant and which had been recovered by the forcible administration of emetics. The court quoted from the opinion (paragraph 52 quoting paragraph 94) that '[w]hile article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law.' The cases of ***Schenk v. Switzerland***, judgment of 12 July 1988, Series A number 140, 29, paragraphs 45 – 46 and ***Teixeira de Castro v. Portugal***, judgment of 9 June 1998, Reports 1998-IV, 1462,

paragraph 34 were cited. The court in ***Jalloh*** (*supra*) agreed that the right to silence and the privilege against self-incrimination were generally recognised international standards that lie at the heart of the notion of a fair procedure under article 6. In examining whether a procedure has extinguished the very essence of the privilege against self-incrimination, the Court will have regard to certain matters: the nature and degree of the compulsion, the existence of any relevant safeguards in the procedures and the use to which any material so obtained is put. The Court in ***Jalloh*** (*supra*) went on, however, the right does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect.

91. The Court in ***O'Halloran*** (*supra*) accepted that the Court in ***Jalloh*** (*supra*) was dealing with a very different factual situation where the issue was the obtaining of 'real' evidence. Nonetheless, the Court was considerably attracted by the arguments and principles that lay behind the decision in the earlier case. The Court accepted that the compulsion in its own case was of a direct nature. However, the Court adopted in full the notion of the owners or drivers of motor cars knowingly acquiescing in a statutory regime as set out by **Lord Bingham** in ***Brown v. Stott*** (*supra*). The Court quoted his Lordship's words and adopted them. The Court also held that the enquiry that the police were authorised to undertake were of a limited nature. Lastly, the Court repeated the conclusion that the information gathered compulsorily could not by itself found any conviction and formed only one part of any subsequent criminal case. The Court therefore considered that the essence of the applicants' right to remain silent and their privilege against self-incrimination had not been destroyed. The Court therefore held that there had been no violation of article 6 of the Convention.

92. The majority of the seventeen-man Court concurred in the joint opinion. **Judge Borrego Borrego**, however, wrote his own, somewhat vitriolic concurring opinion. He castigated his fellow judges for mixing up the rights of motorists with the necessity to combat acts of tyranny and thereby devaluing the latter. The judge did not think much to the ***Jalloh*** (*supra*) case in the circumstances of the instant case and thought that his fellow judges were following the wrong path in placing so much reliance on it. He thought that it was obvious that motorists had to bend to the will of the authorities that administered the relevant scheme of traffic control in whichever jurisdiction was under discussion. The motor vehicle regulations brought with them certain responsibilities and motor vehicle owners and drivers simply had to accept those responsibilities. In the words of the judge, 'end of story'. The judge praised the 'wise reasoning of Lord Bingham' in ***Brown v. Stott*** (supra), in regard to what his Lordship said in relation to the regulatory regime, and went on again to castigate his fellow judges for incorporating a two-page quotation from ***Jalloh*** (*supra*) and further castigated them for spending twelve pages trying to explain 'what everyone already knows'. The judge's opinion, whilst entertaining, is hardly a major contribution to European jurisprudence.

93. In much more serious vein were the two dissenting opinions of **Judge Pavlovshci** of Moldova and of **Judge Myjer** of the Netherlands. In my respectful judgment, the opinion of **Judge Pavlovshci** is a *tour de force* of scholarship and erudition. It should be read by anyone with even a passing interest in the interaction between the citizen and the state and the balance to be achieved between rights, privileges and duties. The opinion of the learned judge is so well-written and so dependent upon the laying of logical and persuasive bricks upon each other that to quote at random would be to devalue the respect that the opinion deserves. Suffice to say that the learned judge deals ruthlessly with the shallowness and lack of logic in the opinion of the majority (absent **Judge Borrego Borrego**, of course). A few samples of the learned judge's contribution would, however, not go amiss. **Judge**

Pavlovshci said, '[i]n my opinion there are some issues of crucial importance to understanding and correctly adjudicating the present case. Allow me here to repeat the words of Judge Walsh in his concurring opinion in the case of ***Saunders v. United Kingdom***: "... it is important to bear in mind that this case does not concern only a rule of evidence but is concerned with the existence of the fundamental right against compulsory self-incrimination ...". I fully subscribe to these words.' The learned judge then goes into a valuable exposition of the historical reasons why, in England and, subsequently, in the United States of America, the freedom from compulsory self-incrimination is so important. The learned judge also dealt with the question of whether the failure to provide information amounted to a 'watertight' separate offence, entirely separated from the underlying offence that the authorities began by investigating. He said, '[i]t is perfectly obvious that for an individual to state that he was the driver of a car which was speeding illegally is tantamount to a confession that he was in breach of the speed regulations'.

94. The learned judge then drove a bulldozer through the flimsy shanty dwelling that the majority had painfully constructed from the straw of the case of ***Jalloh*** (*supra*). He said, 'Given that, in ***Jalloh***, the Court expressly found that the requirements of fairness applied equally to all types of criminal proceedings, it is very difficult for me to accept that the United Kingdom legislation permits deviation from the basic principles of a fair trial for minor offences which do not present any particularly serious threat to society. Furthermore, if we accept policy reasons as a valid ground for violation of the prohibition of compulsory self-incrimination or the presumption of innocence for offences which present a minor danger, why not accept the same approach to areas of legitimate public concern which might justify encroaching on the absolute nature of article 6 rights: terrorism, banditry, murder, organised crime and other truly dangerous forms of criminal behaviour? If the public interest in catching minor offenders (persons committing speeding or parking offences) is so great as to justify limitations on the privilege against self-incrimination, what would be the position when the issue concerned serious offences? Is the public interest in catching those who commit crimes which cost people's lives less great than in catching those which slightly exceed the speed limit? In my view it is illogical for persons who have committed minor offences to

find themselves in a less favourable situation than those who have committed acts which are truly dangerous to society.'

95. The entirety of the learned judge's opinion deserves a full and close (and, indeed, repeated) reading.

96. **Judge Myjer** wrote a shorter dissenting opinion that supported much of what **Judge Pavlovshci** said. However, he added some useful contributions of his own. He dealt with the supposed acceptance of the owners and drivers of motor vehicles of the limitations imposed on their rights by the statutory scheme applying to such vehicles. He said (paragraph 5), '[o]ur own case-law makes it very clear that some rights under article 6 can indeed be waived, provided that this is done unambiguously and in an unequivocal manner. But I sincerely doubt whether the majority accept the corollary which is unavoidable if the judgment in the present case is to be consistent with that case-law: under the British system, when it comes to the identity of the driver of a car, all those who own or drive cars are automatically presumed to have given up unambiguously and unequivocally the right to remain silent'.

97. Both dissenting judges held that there had been a violation of the rights of the applicants under article 6.

98. The defendant cited to me the case of ***HKSAR v. LEE Ming-tee & anor.*** (2001) FACC number 8 of 2000. In that case, the defendant had answered questions from an inspector appointed by the Financial Secretary under the *Companies Ordinance* to investigate matters of irregularity in companies in which the defendant had an interest. The defendant was required under the legislative power in question to answer the questions of the inspector. The material thus gathered, or part of it, was passed to the Hong Kong Police Force for further investigation. The defendant was thereafter charged with criminal offences. The defendant sought and was granted a permanent stay of proceedings on the

basis that his privilege against self-incrimination under the *Bill of Rights Ordinance* had been violated. The Court of Final Appeal allowed the appeal of the prosecution against the permanent stay and ordered a retrial. The Court was not prepared to say that the privilege against self-incrimination was an absolute one and held that the actions of the investigating body were capable of being held to be a proportionate response to a possible offence or set of offences. However, the Court made it clear that there had to be clear evidence put before the court of trial to show that it was in the public interest that the privilege of the defendant against self-incrimination be abrogated.

FINDINGS AND DECISION.

99. The case of ***Attorney General v. TSANG Wai-keung*** (*supra*) was decided in 1996. Four cases only were mentioned in the case. This is not surprising, bearing in mind that the huge volume of human rights cases now available to the courts has largely come into existence since that time. Furthermore, it is clear that **Patrick Chan** J. was deciding the case very largely on first principles. He was also deprived of the assistance of counsel for the defence as the appellant was unrepresented. It is also clear that matters of law that counsel for the Attorney General urged his Lordship to adopt and which his Lordship did adopt have been called into question by the development of the law, particularly in other jurisdictions as represented by many of the cases placed before me in this case. It is therefore, open to question whether the case now represents the law in the issues that have been fully ventilated before me.

100. It is clear that ***Attorney General v. TSANG Wai-keung*** (*supra*) proceeded on the basis that the right to silence and the privilege against self-incrimination were rights available to a defendant only after he had been charged with a criminal offence. It is clear that in all jurisdictions with a common law background this narrow interpretation now no longer holds good. The robust *dictum* of **Jones** J. in ***R. v. LEE Tak-cheung*** (supra) is

clearly, from the authority of the cases cited to me, no longer tenable. Whilst Patrick Chan J. entirely properly, if I may respectfully say so, went on to consider the position if, in fact, the rights in issue were available pre-charge, it is clear that he fully accepted the arguments of counsel for the Attorney General that the rights were only available after a person had been charged and decided the case on that basis. On that basis alone, in my judgment, the case is no longer binding upon me.

101. In any event, no evidence whatsoever has been adduced in this case to prove that the statutory scheme underlying this case is a rational and proportionate response to the perceived problem. Firstly, Patrick Chan J. in ***Attorney General v. TSANG Wai-keung*** (*supra*) continually referred to the problem of those who suffer injury or damage as the result of the actions of other road users and who leave the scene of a road traffic accident without having given the appropriate particulars to any properly interested party. His Lordship clearly had in mind, therefore, that the power to require the supply of information on a compulsory basis related in particular to cases of death, personal injury and damage other than insignificant damage. It is also instructive that the Board in ***Brown v. Stott*** (*supra*) had, from the judgments in the case, the same situation in mind. Indeed, section 172 of the *Road Traffic Act 1988* in the United Kingdom is framed specifically to exclude certain minor traffic infringements. However, section 63 of the *Road Traffic Ordinance* applies to 'any offence under this Ordinance'. This clearly would also include all subsidiary legislation dealing, in many cases, with very minor offences. It is clear that some evidence should be given to support a full and clearly-stated justification for this all-encompassing power.

102. Furthermore, the demand under section 172 is to be made within twenty-eight days; that under section 63 may be made up to six months from the date of the alleged offence. There has been put before me no evidence whatsoever as to why the power to demand

information should last for such a long duration, particularly when memories will have been eroded after the passage of months.

103. There has been no attempt, therefore, to prove, by way of evidence that the sweeping powers of section 63 are necessary in their present form. Clearly, most European states that rely upon the compulsory supply of information have some restrictions on the reach of equivalent legislation. Clearly also, it is unlikely that justification could be found to show that the privilege against self-incrimination should be abrogated in the case of every minor infringement of the *Road Traffic Ordinance* and every one of its numerous sets of regulations covering everything from road markings to the issue of licences, for a period of up to six months.

104. The sentence for infractions of section 63 includes imprisonment for up to six months. No other jurisdiction, at least in the cases cited to me, has such a draconian penalty. Again, no attempt has been made by way of evidence to show that such a measure is necessary and that no other way of dealing with the problem is available. In addition to the penalties of a fine and imprisonment, a court is empowered to disqualify a defendant for such period as the court thinks fit (section 61(1)(b) of the *Road Traffic Ordinance*). The offence under section 63 is not, however, listed in the schedule to the *Road Traffic (Driving-offence Points) Ordinance, Cap.375.* No evidence has been put before me to explain why, with the powers of fine and of disqualification, the penalty of imprisonment is still required as a weapon in the armoury of the police. No explanation or evidence has been put before me to explain why an additional power to impose penalty points on an offender's driving licence would not, together with the powers to fine and to disqualify, give the police a sufficient panoply of sanctions against a recalcitrant registered owner of a motor vehicle.

105. The case-law as set out above makes it quite clear that in cases involving the demand for information as to the driver of a vehicle, the keeper or owner can only be asked one, simple question: 'Who was the driver'. Further questioning is not permitted if the public interest is to prevail over the rights of the owner or keeper of the vehicle. Accordingly, it is difficult to see what justification there is for the notice under section 63 to require the owner or keeper to state what is his relationship with the driver. This is clearly going further than most jurisdictions would think permissible.

106. With regard to the question of the proportionality of the powers available under section 63, no evidence has been put before me as to the scale of the problem. I was somewhat disturbed to learn from the defendant that he had received little co-operation from the police when he requested certain statistics in relation to the use of section 63. Eventually, and, somewhat grudgingly, the relevant department gave the defendant a statistic that is now clearly well out of date. The figures showed that for the last year available (and years out of date) only some five hundred prosecutions were launched under the section. No assistance was given to the defendant as to, for example, how many notices had been sent out and what proportion had been ignored. If only a few thousand notices had been issued and served for example, that would seem to indicate that there is, in reality, no need for the section. If the number is much larger, there appears to be no research as to whether overwhelming compliance comes about from the threat of draconian punishment or because of a natural tendency to comply with demands from official bodies. However, as I have said, there is simply no evidence before me. I note that the Board in ***Brown v. Stott*** (*supra*) was at least given some data on the number of serious road traffic cases for a number of years; I was given none.

107. It is clear from the case-law that the claim that the supply of information compulsorily is not an admission to the underlying offence being investigated now has to be regarded as a

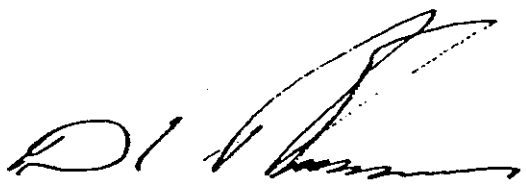
polite fiction. Even **Lord Bingham** in ***Brown v. Stott*** (*supra*) accepted that this is so (paragraph 38 *supra*). **Judge Pavlovschi** in ***O'Halloran*** (*supra*) was of the same view. Accordingly, it is undoubtedly the case that the present defendant has suffered violation of his right to silence and his privilege against self-incrimination. The next question is what effect this finding has on the trial itself?

108. The Board in ***Brown v. Stott*** (*supra*) was highly adversely critical of the European Court in ***Saunders*** (*supra*) for its failure as perceived to say whether the right to silence and the privilege against self-incrimination were 'absolute rights' or not. The Board dealt with this point by saying, in effect, that no real conclusion could be reached until this point had been settled in any particular case. I am disappointed in such an approach. In the field of tort, for example, the courts have moved on. The approach formerly was that, following the desire in Victorian English legal society for certainty, courts would go back to the beginning of an incident and try and work out if what the supposed tortfeasor was doing was a hazard or involved the assumption of liability. The courts then moved forward to hold whether or not the injured person came within the area of liability of the tortfeasor. The modern approach is to look back and for the courts to decide, now that all elements of the incident are known, and with the benefit of hindsight, who should bear the cost of the injury or loss. Usually that could be decided by a simple question of who should have been expected to take out insurance to cover the loss, damage or injury. In other words, there is little to be gained by a process of 'labelling' in advance of deciding issues. The real question in cases such as this, is: what effect upon his undoubted right to a fair trial has the violation of a defendant's right to silence and his privilege against self-incrimination had. If the effect is profound it is difficult to see how it could be argued that a subsequent trial could be fair. If the effect is negligible or trivial, the violation of the defendant's rights would not stand in the way of a fair trial being conducted.

109. That is therefore a simple question and, in this case, can be answered equally simply. The draconian nature of the power under section 63 of the Road Traffic Ordinance coupled with the lack of any evidence or material whatsoever to justify the continued existence of that power mean that the undoubted violation of the defendant's right to silence and his privilege against self-incrimination must result in a trial that cannot, in any sense whatsoever, be said to be fair.

110. Accordingly, I hold that the power in section 63 is 'Bill [of Rights Ordinance] inconsistent'. That being the case, the section has ceased to have any effect. Accordingly, I find the defendant not guilty of the offence in the summons and acquit him thereof. He is discharged.

DATED this 8th day of May 2008



D.I. Thomas,
Magistrate,
Kowloon City Magistracy,
Hong Kong Special Administrative Region.