Chapter 15: Adverse inferences

Failure to testify

Section 35 of the Criminal Justice and Public Order Act 1994

The 'physical or mental condition' exception

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Footnote 18

See also *R v Burnett* [2016] EWCA Crim 1941 at [25], where the court said it would be unjust to draw an adverse inference where the accused, without an intermediary may not be able to do himself justice when giving evidence. But see also *R v Biddle* [2019] EWCA Crim 86 at [33] and [42]: it is necessary to provide some material suggesting a causative link between the absence of an intermediary and the defendant's decision not to give evidence.

Footnote 25

See also *R v Biddle* [2019] EWCA Crim 86 at [34], [41] and [44], citing *R v Burnett* [2016] EWCA Crim 1941 at [28] and *R v Dixon* [2014] 1 WLR 525.

Warning the accused

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See also the Crown Court Compendium (July 2019), Part 1, 17-5, para 21.

The direction to the jury

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See also the Crown Court Compendium (July 2019), Part 1, 17-5, para 17

The circumstances in which inferences may be drawn

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Footnote 43

See also *AB v Crown Prosecution Service* [2017] EWHC 2693.

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Footnote 47

See also the Crown Court Compendium (July 2019), Part 1, 17-5, para 16.

On being questioned under caution

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Questioning does not have to be 'specific' in nature, i.e. comprise specific questions relating to identifiable facts. It is enough if the accused appreciates that he is being questioned under caution and is being invited to give his account by necessary implication (see *R v Green* [2019] EWCA Crim 411 at [20]).

Failed to mention any fact relied on in his defence

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Footnote 70

See also *R v Johnson* [2017] EWCA Crim 191. Although there was no prepared statement, the accused had set up a line of reasoning in interview which was *broadly* consistent with his evidence and some missing details were not significant.

Footnote 74

See also, as an example, *R v Lewis* [2018] EWCA Crim 1101.

'A fact which … the accused could reasonably have been expected to mention'

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Footnote 83

Under *T v DPP* [2007] EWHC 1793 (Admin) there is a three stage test to be applied : (i) has the defendant relied in his defence on a fact which he could reasonably have been expected to mention ; (ii) what is his explanation for not mentioning it ; and (iii) if the explanation is not reasonable, is the proper inference to be drawn that he is guilty? (at [26]). It is unclear how s 34 affects the common law doctrine of recent possession, but see *AB v Crown Prosecution Service* [2017] EWHC 2963 at [27]-[28] in which it was said that the 3 stage test in *T v DPP* applies *mutatis mutandis* whether the potential inference arises under s 34 or at common law. See also *R v*

Ahmed [2019] EWCA Crim 1085: it may not be necessary for the prosecution to assert 'late invention' if the accused has had an opportunity in his oral evidence to explain why he did not put forward the fact.

Silence on legal advice

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Concerning the submission that it would be better to remove any reference to 'genuineness', a reference to genuineness appears in the 'Example' in the Crown Court Compendium (July 2019), Part 1, 17-1.

Circumstances in which a section 34 direction is not appropriate

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Footnote 108

R v Rana [2007] EWCA Crim 2261 at [11], echoed in *R v Spottiswood* [2019] EWCA Crim 949 at [46].

See also *R v Spottiswood* [2019] EWCA Crim 949 at 44] – [45]: where differing accounts are given by the accused at different stages of proceedings in respect of which distinct different legal principles apply, separate directions may be justified; but even in this situation, the approach endorsed is to combine the directions in accordance the Crown Court Compendium, Part 1, 16-3, Example 3**.**

The direction to the jury

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See now the Crown Court Compendium (July 2019), Part 1, 17-1

The word 'mainly' is required because the accused's "…failure to mention facts could be the main influence on the jury's verdict, even though not the only one": *R v Green* [2019] EWCA Crim 411 at [25]. It is also usual to direct the jury that they should only draw an inference if they consider it fair and proper to do so: even if the strict requirements for drawing an inference are met, whether it is actually right to do so remains a matter for the jury's good sense and fair-mindedness. It is also desirable that any proposed direction is discussed with the advocates before closing speeches and the discussion should start by a consideration whether any direction under s 34 should be given: *R v Green* [2019] EWCA Crim 411 at [27] – [28], where the court emphasized the value of a discussion and drew attention to the usefulness of written legal directions.

See also the Crown Court Compendium (July 2019), Part 1, 17-8, 'Example', point 4, and see also para 14

The jury may need guidance as to what level of detail the accused might be expected to go into in circumstances where he has not been asked specific questions but has simply been asked to give his account: see *R v Green* [2019] EWCA Crim 411 at [23].

Failure or refusal to account for objects, substances, marks, etc

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See now the Crown Court Compendium (July 2019), Part 1, 17-2.

Inferences from failure to provide advance disclosure of the defence case

Trials on indictment

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Footnote 179

See now, the Crown Court Compendium (July 2019), Part 1, 17-4, para 16

Inferences from the failure to provide advanced disclosure of the defence case

Trials on indictment

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Section 11(2) commonly applies where the accused has given oral evidence of a defence which differs from the defence set out in his defence statement (see s 11(2)(f)(i); see also *R v Duarte* [2019] EWCA Crim 1466). However, s 11(2) may also apply where the accused has not given oral evidence (*R v Duarte* [2019] EWCA Crim 1466). Where the section does apply, the prosecution may make an application to admit the defence statement and/or provide the jury with a copy of it.

Under s 6E(5)(b) of the 1996 Act, the judge may direct that the jury be given a copy of the defence statement only if he is 'of the opinion that seeing a copy of the defence statement would help the jury to understand the case or to resolve any issue in the case'. In *R v Duarte* [2019] EWCA Crim 1466, the judge was wrong to allow copies of the defence statement to go to the jury. It was not clear that the defence set out in the defence statement was inconsistent with the defence advanced at trial

and therefore it was not capable of helping the jury with whether he had initially put forward a 'lying defence' (see [27] – [28]).

Where it is unclear whether the accused will be giving evidence, the prosecution should not delay too long before making the application. In *R v Duarte* [2019] EWCA Crim 1466, the Court of Appeal held that at the stage when it is the accused's turn to give evidence and he formally indicates that he will not give evidence, it will generally be too late for the prosecution to make an application, absent a prior agreement with the defence, approved by the judge (at [23]). Such an agreement may be to the effect that the prosecution advocate will delay formally closing her case until after the accused has made a final decision about whether to give evidence, or that she will re-open her case for the sole purpose of admitting the defence statement (ibid).