R v ROBLE [1997] Crim LR 449

Adverse Inferences

On 26th March 1996, at Sheffield Crown Court, before His Honour Judge Moore, ROBLE was convicted of wounding with intent and sentenced to 6 years' imprisonment. He also pleaded guilty to criminal damage. It was not disputed that, in the early hours of 30th May 1995, the appellant inflicted a number of knife wounds upon the complainant, Osman Mohammed. But at his trial, for the first time, ROBLE raised before the jury the issue of self-defence. In the interview conducted by the police, following his arrest, he had responded, on the advice of his solicitor, with 'no comment'.

It was on the afternoon of 30th May, that the appellant was arrested. In his pocket was a knife. The fixing mechanism had been broken, so the blade swung freely, but there was blood found on the blade, consistent with that knife having been used as a weapon.

On his arrest ROBLE had a conference with his solicitor, which lasted some two-and-a-half hours. He was given the then 'new style' of caution, that he did not have to say anything and it was his right not to do so, but, if he did not, a court might draw inferences from his refusal. The following day, he was interviewed on three separate occasions, in the presence of his solicitor. The first and second of those interviews both concluded when the appellant said that he wanted to consult his solicitor privately.

He made 'no comment' in relation to the questions he was asked. He indicated that he understood what the meaning of the caution was. He understood parts of the interview, but he had followed his solicitor's advice not to comment on the questions asked. He had kept the knife so that fingerprint tests could confirm his story of it having come from the possession of the victim, but no fingerprint expert had been instructed on his behalf with a view to providing such confirmation.

ROBLES appeal was on the grounds the judge was wrong in ruling that the jury could draw inferences from his failure in interview to account for the knife in his possession, having regard to the provisions of section 36 of the Criminal Justice and Public Order Act 1994. A much stronger appeal was that the judge's ruling and summing-up, in relation to the inferences to be drawn from the appellant's silence in interview, were defective, having regard to the provisions of section 34 of the Act.

ROBLE'S solicitor, Mary Macadam, gave evidence. saying that ROBLE'S instructions were not unclear because he was guilty and/or was hedging his bets. Her view was that the appellant would not be able to give a proper coherent account and that therefore he should remain silent in interview, and she so advised him, knowing that he would follow her advice. She did not think an interpreter would have been of any assistance and so had not sought one.

The advice, which she had given, was given in good faith. At that time section 34 had only been in effect for some 6 weeks, and she agreed that, with the benefit of her experience subsequently, she might well now give different advice.

The defence said it was entirely reasonable for the defendant to follow his solicitor's advice. The difficulty with that submission is the judge did not know why the advice had been given. What is crucial, as was pointed out in **R v. Argent** (unapproved transcript of the Court of Appeal dated 16th December, page 14) is not the correctness of the solicitor's advice, but the reasonableness of the appellant's conduct in all the circumstances which the jury found to exist, including the giving of that advice.

We respectfully agree with what was said in *Condron*, that legal professional privilege is not waived merely by evidence from the accused, whether on the voire dire or before the jury, that he had been advised not to answer questions in interview. But, in itself, such advice is not likely to be regarded as a sufficient reason for not mentioning facts relevant to the defence. The evidence must generally go further and indicate the reason for that advice, for this must be relevant when the jury are assessing the reasonableness of the conduct in remaining silent.

Good reason may well arise if, for example, the interviewing officer has disclosed to the solicitor little or nothing of the nature of the case against the defendant, so that the solicitor cannot usefully advise his client or, where the nature of the offence, or the material in the hands of the police is so complex, or relates to matters so long ago, that no sensible immediate response is feasible. Such considerations do not arise in the present case.

If, as will generally be necessary if no adverse inference is to be capable of being drawn, the reason for the advice to remain silent is given, this in turn is likely to amount to a waiver of privilege. If a solicitor is called, it may be appropriate to ask him what his reasons were and, when this is explored, disclosure of what the defendant said to his solicitor at the time may well become inevitable. In the present case, the solicitor, on the voire dire, was extremely guarded in her evidence, in what she said about what the defendant had said to her.

The purpose of the statutory provisions is to permit adverse inferences to be drawn where there has been late fabrication, to this extent, to encourage speedy disclosure of a genuine defence or of facts, which may go towards establishing a genuine defence. If a defendant disclosed to his solicitor, prior to police interview, charging or trial, information capable of giving rise to a defence, it will always be open to the defence to lead evidence of this to rebut any inference of subsequent fabrication. But if such evidence was not disclosed, or was disclosed at a late stage in the sequence of interview, charge and trial,
adverse inferences can be drawn by the jury.

In the present case, it seems to us that on the voire dire privilege may very well have been waived to a much greater extent than was appreciated by those participating in the trial at the time, in that the solicitor sought to advance reasons why she had advised the appellant to say nothing but this was not further explored in relation to the material on which those reasons were based.

If the defendant had at the time provided information about the origins of the knife and how and the circumstances in which he used it, this too, if privilege were waived, could have been elicited. But, in the absence of such evidence, it would be open to the jury to **infer subsequent fabrication**.

In the present case, the solicitor was not called before the jury, and the only evidence which they heard came from the defendant, namely that he had been advised to say nothing. This, as we have said, in the absence of any reason for that advice, **was unlikely to inhibit the jury from drawing adverse inferences.**

Accordingly, in our judgment, it was correct for the judge to rule in the way which he did and to direct the jury, as he did, that it was open to them to draw inferences both generally and in relation to the knife. He did so in a direction, which, it seems to us, was entirely in accordance with the Judicial Studies Board's specimen direction and with the observations in Condron in relation to point five in Cowan. In any event there was, as it seems to us, overwhelming evidence against this appellant. It follows that his conviction was in our judgment safe, and this appeal must therefore be dismissed.