Risk of self-incrimination will not justify a witness' non-attendance at an inquest

written by Bridget Dolan QC | 29 March 2022

M4 v The Coroner's Service for Northern Ireland **[2022] NICA 6**

The privilege against self-incrimination is an ancient right firmly established in our Common Law dating back to the 17th century abolition of the Star Chamber. This privilege enables a witness to refuse to answer questions in court and to refuse to produce documents or material at trial or pre-trial if doing so might carry a risk of the evidence being used in the course of a criminal prosecution against the person.

However, whilst that right is, very properly, protected at inquests by the Coroners procedural rules, the Court of Appeal of Northern Ireland have made it clear that the privilege cannot be relied upon to avoid any attendance at an inquest altogether. Where a Coroner believes there is some relevant evidence a witness can give that Coroner will be entitled to call them to court, using legal compulsion if necessary, even where the privilege has been claimed.

In this Art 2 inquest, where the key allegation was that a soldier had unlawfully taken the life of the deceased, the need for the witness to attend the inquest was paramount such that the Court's power to set aside a subpoena would not be exercised.

The background

Mr Thomas Mills, a night-watchman at a factory in Ballymurphy, was shot and killed in 1972. At his inquest in 2021 one of the key issues under examination was who fired the shots that had killed him. A Royal Military Police Report from 1972 appeared to name a particular soldier as being responsible for firing the fatal shots and statement from a soldier also acknowledged firing several shots at a gunman in the grounds of the factory in and around the same time Mr Mills was shot. That former soldier had been granted anonymity (under the cypher M4) for the purposes of the inquest.

M4 was listed as a witness at the inquest, however his lawyers conveyed that he would not attend and that he wished to invoke his privilege against self-incrimination. In response the coroner caused a subpoena[1] to be issued by the High Court requiring M4's attendance at the inquest. When M4's application to the High Court to set that subpoena aside was refused he appealed to the NI Court of Appeal.

Compelling an inquest witness

Prior to 2002 inquest witnesses had not been not compellable under the NI Coroners Rules.[2] The practice in inquests involving the use of lethal force by members of the security forces in Northern Ireland had been that the police officers or soldiers concerned would not attend. The European Court of Human Rights had been very critical of that position (in *Jordan v UK*[3]) as it 'does not enable any satisfactory assessment to be made of [a witness'] reliability or credibility on crucial factual issues. It detracts from the inquest's capacity to establish the facts immediately relevant to the death, in particular the lawfulness of the use of force and thereby to achieve one of the purposes required by Art 2'.

Following *Jordan*, the NI Coroners Rules were amended such that any witness was compellable, although a privilege against self-incrimination (similar to that found in in the English and Welsh rules[4]) was preserved in Rule 9 of the NI Coroners Rules which provides:[5]

'(1) No witness at an inquest shall be obliged to answer any question tending to incriminate himself or his spouse.

(2) Where it appears to the coroner that a witness has been asked such a question, the coroner shall inform the witness that he may refuse to answer.'

The appellant argued that the subpoena should be set aside because now he had invoked his privilege against self-incrimination there should be no examination of him by the Coroner at all.

You need to be there to claim the privilege

To seek to justify *complete non-attendance* on the basis of a claim of the privilege made in advance of attending the hearing was always going to be a tricky.

The Court of Appeal recognised the privilege against self-incrimination was embedded in law and did not suggest it could not be invoked by M4. However, as ancient authorities confirmed,[6] that right must be claimed personally and on oath so that the witness can pledge that they 'honestly believe that the answer will tend to incriminate' them. The decision on whether such a claim would be upheld or not will then be made by the judicial officer who is conducting the proceedings

Privilege is not to be claimed lightly

Over a century and half of law has established that the privilege is not one to be claimed lightly, simply to avoid uncomfortable questions. Before a witness is entitled to the privilege of silence, the Court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is a reasonable ground to apprehend danger to the witness from his being called to answer questions. 'The danger to be apprehended must be real and appreciable with reference to the ordinary operation of law in the ordinary course of things – not the danger of an imaginary unsubstantial character, having reference to some extraordinary and barely possible contingency.' As stated in *R v Boyes*:

"a merely remote and naked possibility, should not be suffered to obstruct the administration of justice."[7]

Here the Coroner had clearly explained in a witness statement why this witness was relevant to his enquiries and the themes/areas of evidence the coroner would wish to explore which included many general topics alongside those which more specifically related to Mr. Mills' death.

The Court did not accept the argument that the right to self-incrimination could be invoked in a blanket sense and on affidavit in advance of hearing. It was premature to say, in advance of the hearing, that M4 could answer nothing at all. Rather, the Coroner must assess any request of this nature during the inquest itself.

The Court was confident that the subpoena did not of itself dilute the exercise of the privilege against self-incrimination. That is because all of the appropriate safeguards were in place within the inquest process. M4 was legally represented and so had added protection. Further the Coroner had already agreed that he could provide his evidence by remote link and was open to further collaborative discussion about how M4's evidence should be managed.

In these circumstances the proper course was to compel the witness to attend.

Commentary

This case is a useful reminder that a claim for privilege against self incrimination in the coronial context need not be taken on face value. The coroner is entitled to test the bases for the claim and it should not simply be accepted that a risk of incrimination exists if claimed, without further analysis. The right to avoid answering questions must be founded upon there being a 'real or appreciable' risk that if the particular evidence were given it could then be used in the prosecution of the witness. That risk need not be large, but it must not be a fanciful one. Merely a remote possibility will not be sufficient.

It is not for the Coroner to consider whether it is at all likely that a criminal charge will actually be brought. The relevant question is whether, if a charge were to be brought, the answer to this question might tend to incriminate the witness.

Surprisingly perhaps, one of the very few English cases that has recently considered the issue, *R (Hay) v HMC Lincoln,*[8] was not cited by the Court of Appeal. In *Hay* the Divisional Court had similarly determined that the procedure adopted when dealing with a claim of privilege should not be such as to give the witness a complete immunity against further questioning. Rather the witness needs to claim the privilege in respect of each individual question put to them, and so a series of questions may still be asked of the witness even if they all go unanswered (although oppressive questioning should not be permitted). As *Hay* also establishes, if the witness does give any account of the factual circumstances (even if only by confirming the content of an earlier witness statement) they will be taken to have waived the privilege in respect of factual matters about which evidence has already been given and then may be required to answer any question put to them on the same issue.[9]

Footnotes

[1] subpoena ad testificandum – pursuant to section 67(1) of the Judicature (Northern Ireland) Act 1978. A subpoena was necessary as M4 lived within the United Kingdom but outside the jurisdiction of Northern Ireland, hence a High Court subpoena rather than a coronial power had to be invoked to require him to attend this inquest.

[2] The Coroners (Practice and Procedure) Rules (Northern Ireland) 1963 ("the NI Rules").

[3] *Jordan v UK* (2003) 37 EHRR §127

[4] The Coroners (Inquests) Rules 2013

[5] Section 49(2) of and Schedule 11 to the Coroners and Justice Act 2009 had amended the Coroners Act (Northern Ireland) 1959 ('the NI Act') and empowered a coroner to issue a notice (similar to a Schedule 5 notice) requiring a person to attend at a time and place stated in the notice and to give evidence at the inquest and to impose a fine not exceeding £1000 on a person who fails to comply without reasonable excuse.

[6] such as *Raymond v Tapson* [1881] R 2434 and *R v Boyes* [1861] 1 B& S 311

[7] see *R v Boyes* [1861] 1 B& S 311

[8] [2000] Inquest LR 1

[9] in *Hay* two witnesses who purported to claim the privilege had entered the witness box and been led through their pre-existing witness statements by the Coroner. The Coroner had then, wrongly, allowed them to rely on the privilege to prevent them from being asked and answering any further questions about the same matters from the family's counsel.