

Ch 16: Adverse inferences from and accused's silence or conduct

Section 34 of the Criminal Justice and Public Order Act 1994

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

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An accused may reasonably be expected to mention facts readily within his knowledge even though the prosecution has yet to disclose a significant amount of relevant material: *R v Black* [2020] EWCA Crim 915.

Circumstances in which a section 34 direction is not appropriate

Where a *Lucas* direction is more appropriate

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In *R v Spottiswood* [2019] EWCA Crim 949 at [44]–[45], it was held that 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 with the guidance in the Crown Court Compendium (The Crown Court Compendium (December 2020) Part 1, 16–3, Example 3). In *R v Wainwright* [2021] EWCA Crim 122, it was held that separate directions were appropriate where the accused gave different explanations as to why he told lies and why he failed to mention facts which he had relied on in his evidence.

The direction to the jury

Elements of the direction

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In *R v Black* [2020] EWCA Crim 915 it was held that when deciding whether it is fair to allow a jury to draw an inference in respect of the failure to mention facts in a defence statement, late service of material by the prosecution is a relevant consideration; the fact that the accused had absconded is another. (At [48])

In *R v Green* [2019] EWCA Crim 411 at [27]–[28], the court emphasized the value of a discussion and drew attention to the usefulness of written legal directions. See also *R v Wainwright* [2021] EWCA Crim 122 at [43]: proposed written directions should be given to advocates in advance and it may assist to include in the written directions, the generic elements of s 34. See also the Crown Court Compendium (December 2020), Part 1, 17–1, paras 25 and 29.

Functions of judge and jury

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The rule in *R v McGarry* is not an inflexible rule. The judge retains a discretion as to whether such a specific direction is called for: see *R v Thacker* [2021] EWCA Crim 97 at [106] – [110]. See also *R v Thomas* [2002] EWCA Crim, at [9] – [17]; and *R v Jama* [2008] EWCA Crim 2861, at [14]–[15].

Generally, a specific direction as per *R v McGarry*, would not be called for where, in the circumstances of the case, it would only serve to confuse the jury: see *R v Thacker* [2021] EWCA Crim 97.