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JUDICIAL STUDIES BOARD

CROWN COURT BENCH BOOK

DIRECTING THE JURY

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39. Defendant's Total or Partial Silence at Trial - Section 35, CJPOA 1994

It is desirable before closing speeches to discuss with counsel whether a direction under section 35 is appropriate, and if so, in what terms it should be given; and if necessary to remind counsel of Note 8, below. If, for whatever reason, it is decided that no such direction should be given, Direction 44(B) should be given (R v McGarry [1999] 1 Cr App R 377).

See Note 1 *for the background to this direction.*

1. The defendant has not given evidence (see Note 2). That is his right. He is entitled to remain silent and to require the prosecution to make you sure of his guilt. You must not assume he is guilty because he has not given evidence. But two matters arise from his silence.

2. In the first place, 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.

(If appropriate, add:) However, he did answer questions in interview, and he now seeks to rely on those answers. *(If the interview is partly self-serving, i.e. it amounts to a 'mixed statement', incorporate Direction 45. In the comparatively unlikely event that the interview is wholly self-serving, see Note 3).*

3. In the second place, his silence at this trial may count against him. This is because you may draw the conclusion *(see Note 4)* that he has not given evidence because he has no answer to the prosecution's case, or none that would bear examination. If you do draw that conclusion, you must not convict him wholly or mainly on the strength of it *(see Note 5)*, but you may treat it as some additional support for the prosecution's case *(see Note 6)*.

4. 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 so strong that it clearly calls for an answer by him *(see Note 7)*; and second, that the only sensible explanation for his silence is that he has no answer, or none that would bear examination.

5. *(If appropriate, add:)* The defence invite you not to draw any conclusion from the defendant's silence, on the basis of the following evidence *(here set out the evidence - see Note 8)*. If you [accept the evidence and] think this amounts to a reason why you should not draw any conclusion from his silence, do not do so. Otherwise, subject to what I have said, you may do so *(see Notes 9 to 12)*.

Notes

1. This direction is based on the terms of sections 35 and 38(3) of the 1994 Act; the five 'essentials' listed in *R v Cowan* [1996] 1 Cr App R 1, 7 D-G; *R v Birchall* [1999] Crim LR 311; *Murray v UK* (1996) 22 EHRR 29 and *Condron v UK* (2001) 31 EHRR 1. The two European cases were under section 34 of the 1994 Act, or its Northern Ireland equivalent, but some of the observations of the ECtHR apply equally to section 35.

2. Where the defendant has given evidence, but has refused to answer a particular question or series of questions, the direction should be adapted accordingly.

3. If the defendant makes a wholly self-serving statement, the following direction is suggested:

> *The defendant's answers provide evidence of his reaction and attitude when questioned about the allegation(s) he now faces. However, they do not amount to evidence of the facts stated by the defendant. That is because his answers were not made on oath and have not been repeated on oath.*

See Archbold (2003) paragraphs 15-311 to 314. Take care to ensure, if need be with the assistance of counsel, that the statement truly is wholly self-serving rather than 'mixed'. As to this, see also Archbold (2003) paragraphs 15-307 to 310, and the cases there referred to.

4. The 1994 Act refers to 'inferences' but it is thought that juries will more readily understand 'conclusions'.

5. See section 38(3) of the 1994 Act and *Murray v UK* at page 60, paragraph 47.

6. In *R v Cowan* at page 5B, Lord Taylor CJ said: 'The effect of section 35 is that the ... jury may regard the inference from failure to testify as, in effect, a further evidential factor in support of the prosecution case. *'In Murray v UK* at page 60, paragraph 47, the ECtHR spoke of the accused's silence being ' ... taken into account in assessing the persuasiveness of the evidence adduced by the prosecution.' In the latter case, the Court was considering both the accused's failure to give evidence (section 35) and his failure to answer questions (section 34).

7. This passage has been drafted to reflect the authorities that an adverse inference can be drawn only if the jury finds 'a case to answer' *(R v Cowan* at page 7E) or a case 'sufficiently compelling to call for an answer by him' *(R v Birchall* at page 312) or a situation 'which clearly calls for an explanation from him' *(Murray v UK* at page 60, paragraph 47). The need for a passage such as we suggest has been challenged persuasively by Auld LJ in *R v Doldur* [2000] Crim LR 178, but the weight of authority supports its inclusion. For example, in the even more recent case of *R v Gill* [2001] 1 Cr App R 160, an appeal against conviction was allowed in a section 34 case on the ground, amongst others, that the jury were not given such a direction. The writers have therefore decided to adopt a cautious approach, rather than to give any hostages to fortune. If there is a case to answer, the strength or weakness of the prosecution case is not in itself a ground requiring a judge to direct a jury not to draw an adverse inference under s35: *R v Cameron* [2001] Crim LR 587.

8. Note that there must be evidence. In *R v Cowan* [1996] 1 Cr App R 1, 9G, Lord Taylor CJ said: 'We wish to make it clear that the rule against advocates giving evidence dressed up as a submission applies in this context. 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.' The judge should stop defence counsel, if necessary during his or her final speech, from seeking to give such reasons.

9. If there is evidence that the defendant has declined to give evidence on legal advice, add a direction adapted from paragraph 5 of Direction 40.

10. 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 section 35(1)(b) of the 1994 Act). If the court decides in his favour, then the jury must be directed not to draw any adverse inference: see Direction 44(B). Otherwise, they may do so, but the section 35 direction, above, should incorporate paragraph 5.

11. In *R v Napper* [1996] Crim LR 591, the court expressed the view that: 'In general we can see nothing inconsistent between the standard *Lucas* direction on lies or for that matter the standard direction following Vye and others in relation to good character, on the one hand and the direction on silence at trial approved in *Cowan and others*. We do not consider that the latter in any way undermines either a *Lucas* direction or a *Vye* direction.'

12. If the defendant admits a lesser alternative offence but is tried on the greater, the jury should be directed that if they draw an adverse inference from his failure to give evidence, the inference need not necessarily be that he is guilty of the greater *(see R v Foley,* CA, unreported, 97/07915/Z2).

13. If the defendant absconds before the end of the prosecution case and has therefore not been warned in accordance with Direction 38 above, no adverse inference may be drawn from his failure to give evidence: *R v Gough* [2002] 2 Crim App R 121.

14. Where all the primary facts are agreed, and the issue is whether those facts constitute the offence charged, no adverse inference should be drawn from the defendant's failure to give evidence: *R v McManus and Cross* [2002] 1 *Archbold News* 2.

15. For guidance on comment in a summing-up on the failure of the defence to call a witness, see *R v Khan* [2001] Crim LR 673.

Archbold (2003) 4-305, page 439 et seq, and 4-398, page 472 et seq.
Blackstone (2003) F19.12, page 2337 et seq.

40. Defendant's Failure to Mention Facts when Questioned or Charged - Section 34, CJPOA 1994

It is desirable to discuss any proposed direction with counsel before closing speeches:

(a) to consider whether a direction under section 34 should be given at all (see Notes 2 to 8);
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(b) to identify the precise fact or facts to which the direction should relate (see Note 10);

(c) to identify the permissible inferences (see Note 12);

(d) to consider the terms of the direction; and

(e) (if necessary) to remind counsel of Note 17.

If, for whatever reason, it is decided that no such direction should be given, Direction 44(A) should be given. (R v McGarry *[1999] 1 Cr App R 377); unless, having discussed the matter with counsel, the judge concludes that it would not be in the interests of justice to do so: R v Scott Thomas, unreported (CACD 13 May 2002).*

See Note 1 *for the background to this direction.*

1. Before his interview(s) the defendant was cautioned *(see Note 9)*. He was first told that he need not say anything. It was therefore his right to remain silent. However, he was also told that it might harm his defence if he did not mention when questioned something which he later relied on in court; and that anything he did say might be given in evidence.

2. As part of his defence, the defendant has relied upon *(here specify the facts to which this direction applies - see Note 10)*. But [the prosecution say][he admits] that he failed to mention these facts when he was interviewed about the offence(s). [If you are sure that is so, this/This] failure may count against him. This is because you may draw the conclusion (see Note 11) from his failure that he [had no answer then/had no answer that he then believed would stand up to scrutiny/has since invented his account/has since tailored his account to fit the prosecution's case/*(here refer to any other reasonable inferences contended for - see Note 12)]*. If you do draw that conclusion, you must not convict him wholly or mainly on the strength of it *(see Note 13)*; but you may take it into account as some additional support for the prosecution's case *(see Note 14)* and when deciding whether his [evidence/case] about these facts is true.

3. 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 three things: first, that when he was interviewed he could reasonably have been expected to mention the facts on which he now relies; second, that the only sensible explanation for his failure to do so is that he had no answer at the time or none that would stand up to scrutiny (see Note 15); third, that apart from his failure to mention those facts, the prosecution's case against him is so strong that it clearly calls for an answer by him (see Note 16).

4. *(Add, if appropriate:)* The defence invite you not to draw any conclusion from the defendant's silence, on the basis of the following evidence (here set out the evidence - *see Note 17*). If you [accept this evidence and] think this amounts to a reason why you should not draw any conclusion from his silence, do not do so. Otherwise, subject to what I have said, you may do so.

5. *(Where legal advice to remain silent is relied upon, add the following to or instead of paragraph 4 as appropriate:)* The defendant has given evidence that he did not answer questions on the advice of his solicitor/legal representative. If you accept the evidence that he was so advised, this is obviously an important consideration: but it does not automatically prevent you from drawing any conclusion from his silence. Bear in mind that a person given legal advice has the choice whether to accept or reject it; and that the defendant was warned that any failure to mention facts which he relied on at his trial might harm his defence. Take into account also *(here set out any circumstances relevant to the particular case, which may include the age of the defendant, the nature of and/or reasons for the advice given, and the complexity or otherwise of the facts on which the defendant has relied at the trial)*. Having done so, decide whether the defendant could reasonably have been expected to mention the facts on which he now relies. If, for

example, you considered that he had or may have had an answer to give, but genuinely and reasonably relied on the legal advice to remain silent, you should not draw any conclusion against him. But if, for example, you were sure that the defendant remained silent not because of the legal advice but because he had no answer or no satisfactory answer to give, and merely latched onto the legal advice as a convenient shield behind which to hide, you would be entitled to draw a conclusion against him, subject to the direction I have given you *(see Note 18)*.

Notes

1. This direction is based on the terms of sections 34 and 38(3) of the 1994 Act; the five 'essentials' listed in *R v Cowan* [1996] 1 Cr App R 1, 7 DG, to the extent that they have been applied to section 34 cases; *R v Argent* [1997] 2 Cr App R 27; *Murray v UK* (1996) 22 EHRR 29; and *Condron v UK* (2001) 31 EHRR 1, [2000] Crim LR 679.

2. Note that inferences are permitted only when the defendant is tried for the same offence as that with which he was charged, or for any other offence of which he could lawfully be convicted on that charge: see sections 34(1), 34(2) and 38(2) of the 1994 Act.

2a. By section 34(2A) of the 1994 Act - in force 1 April 2003 - no adverse inference may be drawn against an accused at an authorised place of detention if at the relevant time he has not had the opportunity to consult a solicitor. Note also the corresponding provisions in the new sections 36(4A) and 37(3A).

3. A section 34 direction can be appropriate when the matter which the defendant failed to mention is the central feature in the case: *R v Gowland Wynn* [2002] 1 Crim App R 569.

4. The judge is entitled to give a section 34 direction even if the prosecution have not sought to rely on one *(R v Khan* [1999] *2 Archbold News* 2) or if both counsel have asked the jury not to draw any inference (*R v Elder* [1999] 9 *Archbold News* 2), but only if the defendant has had the opportunity of dealing with the matter when giving evidence (*R v Kerr and Roulstone* (2000) unreported, 98/07476/XS). In *R v Elder*, the Court of Appeal approved the trial judge's direction in the following terms: 'In this case, the prosecution, as well as the defence, invite you not to draw adverse inferences as against either defendant because of their failure to ... answer questions under caution. It is a matter for you whether you wish to follow this course, but in the circumstances you may well feel that it is a course which you should follow.'

5. An interview conducted in breach of Code C of the Codes of Practice under PACE 1984 should not form the basis of a direction under section 34 of the 1994 Act: *R v Pointer* [1997] Crim LR 676. Note, however, that continued questioning after the police believe there is sufficient evidence to charge the suspect is not necessarily in breach of Code C and may therefore engage section 34: *R v Elliott* [2002] 5 *Archbold News* 2. Generally see Archbold (2003) 15-386 et seq.

6. It may be appropriate to give the jury a *Lucas* direction (see Direction 27) and a section 34 direction in respect of the same response: *R v O(A)* [2000] Crim LR 617. When an alibi is advanced for the first time at trial, it may be necessary to give Directions 27 and/or 46 in addition to Direction 40: *R v Sylvester and Walcott* [2002] 36 Crim Law Week 1.

7. It may be permissible to leave a section 34 inference to the jury even if the defendant does not given evidence, but has called witnesses or has elicited material facts in cross-examination of a prosecution witness. See *R v Bowers* [1998] Crim LR 817 and *R v Keating* (2000) 2 Criminal Appeal Office Index E-59. Compare, these cases with *R v Moshaid* [1998] Crim LR 420.

8. Where the guilt or innocence of two or more defendants stands or falls together, the jury should be directed that they should not hold the silence in interview of one defendant against the other: *R v McClean and McClean* [1999] 4 *Archbold News* 1.

9. Section 34 usually arises in practice where a defendant fails to mention facts when interviewed, but it applies also where a defendant is charged or officially informed that he might be prosecuted (*see section 34 (l)(b)*). In such cases, this direction should be adapted accordingly. See eg *R v Dervish* [2002] 2 Crim App R 105 (failure to mention facts when charged).

10. Section 34 relates to inferences from a failure to mention facts (rather than theories or possibilities) which were known to the defendant at the time he was interviewed, and in relation to which he was asked questions. However, if the defendant knows at the time of the interview of a motive for the complainant to lie, the motive may constitute a 'fact' for this purpose - see, for example, *R v Nickolson* [1999] Crim LR 61 and R v B (M.T) [2000] Crim

LR 181. See also *R v Milford* [2001] Crim LR 330; *R v Betts and Hall* [2001] 2 Crim App R 257; and *R v Daly* [2002] 2 Crim App R 201.

11. The 1994 Act refers to 'inferences' but it is thought that juries will more readily understand 'conclusions', the word used in this direction.

12. For a discussion of the permissible inferences in section 34 cases, see Archbold (2003) 15-336 and Blackstone (2003) page 2332. Section 34 itself does not limit such inferences, and a number of recent cases including *R v Daniel* [1998] Crim LR 818 and *R v Beckles and Montague* [1999] Crim LR 148 are authority for the proposition that recent fabrication is not the only permissible inference. In practice, however, it is the one that usually arises.

13. See section 38(3) of the 1994 Act and *Murray v UK* at page 60, paragraph 47.

14. In *R v Cowan* at page 5B, Lord Taylor CJ said: 'The effect of section 35 is that the ... jury may regard the inference from failure to testify as, in effect, a further evidential factor in support of the prosecution case.' *In Murray v UK* at page 60, paragraph 47, the ECtHR spoke of the accused's silence being ' ... taken into account in assessing the persuasiveness of the evidence adduced by the prosecution.' In the latter case, the Court was considering both the accused's failure to give evidence (section 35) and his failure to answer questions (section 34).

15. See *Condron v UK*, referred to in Note 1 above. The word 'scrutiny' is preferred to 'cross-examination' in the context of section 34.

16. This passage has been drafted to reflect the authorities that an adverse inference can be drawn only if the jury finds 'a case to answer' (*R v Cowan* at page 7E) or a case 'sufficiently compelling to call for an answer by him' (*R v Birchall* at page 312) or a situation 'which clearly calls for an explanation from him' (*Murray v UK* at page 60, paragraph 47). The need for a passage such as we suggest has been challenged persuasively by Auld LJ in *R v Doldur* [2000] Crim LR 178, but the weight of authority supports its inclusion. For example, in the even more recent case of *R v Gill* [2001] 1 Cr App R 160, an appeal against conviction was allowed in a section 34 case on the ground, amongst others, that the jury were not given such a direction. The writers have therefore decided to adopt a cautious approach, rather than to give any hostages to fortune.

17. Note that there must be evidence. In *R v Cowan* [1996] 1 Cr App R 1, 9G Lord Taylor CJ said: 'We wish to make it clear that the rule against advocates giving evidence dressed up as a submission applies in this context. 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.' These remarks apply equally to section 34 and 35 cases. The judge should stop defence counsel, if necessary during his or her final speech, from seeking to give such reasons.

18. The direction on legal advice is based on *R v Hoare and Pierce* [2004] EWCA Crim 784 in which Auld LJ considered and reconciled earlier authorities, in particular *R v Betts and Hall* [2001] 2 Crim App R 25, *R v Howell* [2003] Crim LR 405 and *R v Knight* [2004] 1 Crim App R 117 which some commentators had thought to be inconsistent. To the same effect, see also *R v Beckles* [2004] *The Times*, 17 November. For the law relating to the waiver of legal professional privilege in this context, see *R v Bowden* [1999] 2 Crim App R 176.

19. For the situation where the accused submits a prepared written statement when interviewed, which does not omit any fact later relied on in evidence, see *R v Ali* [2001] 6 *Archbold News* 2.

Archbold (2004) 15-414, page 1537 et seq.
Blackstone (2004) F19.4, page 2381 et seq.