**Inferences from silence** – *R. v Black* [2020] EWCA Crim 915, unreported, 17 July 2020, CA.

The decisions in *R. v Condron (William) and Condron (Karen)* [1997] 1 W.L.R. 827, CA, and *R. v Petkar and Farquhar*, CLW/04/05/5, [2003] EWCA Crim 2668, [2004] 1 Cr.App.R. 22, CA, confirm that an adverse inference should only be drawn under section 34 of the *Criminal Justice and Public Order Act* 1994 if the prosecution case at the time of the interview is so strong as to justify calling for an answer. This is because if nothing has been said or shown to the defendant at the police interview to call for an answer from him, it would be wrong to draw an inference against him for a failure to provide such an answer. It is also established that the strength or weakness of the prosecution case at interview may be a relevant circumstance for the jury to consider under section 34: *R. v Argent* [1997] 2 Cr.App.R. 27, CA. Here (in a case of conspiracy to commit fraud by false representation), although the prosecution case eventually consisted of 75,000 pages of evidence, whereas the bundle provided to the defendant at interview was said to run to two pages only, given that there had been disclosure before interview and that the  defendant had confirmed in cross-examination that he had lived through the events, there had been sufficient evidence about the strength of the prosecution case to justify giving the jury a direction under section 34. Further, while there was no requirement on the defence to adduce evidence at trial to show that the prosecution case at the time of the interview had been insufficient to call for an answer, the absence of any such evidence meant that there was nothing to rebut the proper inferences to be drawn about the strength of the prosecution case at the time of interview.

***Archbold* 2020 reference**: 1994 Act, s.34, § 15-458.

Comment:

Before drawing an adverse inference under s.34, the jury must consider the strength of the prosecution case at two different stages of the proceedings. First, they must consider whether the case that was put to the defendant at interview was sufficiently strong to call for an answer. Secondly, they must assess the strength of the evidence that has been adduced at trial. A conviction must not be based solely or mainly on an inference from silence, so the jury must be satisfied that there was/is a case to answer at each stage before drawing such an inference.

In relation to the first of these principles, the Crown Court Compendium suggests directing the jury that they may only draw an inference “if apart from D’s failure to mention facts later relied on in his/her defence, the prosecution case as it appeared at the time of the interview was such that it clearly called for an answer…” (Compendium, p.17-8 at [26]. See also the Example Direction, p.17-9). As regards the second principle, the Compendium advises “[t]he jury must be directed that, if they do draw [an adverse inference], they must not convict D wholly or mainly on the strength of it” (Compendium, p.17-8 at [27]. See also Example Direction, p.17-9). As was explained in *Petkar* (at [51(iii)]):

“The first of those alternatives (“wholly”) is a clear way of putting the need for the prosecution to be able to prove a case to answer, *otherwise than by means of any inference drawn*. The second alternative (“or mainly”) buttresses that need” (emphasis added).

In the present case, the judge directed the jury in the following terms:

“You may only draw an inference against [the defendant] if you are satisfied that the prosecution as it appeared at the time of the interview was such that it clearly called for an answer, and secondly, apart from his failure to mention facts later relied on in his defence, the prosecution case is so strong that it clearly calls for an answer…” at [31]

It seems there was no direction that the jury had to leave aside any adverse inference when considering whether the case at interview was sufficiently strong to call for an answer. The phrase “apart from his failure to mention facts later relied on in his defence” was used when directing the jury to assess the strength of the case at trial (whether “the prosecution case is so strong that it clearly *calls* for an answer” – i.e. present tense). Ensuring the jury understood they had to decide whether the case at interview was sufficiently strong apart from any inference was particularly important in the context of a case in which the cross examination of the defendant pointed out that he had been given “a bundle of … documents” and “of course, had lived through all this” (at [24]).

***Strength of the prosecution case at interview***

The conspiracy here involved false representations relating to the sale of solar panels. Customers were informed that they would be repaid the cost of the panels in full within a specified period, as the monies paid would be invested and insurance would be arranged to cover any shortfall in the investment. At trial, the defendant gave evidence that one of his co-defendants had told him that insurance was in place. He also stated that he believed the scheme for reimbursing customers was underpinned by a specific, named investment. He had not mentioned either of these facts when interviewed. The Court of Appeal concluded that answers were called for about these matters because: (i) the defendant had been given disclosure prior to the interview; and (ii) he had “lived through the events”.

The defence submitted (at [42]) that “the prosecution had failed to adduce any evidence of what was asked in interview, or what disclosure had been given to Mr Black”. It is surely unarguable that a jury cannot assess the strength of the prosecution case at interview without knowing anything about the nature of the disclosure that was provided to the defendant or the questions that were asked. However, elsewhere in the judgment there is reference to a “transcript” (at [26]) and “admissions” (at [19]), so it is unclear precisely what evidence was before the jury about these matters. This case therefore cannot be taken as authority for the proposition that an adverse inference may be drawn from the failure to mention a fact in interview even where the prosecution has adduced no evidence about the case that was put to the defendant at that time.

A further troubling aspect of this judgment is the Court’s acceptance (at [44]) that “living through the events” in question can be relevant to an assessment of the strength of the prosecution case. Save perhaps in cases where defendants deny any knowledge of the alleged offending, they will always have “lived through events”. That is about a defendant’s subjective experience and it is difficult to understand how it can have any bearing on whether the case that is put to them by the interviewing officer is sufficiently strong to call for an answer.

The Court concluded its ruling on the s.34 issue by noting that the defendant had not stated in evidence that the prosecution case at interview was insufficient to call for an answer, adding:

“It is common ground that there was no burden on Mr Black to give such evidence. However the absence of any such evidence meant that there was nothing to rebut the proper inferences to be drawn about the strength of the prosecution case at the time of interview…”

The above suggests that the prosecution case may be deemed to be sufficiently strong unless the defendant adduces evidence to the contrary. In practical terms, the defendant therefore does bear a tactical burden on this issue. And since any decision to remain silent at interview on the basis of insufficiency of evidence is likely to have been based on legal advice, this is likely to give defendants an invidious choice between accepting a s.34 inference or waiving privilege.