

CHAPTER 11: Drawing adverse inferences from a defendant's omissions, lies, or false alibis

1. *What impact has the European Convention on Human Rights exerted on the English law governing the drawing of adverse inferences both from the silence of a person accused of crime and from answers given to questions under compulsion?*

Ever since the decision of the ECtHR in *Murray v. UK* (1996) 22 EHRR 29, it has been apparent that the prosecution's use of inferences drawn from an accused's silence may infringe the defendant's right to fair trial, guaranteed under Article 6 of ECHR. The ECtHR has considered the failure provisions of the Criminal Justice and Public Order Act 1994 on more than one occasion (notably, in *Condron and Condron v. UK* (2000) 8 BHRC 290 and in *Beckles v. UK* (2002) 13 BHRC 522). The issue is discussed in paras. 11.7-11.10.

2. *PC Scuffer is questioning Slimeball at the police station concerning the rape of his neighbour's 20-year-old daughter, Lolita. Lolita claims that Slimeball attacked her when she came to his house to deliver a birthday card. Slimeball's solicitor, Bent, is present during the interrogation. At the beginning of the interview and after caution, Slimeball declares: 'On the categorical advice of Mr Bent, I refuse to answer any of your questions. I merely wish to say that Lolita has made all this up. She is a highly imaginative young lady.' At his trial, Slimeball's defence is that Lolita consented to intercourse with him. Discuss.*

Would your answer be any different if, at interview, Slimeball had handed in a statement, drafted by his solicitor, Bent, in which it was stated that Lolita had agreed to have sex with Slimeball?

This problem requires consideration of s. 34 of the Criminal Justice and Public Order Act 1994 and the extent to which defendants who have failed to mention facts upon which they subsequently rely in their defence at trial can prevent against judges directing juries on their entitlement to draw adverse inferences by invoking the fact that they were so acting upon legal advice. This issue is analysed in some detail especially in paras. 11.14-11.22.

There may also be a lie, requiring a *Lucas* direction, depending upon whether S has or has not altered his story – initially claiming that L has “made all this up”, but later invoking a defence of consent. In cases where both directions may technically be called for, note the advice of the Court of Appeal in *R v. Hackett* [2011] 2 Cr App R 3.

In the alternative scenario, you will need to consider the so-called ‘pre-prepared statement’ which made its first appearance in *R v. Ali (Sarraz)* [2001] EWCA Crim 863, and whose ruling confirmed by the Court of Appeal in *R v. Knight* [2004] 1 Cr App R 9 (see paras. 11.23-11.27).

3. What are (i) *Cowan directions* and (ii) *Lucas directions*? When must they be administered and what form do they take?

(i) *Cowan directions* must be delivered when a judge explains to the jury how they may treat a defendant's failure to give evidence (see paras. 11.58-11.61), whilst (ii) *Lucas directions* must be delivered in the four situations set out in *R v. Burge and Pegg* [1996] 1 Cr App R 163 (para 11.81) and are intended to warn juries against jumping too readily to the conclusion that any lies told by a defendant can be equated with guilt.