**Inferences from silence** – *R. v Murphy (Robert)* [2020] EWCA Crim 1898, [2021] 4 W.L.R. 129, CMAC, 25 November 2020.

The appellant (aged 17 at the time) was interviewed in relation to an allegation that he had placed an LSD tab into the mouth of a fellow soldier while the latter was asleep. On legal advice, he gave a prepared statement, inter alia, denying the allegation, and refused to answer further questions. At trial, the appellant gave a fuller account, accepting he had pulled back the victim’s bedclothes and ruffled his hair, but denying placing the tab in his mouth. He was convicted of attempting to administer a noxious substance.

A full adverse inference direction in the circumstances of the case had clearly been necessary. In his summing up, the judge had failed to give a direction pursuant to section 34 of the *Criminal Justice and Public Order Act* 1994, either as to the reason why the appellant had when questioned not mentioned the facts that he later relied upon, or explaining the circumstances prevailing at the time of the questioning. In particular, he made no mention of the fact that the appellant had relied upon legal advice, nor any mention of any of the circumstances as to why the appellant might have reasonably relied on that advice. Other prevailing circumstances that were relevant for the judge to mention were (1) the age and lack of experience of the appellant, (2) the rank of the appellant and the disparity of rank between him and those who were questioning him, and (3) the severity of the offence with which he was charged. Those were very much the sort of circumstances highlighted in *R. v Argent* [1997] 2 Cr.App.R. 27, CA, as those to which the court should draw the jury’s attention when giving the adverse inference direction. The case was one in which the credibility of the appellant was the central issue, and the giving of an adverse inference direction may well have influenced the outcome. The giving of such a direction is not simply a matter of discretion for the judge.

***Archbold* 2022 reference**: 1994 Act, s.34, § 15B-52.

COMMENT:

The Court of Appeal continues to take a prescriptive approach to the content of jury directions on adverse inferences. The matters to be included in such a direction were comprehensively set out (at [51]) in *R. v Petkar and Farquhar*, CLW/04/05/5,[2003] EWCA Crim 2668, [2004] 1 Cr.App.R. 22, CA, which also noted the requirement for a special direction where a defendant testifies that he declined to answer questions on his solicitor’s advice.

When the jury is deciding whether a defendant could reasonably have been expected to mention relevant facts, legal advice to remain silent must be given appropriate weight (*Condron v UK*, CLW/00/17/2,(2001) 31 E.H.R.R. 1, ECHR; *Averill v UK*, CLW/00/24/2,(2001) 31 E.H.R.R. 36, ECHR). Of course, the jury may draw an adverse inference if they are sure the defendant remained silent “not because of [legal] advice but because he had no or no satisfactory explanation to give” (*R. v Hoare and another*, CLW/04/17/5, [2004] EWCA Crim 784, [2005] 1 W.L.R. 1804, CA). In determining reasonableness, regard must be had to all the relevant circumstances that existed at the time of questioning. The phrase “in the circumstances” should not be construed 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” (*R. v Argent* [1997] 2 Cr.App.R. 27, CA, 33). The instant case makes clear (at [33]) that a judge must specifically identify the relevant circumstances when directing the jury. Here, the Court of Appeal identified these as being the age of the defendant, the disparity in rank between the defendant and his interviewers and the severity of the offence. The first two are uncontroversial but the last is problematic, as it rather suggests that a defendant charged with a more serious offence has a better chance of avoiding a section 34 inference, which surely cannot be what the court intended.

The prosecution advocate had argued that the judge had “a certain discretion” as to the content of the section 34 direction. He pointed out that the board (this being a court-martial case) was experienced and was “very well aware of the disparity in rank and the fact that the defendant before them was young”. The Court of Appeal has acceded to similar submissions in cases in which a jury is tasked with identifying the defendant from photographs or CCTV footage. In this particular type of identification case, it was previously thought that a jury had to be directed to bear in mind the sort of matters found in a *Turnbull* direction (*R. v Turnbull* [1977] Q.B. 224, CA), it being “imperative that a jury is warned by a judge in summing up of the perils of deciding whether by this means alone or with some form of supporting evidence a defendant has committed the crime alleged” (*R. v Dodson and Williams* (1984) 79 Cr.App.R. 220, CA, 228). More recently, however, the court held that such a warning is not required in every case because, it was suggested, the task the jury is being asked to perform is a “perfectly straightforward one” and “modern practice … is not to require trial judges to direct the jury as to the obvious” (*R. v Shanmugarajah and Liberna*, CLW/15/31/2, [2015] EWCA Crim 783, [2015] 2 Cr.App. R. 14, CA, at [27]; see also *R. v Downey* [1995] 1 Cr.App.R. 547, CA). Against this background, the court’s strict adherence to the detail for the purposes of adverse inference directions is most welcome.

A final point of note is that the appellant had apparently been cross-examined about the reasons for his failure in interview to mention facts he subsequently relied on at trial. There is a “singularly delicate” relationship between section 34 of the 1994 Act and legal professional privilege (*R. v Beckles*, CLW/04/42/4, [2004] EWCA Crim 2766, [2005] 1 W.L.R. 2829, CA, at [43]). The basic rules are that a defendant does not waive privilege if he states in interview that he will not answer questions on the basis of legal advice. However, if he goes further and explains the basis for that advice, privilege is waived in relation to the entire police station “transaction” between solicitor and client (*R. v Bowden*, CLW/99/07/4, [1999] 1 W.L.R. 823, CA; *R. v Loizou*, CLW/06/34/14,[2006] EWCA Crim 1719, [2006] 9 Archbold News 2, CA). In the instant case, the appellant’s solicitor suggested that his advice was at least partly based on the disclosure received, which may have opened the door to the “extensive cross-examination” that followed at trial. Where a solicitor, in the presence of his client, gives reasons or grounds for advice to remain silent, “then legal professional privilege has been waived by that client through the mouth of his agent acting within the scope of his authority” (*R. v Hall-Chung*, CLW/07/31/7, [2007] EWCA Crim 3429, (2007) 151 S.J. 1020, CA, at [16]).

In some cases, it will be in a defendant’s interest to open up communications with his police station representative. Where he does so in response to an allegation of recent fabrication, privilege is not waived in relation to the entire conversation (*Loizou*). However, it will usually be necessary to call the representative to confirm that, during his interview consultation, the defendant gave the account that he puts forward at trial. The prosecution or a co-accused may legitimately comment on the fact that a representative has not been called to support the defendant’s contention that the account is not a recent invention (*R. v Roble*, CLW/98/14/20,[1997] Crim L.R. 449, CA). The judgment in the present case does not make clear what the defendant was asked about the advice he received or whether the solicitor was called, but it is worth bearing in mind that extensive cross-examination about, or comment upon, the reasons for a defendant’s failure to mention facts in interview will not always be permissible.

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