

"The Right of Silence"

A. Introduction

Criminal Justice and Public Order Act 1994.

B. Paper

1. Common Law

- 'right to silence' safeguards:

(1) no general duty to assist the police (*Rice v Connolly* [1966] 2 QB 414):

(2) no adverse inferences from silence during the investigation or at trial:

(3) the accused is not a compellable witness at trial.

2. Statutory encroachment

- sections 34-38 *Criminal Justice and Public Order Act 1994*:

- The court is under an obligation to ensure that the jury are properly directed regarding the inferences which can be drawn (*Condon v UK* (2001) 31 EHRR 1).
- In *Condon v UK*, the European Court of Human Rights accepted that the right to silence could not of itself prevent the accused's silence, in cases which clearly call for an explanation by him, being taken into account in assessing the persuasiveness of the prosecution evidence, but also stressed that a fair procedure (under Article 6) required 'particular caution' on the part of a domestic court before invoking the accused's silence against him.

3. Financial investigations

- See Section 59 of the YJCEA 1999, s. 59 and sch. 3, respond to the decision in *Saunders v UK* (1996) 23 EHRR 313; by restricting the use which can be made of evidence obtained under compulsion under a variety of statutory provisions including section 434 of the *Companies Act 1985*.

4. European Convention of Human Rights

right to remain silent during police questioning.

In *John Murray v UK* (1996) 22 EHRR 29, the European Court held (at [20]):

" ... 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."

But it does mean that the introduction into evidence in a criminal trial for the purpose of incriminating the accused of transcripts of statements made under compulsion (e.g. to non-prosecutorial inspectors) will breach Article 6 (*Saunders v UK* (1996) 23 EHRR 313, also *Shannon v UK* (2005) Appln. 6563/03).

5. Mischief

- avoid positive defence following a 'no comment' interview and the 'ambush' defence.

Section 34 of the CJPO 1994¹ addresses this problem:

s. 34:

- (1) Where, in any proceedings against a person for an offence, evidence is given that the accused:
 - (a) at any time before he was charged with the offence, on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or
 - (b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact,
 - (c) at any time after being charged with the offence, on being questioned under section 22 of the *CounterTerrorism Act 2008* (post-charge questioning), failed to mention any such fact,

being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, subsection (2) below applies.

(2) Where this subsection applies:

- (a) a magistrates' court, in deciding whether to grant an application for dismissal made by the accused under section 6 of the *Magistrates' Courts Act 1980* (application for dismissal of charge in course of proceedings with a view to transfer for trial);
- (b) a judge, in deciding whether to grant an application made by the accused under:

¹ It follows the recommendations of the Criminal Law Revision Committee's Eleventh Report: Evidence General (1972) Cmnd 4991, previously implemented in Northern Ireland (Criminal Evidence (Northern Ireland) Order 1988).

- (i) section 6 of the *Criminal Justice Act 1987* (application for dismissal of charge of serious fraud in respect of which notice of transfer has been given under section 4 of that Act); or
 - (ii) paragraph 5 of Schedule 6 to the *Criminal Justice Act 1991* (application for dismissal of charge of violent or sexual offence involving child in respect of which notice of transfer has been given under section 53 of that Act);
- (c) the court, in determining whether there is a case to answer; and
 - (d) the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences from the failure as appear proper.
- (2A) Where the accused was at an authorised place of detention at the time of the failure, subsections (1) and (2) above do not apply if he had not been allowed an opportunity to consult a solicitor prior to being questioned, charged or informed as mentioned in subsection (1) above.
- (3) Subject to any directions by the court, evidence tending to establish the failure may be given before or after evidence tending to establish the fact which the accused is alleged to have failed to mention.
- (4) This section applies in relation to questioning by persons (other than constables) charged with the duty of investigating offences or charging offenders as it applies in relation to questioning by constables; and in subsection (1) above 'officially informed' means informed by a constable or any such person.
- (5) This section does not:
- (a) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his presence relating to the conduct in respect of which he is charged, in so far as evidence thereof would be admissible apart from this section; or
 - (b) preclude the drawing of any inference from any such silence or other reaction of the accused which could properly be drawn apart from this section.
- (6) This section does not apply in relation to a failure to mention a fact if the failure occurred before the commencement of this section.

'Such inferences as appear proper' (s. 34(2)) from the accused's silence, provided that the various conditions in s. 34(1) are made out and any questions of fact arising there under are resolved against the accused (*Argent* [1997] 2 Cr App R 27).

Argent sets out six formal conditions:

- (1) proceedings;
- (2) before a defendant was charged;
- (3) during questioning under caution;
- (4) questioning had to be directed to trying to discover whether or by whom the offence had been committed;
- (5) failure had to be to mention any fact relied on in the person's defence; and
- (6) circumstances existing at the time of the interview, he could reasonably have been expected to mention when so questioned.

s. 34 does not apply simply because the accused has declined to answer questions.

s.34 can apply if a particular fact relied upon is not mentioned (see *Abdalla* [2007] EWCA Crim 2495)

Avoid over-complication: *Maguire* (2008) 172 JP 417

General inference of guilt: JSB direction = additional support for Prosecution case

ECHR

- article 6 compatible:

facts of each case.

terms of the judicial direction: *Condron v UK* (2001) 31 EHRR 1; *Beckles v UK* (2003) 36 EHRR 162.

follow JSB specimen direction: *Beckles v UK (Chenia)* [2003] 2 Cr App R 83).

practice developed.

failure to give direction.

see *Chenia*.

Access to legal advice.

see section 34(2A) of the *CJPO* 1994 (s.58 *YJCEA* 1999) to comply with *Murray v UK* (1996) 22 EHRR 29.

No conviction wholly or mainly on silence (s.38)

- section 34 inference cannot alone prove guilt (*Abdullah* [1999] 3 Arch News 3).
- case to meet: *Milford* [2001] Grim LR 330.
- incompatible with the right of silence: *Beckles v UK* (2003) 36 EHRR 162.
- case to answer direction: *Chenia* [2003] 2 Cr App R 83.
- jury direction: *Petkar* [2004] 1 Cr App R 270.
- weak evidential case: *Parchment* [2003] EWCA Crim 2428.

Fact Relied On

- no comment, does not give evidence= no reliance: *Moshaid* [1998] Crim LR 420.
- reliance: *Webber* [2004] 1 WLR 404.
- admission at trial is not reliance: *Betts* [2001] 2 Cr App R 257.
- no reliance proved, no inference: (*B (MT)* [2000] Crim LR 181).
- identify facts relied upon: (*Lewis* [2003] EWCA Crim 223; *Lowe* [2007] EWCA Crim 833).
- discussion with counsel: in *B* the Court of Appeal stated:

"In our view it is particularly important that judges should take this course in relation to directions as to the application of section 34. That section is a notorious minefield. Discussion with counsel will reduce the risk of mistakes."

Prepared Statements

- *R v McGarry* [1998] 3 All ER 805.
- *Knight* [2004] 1 WLR 340 and see *Tv DPP* (2007) 171 JP 605.

Caution or Charge

- No questions, no inference: *Johnson* [2005] EWCA Crim 971.
- Handing over of Prepared Statement: *Ali* [2001] EWCA Crim 863.
- Terms of caution:

"You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence."

- Questioning in Police station with recorded interview.

- Exclusion of evidence under s.78 PACE of improper questions: *Pointer* [1997] Crim LR 676; *Gayle* [1999] 2 Cr App R 130, *McGuinness* [1999] Crim LR 318; *Flynn* [2001] EWCA Crim 1633; *Elliott* [2002] EWCA Crim 931.
- Inference from silence on charge: *Dervish* [2002] 2 Cr App R 105). In that case D had the opportunity 'in a single sentence' to put the essence of his defence following charge, and the police would thereafter have been precluded from questioning him about it. Since he declined to do so, it was rightly left to the jury to decide whether an inference should be drawn.

Facts which Should Have Been Mentioned

Examine reason for no comment, whether explanation truthful: *Webber* [2004] 1 WLR 404.

No answer or none capable of withstanding questioning: *Condon* [1997] 1 WLR 827; *Betts* [2001] 2 Cr App R 257; *Daly* [2002] 2 Cr App R 201; *Petkar* [2004] 1 Cr App R 270; *Condon v UK* (2001) 31 EHRR 1, and *Beckles v UK* (2003) 36 EHRR 162.

No opportunity for Defendant to deal with matter in interview: *Hilliard* [2004] EWCA Crim 837.

Consider the accused age, experience, mental capacity, health, sobriety, tiredness and personality; non-restrictive: *Argent* [1997] 2 Cr App R 27.

Interviewer failure: *Roble* [1997] Crim LR 449.

Legal Advice to Remain Silent

Delicate issue: *Beckles* [2005] 1 WLR 2829

See *Condon* [1997] 1 WLR 827 and *Condon v UK* (2001) 31 EHRR 1: the giving of legal advice to remain silent did not of itself preclude the drawing of inferences: all depends on the view the jury takes of the reason advanced by the accused = having no answer, or none that would stand up to questioning.

Correctness of defence lawyers advice: *Argent*.

Review of the authorities: *Beckles* [2005] 1 WLR 2829 'genuine reliance by a defendant on his solicitor's advice to remain silent is not in itself enough to preclude adverse comment'. Auld LJ went on:

" The section 34 inference is concerned with flushing out innocence at an early stage, or supporting other evidence of guilt at a later stage, not simply with whether a guilty defendant is entitled, or genuinely or reasonably believes that he is entitled, to rely on legal rights of which his solicitor has advised him. Legal entitlement is one thing. An accused's reason for exercising it is another. His belief in his entitlement may be genuine, but it does not follow that his reason for exercising it is ..."

Satisfactory explanation: *Hoare* (2005) 1 WLR 1804.

Circumstances: **Howell** [2005] 1 Cr.App.R. 1

- the suspect's condition (ill-health, in particular mental disability; confusion; intoxication; shock, or his inability genuinely to recollect events without reference to documents which are not to hand, or communication with other persons who may be able to assist his recollection. 'There must always be soundly based objective reasons for silence, sufficiently cogent and telling to weigh in the balance against the clear public interest in an account being given by the suspect to the Police'

Waiver of Privilege and Statements

- Waiving privilege to offer explanation: **R v Seaton** [2011]1 AER 932.
- No waiver = little weight: **Condon** [1997] 1 WLR 827; **Robinson** [2003] EWCA Crim 2219.
- Waiver by solicitor comment in interview, giving of evidence on voir dire: **Bowden** [1999] 1 WLR 823.
- Evidential use that can be made of waiver.
- Has waiver occurred: **Ha/1-Chung** [2007] EWGA Grim 3429.
- Solicitors statement: **Fitzgerald** [1998] 4 Archbold News 2.
- Reason for withholding facts issue, no hearsay problem: **Davis** [1998] Grim LR 659.
- Solicitor conflict of interest: **Hill** [2003] EWGA Crim 1179.

Judicial direction as to permissible inferences

- late invention/fabrication and unwilling to expose account to scrutiny: **Milford** [2001] Grim LR 330).
- something less severe, direct so: **Petkar** [2004] 1 Gr App R 270.

Direction where s. 34 applicable

- No reliance by Prosecution, trial Judge consider whether s.34 direction necessary: **Khan** [1999] 2 Archbold News 2.
- Raise with Defence counsel.
- JSB Specimen Direction provides useful guidance: **Salami** [2003] EWCA Grim 3831.
- 5.34 direction and lies Lucas direction: **Turner**[2004J 1 AllER 1025.

Direction where s.34 not applicable to accused's silence

- No s.34 inference but direct jury: McGary [1999] 1 WLR 1500.
- Counterweight not fatal: *La Rose* [2003] EWCA Crim 1471.
- McGary direction maybe problematic: *Thomas* [2002] EWCA Crim 2861; *Jama* [2008] EWCA Crim 2861.

Silence at trial

Failure to Testify (s.35 CJPOA 1994)

- careful direction to ensure fair trial: (*Birchall* [1999] Crim LR 311).
- Section 35 *Criminal Justice and Public Order Act 1994*:
 - (1) At the trial of any person for an offence, subsections (2) and (3) below apply unless:
 - (a) the accused's guilt is not in issue; or
 - (b) it appears to the court that the physical or mental condition of the accused makes it undesirable for him to give evidence;but subsection (2) below does not apply if, at the conclusion of the evidence for the prosecution, his legal representative informs the court that the accused will give evidence or, where he is unrepresented, the court ascertains from him that he will give evidence.
 - (2) Where this subsection applies, the court shall, at the conclusion of the evidence for the prosecution, satisfy itself (in the case of proceedings on indictment, in the presence of the jury) that the accused is aware that the stage has been reached at which evidence can be given for the defence and that he can, if he wishes, give evidence and that, if he chooses not to give evidence, or having been sworn, without good cause refuses to answer any question, it will be permissible for the court or jury to draw such inferences as appear proper from his failure to give evidence or his refusal, without good cause, to answer any question.
 - (3) Where this subsection applies, the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences as appear proper from the failure of the accused to give evidence or his refusal, without good cause, to answer any question.
 - (4) This section does not render the accused compellable to give evidence on his own behalf, and he shall accordingly not be guilty of contempt of court by reason of a failure to do so.
 - (5) For the purposes of this section a person who, having been sworn, refuses to answer any question shall be taken to do so without good cause unless:

- (a) he is entitled to refuse to answer the question by virtue of any enactment, whenever passed or made, or on the ground of privilege; or
 - (b) the court in the exercise of its general discretion excuses him from answering it
- (7) This section applies:
- (a) in relation to proceedings on indictment for an offence, only if the person charged with the offence is arraigned on or after the commencement of this section;
 - (b) in relation to proceedings in a magistrates' court, only if the time when the court begins to receive evidence in the proceedings falls after the commencement of this section.

Consolidated Criminal Practice Direction, para. IV.44

IV.44.1 At the conclusion of the evidence for the prosecution, section 35(2) of the Criminal Justice and *Public Order Act 1994* requires the court to satisfy itself that the accused is aware that the stage has been reached at which evidence can be given for the defence and that he can, if he wishes, give evidence and that, if he chooses not to give evidence or, having been sworn, without good cause refuses to answer any question, it will be permissible for the jury to draw such inferences as appear proper from his failure to give evidence of his refusal, without good cause, to answer any question.

If the accused is legally represented

IV.44.2 Section 35(1) provides that section 35(2) does not apply if at the conclusion of the evidence for the prosecution the accused's legal representative informs the court that the accused will give evidence. This should be done in the presence of the jury. If the representative indicates that the accused will give evidence, the case should proceed in the usual way.

IV.44.3 If the court is not so informed, or if the court is informed that the accused does not intend to give evidence, the judge should in the presence of the jury inquire of the representative in these terms:

'Have you advised your client that the stage has now been reached at which he may give evidence and, if he chooses not to do so or, having been sworn, without good cause refuses to answer any question, the jury may draw such inferences as appear proper from his failure to do so?'

IV.44.4 If the representative replies to the judge that the accused has been so advised, then the case shall proceed. If counsel replies that the accused has not been so advised then the judge shall direct the representative to advise his client of the consequences set out in paragraph 44.3 and should adjourn briefly for this purpose before proceeding further.

If the accused is not legally represented.

IV.44.5 If the accused is not represented, the judge shall at the conclusion of the evidence for the prosecution and in the presence of the jury say to the accused:

'You have heard the evidence against you. Now is the time for you to make your defence. You may give evidence on oath, and be cross-examined like any other witness. If you do not give evidence or, having been sworn, without good cause refuse to answer any question the jury may draw such inferences as appear proper. That means they may hold it against you. You may also call any witness or witnesses whom you have arranged to attend court. Afterwards you may also, if you wish, address the jury by arguing your case from the dock. But you cannot at that stage give evidence. Do you now intend to give evidence?'

The court's obligation in s. 35(2) to satisfy itself that the accused knows that he can, if he wishes, give evidence is mandatory and cannot be overlooked even where the accused has, by absconding, put himself beyond the reach of the warning (*Gough* [2002] 2 Cr App R 121).

Good practice to record and sign decision not to give evidence: *Bevan* (1994) 98 Cr App R 354 and *Chatroodi* [2001] EWCA Crim 585.

'Proper' Inferences of Guilt

- inference if no good cause to answer questions.
- physical or mental condition.
- judge remind accused that proper questions should be answered: *Ackinclose* [1996] Crim LR 747.

Accused with Physical or Mental Limitations

- Mental age/IQ: *Friend* [1997] 1 WLR 1433.
- Self-harm and post-traumatic stress disorder: *Tabbakh* [2009] EWCA Crim 464.

Case to answer

- Prosecution case must be strong enough to require an answer: *DPP v Kavanagh* [2006] Crim LR 370.

Nature of Inference under s.35

- Guilty of the offence: *Murray v DPP* [1994] 1 WLR 1.
- Proper inference Lord Slynn said (at p. 11):

"If there is no prima facie case shown by the prosecution there is no case to answer. Equally, if parts of the prosecution case had so little evidential value that they called for no answer, a failure to deal with those specific matters cannot justify an inference of guilt."

On the other hand, if aspects of the evidence taken alone or in combination with other facts clearly call for an explanation which the accused ought to be in a position to give, if an explanation exists, then a failure to give any explanation may as a matter of common sense allow the drawing of an inference that there is no explanation and that the accused is guilty."

No Conviction Solely: on Inference from s.35

- From section 38 (3).
- Prima facie case: *Cowan* [1996] QB 373.
- Failure to remind jury of need for prima facie case: *Bromfield* [2002] EWCA Crim 195 and *Whitehead* [2006] EWCA Crim 1486

No Inference where Prosecution Case is Weak

- Prosecution case of "little evidential value", no inference: *Murray v DPP* [1994] 1 WLR1.
- *Phillips v Mu/caire* [2012] EWCA CIV 48.

Colin Wells

25 Bedford Row
London WC1R 4HD

May 2013