

Chapter 6: Confessions, Silence and Improperly Obtained Evidence

Question One

Police are concerned about a spate of burglaries from a sports-shop on the Happy Days estate. No arrests have been made but it is suspected that young boys resident on the estate are involved. Victor, a policeman acting undercover, strikes up a conversation with a group of teenage boys in a public garden on the estate. He pretends he is going to run a Marathon for charity and expressed admiration for the trainers they are wearing. He asks where he can get a second hand pair since he does not have much money. Two of the boys are suspicious and leave but a third, Harry, continues the conversation. Victor tells him sad stories about animal cruelty and that his Marathon Run is for an organisation which will rescue the animals. Harry finally agrees to get hold of a pair of trainers for Victor and the next day arranges to bring him a pair which he has taken from his older brother. The trainers turn out to have been stolen and Harry is charged with receiving stolen goods. At the trial he wants to plead not guilty and claim entrapment. He has not been in trouble with the police before and was not one of the people the police suspected of the burglaries.

Advise Harry.

Answer guidance

Case-law on improperly obtained evidence has demonstrated that the courts are developing a principled approach to improperly obtained evidence but earlier judgments are still relevant. The answer should make clear that entrapment is not a defence as *R v Sang* [1980] AC 402 established. On examination of the facts in the scenario in the question, it is arguable that an offence has been committed which would not have been committed without the pressure from Victor. However it is also arguable that the pre-existing facts of criminality did seem to justify an undercover police operation. The leading case on this is *R v Looseley* [2001] UKHL 53 which set the test is whether the police did no more than present the defendant with an unexceptional opportunity to commit a crime. The important question was the conduct of the police and the protection of the integrity of the criminal justice system rather than the predisposition of the defendant. Cite also *Teixeira v Portugal* (1998) 28EHRR 101 which set out the factors to consider including the nature of the offence, the factual basis for the police carrying out the operation and the degree and extent of the police inducement. See also *R v Smurthwaite* (1994) 98 Cr App R 437. The procedural points are also important namely, as *Looseley*, set out stay of prosecution is an appropriate remedy rather than exclusion of evidence under s78 PACE 1984. Consider also whether the undercover police exceeded authority *R v Barkshire* [2011] EWCA Crim 4.

Question Two

Under section 38 Criminal Justice and Public Order Act 1994 the accused cannot be convicted solely by inferences drawn from a failure to respond to a constable's questions. Critically evaluate why, by contrast, a confession alone can found a conviction.

Answer guidance

The introduction to the essay could explain the differing status between the weight of evidence of guilt from a confession, which is a positive act, and the permissible inferences from silence in the face of police questioning which the jury may draw. Failure to respond to questioning is more ambiguous and subject to misinterpretation. Contrast s38 Criminal Justice and Public Order Act 1994 with the common law rule in relation to confessions (which can be in words or otherwise) which do not need corroborative evidence to found a conviction. Explain that your answer is (i) going to address in what way and why the law treats these two areas of evidence differently and then (ii) comment on whether the justification given is convincing. The body of the essay should consider the history of confessions and the privilege against self-incrimination in western culture and discuss how the law tries to balance two assumptions: firstly that people do not as a rule make statements which are against their own interests and secondly that the law should protect the individual from intrusive and oppressive questioning which might lead to unreliable evidence being obtained. To do otherwise would violate individual autonomy and jeopardise the moral integrity of the verdict. With regard to confessions PACE provides safeguards against the admissibility of confessions which may be obtained in ways which are tainted, ie ss76 and s78 and also s58 provides for access to legal advice. Note that under s76 confessions may be excluded, 'notwithstanding that they may be true'. By contrast the more limited protections in CJPOA, as amended after *Murray v UK* (1996) 22 EHRR 29, consist of an absolute right to access to legal advice, as well as s38. Give examples such as *R v Goldenberg* where the courts have adopted a protective approach to defendants in excluding confession evidence, examples are *R v Samuel* [1988] QB 615, *R v Mason* [1988] 1WLR 139 although contrast this with cases such as *R v Goldenberg* (1989) Cr App R 285. Cite *R v Howell* (2005) 2 Cr App R 1 as illustrating the stringent test for the exclusion of evidence of silence. Answers could point out that the possible over-use use of confessions and silence as evidence concentrates too much on police interviews and that more proactive forensic evidence gathering should be encouraged to supplement interrogation of the suspect. DNA evidence is one example.

Question Three

James claims to be the victim of an assault by two men outside a dance club. He said that two young men, Phillip and Glen, accused him of having flirted with Glen's girlfriend in the dance hall and then started punching him. A passer-by, Hilary, came to the aid of James who told her what had happened. She knew Glen and saw him waiting at the nearby taxi-rank. She shouted at him. 'Why did you set about James?' According to her, Glen shrugged his shoulders and got into the taxi. Phillip had gone back into the club. Hilary called the police who cautioned and arrested Phillip in the club. In the police car on the way to the station Phillip said to the arresting officer that he was outside the club when James was attacked but that he, Phillip, had nothing to do with it.

At the station, Phillip who is aged seventeen and with learning difficulties, asked for a solicitor to be present but PC Johnson replied, "That would take too long to organise" and refused to allow one to be present. Phillip was questioned for three hours. Finally Peter admitted that he did punch James but that Glen had had nothing to do with the assault and had tried to stop it. Glen, aged twenty three, was also cautioned and arrested and questioned separately at the police station. He asked to see the solicitor who had recently given him good advice on another issue but it turns out she is not available at that time. When told this by the police he refused the police offer of a duty solicitor. He refused to answer any of the police questions. Both Phillip and Glen are charged with assault. At the trial both plead not guilty. Glen plans to testify that he had nothing to do with the robbery and had tried to stop Phillip snatching the camera.

Advise Glen and Phillip on their defence.

Answer guidance

The question requires you to demonstrate knowledge of the statutory provisions and case-law on confessions and inferences from silence. The status of silence as a possible confession under the common law is relevant to the exchange outside the police station, see *R v Christie* [1914] AC 545. *R v Sharp* [WLR 7. should be cited in relation to Phillip's partly incriminating and partly excusatory statement. The case law on section s34 CJPOA should be analysed. On the voluntary refusal of a duty solicitor see *R v Karapetyan* [2013] EWCA Crim 74. At the police interview question whether there was wrongful denial of access to legal advice and an appropriate adult to a juvenile under the provisions in Code C. Consider whether the questioning is oppressive under, s76(2)(a) and s76(2)(b) , see *R v Harvey* [1988] Crim LR 241). Section s78 may apply especially since there is evidence of police bad faith. If the confession is excluded under s76(2)(b) one defendant may attempt to have the other's pre-trial statement exonerating him admitted as part of the defence. Consider the possibility of editing the statement and the test set out under PACE s76A(2)(b).

Question Four

Tim and Martin, two brothers who are sharing a flat, are facing trial for receiving stolen goods. Police had conducted a lawful search of their flat and found boxes of computer parts which turn out to be stolen. They confiscated their mobile phones. Tim and Martin were arrested and interviewed separately with solicitors present. The police told Tim that they have accessed a text message from his mobile phone offering a stolen computer for sale. Tim then confessed to receiving stolen goods. Martin, on the advice of his solicitor, did not explain how the boxes of computers came to be in his room. Tim's solicitor subsequently found out that the police had lied to her and Tim about the text message. Tim plans to plead not guilty and wants to retract his confession. Martin also plans to plead not guilty and testify that he was asked by a friend at work to store a sealed box of for him which contained a scooter. The friend said he was going to give to his daughter on her birthday. While he is awaiting trial, Tim is confronted in the street by his next door neighbour, Alison. She called out to him, 'Why did you bring your criminal habits to our nice neighbourhood. You should be ashamed'. Tim ran into his house without replying.

Advise Tim and Martin on the evidential issues arising from the above facts.

Answer guidance

The police interviews in this scenario raise questions relating to both PACE and the Criminal Justice and Public Order Act 1994 (CJPOA) . Deal with each defendant separately and apply the law to the facts in a structured way. The facts of the interview with Tim have some similarity with *R v Mason* [1988] 1 WLR 139 where the fact that the police had lied to the solicitor was one of the factors in prompting the Court of Appeal to exclude the confession under s78 PACE. Discuss the importance of bad faith on the part of the police in this decision. Note the possible relevance of the common law and silence on accusation, see *R v Osborne* [2005] EWCA Crim 3082. Martin is proposing to give an explanation at trial which arguably he could have given in response to police questions at interview. An examination is needed of the approach of the courts to a claim by the defendant that he remained silent on legal advice. Cite the relevant case law under s34 CJPOA including *R v Hoare* [2005] 1WLR 1804. There the Court of Appeal held that the judge must direct the jury to consider whether, regardless genuinely given and genuinely accepted, the accused has remained silent not because of legal advice but because he had no, or no satisfactory explanation to give. Reference could be made the effect of the requirement to explain the solicitor's advice on legal professional privilege, see *R v Bowden* [1999] 1WLR 823. Note also s38 CJPOA which specifies that an accused cannot be convicted on his silence alone. Where there are more than one defendants note the implications of *R v Hayter* [2005] 1WLR 605.

The answer should contain reference to the importance of the judge giving clear directions to the jury, see Crown Court Bench Book, <https://www.judiciary.gov.uk/wp-content/uploads/2016/05/crown-court-compendium-part-i-jury-and-trial-management-and-summing-up.pdf>.