Right to Silence

1. Common Law

The evidential rule which places a burden of proof on the prosecution that they should prove the defendant's guilt beyond reasonable doubt (Woolimington v DPP (1935) AC462) – *Woolimington* principle) is a cornerstone of criminal law in England. Such a presumption of innocence means that there is np obligation on the accused to produce evidence or to testify.

An accused person involved in a criminal investigation has traditionally been accorded a 'right to silence', sometimes termed a privilege against self-incrimination.

The right to silence provides a number of safeguards to those suspected and accused of crime. These include :

(1) that the accused is under no general duty to assist the police with their inquiries (Rice v Connolly [1966] 2 QB 414) :

(2) no adverse inferences were generally permitted to be drawn from the exercise of the right to silence either by a suspect under investigation (Hall v R (1971) 1 All ER 322) or by an accused person at his trial (section 1 (b) of the Criminal Evidence Act 1898)[1]:

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

2. Statutory encroachment

In recent times statutory provision has encroached upon the right of silence.

(a) Financial investigations

For example, a person who refuses to answer the questions of investigators examining various commercial or financial activities can incurs a penalty. In Saunders v UK (1997) 23 EHRR 313, the European Court of Human Rights held that the right to a fair trial was contravened where evidence obtained by these methods was used at trial.

Section 59 of the Youth Justice and Criminal Evidence Act 1999 and sch. 3, respond to the decision in Saunders v UK 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. The powers

[1] The failure of any person charged with an offence to give evidence shall not be subject of any comment by the prosecution.

of investigation themselves are not affected: only the use of evidence obtained under them. The effect of the amendments to section 434 CA 1985 and other similar statutory powers is that, in criminal proceedings, the prosecution will not be able to adduce evidence, or put questions, about the accused's answers to inspectors conducting an investigation using their powers of compulsion unless the evidence is first adduced, or a question asked, by or on behalf of the accused in the proceedings.

(b) Sections 34-38 Criminal Justice Public Order Act 1994

At common law no adverse inferences against an accused who refused to answer questions during the investigation or at trial.

The common law of a suspect to remain silent during questioning continues.

However, this right has been substantially eroded by sections 34 to 38 CJPOA 1994, which specify the circumstances in which adverse inferences may be drawn from the exercise of the primary right.

The court is under an obligation to ensure that the jury are properly directed regarding the limited inferences which can be drawn (Condron v UK (2001) 31 EHRR 1). In Condron 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. European Convention of Human Rights

The ECHR recognises a 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."*

That does not mean that adverse inference cannot be drawn from silence. The fairness of drawing such inferences is a matter to be determined at trial in light of all the evidence.

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 (1997) 23 EHRR 313; see also Shannon v UK (2005) Appln. 6563/03).

The same applies where the authorities seek to compel a suspect to hand over incriminating documentation (Funke v France (1993) 16 EHRR 297).

Incriminating answers obtained by the questioning of a suspect during incommunicado detention require very close scrutiny (G v UK (1984) 34 DR 75).

Mischief

Statutory curtailment of the right of silence has been justified to **prevent "ambush" defences**. Early disclosure of the accused's defence is the objective behind section 34.

A strong argument for drawing an adverse inference from silence occurs where the accused withholds his defence under interrogation but presents it at trial when it may be too late for it to be countered.

Section 34 of the Criminal Justice Public Order 1994[2] addresses the ambush defence:

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 Counter-Terrorism 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] 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).

(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—

(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.

The **function of s. 34 is to permit the tribunal of fact (magistrates or jury) to draw '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 thereunder are resolved against the accused (Argent [1997] 2 Cr App R 27).

Argent sets out six formal conditions that have to be met

(1) There had to be proceedings against a person for an offence;
(2) The failure to answer had to occur before a defendant was charged (subject to s.34(1)(b));
(3) The failure had to occur during questioning under caution by a constable or other person within section 34(4)
(4) The questioning had to be directed to trying to discover whether or by whom the offence had been committed;
(5) The failure had to be to mention any fact relied on in the person's defence in those proceedings; and
(6) The fact the defendant failed to mention had to be one which, in the circumstances existing at the time of the interview, he could reasonably have been expected to mention when so questioned.

The provision applies only where a particular fact is advanced by the defence which is suspicious by reason of not being put forward at an early opportunity: s. 34 does not apply simply because the accused has declined to answer questions (Argent; T v DPP (2007) 171 JP 605; and see F19.7).

Section 34 is, however, capable of applying to a case in which the accused, though he discloses his defence, fails to mention a particular fact that he thereafter relies upon. In such a case there is a discretion whether to give a warning. In Abdalla [2007] EWCA Crim 2495 the accused immediately disclosed his defence of self-defence, but neglected to mention that he believed his victim was armed with a hammer. The decision of the judge to proceed in a 'low key' way without giving a warning was upheld. The court referred with approval to the statement of Hedley J in Brizzalari [2004] EWCA Crim 310 that the mischief at which s. 34 is primarily directed is 'the positive defence following a "no comment" interview and/or the "ambush" defence'.

Counsel should not complicate trials and summings-up by invoking the section unless the merits of the individual case require it. Brizzalari was approved in Maguire (2008) 172 JP 417, where the court discouraged 'anything which over-formalises common sense'.

It is now accepted that the adverse inference which may be drawn under s. 34 includes a general inference of guilt. **The current Judicial Studies Board Direction tells the jury that they may take the failure to mention the fact into account as 'some additional support' for the prosecution case**.

Decisions of the European Court of Human Rights have confirmed that the mere fact that a trial judge leaves a jury with the option of drawing an adverse inference from silence in interview is not incompatible with the requirements of a fair trial. Whether the drawing of adverse inferences infringes the ECHR, Article 6, is a matter to be determined in light of all the circumstances of the case, having regard to the situations where inferences may be drawn, the weight attached to them by the national court, and the degree of compulsion inherent in the situation. Of particular importance are the terms of the judge's direction to the jury on the drawing of adverse inferences (Condron v UK (2001) 31 EHRR 1; Beckles v UK (2003) 36 EHRR 162).

The domestic cases show that s. 34 has given rise to much more difficulty in directing the jury than s. 35 (failure to testify at trial). Although each case requires a direction tailored to its own facts, **trial judges should follow closely the Judicial Studies Board specimen direction which was accepted by the European Court of Human Rights in Beckles v UK (**2003) 36 EHRR 162 (see also Chenia [2003] 2 Cr App R 83).

Failure to give a proper direction will not, however, necessarily involve a breach of Article 6, nor render a conviction unsafe. In Chenia, the factors which persuaded the court that C had received a fair trial included the strength of the evidence, the fact that his failure to mention relevant facts was not consequent upon legal advice and the clear and accurate direction given on the failure to give evidence in the case.

In relation to access to Legal Advice, section 34(2A) of the CJPO 1994 was added by s.58 YJCEA 1999, to bring the law into line with the judgment of the European Court of Human Rights in Murray v UK (1996) 22 EHRR 29. The court considered that even the lawful exercise of a power to delay access to legal advice could, where the accused was at risk of adverse inferences under the statutory scheme, be sufficient to deprive the accused of a fair procedure under Article 6. The accused was faced with a 'fundamental dilemma' at the outset of the investigation, in that his silence might lead to adverse inferences being drawn against him, while breaking his silence might prejudice his defence without necessarily removing the possibility of inferences being drawn against him. Under the amended scheme, the dilemma is resolved by **postponing the prospect that inferences will be drawn until the accused has had the option of consulting with a legal adviser**. The postponement occurs in exactly the same way whether access to legal advice is delayed lawfully or unlawfully. An 'authorised place of detention' is defined by s. 38(2A) to include police stations and any other place prescribed by order. The caution to be given to a person to whom a restriction on drawing inferences applies is specified by PACE Code C, annex C.

No conviction wholly or mainly on silence

Section 38 Criminal Justice and Public Order Act 1994

(3) A person shall not have the proceedings against him transferred to the Crown Court for trial, have a case to answer or be convicted of an offence solely on an inference drawn from such a failure or refusal as is mentioned in section 34(2), 35(3), 36(2) or 37(2).

(4) A judge shall not refuse to grant such an application as is mentioned in section 34(2)(b), 36(2)(b) and 37(2)(b) solely on an inference drawn from such a failure as is mentioned in section 34(2), 36(2) or 37(2).

Section 38(3) applies to all four of the provisions of the 1994 Act which operate to permit the drawing of inferences from silence, and s. 38(4) to the three appertaining to out-of-court silence.

Where the issue is whether the jury should be at liberty to convict in reliance on an inference drawn under s. 34, it is essential that they be directed that **such an inference cannot standing alone prove guilt** (Abdullah [1999] 3 Arch News 3).

A more pressing question is whether the courts should go beyond the rule laid down in s. 38(3) in order to ensure that no conviction is based mainly on one or more of the statutory inferences. In Murray v UK (1996) 22 EHRR 29, there is a very strong statement that it would be incompatible with the accused's rights to base a conviction 'solely or mainly on the accused's silence or on a refusal to answer questions or to give evidence himself'; see also Condron v UK (2001) 31 EHRR 1.

The current specimen direction of the Judicial Studies Board makes reference to the need for the jury to be satisfied that there is a case to meet : Milford [2001] Crim LR 330.

In **Beckles v UK** (2003) 36 EHRR 162, the European Court of Human Rights, after considering the above authorities, confirmed that the correct principle was, as stated in Murray v UK, that **a conviction based solely or mainly on silence or a refusal to answer questions would be incompatible with the right to silence.**

In **Chenia** [2003] 2 Cr App R 83, the Court of Appeal confirmed that **a direction which omitted reference to the need to consider whether there was a case to answer is 'deficient'**, but on the facts did not consider it was fatal to a conviction where the existence of a prima facie case is beyond dispute.

Further, in **Petkar** [2004] 1 Cr App R 270, it was held that **the jury should be told in terms not to convict 'wholly or mainly' on an adverse inference,** and that the words 'or mainly' were required to 'buttress' the requirement for proof of a case to answer otherwise than by means of the inference.

In **Parchment** [2003] EWCA Crim 2428, it was said that **where the case against an accused was weak it was crucial that the limited function of the failure to mention something in interview was clearly spelled out to the jury, and accordingly the conviction of one of the accused for murder was quashed where the appropriate direction had not been given.**

<u>Fact Relied On</u>

Section 34 of the CJPO 1994 does not apply where the accused makes no attempt to put forward at trial some previously undisclosed fact (e.g., where he simply contends that the prosecution has failed to prove its case).

In **Moshaid** [1998] Crim LR 420, M, **acting on legal advice, declined to answer any questions. At trial he did not give or call any evidence. It was held that s. 34 did not bite in these circumstances**.

It goes too far, however, to suggest that s. 34 applies only where the accused gives evidence: a fact relied on may be established by a witness called by the accused, or may be elicited from a prosecution witness (Bowers [1988] Crim LR 817).

In **Webber** [2004] 1 WLR 404, where the authorities are reviewed by Lord Bingham, it was held that an **accused 'relies on' a fact or matter in his defence not only where he gives or adduces evidence of it but also where 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. The effect of specific and positive suggestions from counsel, whether or not accepted, is to plant in the jury's mind the accused's version of events. This may be so even if the witness rejects the suggestion, since the jury may mistrust the witness's evidence. **If the judge is in doubt whether counsel is merely testing the prosecution case or putting a positive case, counsel should be asked, in the absence of the jury, to make the position clear. However, the positive case ought to be apparent from the Defence Statement made in advance of trial.**

The same reasoning also led the House of Lords to conclude that the adoption by counsel of evidence given by a co-defendant may amount to reliance on the relevant facts or matters. Following Webber it has been held that the putting forward by an accused of a possible explanation for his fingerprints being on a car number plate is a 'fact' as broadly construed in that case (Esimu (2007) 171 JP 452).

In Betts [2001] 2 Cr App R 257, a bare admission at trial of a part of the prosecution case was held incapable of constituting a 'fact' for the purposes of s. 34. The alternative construction would effectively have removed the accused's right to silence by requiring him to make admissions at interview, an obligation which would have conflicted with the ECHR, Article 6.

If the prosecution fail to establish that the accused has failed to mention a fact, the jury should be directed to draw no inference (B (MT) [2000] Crim LR 181).

Where the judge directs the jury on the basis that s. 34 applies, it is important that the facts relied on should be identified in the course of the direction (Lewis [2003] EWCA Crim 223; Lowe [2007] EWCA Crim 833, in which the judge was allowed some latitude in a complex case in not having to list every fact, as distinct from the parts of the case, which were not disclosed).

The identification of the specific fact or facts is required by the Judicial Studies Board Direction, which also suggests that any proposed direction should be discussed with counsel before closing speeches.

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*."

Where the prosecution is able to identify a specific fact or fact relied upon within the meaning of s. 34, it does not necessarily follow that the point should be taken at trial: prosecutors should remember that the twin mischiefs at which the section is aimed are the positive defence following a 'no comment' interview and the 'ambush' defence. Consideration should therefore be given in other cases to whether the withholding of the fact is sufficient to justify the sanction of s. 34, given the weight juries are likely to give to being directed as to adverse inferences (Brizzalari [2004] EWCA Crim 310).

Prepared Statements

The use of prepared statements as a way of potentially avoiding adverse inferences under CJPOA 1994 is now well established (see R v McGarry [1998] 3 All ER 805).

A prepared statement may be appropriate where the accused is nervous, vulnerable, the allegations are factually complex or because Police disclosure has been limited or partial.

Where the accused at the relevant time gives a prepared statement in which certain facts are set forth, it cannot subsequently be said that he has failed to mention those facts. The aim of s. 34 of the CJPO 1994 was to encourage a suspect to disclose his factual defence, not to sanction inferences from the accused's failure to respond to questions (Knight [2004] 1 WLR 340, and see T v DPP (2007) 171 JP 605).

A prepared statement may, however, be a dangerous device for an innocent accused who later discovers that something significant has been omitted (Knight and Turner [2004] 1 All ER 1025).

In **Turner it was noted that, as inconsistencies between the prepared statement and the defence at trial do not necessarily amount to reliance on unmentioned facts, the judge must be particularly careful to pinpoint any fact that might properly be the subject of a s. 34 direction. Alternatively, the jury might more appropriately be directed to regard differences between the prepared statement and the accused's evidence as constituting a previous lie rather than as the foundation for a direction under s. 34.**

Caution or Charge

Inferences before a suspect is charged under the CJPO 1994, s. 34, may not be drawn except 'on being questioned under caution by a constable' (s. 34(1)(a)).

If no questions have been put, for example because the accused refuses to leave his cell for questioning, the section cannot apply, as the statutory language cannot be ignored (Johnson [2005] EWCA Crim 971).

It does not however follow that a fact can only be 'mentioned' in the form of an answer to a question: in Ali [2001] EWCA Crim 863, the accused handed over a prepared statement in which the relevant facts were mentioned and this was sufficient to prevent an inference, although he subsequently declined to answer questions: see also Knight [2004] 1 WLR 340. (The reference to 'constable' includes others charged with investigating offences: s. 34(4).)

The caution makes clear the risks that attend the failure to mention facts which later form part of the defence. It is set out in Code C, para. 10.5 as follows:

"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."

Minor deviations from the formula are not a breach of the code as long as the sense is preserved (para. 10.7), and an officer is permitted to paraphrase if it appears that the person with whom he is dealing does not understand what the caution means (Note for Guidance 10D).

A suspect who has been arrested should not normally be questioned about his involvement in an offence except in an interview at a police station, and it is envisaged that questioning to which s. 34 applies should occur in the course of such an interview which, being properly recorded, will then allow the court to make reliable deductions about the nature and extent of any silence.

Clearly, if the accused alleges that he did mention the relevant fact when questioned, the prosecution will have to prove the contrary before any adverse inference can be drawn.

Where it is alleged that a 'significant silence' (i.e. one which appears capable of being used in evidence against the suspect) has occurred before his arrival at a police station, then at the beginning of an interview at the station the interviewing officer should put the matter to the suspect, under caution, and ask him whether he confirms or denies that earlier silence and whether he wishes to add anything (para. 11.4). The consequence of failing to go through this procedure (which applies to evidentially significant statements as it does to silences) must be to increase significantly the likelihood that the evidence in question will be excluded under s. 78 if the suspect denies that the earlier statement was made or that the silence occurred.

Furthermore if the suspect is questioned improperly in circumstances prohibited by Code C, e.g., where sufficient evidence for the accused to be charged already exists, s. 34 should not be brought to bear on the suspect's failure to respond (Pointer [1997] Crim LR 676; Gayle [1999] 2 Cr App R 130). There is a

lack of consistency in the authorities on when there is sufficient evidence for this purpose (see McGuinness [1999] Crim LR 318; Ioannou [1999] Crim LR 586; Odeyemi [1999] Crim LR 828; Flynn [2001] EWCA Crim 1633; Elliott [2002] EWCA Crim 931), but no doubt about the principle.

The drawing of inferences from the withholding of a fact at the point of charge under s. 34(1)(b) is a distinct process from that under s. 34(1)(a). Where, therefore, no inference could be drawn from silence at interview because the interview itself had been excluded under s.78 PACE 1984, it did not follow that an inference could not be drawn from silence at the point of charge as long as there is no unfairness in doing so (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

Adverse inferences may be drawn from a fact subsequently relied on in defence only where the fact is one which, in the circumstances existing at the time, the accused could reasonably have been expected to mention (s. 34(1)).

If the accused gives evidence, his reason for failing to disclose should be explored (T v DPP (2007) 171 JP 605), and any explanation advanced by the accused for non-disclosure must be considered in deciding what inferences, if any, should be drawn (Webber [2004] 1 WLR 404, where the House of Lords considered that the jury was 'very much concerned' with the truth or otherwise of an explanation from the accused as, if they accept it as true or possibly so, no adverse inference should be drawn from his failure to mention it).

Ultimately an adverse inference is appropriate only where the jury concludes that the silence can only sensibly be attributed to the defendant's having no answer, or none that would stand up to questioning (Condron [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; Condron v UK (2001) 31 EHRR 1, and Beckles v UK (2003) 36 EHRR 162).

In Hilliard [2004] EWCA Crim 837, H's only chance to mention a fact was when a witness's statement had been read to him in interview. He had not been told that he should correct any statement with which he disagreed. It was held that it would be 'wholly unsafe' to seek to draw an adverse inference since H had never had the opportunity to deal with the matter (which was not central) even if he ought to have identified it as something that was important enough to mention.

The specific references to the accused and to the circumstances indicates that a range of factors may be relevant to what might have been expected to be forthcoming, including age, experience, mental capacity, health, sobriety, tiredness, personality and legal advice. A restrictive approach would not be appropriate (Argent [1997] 2 Cr App R 27). A court may conclude that it was reasonable for the defendant to have remained silent for a host of reasons : he was tired, ill, frightened, drunk, drugged,

unable to understand what was going on, suspicious of the police, afraid that he his answer would not be fairly recorded or worried at committing himself without legal advice. In deciding what was reasonable, a court is to consider the particular accused with such qualities, knowledge, apprehensions and advice as he was shown to have had at the time.

The failure of the interviewer to disclose relevant information when asked to do so by the accused or his legal adviser is another factor bearing upon the propriety of drawing an inference. **If little information is forthcoming a legal adviser may well counsel silence until a better assessment of the case to answer can be made (Roble** [1997] Crim LR 449).

Legal Advice to Remain Silent

The difficult issue of what use, if any, can be made of a failure to advance facts following legal advice to remain silent has been the subject of numerous decisions, both by domestic courts and Strasbourg.

In **Beckles [2005] 1 WLR 2829, Lord Woolf CJ, commented that the position in such cases is 'singularly delicate'.**

On the one hand, the courts not unreasonably seek to avoid having the accused drive a coach and horses through s. 34 by advancing an explanation for silence that is easy to make and difficult to investigate because of legal professional privilege.

On the other hand, 'it is of the greatest importance that defendants should be able to be advised by their lawyer without their having to reveal the terms of that advice if they act in accordance with that advice'.

In **Condron** [1997] 1 WLR 827, C and his wife, admitted heroin addicts, were convicted of offences relating to the supply of the drug. At interview both remained silent, on the advice of their solicitor who (despite medical advice to the contrary) considered that their drug withdrawal symptoms rendered them unfit to be interviewed. At trial, the defence relied upon detailed innocent explanations of prosecution evidence which could have been put forward at the time of interview. **It was held that 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, after having been directed in**

accordance with the formula (above) that they should consider whether the silence can only sensibly be attributed to the accused having no answer, or none that would stand up to questioning. (Such a direction was said to be 'desirable' in Condron, but the European Court of Human Rights subsequently considered that fairness required a direction to be given which left the jury in no doubt in this important matter (Condron v UK (2001) 31 EHRR 1)).

In **Argent** ([1997] 2 Cr.App.R.27**) Lord Bingham CJ noted that the jury are concerned with the correctness of the solicitor's advice, nor with whether it complies with The Law Society's guidelines, but with the reasonableness of the defendant's conduct in all the circumstances**.

In **Beckles** [2005] 1 WLR 2829, the Court of Appeal reviewed a number of post-Condron authorities, including the earlier decision of the European Court of Human Rights in Beckles itself ((2003) 36 EHRR 162). Two strands of authority, one proceeding from Betts [2001] 2 Cr App R 257, and the other from Howell [2005] 1 Cr App R 1 and Knight [2003] EWCA Crim 1977 had been regarded as in conflict, with Betts favouring a subjective test (did the accused genuinely rely on legal advice?) and Howell and Knight an objective test (did the accused reasonably rely on legal advice?).

The court in Beckles **adopted the reconciliation of the two strands proposed by Auld LJ in Hoare [2005] 1 WLR 1804, which accepts that '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:

> *"It is not the purpose of section 34 to exclude a jury from drawing an adverse inference against a defendant because he genuinely or reasonably believes that, regardless of his guilt or innocence, he is entitled to take advantage of that advice to impede the prosecution case against him. In such a case the advice is not truly the reason for not mentioning the facts. 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 …"*

In **Hoare**, the defence produced at trial for producing a Class B drug was that H believed he was involved in the secret production of a cure for cancer. H had given a 'no comment' interview following legal advice, the solicitor apparently having thought that there was insufficient disclosure of the evidence against H at that stage. Under cross-examination, H said that, while he could have given his explanation at the time, he had been stunned and surprised, had not had much sleep, and 'most people would act

on the advice of their lawyer'. The true question, however, according to Hoare, is not whether H's solicitors rightly or wrongly believed that H was not required to answer the questions, nor whether H genuinely relied on the advice in the sense that he believed he had the right to do so. **The true question is whether H remained silent 'not because of that advice but because he had no or no satisfactory explanation to give'**. See also Essa [2009] EWCA Crim 43, where the court adds the rider that in such cases the court may wish to pause and consider whether a s. 34 direction helps the jury (e.g., where the defence at trial is a simple denial of presence).

In **Howell** [2005] 1 Cr.App.R. 1 the Court of Appeal noted at paragraph 24 that :

"the **kind of circumstances which may most likely justify silence will be such matters as the suspect's condition (ill-health, in particular mental disability; confusion; intoxication; shock, and so forth – of course we are not laying down an authoritative list), 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"**

<u>Waiver of Privilege and Statements</u>

The accused who wishes to give an account of his reasons for silence following legal advice may find it hard to do so without waiving privilege.

While no waiver is involved in a bare assertion that he had been advised to remain silent, little weight in likely to attach to such an assertion unless the reasons for it are before the court (Condron [1997] 1 WLR 827; Robinson [2003] EWCA Crim 2219). **If the accused or his solicitor in his presence, elaborates on the basis of such advice, privilege is waived, at least to the extent of opening up questions which properly go to whether such basis can be the true explanation for his silence (such as, ordinarily, whether he told his solicitor of the facts now relied upon at trial)** : R v Seaton [2011]1 AER 932.

In **Bowden** [1999] 1 WLR 823 a waiver was held to have occurred where B called evidence in his defence of a statement made by his solicitor at interview, namely that he had advised B to remain silent because of the lack of evidence against him. B was held to have been properly cross-examined about the extent to which he had disclosed to the solicitor the facts that subsequently formed the basis of his defence. **Lord Bingham CJ stated, obiter, that the giving of evidence at a voir dire as to the reasons for legal**

advice for silence would operate as a waiver of privilege at trial even if the evidence was not repeated before the jury: the accused cannot 'have his cake and eat it' where privilege is concerned.

The same point is also made by the European Court of Human Rights in Condron v UK (2001) 31 EHRR 1, where it is said that there was no compulsion on C to disclose the advice given, other than the indirect compulsion to provide a convincing explanation for silence, and that because C chose to make the content of the solicitor's advice part of his defence he could not complain that the CJPO 1994 overrode the confidentiality of discussions with his legal adviser.

In Hall-Chung [2007] EWCA Crim 3429 it was held that the issue is not whether the prosecution or the defence adduces the evidence, but whether waiver has in fact occurred. The circumstances of the waiver, and how it is deployed by the Crown, may be relevant to whether it is fair to exclude evidence pursuant to section 78 PACE 1984.

Where the accused's solicitor, following a consultation with his client, makes a statement to the officers conducting the interview with regard to the accused's reasons for silence (in the presence of the accused who says nothing in dissent), the statement may be given in evidence and may form the basis of an adverse inference (Fitzgerald [1998] 4 Arch News 2). It would appear that the Court of Appeal had in mind by way of exception to the hearsay rule either the doctrine of admission by an agent, or implied admission by silence where a statement is made in the presence of the accused.

In Bowden the Court of Appeal expressed a preference for the explanation based on agency, which it is submitted is correct. In this connection it is relevant to note that privilege should not be regarded as waived if the accused merely seeks to demonstrate the fact that he communicated relevant exculpatory facts to his legal adviser prior to the interview.

It is the accused's reason for withholding facts that is in issue so, provided that, for example, he merely wishes to explain the impact upon him of the advice given, there is no hearsay problem (Davis [1998] Crim LR 659).

In Hill [2003] EWCA Crim 1179, H contended that an interview conducted in the presence of a solicitor should have been excluded (and therefore unavailable as the basis for an inference) on the ground that her solicitor was affected by a conflict of interest as the representative of a co-accused. It was held that the proper course would have been to waive privilege and consider the matter fully on a voir dire: the court should not be asked to speculate that the solicitor had acted improperly.

A frequent outcome of consultation with a legal adviser is that the accused volunteers a prepared statement which is subsequently relied upon as demonstrating that he has 'mentioned' those facts which form the basis of his defence at trial. If the statement proves incomplete, a particularly careful

direction may be required which may be complicated further by the fact that the statement was originally crafted on legal advice.

Judicial direction as to permissible inferences

Where the fact is one which the accused could reasonably have been expected to mention it will be permissible to draw 'such inferences from the failure as appear proper' (s. 34(2)) in a variety of contexts including the determination of guilt (s. 34(2)(d), and whether there is a case to answer (s. 34(2)(c)), bearing in mind always that an inference drawn under the subsection is not by itself sufficient to sustain either determination (s. 38(3): see F19.6).

Although the most common inference from failure to reveal facts which are subsequently relied on is that the facts have been invented after the interview, it may equally appear to the jury that the accused had the facts in mind at the time of interview, but was unwilling to expose his account to scrutiny (Milford [2001] Crim LR 330).

Similarly, the jury may deduce that the accused was faced with a choice between on the one hand silence, and on the other either lying or incriminating himself further with the truth. Again, this is a permissible inference under s. 34 (Daniel [1998] 2 Cr App R 373).

It follows that, even if it is common ground that an accused spoke to his solicitor about a proposed defence of alibi before any interview took place, his failure to reveal the alibi in interview was still a matter from which inferences could be drawn if the jury were unconvinced by the accused's explanation (Taylor [1999] Crim LR 77).

Where the inference which the prosecution suggests should be drawn is not the standard inference of late fabrication but is less severe, the judge should make this clear when summing-up (Petkar [2004] 1 Cr App R 270).

In cases where the accused explains his failure to mention facts on the ground that he was acting on legal advice, but without explaining the reasons behind the advice, the trial judge should be particularly careful to avoid directing the jury in such a way as to indicate that the silence is necessarily a guilty one (Bresa [2005] EWCA Crim 1414).

Direction where s. 34 applicable

In all cases where the s.34 CJPO 1994 is to be relied upon, it is submitted that a clear judicial direction will be required as to the nature of the inference that may properly be drawn.

Where prosecution counsel had not sought to rely upon s. 34, and had not raised the matter with the accused in cross-examination, the Court of Appeal in Khan [1999] 2 Arch News 2 rightly 'deprecated' the decision of the trial judge to direct the jury that they might draw an inference under s. 34 without **first raising the matter with counsel**. It was held, however, that K had suffered no disadvantage. It is submitted that this is a dangerous approach. A trial judge ought not, in fairness, to leave it open to the jury to make use of silence which, because the defence did not expect to have to explain it away, has not been the subject of any comment by the accused or the defence witnesses.

If the judge thinks that s. 34 might come into play, the matter should be raised in time for it to be the subject of evidence not speculation.

The **importance of following and adapting the Judicial Studies Board Specimen Direction**[3] is frequently mentioned in connection with s. 34, and although it need not be slavishly adhered to in every case (Salami [2003] EWCA Crim 3831) it affords particularly useful guidance in this difficult area.

A direction may also be called for in relation to something said by the accused which the prosecution claim both conceals a fact later relied on and constitutes a positive lie. In such a case both a s. 34 direction and a Lucas direction should be given; see Turner [2004] 1 All ER 1025.

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

Where the judge concludes that the requirements of section 34, have not been met, but the jury have been made aware of the accused's failure to answer questions, it was held in McGarry [1999] 1 WLR 1500 that a direction should be given to the jury that they should not hold the accused's silence against him. If that were not done, the jury would be left in 'no-man's land' between the common-law rule and the statutory exception, without any guidance as to how to regard the accused's silence. This was qualified in La Rose [2003] EWCA Crim 1471, where it was held that the omission of the so-called 'counterweight' direction was not fatal where L had never given any explanation for his conduct and had declined to give evidence at trial, thus attracting a s. 35 direction.

The McGarry direction may also be problematic in that it may do harm by drawing attention to the accused's failure to answer questions, so that the failure to give the direction may be a benefit (Thomas [2002] EWCA Crim 2861; Jama [2008] EWCA Crim 2861).

[3] SEE Appendix A

Failure to Account for Objects, Substances, Marks and Presence

Sections 36 and 37 Criminal Justice and Public Order Act 1994

36.—(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 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 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 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.

(4A) Where the accused was at an authorised place of detention at the time of the failure or refusal, subsections (1) and (2) do not apply if he had not been allowed an opportunity to consult a solicitor prior to the request being made.

(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.

37.—(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 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 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 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.

(3A) Where the accused was at an authorised place of detention at the time of the failure or refusal, subsection (1) and (2) do not apply if he had not been allowed an opportunity to consult a solicitor prior to the request being made.

(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.

Sections 36 and 37 are based on the Irish Criminal Justice Act 1984. They go further than s. 34, which relates to the weight to be given to D's defence, and amount to positive evidence to support the prosecution case.

Basis for Inference

Neither s. 36 nor s. 37 of the CJPO 1994 permits an inference to be drawn unless four conditions are satisfied:

(a) **the accused is arrested**;

(b) **a constable** (not necessarily the arresting officer) **reasonably believes that the object, substance or mark, or the presence of the accused at the relevant place, may be attributable to the accused's participation in a crime** (in s. 36 an offence 'specified by the constable'; in s. 37 the offence for which he was arrested);

(c) **the constable informs the accused of his belief and requests an explanation of the matter in question**;

(d) **the constable tells the suspect in ordinary language the effect of a failure or refusal to comply with the request**.

The four conditions may, on their face, be satisfied where an arrested person is confronted with incriminating circumstances before he is taken to the police station for interview.

However, a request for information under the two sections would appear to be a form of questioning, and because an arrested suspect should not normally be questioned about his involvement in an offence except in interview at a police station (PACE Code C, para. 11.1) the tendering in evidence of an unproductive request for information 'on the beat' should be the exception rather than the norm.

If such a request is made and is alleged to have yielded a silence from which inferences can properly be drawn, the procedure for putting the silence to the suspect in a subsequent interview at the police station will apply. The 'special warnings' to be given at interview in connection with ss. 36 and 37 are dealt with in PACE Code C, paras. 10.10 and 10.11.

As with s. 34 only 'proper' inferences may be drawn. The jury must be satisfied that the accused has failed to 'account' for the relevant matter (Compton [2002] EWCA Crim 2835) and that any explanation advanced by the accused should be rejected as implausible before an inference can be said to be proper.

Clearly the strength of the inference increases with the suspicious nature of the circumstances, so that if the accused is arrested when in possession of a car with explosive devices in full view on the back seat, his failure to give an account is more suggestive of guilt than if he refuses to account for a dirty mark on his clothing following a fight in which he is alleged to have fallen to the ground.

Sections 36 and 37 are somewhat restrictively drawn. Section 36 is concerned with the state of the suspect at the time of his arrest, and not with his state at other relevant times, e.g., when seen by an eye-witness at the time of the crime. Section 37 is similarly concerned only with the suspect's location at the time of arrest, and applies only when he was found at the location of the crime at or about the relevant time. No mention is made of his presence at the scene at other relevant times: what if he gave the police the slip at the scene and was arrested elsewhere? If the intention is to build upon already suspicious circumstances by allowing an additional guilty inference if the accused fails to explain them, it is not clear why the provisions are so restrictive: a suspected rapist may have inferences drawn for failing to explain away stains on his trousers, but not for refusing to explain why he is not wearing any (unless he has discarded them nearby).

Section 38(3) provides that an inference drawn under these provisions may, inter alia, form part of the case to answer or contribute to a verdict of guilty, though neither outcome may be based 'solely' upon such an inference. It is not clear what this means. An inference drawn under ss. 36 and 37 can never exist 'solely', in the sense of independently of the proof of the suspicious circumstances for which the accused refuses to account. In some cases, such circumstances may be sufficient to convict, as in the case of the man arrested with two bombs on the back seat of his car. The fact that the accused gave no explanation cannot prevent the circumstances having this effect: on the contrary, it strengthens the inference to be drawn from them. Perhaps the intention behind the provision is to prompt the judge to tell the jury not to convict just because the accused has been unhelpful.

It is not clear how frequently these two provisions will function independently of ss. 34 and 35. If D goes on to present a defence relying on facts he could have mentioned earlier, as in Connolly, it is likely that s. 34 will also apply. If he gives no evidence, then s. 35 (see F19.20) may come into play.

FAILURE OF ACCUSED TO TESTIFY

The CJPO 1994 repealed s.1(b) Criminal Evidence Act 1898 (which provided that the failure of the accused to testify was not to be made the subject of any comment by the prosecution).

Failure to Testify following the 1994 Act

A careful direction will be required in all cases where the accused does not testify, in order to make the jury aware of the inferences which may properly be drawn, not least because of the need to comply with the 'fair trial' provisions of the ECHR, Article 6 (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

Defendant's right to give or not to give evidence

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).

It has long been the recommended practice, and is of great importance in light of s. 35, for counsel to record the decision of the accused not to give evidence, and to sign it and indicate that it was made voluntarily (see Bevan (1994) 98 Cr App R 354 and Chatroodi [2001] EWCA Crim 585).

Judicial direction

In R v Cowan [1996] 1 Cr App R 3[4]Lord Taylor (LCJ), giving the judgment of the Court of Appeal, described (at page 7) the essential elements of the directions that should be given to a jury at a Crown Court trial:

(1) The judge will have told the jury that the burden of proof remains on the prosecution throughout and what the required standard is.

(2) It is necessary for the judge to make clear to the jury that the defendant is entitled to remain silent. That is his right and his choice. The right of silence remains.

[4] As cited with approval in RS v DPP (2013) EWHC 322(Admin)

(3) An inference from failure to give evidence cannot on its own prove guilt. That is expressly stated in section 38(3) of the Act.

(4) Therefore, the jury must be satisfied that the prosecution have established a case to answer before drawing any inferences from silence. Of course, the judge must have thought so, or the question as to whether the defendant was to give evidence would not have arisen. But the jury may not believe the witnesses whose evidence the judge considered sufficient to raise a prima facie case. It must therefore be made clear to them that they must find there to be a case to answer on the prosecution evidence before drawing an adverse inference from the defendant's silence.

(5) If, despite any evidence relied upon to explain his silence or in the absence of any such evidence, the jury conclude the silence can only sensibly be attributed to the defendant's having no answer or none that would stand up to cross-examination, they may draw an adverse inference.

'Proper' Inferences of Guilt

Under s.35 CJPO 1994, the 'proper' inferences come about as a result of the failure of the accused to give evidence or his refusal without good cause to answer any question (s. 35(3)).

Defendants whose 'physical or mental condition make it undesirable' for them to give evidence are excluded from the operation of the section, together with those whose 'guilt is not in issue' (s. 35(1)).

By virtue of s. 35(5), the accused may be excused from answering a particular question on grounds of privilege or statutory entitlement, or in the discretion of the court. Subject to these exceptions, the accused must answer all proper questions or risk the drawing of inferences, and a judge may remind him of his duty in this regard, though he should avoid doing so in an oppressive way (Ackinclose [1996] Crim LR 747).

The court is obliged to satisfy itself that defendants who have not indicated that they intend to give evidence understand the consequences of declining to do so (s. 35(2) and (3) and the Consolidated Criminal Practice Direction, para. IV.44, Defendant's right to give or not to give evidence). The Practice Direction makes clear that the burden of explaining the option to testify and the consequences of failing to do so to the defendant rests, in the case of a legally represented defendant, with the legal representative.

Accused with Physical or Mental Limitations

The meaning of s. 35(1)(b) of the CJPO 1994 was considered in **Friend** [1997] 1 WLR 1433. F was tried for murder. He had a **physical age of 15, a mental age of 9, and an IQ of 63. Expert evidence suggested that, although not suggestible, his powers of comprehension were limited and he might find it difficult**

to do justice to himself in the witness box. Nevertheless F had given a clear account of his defence at various stages prior to trial. Taking all of these matters into account, the trial judge ruled that F's mental condition did not make it 'undesirable' for him to give evidence, so that his failure to do so led to the jury being directed that they might draw inferences under s. 35(3). The Court of Appeal agreed, noting that it would only be in a rare case that the judge would be called upon to arrive at a decision under s. 35(1)(b); generally an accused who was unable to comprehend proceedings so as to make a proper defence would be unfit to plead, so the issue would not arise.

Section 35(1)(b) was intended to mitigate any injustice to a person whose physical or mental handicap was less severe, and it gave a wide discretion to a trial judge which did not require to be circumscribed by any further judicial test.

The trial judge had been right not to base his conclusion on the mental age of F: a person with a mental age of less than 14 did not automatically qualify for the protection which before 1998 applied to a person of that physical age. Nor was he bound to determine the issue on the expert evidence alone, but was entitled to take account of the behaviour of F before and after the commission of the offence including the way in which he had put his defence in interview. (The conduct of F at the time of the offence, which was hotly disputed, was rightly not considered by the judge.) The trial judge in Friend seems to have been much influenced by the fact that young children regularly appear as witnesses in criminal cases, and that measures can be taken by which they and other vulnerable witnesses can, if their needs are correctly assessed, be protected from unfair or oppressive cross-examination. Thus, as the main reason for questioning the desirability of F testifying was that he might give a poor account of himself unless care were taken to ensure that he understood and had time to respond to questions, the fact that the court itself could respond sensitively to F's needs was a factor militating against the defence argument. The outcome suggests that the discretion will be exercised against the background of an assumption that it is generally desirable for an accused to testify, so that cases in which it can be said to be 'undesirable' will be rare indeed.

In **DPP v Kavanagh [2006] Crim LR 370 Stanley Burnton J set out the general proposition that the adverse inference will only be proper if there is strength in the prosecution case that requires an answer (which will the legitimate inference that the failure to provide that must mean that there is no realistic answer available).**

In Tabbakh [2009] EWCA Crim 464 the trial judge was held entitled to conclude that T's history of self-harm and post-traumatic stress disorder did not render it undesirable for him to give evidence: the risk that he might react in a hostile way to questioning and lose his self-control was one which could be taken into account by the jury, and did not justify a comprehensive failure to testify.

Nature of Inference under s. 35

The adverse inference which it may be proper to draw under s. 35(3) of the CJPO 1994 is that the accused 'is guilty of the offence charged'.

In Murray v DPP [1994] 1 WLR 1, a decision concerning the equivalent provision in the Criminal Evidence (Northern Ireland) Order 1988 (SI 1988 No. 1987, N.I. 20), M was convicted of attempted murder and possession of a firearm with intent to endanger life. Scientific evidence linked M with a car used in the attack: the situation was one calling for 'confession and avoidance'. M advanced various explanations during interrogation, but gave no evidence at trial, from which failure the trial judge drew a strong adverse inference. The House of Lords considered that the inference was justified.

As to what is proper, 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

The accused cannot be convicted solely on an inference drawn from a failure or refusal (s. 38(3)).

In Cowan [1996] QB 373 the Court of Appeal emphasised that the prosecution remains under an obligation to establish a prima facie case before any question of the accused testifying is raised. Their lordships took this to mean not only that the case should be fit to be left to the jury, but also that the judge should make clear to the jury that they must be convinced of the existence of a prima facie case before drawing an adverse inference from silence.

In a case where there is a compelling case for the accused to answer it has been held that the failure to direct in accordance with this aspect of Cowan could not affect the safety of the conviction (Bromfield [2002] EWCA Crim 195).

In Whitehead [2006] EWCA Crim 1486, where the case for the prosecution in a sexual offence depended on the credibility of a complainant who had delayed making a complaint for more than ten years, the Criminal Cases Review Commission referred the case to the Court of Appeal on the basis that the omission to direct the jury that they should first find a case to answer might have led to them using the accused's failure to testify to 'shore up' the deficiencies in the complainant's evidence. The Court of Appeal dismissed this possibility as 'fanciful' in light of the very clear directions that had been given to the jury that they had to be 'sure' the complainant was not lying, and that the accused's silence was not by itself proof of guilt. The court considered that the direction to the jury to find a prima facie case before considering the implications of the accused's silence 'amplifies and spells out' what is already implicit in the separate injunction that failure to give evidence cannot by itself prove guilt.

No Inference where Prosecution Case is Weak

It seems from the observations of Lord Slynn in Murray v DPP [1994] 1 WLR 1 (see F19.23) that inferences of guilt should not be drawn from failure to give evidence to contradict a prosecution case of 'little evidential value'.

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(as amended from March 2013)

Appendix A

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4.19 DEFENDANT'S FAILURE TO MENTION FACTS WHEN QUESTIONED OR CHARGED

Article 3 Criminal Evidence (NI) Order 1988 (as amended)

(1) "When arrested, and at the beginning of each of his interview(s), the defendant was cautioned. He was told that he need not say anything, and it was therefore his right to remain silent. However, he was also told that it may harm his defence if he did not mention something when questioned which he later relied on in court; and that anything he did say may be given in evidence.

(2) As part of his defence the defendant has relied upon ... (specify precisely the fact(s) to which this direction applies). (The prosecution case is/he admits) that he did not mention the fact (s) when he was questioned under caution about the offence(s).

(3) The prosecution case is that, in the circumstances when he was questioned and having regard to the warning he had been given by the caution, he could reasonably have been expected to mention (it/them) at that stage, and so you may decide that the reason why it was not mentioned was because (e.g. it has since been invented/tailored to fit the prosecution case/he believed that it would not stand up to scrutiny at that time).

((If you are satisfied beyond reasonable doubt that the defendant did fail to mention (…) (when he was questioned), then it is for you to decide whether, in the circumstances, it was something which he could reasonably have been expected to mention at that time. If it was not, then that is the end of the matter and you should not hold the defendant's failure to mention the fact(s) against him in any way.

(4) If it was something which the defendant could reasonably have been expected to mention at that time, the law is that you may draw such inferences-that is conclusions-as appear proper from his failure to mention it at that time. You do not have to hold it against him. It is for you to decide whether it is proper to do so. Failure to mention (it/them) at that time cannot, on its own, prove the defendant's guilt, but depending upon the circumstances, you may hold that failure against him when deciding whether he is guilty. (Here set out any circumstances relevant to the particular case, for example the age of the defendant, the nature of and/or reasons for the advice given, and the complexity or otherwise of the facts upon which the defendant has relied at the trial(1)).

You should hold the defendant's failure to mention the fact(s) during interview against him only if you are satisfied beyond reasonable doubt that his failure could sensibly be attributed to his having no answer to the questions being put to him, or none that could stand up to questioning or investigation by the police at that time. (2) You must not find him guilty only, or mainly, because he failed to mention the fact(s) (3). But you may take it into account as some additional support for the prosecution's case and when deciding whether his (evidence/case) about (the/these) fact(s) is true.

(He has given no explanation for his failure, and none has been suggested for which there is any support in the evidence (4)

Consider (his explanation e.g. that), and consider what the prosecution say about that.

(5) (Where legal advice to remain silent is relied upon, substitute the following for paragraph (4))

"If it was something which the defendant could reasonably have been expected to mention at that time, the law is that you may draw such inferences-that is conclusions-as appear proper from his failure to mention it at that time. You do not have to hold it against him. It is for you to decide whether it is proper to do so.

The defendant says that the reason why he did answer (any/those) questions was because his solicitor advised him not to answer (any/those) questions and he followed that advice. This is obviously an important consideration, but it does not automatically prevent you from holding his silence against him, because the defendant had the choice whether to accept his solicitor's advice or to reject it, and he had been warned that any failure to mention facts which he relied upon at his trial might harm his defence.

You should also take into account (here set out any circumstances relevant to the particular case, for example the age of the defendant, the nature of and/or reasons for the advice given, and the complexity or otherwise of the facts upon which the defendant has relied at the trial (1)).

If he genuinely and reasonably relied on the legal advice to remain silent, you should not draw any conclusion against him.

If you are satisfied beyond reasonable doubt that the true explanation for the defendant's failure to mention the fact(s) is because he had no answer, or no satisfactory answer, (5) to the questions being put to him, and that the advice of the solicitor did no more than provide the defendant with a convenient shield behind which to hide, then, and only then, can you hold his failure to mention the fact(s) against him and draw such conclusions as you think proper from that failure. However, you must not find him guilty only, or mainly, because he failed to mention the fact(s). But you may take it into account as some additional support for the prosecution's case and when deciding whether his (evidence/case) about (the/these) facts is true."

NOTE.

1. See Lord Bingham C.J. in R v Argent [1997] 2 Cr. App. R. 27 as to examples of the types of circumstances that may be relevant.
2. The words "sensibly be attributed to" were used by Lord Taylor CJ in R v Cowan [1996] 1 Cr. App. R 1 and by the European Court of Human Rights at para. 61 of Condron v UK [2000] Crim. L.R. 676.
3. The words "only or mainly" are included to reflect the views of the European Court in Condron.
4. There must be evidence. In R v Cowan Lord Taylor CJ said "it cannot be proper for a defence advocate to give the jury reasons for his client's silence at trial in the absence of evidence to support such reasons".
5. See Auld LJ in R v Hoare & Pierce [2005] 1 Cr. App. R.22 at pp.372-73.

Appendix B

REVISED 18 JANUARY 2010

4.22 DEFENDANT'S TOTAL OR PARTIAL SILENCE AT TRIAL

Article 4 Criminal Evidence (NI) Order 1988 (as amended)

Directions to jury where defendant has not given evidence or refused to answer questions when sworn.

(When the defendant was questioned by the police he admitted a number of matters which the prosecution say incriminate him in the charge(s). (Identify the relevant matters). (However, the defendant's explanation to the police about those matters was (specify his explanation), and he denied the offence(s)). Those explanations and denials are relied upon by him and you must consider the whole of what he said to the police in deciding where the truth lies.

You may feel that the incriminating parts of what he said are likely to be true because why else would he have said them? You may feel that less significance should be given to his explanations and denials because they were not made on oath, have not been repeated on oath and have not been tested by cross-examination, as they would have been had the defendant given evidence."(1))

"The defendant has not given evidence. That is his right. He is entitled not to give evidence, to remain silent and to make the prosecution prove his guilt beyond reasonable doubt. Two matters arise from his not giving evidence. The first is that you try this case according to the evidence, and you will appreciate that the defendant has not given evidence at this trial to undermine, contradict or explain the evidence put before you by the prosecution. The second is, as you heard him being told, the law is that you may draw such inferences as appear proper from his failure to do so. It is for you to decide whether it is proper to hold the defendant's failure to give evidence (to answer certain questions having decided to give evidence (2)) against him when deciding whether he is guilty.

(There is evidence before you on the basis of which the defendant's counsel invites you not to hold it against the defendant that he has not given evidence before you namely ...(3)

If you think that because of this evidence you should not hold it against the defendant that he has not given evidence, do not do so. But if you are satisfied beyond reasonable doubt that the evidence he relies on presents no adequate explanation for his absence from the witness box then you may hold his failure to give evidence against him.)

What proper inferences-in other words what conclusions-can you draw from the defendant's decision not to give evidence before you/refusal to answer certain questions when he was giving evidence? You may think that the defendant would have gone into the witness box to give you an explanation for or an answer to the case against him. However, you may draw such a conclusion against him only if you think it is a fair and proper conclusion, and you are satisfied about two things: first, that the prosecution's case is such that it clearly calls for an answer by him; and second, that the only sensible explanation for his silence is that he has no answer, or none that would bear examination. (4) It is for you to decide whether it is fair to do so.

However, you should not find the defendant guilty only, or mainly, because he did not give evidence (answer those questions when he did give evidence.) But you may take it into account as some additional support for the prosecution's case and when deciding whether his (evidence/case) about the/these charge(s) is true.

(You may also treat his failure to give evidence as or as capable of amounting to corroboration).

NOTE:

(1) Where the defendant has said things, whether in interview to the police or elsewhere, which contain both incriminating and exculpatory material, it may be convenient to incorporate this passage in the directions to the jury at this stage.

(2) Where the defendant has been sworn and refuses to give evidence, or refuses to answer relevant questions having been sworn, then the jury should be directed that the defendant, having decided to give evidence, could not refuse to answer relevant questions. R v Bingham, R v Cooke [1999] NI 118.

(3) The words in brackets should only be used in cases where there is **evidence.**

(4) In R v Matthew O'Donnell [2010] NICA 1 the Court of Appeal directed judges in this jurisdiction to apply R v Cowan and others [1996] 1 Cr. App. R. 1. The judge should, if he considers it necessary, discuss with counsel the form of his direction in the absence of the jury.

(5) If it is contended that the physical or mental condition of the accused makes it undesirable for him to give evidence that question has to be decided by the court (see Article 4(1)(b) of the Order). If the court decides in his favour, then the jury must be directed not to draw any adverse inference.