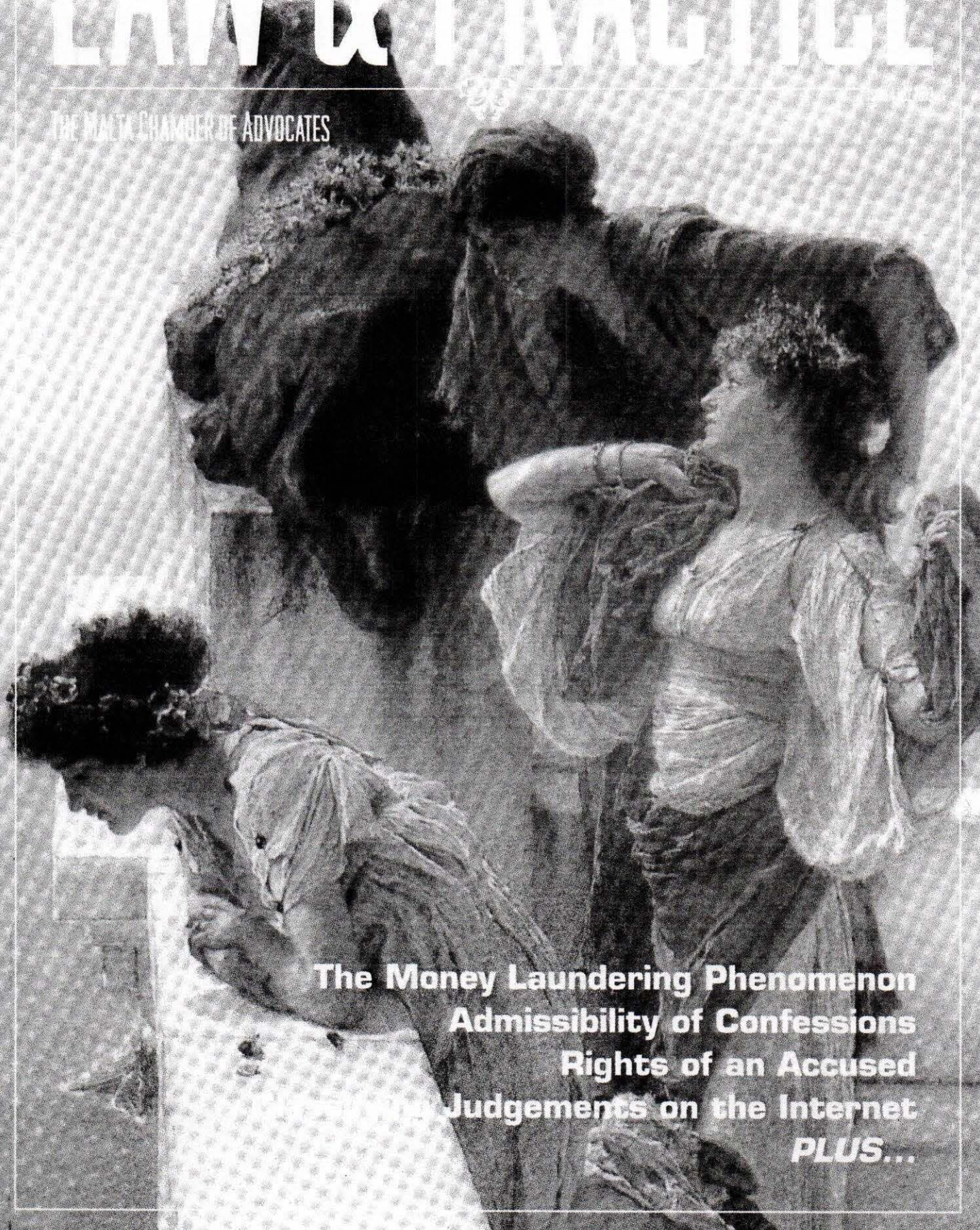


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**The Money Laundering Phenomenon
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PLUS...**

ADMISSIBILITY OF CONFESSIONS

AN ENGLISH PERSPECTIVE



Dr Stefano Filletti
B.A., LL.D., LL.M. (IMLI), M.Jur
(Oxon)

The writer graduated Bachelor of Arts (Legal and Humanistic Studies) and Doctor of Laws (LL.D.) from the University of Malta. He furthered his studies in Public international Law, Shipping Law and the Law of the Sea at the international Maritime Law Institute where he was awarded a Masters of Law (LL.M.) with distinction. As a Chevening Scholar at the University of Oxford he studied Advanced Criminal Law, Law of Evidence and the Law of the Sea under the tutorship of Professors A. Ashworth, C. Tapper and V. Lowe and was awarded a Masters of Law (M.Jur) with distinction. He is now in private practice.

The first formulation of the rule on the admissibility of confessions was given in Rex v. Warickshall (1783),

'A confession forced from the mind by flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it, and therefore is rejected'..

This was subsequently taken up to be the common law exclusion of confessions obtained by threats, promises or oppression.

A confession offered by a person accused is one of the exceptions to the hearsay rule. While formerly the province of common law, the same has now been enshrined in statute.

In order to facilitate an understanding of the matter it is necessary to briefly consider what the common law position was before examining the relevant statutes. There can be

three possibilities for the treatment of evidence that has been gathered by questionable methods: the law may either have a rule for its exclusion, it may be a matter of judicial discretion in the interests of ensuring fairness to the accused or, finally, the courts may concern themselves with only the quality of the evidence and not consider its provenance at all. It is clear that the latter approach was adopted by the common law.

In *Jeffrey v. Black* (1978), Lord Widgery stated that the mere fact that evidence is obtained

in an irregular fashion does on its own prevent that evidence from being relevant and acceptable to the court - the test instead was to be one of relevance. His lordship proceeded to state that the judge had discretion to disallow any evidence that the prosecution was purporting to rely upon, on the basis that the same would be unfair and oppressive to the accused. This discretion, his lordship stated was rarely if ever exercised.

According to the judgment of Lord Diplock in the landmark case of *Reg. v. Sang* (1980), confessions were to be excluded under the rule *nemo debet prodere se ipsum*. This means simply that no man can be required to betray himself. The rule is now encapsulated in the Police and Criminal Evidence Act (1984) (hereinafter referred to as iPACEi).

Section 76 of PACE creates two grounds of exclusion. A confession is described by



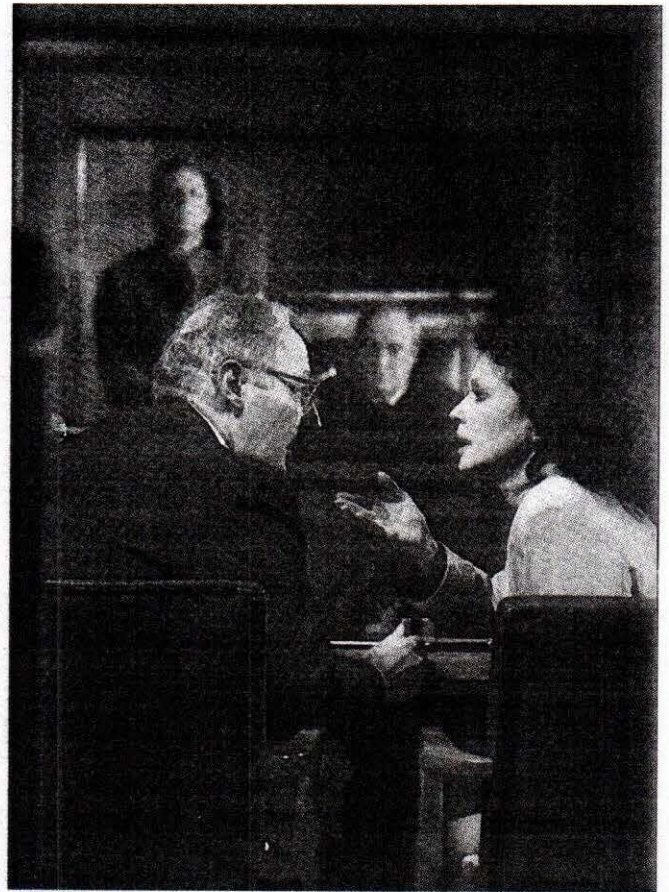
'Oppression' is defined in s 76(8) of PACE as including torture, inhuman or degrading treatment and the use of threats or violence (whether or not amounting to torture).

PACE as including 'any statement wholly or partly adverse to the person who made it, whether made to a person in authority or not, and whether made in words or otherwise'.

Section 76 provides for the exclusion of confessions on the ground that they were obtained either by oppression, or in the course of things said or done that would render them unreliable. It is to be noted that the section is a mandatory rule for exclusion, not permitting the scope of any judicial discretion.

'Oppression' is defined in s 76(8) of PACE as including torture, inhuman or degrading treatment and the use of threats or violence (whether or not amounting to torture). Article 3 of the European Convention on Human Rights also lends assistance in defining the terms 'torture' and 'inhuman or degrading treatment'. The case of *Ireland v. UK* (1978) seems to suggest that the conduct that is capable of causing intense physical and mental suffering to the person and to acute psychiatric disturbances during interrogation fall within the category of inhuman treatment within article 3. The case of *R v. Fulling* (1987) sheds some light on the matter. Here the accused had been told by the police that her lover had been having relations with a woman who was in the next cell. The accused claimed that she was so affected by the news that she wanted desperately to leave the station and that was the sole reason why the statement was tendered. This amounted to oppression by the police. Lord Lane defined oppression as the exercise of authority in a burdensome, wrongful or harsh manner, unjust or cruel treatment of inferiors, and the imposition of unreasonable or unjust burdens. In *R v. Paris* (1992) oppression took the form of shouting at the accused and brainwashing him into repeating what the police were saying.

It seems therefore that in determining whether conduct is oppressive, the courts will place emphasis on the physical



and temporal circumstances of the interrogation, the personal characteristics of the accused and any elements of unlawfulness by the police. It should be borne in mind however that there may be unlawfulness without oppression and conversely oppression without unlawfulness. Again the courts realize that what may be oppressive for some may not be so for others. In this way they take the personal characteristics of the accused into account, namely, old age, low or subnormal intelligence and the presence or absence of a criminal record.

The second ground of exclusion found in section 76(2)(b) deals with things said or done that render the evidence unreliable. Salient features here are that the actions may be performed by some person other than the investigator, for example in the case of *R v. Souter* (1995), it was the commanding officer of the soldier charged with rape who had told the soldier to shut up and act like a man. It is clear from the case of *R v. Goldenburg* (1985) that the things said or done however, did not include

the actions of the accused himself. In reply to submissions that the accused here had made the statement in order to obtain credit for helping the police, the court replied that the wording of the section, in particular the phrase 'in consequence' implied that the thing said or done was limited to something external to the person making the confession and to have an effect on him. In *R v. Crampton* (1990) this was applied to the case of an addict who claimed that he had made the statement because he was suffering from withdrawal symptoms and wanted to feed his habit upon leaving the station. The court, on the facts brought forward, found that the accused had been in perfect condition for the purposes of making the statement and that the mere fact that a person was suffering from withdrawal symptoms, which might have been the motivating factor to tender the confession, this by itself did not automatically make the confession unreliable.

Police impropriety may tilt

the balance in favor of the accused. However in every case for an exclusion to be made there must be established a causal link between police impropriety or inducement and oppression or unreliability. In the case of oppression the question is: *did the conduct of the police or other interrogator assuming it to amount to oppression, cause, in the relevant sense, the confession to be made?*

When dealing with the issue of unreliability, two questions have to be addressed:

a) *Was the confession obtained in consequence of the thing said or done (oppression or otherwise)?*

b) *If it was so obtained, was it likely to render unreliable any confession which the accused might make?*

Some have thought that the causal requirement might complicate what was otherwise a simple exclusionary procedure. However in *R v. Rennie (1986)* Lord Lane, held that a judge should not embark on 'any refined analysis of the concept of causation' in instructing juries. Rather 'he should understand the principle and the spirit behind [the exclusionary rule] and apply his common sense'.

Subsequent Confessions

What if after an interview where the confession is declared inadmissible a second interview is conducted, wherein the accused again confesses? In the context of s.76(1) the latter confessions will be excluded until the causes operating in favour of the inadmissibility of the first confession are not dissipated. Otherwise the second confession will equally be tainted. In *R v. Glaves (1993)*, the juvenile did not have legal assistance in between the two confessions and therefore the subsequent confession given remain tainted. In *R v. Smith (1959)* it was held that the fact that the accused was properly cautioned coupled with the fact that circumstances had changed, these spent the effects

of the original threat or inducement. Therefore the second confession was deemed admissible. However it is argued, that although the circumstances did change this did not mean that there was no indirect pressure being exercised on the accused (just as in *Glaves*).

Section 78(1) of PACE may also be of relevance for subsequent confessions whereby the Court can exclude them on the basis that it would be unfair at trial to make the accused suffer the disadvantage of being faced with a second confession which had been obtained from him at a time when he would have assumed that he was already condemned out of his own mouth.

Exclusion on the basis of Unfairness

Unfairness is governed by section 78 of PACE and may result from a number of circumstances, such as:

1) *inequality of access to evidence*: where for instance police officers fail to draw a, contemporaneous record of a statement or fail to present it for correction by the accused. The result of this action would be that in trial the accused would be limited to stating that the facts written in the

statement are not precise, while the police can refresh their memory by looking at the defective record. This was expressly recognised in *R v. Quinn (1996)*.

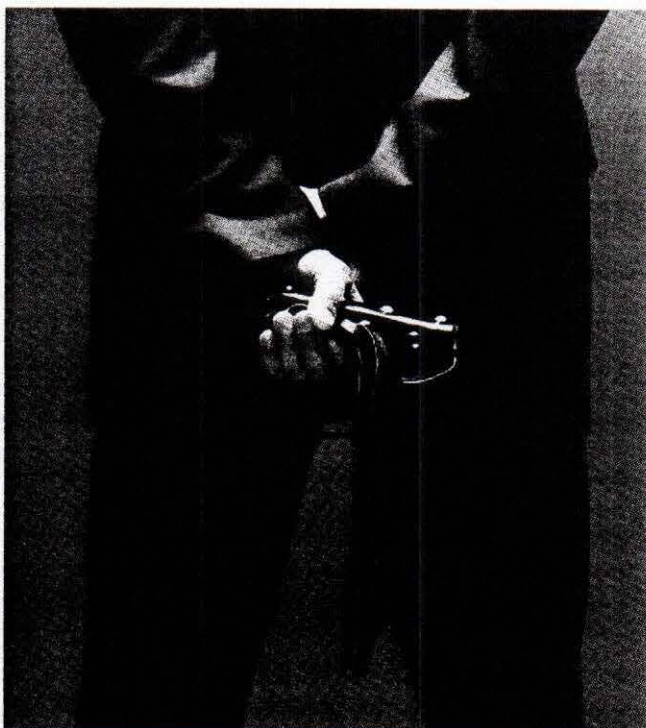
2) *breach of promise regarding the use of the evidence*: - *R v. Nathaniel (1995)* concerned a breach by police officers who failed to destroy blood samples as promised. The blood samples were instead used in other proceedings.

3) *The dictum in R v. Keenan (1990)*: adducing an unfairly or improperly obtained record would force the accused to rebut it, jeopardising his right of non-compellability.

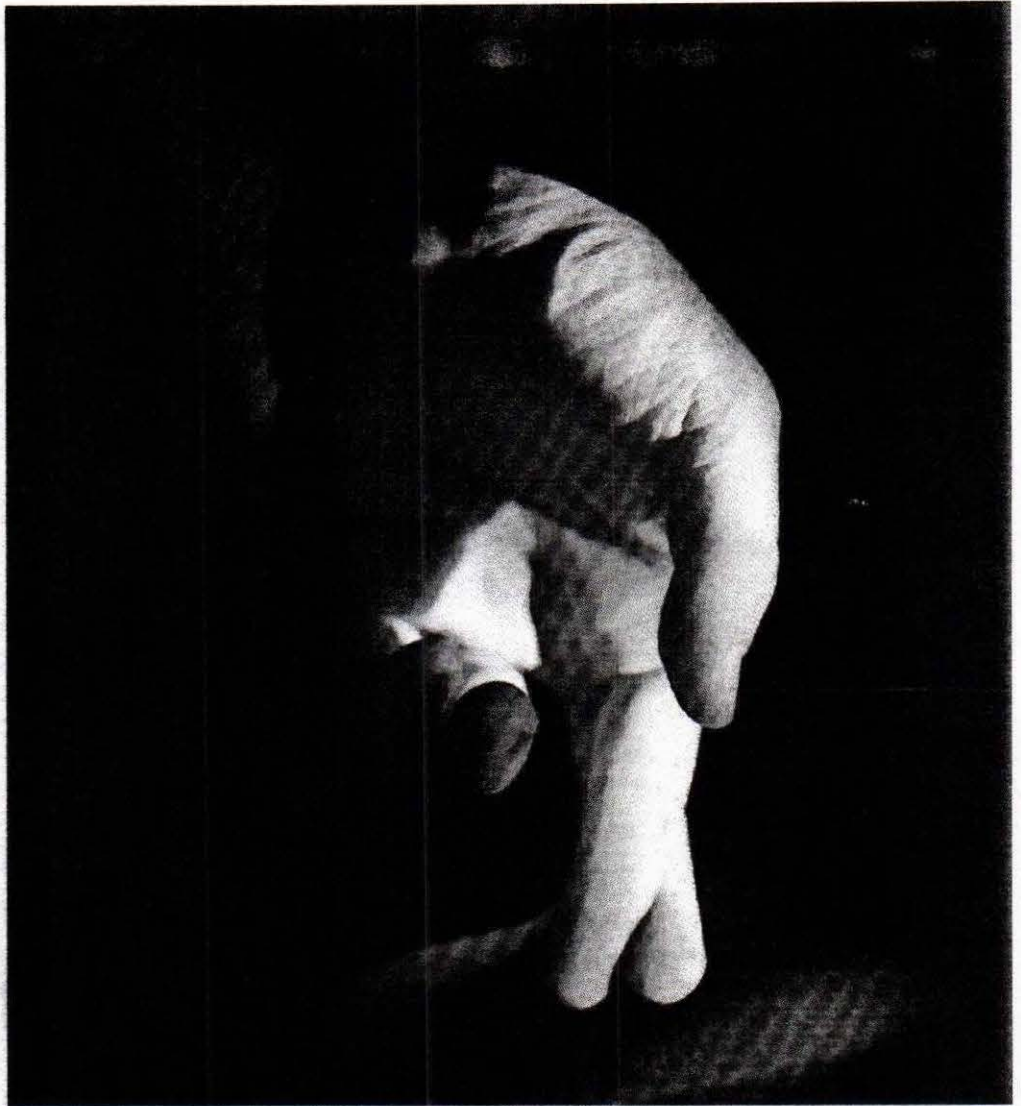
4) *deliberate and bad faith breaches*: unlike oppression unfairness does not have to result from a deliberate act, although this strengthens the case for inadmissibility.

5) *fairness to both sides*: or what is known as equality of arms. Further the prosecution represents the public interest, the question being whether public interest is achieved in adducing unreliable evidence against the accused which has more potential for prejudice than

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Deception can either be express, as in *R v. Mason* (1987) where the police lied to the accused and solicitor by telling them that the suspect's fingerprints were found on the scene of the crime...



for proof

With regard to the element of *causation* the question is whether the evidence would be more prejudicial than probative.

Trickery and Entrapment

Sang distinguished between evidence acquired *after* the commission of the offence and that obtained *during*, or even *before* its commission. The discretion to exclude confessions on the basis of unfairness exists only in the former scenario. It therefore applies for trickery but not entrapment. In *R v. Latif and Shahzad* (1996), the Court stayed proceedings in the case of entrapment. However it is held that s.78(1) applies now (unlike in common law) to evidence obtained before the completion of the offence in question. In *Smurthwaite and Gill* (1994) the question was

whether the person would have committed the offence without enticement; whether the evidence amounts to a completed offence; whether there was corroboration and how active/passive the officer was.

Implied and Express Deception

Deception can either be express, as in *R v. Mason* (1987) where the police lied to the accused and solicitor by telling them that the suspect's fingerprints were found on the scene of the crime. They could be implied as in *DPP v Marshall* (1988) where policemen dressed as civilians and did not say they were policemen. The Court in this case held that the impact was not like that of express deception.

Right to Legal Advice

This is deemed to be a

fundamental right of a suspect. An improper refusal to such a right by the police should be distinguished in theory from a mere oversight, although both may result in the exclusion of a confession. This right is also manifested in the obligation of the police to inform the suspect of the arrival of legal advisor at the station even where the suspect previously declined legal advice. In case of a breach *R v. Walsh* (1989) establishes that there is a presumption created in favour of its exclusion. Further it has been held that with the introduction of the inferences to be made from silences in the Criminal Justice and Public Order Act 1994, the issue as to whether one is to remain silent or not has become more important and legal advice is indispensable.