The Evidence of the Prisoner at His Trial: A Comparative Analysis

H. A. HAMMELMANN
Burgh, near Woodbridge, Suffolk

Among the persons who inform a court of law of facts which can serve as a basis for a decision, the accused who gives evidence at his own trial occupies a peculiar position. Since he is under a serious suspicion, his evidence will be regarded with distrust: if guilty, he has an obvious interest in concealing the truth; even if innocent he may have overriding reasons for doing so. Neither oath, nor fear of punishment for false testimony, nor even moral reasons are likely to incline him to speak the truth, as they do normally in the case of witnesses.

For this reason, based on the old maxims *nullus in re sua testis intellegitur* and *nemo seipsum prodere tenetur*, Continental countries generally exclude the prisoner at his trial from the definition of witness. In Anglo-American law, on the other hand, the term "witness" covers all persons giving evidence at the hearing and the general rules governing the examination of witnesses include therefore the prisoner when he testifies at his own trial.

This difference of terminology indicates a different approach to the problem, but it would be mistaken to assume that French law, for instance, because it does not regard the accused as a competent witness, for that reason renders impossible all examination of the accused or makes in any way less use of his knowledge. On the contrary, in most Continental countries the examination of the prisoner forms an integral and essential part of the hearing of a criminal case. For, if the testimony of the prisoner is of doubtful credibility, it is still of great value to enable the court to come to a true estimate of the matters in issue. There are few instruments of proof which guarantee the truth of the evidence they present: the tribunal, by taking evidence, receives knowledge of facts which, in its free evaluation, it may or may not accept as true. The prisoner is a person who can be assumed to possess better knowledge of the facts than any-

one else; his personality in general and the way in which he gives his evidence may alone be of assistance to judge and jury in their task of arriving at the decision.

It is in the methods adopted to secure the evidence of the accused at his trial that a marked difference exists between the Anglo-American and the Continental systems. Logically, the accused can be treated in any one of the following four ways:

(a) he is under a duty to speak and can be compelled to state in evidence everything he knows about the issue;

(b) he has the right to remain silent in examination — no means of coercion are employed to make him answer questions;

(c) he has the right to testify if he wishes, but examination is facultative for him;

(d) the prisoner is not examined at all — he is obliged to remain silent.

At various periods English law has followed every one of the methods enumerated. The last mentioned method, which makes the prisoner incompetent to testify, prevailed during the 18th and early 19th century. It is true that the prisoner had for some time been entitled to make an unsworn statement from the dock which enabled him to plead extenuating circumstances or to protest his innocence, but this was of little, if any, value as evidence. Only in the second half of the last century did the view gain ground that virtually to oblige the accused to silence is calculated to work injustice instead of affording him protection. After certain tentative enactments of limited scope, and after some experience had been gained in Australia and under the Canada Evidence Act, 1893, the Criminal Evidence Act, 1898 (s. 1) determined that:

> Every person charged with an offence . . . shall be a competent witness for the defence at every stage of the proceedings . . . provided as follows: (a) a person so charged shall not be called as a witness in pursuance of this Act except upon his own application.

Even now, the accused cannot be called to give evidence for the prosecution either against himself or against his accomplices.[1] The 1898 Act does, however, enable the accused, at his own option and application, to be examined under oath in the witness box as a witness. Where the prisoner is undefended, the judge should inform him of this right. The examination takes place, like that of any other witness, in contradictory examination and

---

[1] *R.* v. *Grant*, [1944] 2 All E.R. 311; *R.* v. *Sharrock*, [1948] 1 All E.R. 145.

cross-examination by defence and prosecution; a prisoner wilfully giving false evidence is liable to be convicted for perjury.[2] Questions asked in cross-examination must necessarily be directed to make proof against the prisoner.[3] The prisoner cannot refuse to answer questions directly relevant to the offence on the ground that they tend to incriminate him (Evidence Act (1898), s. 1(e)); he can be compelled to answer and what he says may be used as a basis for conviction.[4]

Once the prisoner has pleaded "not guilty" he is at liberty to remain absolutely silent throughout the remainder of his trial. Where the evidence is equally consistent with innocence or with guilt, and the case has not therefore been made out, no inference of guilt should be drawn from the fact that the accused has refused to give evidence on his own behalf.[5] Since adverse comment might suggest to the jury that the burden of proof has shifted to the defence and that, by remaining silent, the prisoner has failed to discharge it, the law has expressly safeguarded the prisoner's option by section 1(b) of the Evidence Act (1898), according to which failure of the accused to give evidence must not be made the subject of any comment by the prosecution.

In practice, the question whether the prisoner should be made to go into the witness box is nonetheless always one particularly difficult and responsible for the prisoner or defending counsel to decide. If unwillingness to go into the box cannot be commented on by the prosecution, it may be commented on and even emphasised by the judge in his summing-up;[6] the prisoner's

[2] *R.* v. *Wookey* (1899), 63 J.P. 409.

[3] We are not here concerned with the exceptions under s. 1(f) of the 1898 Act, which render certain evidence and certain questions inadmissible for fear of creating prejudice against the prisoner. In the words of Viscount Sankey L.C. in *Maxwell* v. *Director of Public Prosecutions*, [1935] A.C. 309, at p. 317, ". . . a certain amount of protection was accorded to a prisoner who gave evidence on his own behalf. As it has been expressed, he was presented with a shield and it was provided that he was not to be asked, and that, if he was asked, he should not be required to answer, any question tending to show that he had committed or been convicted of or been charged with any offence other than that wherewith he was then charged, or was a bad character. Apart, however, from this protection, he was placed in the position of an ordinary witness in an ordinary civil case."

[4] To this extent it is somewhat equivocal to say that "the prisoner is an incompetent witness for the prosecution"; he simply cannot be called by the prosecution.

[5] Nor does the fact that the prisoner has not made any denial of the charge afford any corroboration which may be necessary by law (*R.* v. *Whitehead* (1929), 21 Cr. App. R. 23, and *R.* v. *Keeling* (1942), 28 Cr. App. R. 121; compare also *R.* v. *Leckey*, [1943] 2 All E.R. 665, where a conviction for murder was quashed because the judge commented adversely on the fact of the prisoner's silence when charged and cautioned by the police.

[6] *R.* v. *Rhodes*, [1899] 1 Q.B. 77, *per* Lord Russell C. J. at p. 83; Archbold, Criminal Pleading (31st ed.) p. 443. In Canada no such comment is permitted.

silence is, in any event, always noted by the jury as a sign that he has "nothing to say for himself".[7]

As we have seen, English law leaves the defence an option to decide whether the prisoner shall be examined at the hearing or not. French law and most Continental legal systems have, on the other hand, made the examination of the prisoner one of the main phases of the criminal trial.[8] There is no "plea of guilty"; the judicial confession of the accused does not ipso facto lead to conviction. In the search for the truth in which the tribunal is engaged, the prisoner is regarded as the person who should, in the first place, contribute his knowledge to the enlightenment of the court. Where the prisoner's guilt is obvious, "some trouble may even be taken to procure a confession" [9] since it will fully reassure the conscience of the court,[10] but the maxim *confessus pro judicato habetur* has no application in France and a confession does not free the prosecutor from the duty of proving the existence of the offence and the guilt of the prisoner.[11]

The examination of the accused at the trial is provided by the French Code d'Instruction Criminelle only for proceedings before the "Tribunal de police" (article 190), but either by virtue of article 319, which gives a general right to demand from the

[7] Cp. *R.* v. *Kelson* (1909), 3 Cr. App. R. 230.

[8] There is a widespread popular view that the so-called "presumption of innocence" covering the prisoner is an institution peculiar to Anglo-American law, essential for the protection of the prisoner, yet unknown on the Continent. This view is, however, incorrect. The so-called "presumption of innocence" is not what is usually termed a presumption of law, inverting the incidence of the burden of proof. Since criminal proceedings are instituted by the prosecution and since the charge or indictment contains allegations against the prisoner, the burden of proof must in every country necessarily fall upon the prosecution. (Cp. Lord Wright's judgment in *Joseph Constantine Line* v. *Imperial Smelting Corporation* (1941), 110 L.J.K.B. 433, in which he explained that the so-called presumption of innocence is only a way of expressing the fact that the burden of proving the fact falls upon the party who alleges it.) This principle is as fundamental in Continental criminal proceedings as it is in England and in the United States (Ploscowe: The Development of Present-Day Criminal Procedures in Europe and America, in (1935), 48 Harv. L. Rev. 433). "The accused", says Donnedieu-Vabres (Traité Elementaire de droit criminelle, Paris 1938, p. 716), "is covered by a presumption of innocence which is a guarantee of individual liberty. The presumption benefits the habitual criminal as well as the first offender". In German law the whole burden of proof in a criminal trial devolved upon the prosecution, since in every case the *non liquet* operates in favour of the accused, and a verdict of not guilty must be returned if the evidence adduced by the prosecution has not convinced the court (Dohna: Strafprozessrecht, Berlin 1929; Gerland: Der deutsche Strafprozess, Mannheim 1927).

[9] Donnedieu-Vabres, *ubi supra*, p. 732.

[10] R. de la Grasserie: L'Aveu, in 4 Rivista di Diritto penale e Sociologia criminale.

[11] Garraud: Traité théorique et pratique d'Instruction Criminelle (Paris 1907-1929), Vol. I, p. 488.

prisoner "all information which is necessary for the discovery of the truth", or by simple usage arising out of the president's discretionary powers[12] the examination of the prisoner has become the constant practice of the assize courts also where the more serious offences are dealt with. The examination of the accused is regarded in France as a "moyen d'instruction" as well as a "moyen de defense"; his evidence may be used by the prosecution as well as the defence.[13] According to the Code, the examination of the prisoner is to take place after the examination of the witnesses for the prosecution, but in fact the "interrogatoire" often follows immediately upon the reading of the indictment (acte d'accusation) by the clerk of the court (greffier),[14] that is before any evidence has been introduced by the prosecution. The judge, or at the assizes the president of the court, who has before him all the relevant information collected in the preliminary investigations, addresses the questions to the prisoner and asks him for precise explanations of his actions, so far as they form part of the offence charged. It is considered essential for the maintenance of a fair balance in the proceedings that the examination should be conducted only by the judge. Counsel for the defence are not at all, and the public prosecutor only in exceptional circumstances, permitted to address questions direct to the accused, although to allow the latter to do so is strictly speaking legal (*e.g.*, Cour Cass. 13-5-1836). It becomes thus the duty of the judge to put to the accused such questions as are calculated to provoke a justification or a confession, and though he is supposed to, and will generally, undertake this task in a spirit of neutrality, he necessarily acquires the character of an inquisitor rather than of an impartial umpire.

The position occupied by the prisoner in examination is quite different from that of a witness. In the first place, he is never sworn and cannot be punished for any false statements which he may have made. In addition, the accused possesses in French law a well-recognized right to refuse to answer any or all questions put to him; his attention is drawn to this right and the employment of any means of coercion in order to induce him to answer is unlawful.[15] It is in theory well-recognized that if the right of the prisoner to remain silent is to have any meaning, his silence

---

[12] Donnedieu-Vabres: La justice pénale d'aujourd'hui (Paris 1929).

[13] Helie-Depeiges: Pratique Criminelle des Cours et Tribunaux (Paris 1928), Vol. I, p. 403.

[14] Helie-Depeiges, *ubi supra*, Vol. I, p. 402.

[15] Garraud, *ubi supra*, Vol. II, p. 230.

must not be construed or regarded as a confession of guilt.[16] In the absence from the Code, however, of any positive safeguard in this respect, the prosecution usually makes the most of the prisoner's refusal to speak, which in the circumstances of the trial becomes anyway a very obvious and extraordinary fact. Complete silence is often denounced as "rebellion envers la justice".[17] For this reason, the right to refuse to give any evidence at all is rarely exercised in France, though particular questions are often evaded or left unanswered and this is a recognized exercise of the prerogative of the defence.

The Code d'Instruction Criminelle embodied ideas which were completely new in many respects and set at that time an example for most European countries. Even today, its influence is still felt in the Italian Codice di Procedura Penale of 1930, which regulates the examination of the accused in articles 441 ff., very similarly to the French practice. Article 441^{II} says:

> . . . the judge explains to the accused the offence with which he is charged and its circumstances and invites him to state his justification and anything else he considers useful for his defence. If the accused refuses to reply, this fact is mentioned in the report of the proceedings and the hearing continues.

and article 443 provides:

> In the course of the hearing, the accused is entitled to make any statements which he considers useful, provided they refer to his own defence.

It is clear from article 441^{II} that no compulsion will be used to make the accused answer any or all questions, but there is no provision for telling him of his right to refuse to answer.[18] In fact, such a warning was sternly rejected by at least one of the authors of the Code, who called it "strange and contradictory".[19]

---

16 Vidal Magnol, p. 890.

17 Helie-Depeiges, *ubi supra*, Vol. I, p. 403.

18 M. Ploscowe: The Judge d'Instruction in European Criminal Procedure, in 33 Michigan Law Review, at pp. 1024-5.

19 In Germany, according to §§ 243, 257, 163 Code of Criminal Procedure, the prisoner must be "given occasion" to speak; he is to be asked whether he "wishes" to make a statement. He has, accordingly, a right to remain silent and if he refuses to give any evidence, his examination "is to be dropped" (Gerland, *ubi supra*, 237; E. Beling, Lehrbuch des Deutschen Reichs-Strafprozessrechts, Breslau 1900). Moreover, according to § 343 Criminal Code, it is a criminal offence to use any compulsion in order to extort from a prisoner a confession or other testimony. In practice, nonetheless, the prisoner is usually subjected to a series of questions by the judge and his examination may take a form which is very similiar to that which can be observed in French courts, with the important qualification that his attention is not expressly drawn to his right to refuse to give evidence; moreover, it has been said that judges have sometimes gone so far as to regard "obstinate silence" as a circumstance aggravating the offence (G. Gonell: Die Stellung des Verteidigers im modernen Strafprozess, Goettingen 1936, p. 55).

The writer is not aware that any existing legal system places the prisoner under a strict obligation to give evidence against himself at his trial. It is believed that even in Soviet Russia, where the prisoner is not on the whole granted particularly considerate treatment, the right to refuse to give evidence is implied in article 136 of the Code of Criminal Procedure of 1927.[20]

It requires in fact no argument to show that both the first and the last of the four possible methods for dealing with the problem of the testimony of the accused are unsatisfactory and unacceptable in a modern court that wishes to be fair to the prisoner. The proper solution must undoubtedly lie between the two extremes of compulsory abstention and extorted testimony. There remains still the question whether the English system, which (in theory at least) grants the prisoner an option to decide whether he wishes to speak or not, or the French system which (in theory at least) grants him a right to remain silent, are likely to produce better and fairer results in practice. But, so put, the question resolves itself, since it discloses no essential difference at all. The contrast, in fact, lies in the safeguards which each system has adopted to ensure to the prisoner the free choice of his attitude. If, in this respect, English law appears superior, it does not necessarily follow that it gives greater protection to an innocent person who by misfortune finds himself in the dock. The amount of protection that the prisoner enjoys depends to a large extent on the way in which the existing rules are being worked in practice and on the attitude that governs those responsible for their working. Both systems can be worked fairly, but both give occasion for abuse.

The Anglo-American system has been criticised both at home and abroad. It has often been argued against it that the option of testifying is only an apparent option. If the prisoner exercises his supposed privilege and refuses to be subjected to a gruelling cross-examination under oath, there is, even in the absence of any comment, a "probability, if not a certainty"[21] that the jury will be unfavourably affected. The opinion is widespread both in England and the United States that the accused, if innocent, has every inducement to state the facts which would exonerate him. "The truth", it is said, "would be his protection; there can

---

[20] Under Fascism, lawyers in Germany and Italy have gone so far as to demand that a comprehensive duty to speak should replace the right to silence which the prisoner possesses under the Codes of Criminal Procedure in both countries.

[21] Best: Evidence (12th ed.), p. 542.

be no reason why he should withhold it".[22] According to Professor Wigmore,[23] the vast majority of accused persons who do not avail themselves of the opportunity to testify are convicted. We must not confuse cause with effect, but in any case there is no doubt that the prisoner (or more often his counsel) is placed in a dilemma from which it is difficult to escape: to be silent and thus to prejudice his case, or to speak and eventually be subjected to questions from an avowedly hostile cross-examiner, an experience which requires good nerves even in an unembarrassed and unconcerned outsider.

Assuming then that the option is today not a true option at all, and that a man accused of a criminal offence must sooner or later tell what he knows, it is difficult to escape the conclusion that some of the features of the French system have an attraction. Bentham objected to the examination of a prisoner on his oath because it subjected him "to a temptation under which it is not possible that he should not sink".[24] In fact, the oath which accompanies testimony is valuable only where it is a free oath; the prisoner, however, knows that his life or freedom may depend directly on what he says. The rule that requires the prisoner to swear the oath before he can be examined is a direct result of the failure to distinguish his position in the witness-box from that of a witness proper, a failure of which his mis-description as "a competent, but not a compellable witness for the defence" is typical.

As a French lawyer, François Gorphe,[25] has pointed out, the prisoner ought to be regarded not as a witness, but as a prisoner, that is to say as a man against whom serious charges have been preferred; his declarations, answers and statements ought to be considered as the statements of an interested person who defends himself, perhaps his life. Since the oath would, if he is guilty, put him between his conscience and his interest, his sworn evidence will not be regarded as free from suspicion if he is innocent. The evidence of a prisoner should never be taken on oath, even where, as in present Anglo-American procedure, it is, strictly speaking, facultative.

Like the oath, the cross-examination of the prisoner by the prosecution is a necessary result of his position as witness and of the proposition that the truthfulness and veracity of his evidence

---

[22] Storey: The Reform of Legal Procedure (Yale 1911).
[23] Supplement to a Treatise on Evidence (2nd ed. 1923), § 2251.
[24] Rationale of Judicial Evidence (London 1827), Book II, Ch. 6, p. 392.
[25] In a report to the Third International Law Congress at Palermo in 1933, where this topic was discussed.

can be tested by the same safeguards as those of other witnesses. This proposition may also be unsound, but in the absence of other tests the contradictory examination by counsel for defence and prosecution cannot so easily be pronounced unsatisfactory. Experience in France, where the accused is examined by the judge, and where neither prosecution nor defence possess a right to put questions directly, has not been very happy. Frequently the judge, whose strict duty in the "interrogatoire de l'accusé à l'audience" does not go further than to elucidate the facts upon which the prisoner bases his "system of defence" — an all important phrase in French courts and significant — falls to the temptation of siding with the prosecution, and thus disturbs the equilibrium between defence and prosecution to the prejudice of the prisoner.[26] There may arise that deplorable cat and mouse fight between an instructed and clever judge and an ignorant and dumb-founded prisoner, which was described by Masmonteil:[27]

> Between the judge and the accused, there develops a veritable duel in which the judge fights with skill and dexterity to induce his adversary to drop his guard, scoring hits and inviting him to a thrust, often changing his line of approach, deceiving him by a feint in order to distract his attention, to make him fall into a trap, until he has completely bewildered and confused the prisoner's defence and induced the unfortunate victim, routed and driven half-mad, tired of the combat, to confess his guilt despite himself.

But this is a description of what happened at the examination of a prisoner over one hundred and fifty years ago, and there is no doubt that at French assizes today the jury would resent an "interrogatoire" taking such a course. All the leading French textbooks[28] are firmly against abolition of this form of examination of the accused and in fact it seems likely that such abuses as still occur in practice are due not so much to the system as to the attitude taken by some members of the bench in the exercise of their function. Although far from proposing that such a solution would be valuable in English courts, I am inclined to agree with Garraud[29] that the examination of the accused by the judge may present a natural and fair method provided it is conducted in a spirit of impartial calm and justice.

[26] Cuche: Précis de Droit Criminel (Paris 1934); J. Cuppi: La Cour d'Assizes (Paris 1898).

[27] E. Masmonteil: La Législation Criminelle dans l'ouvre de Voltaire (Paris 1901).

[28] Vidal Magnon, p. 889; Helie-Depeiges, *ubi supra*, I, pp. 617-8; Donnedieu-Vabres, Traité, p. 733.

[29] *Ubi supra*, II, p. 216.