

The Right to Silence (with no repercussions)

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"It is totally wrong to submit that a defendant should be prevented from lying by being presented with the whole of the evidence against him prior to the interview."

The above statement was made by a Judge during a Trial relating to attempted robbery. On Appeal, the Court¹ completely agreed with his view. The brief facts are as follows.

The Police, in an unrelated investigation, stationed a camera looking out onto the Warwick Road, Birmingham. One point in view is a shop. A car driven by one of the Appellants (I) and containing three others is seen to arrive. The car stopped and all four were seen to get out and go to some shrubbery across the way from the shop where weapons were collected. One of the four ran into the shop. He was wearing a balaclava and holding a machete. Another followed with a knife and stood by the door. Both of these men would plead guilty in due course. H then rushed into the shop and shortly afterwards all three ran towards the car which had been moved by I. The car was reversed with all doors open, whereupon the other three bundled into it and tried to escape before being arrested by the watching Officers. When arrested, H had a balaclava in his hand and in the car three pairs of clear plastic gloves were found.

It was the prosecution's case that this was a concerted plan to rob the shop; that the first man in the shop would do the robbery; the second would look out, I was to drive the car; and H would assist generally.

¹ R v Imran and Hussain [1997] Crim LR 751

However, H had somehow appreciated that the police were watching them, had rushed into the shop to warn the other two and they had attempted to make a quick get away. It was a case which received strong evidential support from the video.

The Appellant I was arrested and interviewed. He was properly cautioned. He was not told prior to the interview that the video existed. At trial his Counsel submitted that the failure to tell the Defendant about the video was unfair. The Court took the view that the rules of disclosure are very different when the Police are still investigating. The Court considered that

“...to hold that the police have to play a form of cricket under one rigorous set of rules whereas the suspect can play under no rules whatever seems to us to lack reality.”²

Half-way through the first interview, the Police mentioned a video. The Police stated that there was no copy of the video available at the time. This was incorrect. The Defendant said that he did not wish to view it. The Court took the view that whether or not the officers were being truthful in denying the presence of the copy of the video was largely irrelevant. It was open to the solicitor, had he thought it proper, to advise his client to say no more until the officers had *“vouchsafed an opportunity to consider the video if they thought it proper to do so”*.

If the Police had refused to provide for the video to be shown, and the solicitor had then advised his client to say no more, it would at the trial have been up to the learned judge to have come to a decision as to whether or not the jury should be entitled to draw any adverse inference from the defendant's silence on that point.

² Mr Justice Rougie pg 4 Imran

The Court did repeat that there is a duty on the police not actively to mislead any suspect, but went on to say that the combined provisions of s.34-38 Criminal Justice and Public Order Act 1994 did not require the Police to “*give as full a briefing as possible of disclosing all material to a legal representative before the interview with a suspect commences*”.

What is crucial, as was pointed out in R v Argent³ 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. In R v Condon⁴ it was confirmed that legal professional privilege was 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 Defendant's conduct in remaining silent.

Good Reason

In *Roble*, the Lord Justice Rose envisaged one way in which no-comment advice might be given for a good reason:

*“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.”*⁵

³ (1997) 2 Cr App R 27

⁴ (1997) 1 WLR 827

⁵ *Roble*, pg 9

The necessity for a “good reason” is somewhat curbed in the dicta from the European proceedings in Condron⁶. The European Court held that as a matter of fairness, the jury must be directed that if they were satisfied that the applicants' silence at the police interview could not sensibly be attributed to their having no answer, or none that would stand up to cross-examination, then they should not draw an adverse inference.

Sanction

The Court is not going to regard later criminal proceedings as “unfair” when an accused or his legal representative has not been told prior to interview what evidence he faces. In R v Nottle⁷, the Court made plain the risk that the Police run in not making proper disclosure.

‘...the police were not obliged to disclose every piece of evidence they had.... There are, we understand, no rules or established procedure about this [pre-interview] disclosure. The quality and quantity of disclosure will depend on the case. The officer must assess the risk of giving inadequate disclosure, namely that no adverse inferences will be drawn.’

The solicitor advising the suspect in the police station now plays a crucial role in criminal litigation. While the Police can remain virtually silent, the suspect must decide whether to give an account. The sanctions later in the process are too great to ignore for the suspect and perhaps too insignificant for the Police to concern themselves with. It is important to take clear and comprehensive instructions and to tailor the advice to all of the available information. Difficult decisions will have to be taken about what to say and what not to say. The solicitor will have to weigh up the relevance and importance of any instructions and whether or not such facts might later be relied upon at trial. In due course you will be asked “what would you do?” the decision what to say in the interview should be left to the

⁶ Times, May 9, 2000

⁷ EWCA Crim 599

client after the advice has been given.