

R v ABBAS and another [2010] CA Cr D

The 15 year old victim was a highly disturbed young woman. She had been sexually promiscuous since the age of 12, told lies and had run away from home on numerous occasions. She sought out sexual encounters with men and boys and had been placed in the care of the local authority for her own safety. In February 2008, she absconded from the care home. She had had oral and penetrative sex with a number of men during that period, and had been controlled for prostitution by the second defendant during that time. The second defendant had also supplied her with drink and drugs. When the victim was brought home, her mother found some knickers on her floor. DNA belonging to Abbas was found in a semen stain in the crotch. He was arrested. He made no comment in interview. Police officers specifically warned him as to the presence of the DNA on the underwear and informed him that a failure by him to account for the presence on the underwear could lead to adverse inferences being drawn at trial. (Special Warning s.36)

Abbas was charged with engaging in sexual activity with a child under 16. The victim had no recollection of any sexual encounter with him. The defendant contended that there was no case to answer. However, the judge rejected that submission. In his directions to the jury, the judge directed them that the defendant had been asked to explain at an early stage the presence of his DNA on the underwear and that he had not done so. He directed it was open to the jury to draw **adverse inferences** from the defendant's failure to account for the DNA in that they might take it into account as additional support for the prosecution case. The first defendant was convicted. He appealed. The second defendant had pleaded guilty to various offences and appealed against his sentence on other grounds.

The defendant contended that the conviction was unsafe as the judge had erred in permitting the jury to draw adverse inferences from his failure to account for the presence of his DNA on the victim's underwear.

Abbas's appeal would be allowed. The second defendant's appeal would be allowed on other grounds.

It was clear that the judge's direction as to adverse inferences had purportedly been given under s 36 of the Criminal Justice and Public Order Act 1994; however, it was equally clear that s 36 had no application in the circumstances of the instant case. The semen staining on the victim's underwear did not come within any of the circumstances of s 36. The object, mark or substance has to be on or in the possession of the defendant.

It followed that the police should not have given the defendant the warning they had and no adverse inferences direction should have been given. It could not be said that the direction given by the judge had related to s 34 of the 1994 as, in all the circumstances, it could not be said that the defendant had relied on any fact in his defence at trial which he reasonably could have been expected to mention at trial. Moreover, the judge had erred in failing positively to direct the jury not to hold against the defendant his failure to answer questions.

The combined effect of the s 36 direction which should not have been given and the judge's failure to direct the jury not to hold the defendant's silence in interview against him rendered the conviction unsafe.

The conviction would be quashed. No retrial would be ordered in the light of the current condition of the victim and the time the defendant had spent in custody.

*The interpretation and comments made within this document are not to be considered as legal advice.
Reference should always be made to the original case.*