

TO SPEAK OR NOT TO SPEAK?

Adverse Inferences-A practical guide.

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Before a decision can be made about s34 CJPOA 1994 and adverse inferences, six pre-conditions must apply. They are set out in the case of:

R v ARGENT (1997) 2 Cr App R 27 : (1997) Crim LR 346 : Times, December 19, 1996

1. There must be proceedings against a person for an offence;
2. The alleged failure must occur before a defendant is charged;
3. The alleged failure must occur during questioning under caution by a constable;
4. The constable's questioning must be directed to trying to discover whether or by whom the alleged offence had been committed;
5. The alleged failure by the defendant must be to mention any fact relied on in his defence in those proceedings;
6. The appellant failed to mention a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned.

CRIMINAL JUSTICE AND PUBLIC ORDER ACT 1994

34. Effect of accused's failure to mention facts when questioned or charged

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,

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 [1980 c. 43.] 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

i) section 6 of the [1987 c. 38.] 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 [1991 c. 53.] 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.

- 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.
- 7) In relation to any time before the commencement of section 44 of this Act, this section shall have effect as if the reference in subsection (2)(a) to the grant of an application

for dismissal was a reference to the committal of the accused for trial.

POLICE AND CRIMINAL EVIDENCE ACT 1984

78. Exclusion of unfair evidence.

- 1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.
- 2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence.

Let us look at the section together:

“at any time before he was charged with the offence”

“on being questioned under caution by a constable”

The section does not apply to a suspect who refuses to leave his cell to be questioned and as a result was not asked any questions.

See R v Johnson 2006 Crim LR 253

Note that the position would be different if the police asked the suspect questions at or in his cell.

Nor does it apply to a Defendant who remains “asleep” in his cell and does not come for

interview. R v Johnson and Hind [2005] EWCA Crim 971

“trying to discover whether or by whom the offence had been committed”

If the police have sufficient evidence to charge but continue to question an adverse inference should not be drawn. R v Gayle CA Crim Div 17 2 98

R v Pointer Rose L.J. said:

“It would drive a coach and horses through the provisions of the code if it were open to an officer, without complying with the code provisions, to ask a defendant whether he wanted to say anything about the circumstances of an offence in relation to which the officer was satisfied that he already had a powerful case. If, in such circumstances, a suspected person made an admission, the first thing which would be said on his behalf, as it seems to this Court, would be that there had been a breach of the code in relation to interviews. ...it was recorded on the custody record prior to interview that the solicitor submitted that there was sufficient evidence to charge and that therefore there was a duty to charge him without delay and thus any further question was out of order.”

“failed to mention any fact relied on in his defence in those proceedings”

R v Webber [2004] 1 Cr. App. R. 40 HL

Per Lord Bingham C.J.:

“33. Since the object of section 34 is to bring the law back into line with common sense, we think it clear that “fact” should be given a broad and not a narrow or pedantic meaning.

The word covers any alleged fact which is in issue and is put forward as part of the defence case: if the defendant advances at trial any pure fact or exculpatory explanation or account which, if it were true, he could reasonably have been expected to advance earlier, section 34 is potentially applicable. When directing the jury in this case the trial judge made repeated reference to "fact or matter", which is consistent with the reference to "something" in the caution and in our view expresses the meaning of the subsection.

34. We consider that a defendant relies on a fact or matter in his defence not only when he gives or adduces evidence of it but also when counsel, acting on his instructions, puts a specific and positive case to prosecution witnesses, as opposed to asking questions intended to probe or test the prosecution case. This is so whether or not the prosecution witness accepts the suggestion put. Two considerations in particular lead us to that conclusion:

39. We would answer the certified question by saying that a positive suggestion put to a witness by or on behalf of a defendant may amount to a fact relied on in his defence for the purpose of section 34 of the Criminal Justice and Public Order Act 1994 even if that suggestion is not accepted by the witness. We would dismiss the appeal."

Therefore:

- A Defendant who does not call evidence or put a positive case does not rely on any fact for s34. R v Moshaid and Mahmood (1998) Crim LR 420
- A Defendant will be taken to rely on a fact if it is asserted by his advocate.

- Adopting in closing submissions a co-Defendant's account can amount to a fact.
- It does not apply if a Defendant did not know a fact at the time he was questioned.
- Facts not in issue cannot give rise to adverse inferences.
- Fact should be given a wide and not a narrow pedantic meaning.

R v Wheeler [2008] EWCA Crim. 688

If facts are not in dispute no adverse inference arises as a result of a failure to mention them.

R v Johnson [2005] EWCA Crim 3540

An account when initially detained is sufficient to rebut the adverse inference.

“on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact”

Consideration can be made to the drawing of an adverse inference at the charging stage but this rarely adds to a jury's deliberation unless there has been a significant delay between charge and interview.

“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”

Per Lord Bingham C.J. in R v Argent [1997] 2 Cr. App. R. 27

“The courts should not construe the expression “in the circumstances” restrictively: matters such as time of day, the defendant’s age, experience, mental capacity, state of health, sobriety, tiredness, knowledge, personality and legal advice are all part of the relevant circumstances; and those are only examples of things which may be relevant. When reference is made to “the accused” attention is directed not to some hypothetical, reasonable accused of ordinary phlegm and fortitude but to the actual accused with such qualities, apprehensions, knowledge and advice as he is shown to have had at the time.”

R v Nickolson 97/3647/Z4

A defendant cannot be criticized for not giving an account in respect of forensic evidence not known to him at the time of interview.

Legal Advice

Section 58 Youth Justice and Criminal Evidence Act 1999 amends section 34 to prohibit the drawing of adverse inferences where a suspect has not had the opportunity to consult a solicitor.

Per Lord Bingham C.J. in R v Argent [1997] 2 Cr. App. R. 27

“...under section 34, the jury is not concerned with the correctness of the solicitor's advice, nor with whether it complies with the Law Society guidelines, but with the reasonableness of the appellant's conduct in all the circumstances which the jury have found to exist. One of those circumstances, and a very relevant one, is the advice given to a defendant.”

The direction to a jury where legal advice to remain silent has been given should be given in very careful and measured terms.

The JSB direction on adverse inferences following legal advice to remain silent has been carefully worded following the cases of Condron v UK and Averill V UK.

The Court of Appeal reviewed the authorities in the case of R v Hoare and Pierce [2005] 1 Cr. App. R. 22 to confirm that reliance on Solicitors' advice by itself is not sufficient to avoid an adverse inference.

In R v Beckles [2005] 1 Cr. App. R. 23 CA Lord Woolf C.J. said

“In our judgment, in a case where a solicitor's advice is relied upon by the defendant, the ultimate question for the jury remains under section 34 whether the facts relied on at the trial were facts which the defendant could reasonably have been expected to mention at interview. If they were not, that is the end of the matter. If the jury consider that the defendant genuinely relied on the advice, that is not necessarily the end of the matter. It may still not have been reasonable for him to rely on the advice, or the advice may not have been the true explanation for his silence.”

R v Roble [1997] Crim. L.R. 449

“What is crucial, as was pointed out in R v. Argent (unapproved transcript of the Court of Appeal dated 16th December, page 14) is not the correctness of the solicitor's advice, but the reasonableness of the appellant's conduct in all the circumstances which the jury found to exist, including the giving of that advice.

We respectfully agree with what was said in Condron, that legal professional privilege is not waived merely by evidence from the accused, whether on the voire dire or before the jury, that he had been advised not to answer questions in interview. But, in itself, such advice is not likely to be regarded as a sufficient reason for not mentioning facts relevant to the defence. The evidence must generally go further and indicate the reason for that advice, for this must be relevant when the jury are assessing the reasonableness of the conduct in remaining silent. Good reason may well arise if, for example, the interviewing officer has disclosed to the solicitor little or nothing of the nature of the case against the defendant, so that the solicitor cannot usefully advise his client or, where the nature of the offence, or the material in the hands of the police is so complex, or relates to matters so long ago, that no sensible immediate response is feasible. Such considerations do not arise in the present case. If, as will generally be necessary if no adverse inference is to be capable of being drawn, the reason for the advice to remain silent is given, this in turn is likely to amount to a waiver of privilege. If a solicitor is called, it may be appropriate to ask him what his reasons were and, when this is explored, disclosure of what the defendant said to his solicitor at the time may well become inevitable. In the present case, the solicitor, on the voire dire, was extremely guarded in her evidence, in what she said about what the defendant had said to her.”

Privilege

If a Defendant indicates the advice given to him by a Solicitor this may not involve a question of hearsay. A waiver of privilege will be involved if the Solicitor or Defendant chooses to give an explanation for the advice (bear in mind the reasonableness of the advice is not relevant-just the reason for the reliance upon it).

If a Solicitor chooses in the presence and hearing of his client to say something for the record as to why his client is remaining silent that is admissible. R v Fitzgerald [1998] Arch News 2 CA

If to avoid an adverse inference a Defendant says that his Solicitor advised him to remain silent as there was a conflict with a co-Defendant whom the solicitor was also acting for the proper way forward is to waive privilege, R v Hill [2003] 5 Arch News 2

If a full account is given to a solicitor but the solicitor advises that there should be a no comment interview the Solicitor should expect to attend and give evidence at trial. Failure to do so will mean that the Court gives far less weight to the account R v Daniel (1998)

Case to answer

There must be a case to answer before s34 bites

R v Birchall 96/2301/W5 Court of Appeal

Lies and s34

If a case involves a Defendant departing from his original account in interview and giving a different version of events then a lies direction is probably the most accurate direction to

give. R V Rana [2007] EWCA Crim 2261

R v Glen Maguire [2008] EWCA Crim 1028 is a similar case.

Prosecutors and s34

R v Michael Brizzalari (2004) [2004] EWCA Crim 310

“57. We would, however, seek to add an observation discouraging prosecutors from too readily seeking to activate the provisions of section 34. We acknowledge the weight juries will give to being directed as to adverse inferences. We appreciate the difficulties that can be caused to the prosecution if no reliance is placed on section 34 and this is clearly illustrated in the Opinion of the House of Lords (paragraphs 16 and 17) in the case of R v Webber [2004] UKHL 1. Nevertheless, the mischief at which the provision was primarily directed was the positive defence following a “no comment” interview and /or the “ambush” defence. That was not the case here. Whilst, therefore, we have held that the prosecution were entitled to take the point and, once they had done so, the judge was required to deal with it, we would counsel against the further complicating of trials and summings-up by invoking this statute unless the merits of the individual case require that that should be done. If the section is not relied on in a particular case, it may well be sensible for the judge to raise with counsel whether a direction not to draw any adverse inference is desirable or necessary (See R v McGarry [1999] 1 Cr App R 377 and R v Scott Thomas [2002] EWCA Crim 1308)”

36 Effect of accused's failure or refusal to account for objects, substances or marks

1) Where

- a) a person is arrested by a constable, and there is
 - i) on his person; or
 - ii) in or on his clothing or footwear; or
 - iii) otherwise in his possession; or
 - iv) in any place in which he is at the time of his arrest,

any object, substance or mark, or there is any mark on any such object; and

- b) that or another constable investigating the case reasonably believes that the presence of the object, substance or mark may be attributable to the participation of the person arrested in the commission of an offence specified by the constable; and
- c) the constable informs the person arrested that he so believes, and requests him to account for the presence of the object, substance or mark; and
- d) the person fails or refuses to do so,

then if, in any proceedings against the person for the offence so specified, evidence of those matters is given, 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 [1980 c. 43.] 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
 - i) section 6 of the [1987 c. 38.] 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 [1991 c. 53.] 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 or refusal as appear proper.

3) Subsections (1) and (2) above apply to the condition of clothing or footwear as they apply to a substance or mark thereon.

4) Subsections (1) and (2) above do not apply unless the accused was told in ordinary language by the constable when making the request mentioned in subsection (1)(c) above what the effect of this section would be if he failed or refused to comply with the request.

5) This section applies in relation to officers of customs and excise as it applies in relation to constables.

6) This section does not preclude the drawing of any inference from a failure or refusal of the accused to account for the presence of an object, substance or mark or from the condition of clothing or footwear which could properly be drawn apart from this section.

7) This section does not apply in relation to a failure or refusal which occurred before the commencement of this section.

8) In relation to any time before the commencement of section 44 of this Act, this section shall have effect as if the reference in subsection (2)(a) to the grant of an application

for dismissal was a reference to the committal of the accused for trial.

Differences:

- This only applies following arrest.
- The suspect must be told about the particular item and asked to account for it.
- He must be told in ordinary language
- There is no qualifying provision of reasonableness.
- It invites no comparison between the initial statement and the evidence at trial.
- The sole question is whether or not he did account for the item.

37 Effect of accused's failure or refusal to account for presence at a particular place

1) Where

- a) a person arrested by a constable was found by him at a place at or about the time the offence for which he was arrested is alleged to have been committed; and
- b) that or another constable investigating the offence reasonably believes that the presence of the person at that place and at that time may be attributable to his participation in the commission of the offence; and
- c) the constable informs the person that he so believes, and requests him to account for that presence; and
- d) the person fails or refuses to do so,

then if, in any proceedings against the person for the offence, evidence of those matters is given, 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 [1980 c. 43.] 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
 - i) section 6 of the [1987 c. 38.] 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 [1991 c. 53.] 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 or refusal as appear proper.

- 3) Subsections (1) and (2) do not apply unless the accused was told in ordinary language by the constable when making the request mentioned in subsection (1)(c) above what the effect of this section would be if he failed or refused to comply with the request.
- 4) This section applies in relation to officers of customs and excise as it applies in relation to constables.
- 5) This section does not preclude the drawing of any inference from a failure or refusal of the accused to account for his presence at a place which could properly be drawn apart from this section.

- 6) This section does not apply in relation to a failure or refusal which occurred before the commencement of this section.
- 7) In relation to any time before the commencement of section 44 of this Act, this section shall have effect as if the reference in subsection (2)(a) to the grant of an application for dismissal was a reference to the committal of the accused for trial.