SILENCE AS EVIDENCE

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One of the most difficult problems in the law of evidence arises when a party remains silent, either before or during the trial.[1] There are four principal areas of difficulty. First, what inferences of logic and commonsense can be drawn from silence? Secondly, which commonsense inferences are permissible in law? Thirdly, what tests govern the drawing of permissible inferences in a particular case? Fourthly, is the current law desirable? The last problem has become a matter of heated debate since the publication of the Eleventh Report of the English Criminal Law Revision Committee on Evidence.[2] What follows does not purport to be a part of the debate, but a necessary preliminary to participation in it: an attempt to work out exactly what the status of silence is in the world of commonsense and in the law.[3]

COMMONSENSE INFERENCES FROM SILENCE

It is thought that three kinds of reasoning may be employed when a party is silent.

First, his silence may be taken as consent to whatever has been said to him, as an implied admission. This inference arises where a denial would be expected if the statement was false. Here silence operates rather like a nod; it is as if the party did not think it worth while wasting words in assenting to what he and the speaker know is obvious.

Secondly, silence may be taken, by itself or with other evidence, as a sign that the party is conscious of guilt or liability which he may be trying to hide. In this sense silence is a piece of conduct, like a lie or other interference with the course of justice, which operates as an implied

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1 The most useful discussions are: H. S. Hilles, "Tacit Criminal Admissions", 112 U. of Pa. L.R. 210 (1963); R. S. O'Regan, "Adverse Inferences from Failure of an Accused Person to Testify", [1965] Crim. L.R. 711; A. R. N. Cross, "A Very Wicked Animal Defends the 11th Report of the Criminal Law Revision Committee", [1973] Crim. L.R. 329; A. Zuckerman, Note, 36 M.L.R. 509 (1973).

2 1972, Cmnd. 4991.

3 Space precludes a discussion of two related matters. One is the status of the silence of non-parties; this involves a dispute (about whether silence falls within the rule against hearsay) which does not arise in the case of parties since even if their silence is hearsay, it falls within the admissions exception. The other is what inferences follow from a party's failure to call other witnesses or produce documents or chattels.

4 See J. D. Heydon, "Can Lies Corroborate?", 89 L.Q.R. 552 (1973).

admission that the party's case is bad. This is often confused with the first kind of implied admission but it is clearly different from it. The first kind of admission amounts to agreement with what is said, whereas the latter need not entail agreement with what is said, because the guilt evidenced may relate to some other crime: the party shows a consciousness of guilt despite himself. Further, in the second case the statement made to the party may in fact not be strictly or even substantially true, but may remind the party of his guilt so that he then displays it. Hence the statement would not logically (as in the first case) be evidence of its truth, but would, when coupled with silence, simply tend to prove that the party was guilty of some misconduct.[5] If a man accused of killing A and B is silent, and in fact there is evidence that he killed A and C, his silence may amount to an assent to killing A and a sign that he is conscious of his guilt of killing C.

A slightly different form of this "consciousness of guilt" reasoning may be used when the accused is silent in the face of an accusation but advances a defence at his trial. An inference is drawn from the belatedness of the defence to a consciousness at the time of the accusation that he has no true defence. In other words, though normally one may infer guilt from silence at the very moment of silence, sometimes the occurrence of later events permits the inference because they change the character of the silence.

The third commonsense inference takes a number of forms, but essentially it is that silence makes any defence advanced difficult to believe, so that the opposing case, being uncontradicted, becomes stronger. The difficulty of believing the defence may exist because the failure to disclose it until trial prevents any checking of it, or because it has the appearance of being an afterthought, or because it is unsupported by the sworn evidence, tested in cross-examination, of one who is best able to support it. Plainly the distinction between this third inference and the first two, between using silence to weaken the defence case and *thus* strengthen the prosecution's, and using it directly to strengthen the prosecution's, is subtle, though real, and not easy to understand.

Sometimes the three inferences may all be drawn from a given set of facts; sometimes none can. Let us assume that a parent accuses a teacher of stealing money from a pupil's wallet at 6 p.m. on Monday, and that the teacher says nothing but bursts into tears. At the trial six weeks later he alleges for the first time that on Monday at 6 p.m. he was in a pub with friends. It may be possible legitimately to make the following commonsense inferences. The teacher admits guilt by not denying the outrageous charge at once as an innocent man would; the teacher's silent and ashamed demeanour indicates a consciousness of guilt of this and similar

[5] *Bailey*, [1956] S.A.S.R. 153; *Starr*, [1969] Q.W.N. 23.

crimes; the alibi is unsupported because the friends cannot now remember whether on that day the accused drank with them as he sometimes did, and so the inferences from the prosecution's evidence become stronger. Changes in the facts will entail changes in the possible inferences.

The problem is that it is often dangerous to draw these commonsense inferences. Silence is quite unlike an express admission or even such an implied admission as a lie, or flight, or interference with the course of justice by destruction of evidence; silence is so equivocal. A man may be silent in the face of an accusation for many reasons other than guilt. He may not have heard or understood what was said; he may not consider the charge to have been addressed to him; he may be silent because he is attempting to work out the meaning of an ambiguous statement. The accusation may be so sudden as to make him silent through confusion, as where he has just woken up. He may fear misreporting of any reply he makes; he may be shocked into silence by a false but serious charge; he may indignantly and contemptuously consider it beneath his dignity to begin a debate about baseless and dishonourable accusations. He may not answer because he lacks knowledge of the matter in question. He may fear that to protest too much will be taken as a sign of guilt. He may believe he has a right of silence of which he wishes to avail himself, perhaps because he thinks an early disclosure of his defence will enable the other side to interfere with his witnesses. He may be silent because he wishes to protect others or to avoid disclosing discreditable but irrelevant facts about himself or others. Further, human reactions vary so much; the guilty may deny guilt strongly while the innocent stay silent. Shaw C.J. once told a Massachusetts jury: "Have you any experience that an innocent man, stunned under the mere imputation of such a charge though conscious of innocence, will always appear calm and collected? Or that a guilty man who, by knowledge of his danger, might be somewhat braced up for the consequences, would always appear agitated? Or the reverse? Judge you concerning it."[6] Another difficulty is determining how much of a statement a man approves by being silent—all or only part? If a man charged with murder pleads self-defence, and also denies that he had the mens rea for murder, what follows from his silence? Do we infer that he had mens rea and justification, or one, or the other? Commonsense will often suggest inferences from silence, but will more often require extreme caution.

Does the law allow triers of fact to draw such inferences as commonsense suggests? Let us first consider the situation where a defendant's counsel raises a defence at the trial (which may or may not be supported by his sworn testimony) not mentioned by the defendant earlier, and then

[6] *Webster's Trial*, Bemis' Rep. 486 (quoted by Wigmore, *Evidence* (3rd ed., 1940) para. 273); see also *Walsh* (1905), 7 W.A.R. 263, 265.

consider the inferences to be drawn from silence at the trial (whether or not the defendant was silent before the trial).

LEGALLY PERMISSIBLE INFERENCES FROM OUT OF COURT SILENCE

One consequence of the 'right to silence' is that no-one is obliged to answer out-of-court questions, subject to special statutory exceptions.[7] Silence does not constitute the offence of obstructing a policeman in the course of his duty[8] and is not otherwise punishable. But normally all three commonsense inferences may be drawn from it.

(a) *Silence as consent*

Normally the trier of fact may draw the inference that the silence of the party in the face of the accusation is consent to it if this is open as a matter of commonsense, and the judge may give a direction to this effect. The exception to the rule is where the accusation is made in the presence of a policeman to an accused person; the Privy Council has recently held that a blanket rule of prudence prevents the inference being drawn, whether or not the policeman cautioned the accused that he had a right to stay silent.[9] Its justification is that in many cases innocent accused persons may fear the consequences of speaking and do not feel psychologically at liberty to do so.

Even if no policeman is involved, there may be a difference in application of the principle as between civil and criminal cases. There are a number of reasons why silence is likely to be more common in the latter. Criminal charges are generally felt to be more serious. in that an accused will be more wary in answering. In civil cases where actual corroboration is required (particularly affiliation proceedings) the court is under some pressure to find corroboration in silence because the requirement sometimes masks injustice; in criminal cases, however, the serious inference of guilt is less likely to be drawn.

[7] See J. D. Heydon, "Statutory Restrictions on the Privilege Against Self-Incrimination" (1971) 87 L.Q.R. 214.

[8] *Rice* v. *Connolly*, [1966] 2 Q.B. 414.

[9] *Hall*, [1971] 1 All E.R. 322, following *Whitehead*, [1929] 1 K.B. 99 and *Keeling*, [1942] 1 All E.R. 507 in preference to *Feigenbaum*, [1919] 1 K.B. 431. See also *Tate*, [1908] 2 K.B. 680; *Charavanmuttu* (1930), 22 Cr. App. R. 1; *Naylor*, [1933] 1 K.B. 685; *Littleboy*, [1934] 2 K.B. 408; *Leckey*, [1944] K.B. 80; *Twist*, [1954] V.L.R. 121; *People* v. *Quinn*, [1955] I.R. 57; *Sullivan* (1967), 51 Cr. App. R. 102; *Vandine*, [1968] 1 N.S.W.R. 417; cf. *McKelvey*, [1914] St. R. Qd. 42; *Mutton* (1932), 32 S.R.N.S.W. 282 and *Thomas*, [1970] V.R. 674. The majority U.S. view is the same: Hilles, *op. cit.*, 253; *People* v. *Lewerenz*, 181 N.E. 2d 99 (1962).

[10] *Doe d. Leicester* v. *Biggs* (1809), 2 Taunt. 109; *Doe d. Baker* v. *Woombwell* (1811), 2 Camp. 559; *Thomas d. Jones* v. *Thomas* (1811), 2 Camp. 648; *Doe d. Clarges* v. *Forster* (1811), 13 East 405.

[11] *Permewan* v. *Ippolito* (1965), 83 W.N.N.S.W. 90.

In cases where the inference may be drawn, the test is whether a denial could reasonably be expected in the circumstances. The circumstances of a business relationship commonly permit the inference to be drawn; a tenant's silence in the face of correspondence becomes much more relevant in business cases than in affiliation cases. Inferences will be drawn from a failure to reply to letters alleging overpayment,[12] or agreement,[13] or rendering accounts, particularly if there has been a continuous stream of correspondence.[14] But in affiliation cases, in the absence of such special circumstances as a threat of legal action if there is no reply,[15] or where the girl's father and the putative father are related,[15] it is most unlikely that silence will prove paternity.[16] It is much more natural to reply to accusations made publicly to one's face than to those in letters. There are many more reasons for not replying to letters than for silence—laziness, the time and money used, a dislike for or lack of facility in writing, the urgency of other affairs, a desire to discourage importunity. And there are reasons of policy against allowing evidence to be acquired in this way just as there are against "inertia sellers". Holmes J. once said that a man can in this way "no more impose a duty to answer a charge than he can impose a duty to pay by selling goods".[17]

Regard must be paid to the status of the accuser. It is futile to argue with a madman, a drunk, a baby,[18] or an hysterical mother whose child has just been run over.[19] Where the accuser was on her death bed the accused's silence was not evidence, partly because it was inappropriate to contradict her in such circumstances and partly because the accused was relying on the presence of his solicitor for protection.[20] Accusations among relatives are often held to call for an answer because there are less likely to be inhibitions against speaking; but this is not so in the case of an angry spouse. "It is not always conducive to domestic peace for a husband to contradict the statements of his wife and ordinarily the wise husband attempts to sooth and placate his irate spouse, rather than to question her statements, however wide of the truth they may be."[21] If the party is in some respect superior to his accuser, silence may be due to contempt rather than consent, and officious busybodies who have little to do with the relevant events need not be answered.

[12] *Gaskill* v. *Skene* (1850), 14 Q.B. 664.
[13] *Weidemann* v. *Walpole*, [1891] 2 Q.B. 534.
[14] *Fairlie* v. *Denton* (1828), 3 C. & P. 103; *Richards* v. *Gellatly* (1872), L.R. 7 C.P. 127; cf. *Draper* v. *Crofts* (1846), 15 M. & W. 166; *Keen* v. *Priest* (1858), 1 F. & F. 314.
[15] *Ex p. Freeman* (1922), 39 W.N.N.S.W. 73.
[16] *Thomas* v. *Jones*, [1921] 1 K.B. 22; *Snead* v. *Commonwealth*, 121 S.E. 82 (1924); *Oliver* v. *Jeffrey* (1924), 89 J.P. 355; *Ex p. Cregan* (1931), 49 W.N.N.S.W. 30; *Kurth* v. *Paff*, [1968] Q.W.N. 21; cf. *Grice* v. *Reimer*, [1915] Q.W.N. 24.
[17] *A.B. Leach & Co.* v. *Peirson*, 275 U.S. 120, 128 (1927).
[18] *Robinson* v. *State*, 108 S. 2d 583 (1959) (2½ years old).
[19] *Thatcher* v. *Charles* (1961), 104 C.L.R. 57.
[20] *Mitchell* (1892), 17 Cox C.C. 503.
[21] *Riley* v. *State*, 65 S. 882, 883 (1914) *per* Cook J.

Another factor is the situation of the party charged and the circumstances surrounding the making of the charge. A man is not expected to speak after an accident if he is physically injured or shocked,[22] or busy attending to victims.[23] Silence on being identified as a criminal is not an admission if the accused does not know what crime he is supposed to have committed,[24] or the accusation does not relate to the appropriate issue. Windeyer J. once said: "A failure to answer an accusation 'You drive too fast round here' could hardly be an admission by the appellant that he ought not to have backed his car where and when he did."[25] Further, a reply cannot reasonably be expected "to a statement untrue past all controversy".[26] If the party's attempts to deny accusations are inhibited by the efforts of others present[27] or by the need for decorum and orderly procedure in formal inquiries, silence is of no weight. A husband's failure to deny his wife's claim that marital relations had ceased is not an admission; it is reasonable not to discuss intimate problems in public.[28]

When will an indignant reply be expected? One test is the seriousness of an accusation, e.g. a charge of incest by a daughter to her father,[29] or a breach of promise of marriage.[30] Another is where there is more than a mere charge of the crime,[31] as in *Cramp*, where a father said to the accused: "I have here those things which you gave my daughter to produce abortion."[32] Another is the solemnity of the form of the accusation: so an executor's failure to dispute an affidavit alleging that he owes the estate money may be an admission.[33]

It is easier to infer an admission from silence to particular questions out of a large number than it is from a general refusal to answer any questions at all.[34]

It might be noted that implied admissions by silence often merge into implied admissions by vague and equivocal answers. An example is *Mars* v. *McMahon*, where the respondent in an affiliation case was addressed as follows: "I understand that you do not deny having had connection with the girl [ten seconds' silence], but that others have also had connection with her." The respondent replied: 'It's pretty rotten when she picks on me when I know that others have also been out with her."[35]

22 *Thatcher* v. *Charles* (1961), 104 C.L.R. 57.
23 *Beck* v. *Dye* 92 P. 2d 1113 (1939).
24 *People* v. *Aughinbaugh*, 223 N.E. 2d 117 (1967).
25 *Thatcher* v. *Charles* (1961), 104 C.L.R. 57, 70.
26 *Young* v. *Tibbits* (1912), 14 C.L.R. 114, 129 *per* Barton J.
27 *Campbell*, [1960] N.Z.L.R. 884.
28 *Zink* v. *Zink* 137 A. 2d 139 (1957).
29 *Power*, [1940] St. R. Qd. 111. See also *Hayslep* v. *Gymer* (1834), 1 Ad. & E. 162 (charge that property was given to defendant as executor).
30 *Bessela* v. *Stern* (1877), 2 C.P.D. 265.
31 *Tate*, [1908] 2 K.B. 680, 683.
32 (1880), 14 Cox C.C. 394.
33 *Freeman* v. *Cox* (1878), 8 Ch.D. 148; cf. *Hollis* v. *Burton*, [1892] 3 Ch. 226.
34 *Paterson* v. *Martin* (1966), 40 A.L.J.R. 312, 314; cf. *Rudd*, [1923] S.A.S.R. 229.
35 [1929] S.A.S.R. 179; *Hockey* v. *Rossiter*, [1929] S.A.S.R. 240; *Ex p. Tully* (1929), 29 S.R.N.S.W. 206.

(b) *Silence evidencing a consciousness of guilt*

In *Christie* Lord Reading said that a statement made in the accused's presence was sometimes admissible 'in order to prove the conduct and demeanour of the accused when hearing the statement as a relevant fact in the particular case, notwithstanding that it did not amount . . . to an acknowledgment . . . of the truth of the statement'.[36] The Criminal Law Revision Committee[37] is technically correct in saying that this doctrine is not affected by the decision in *Hall*[38] that silence in the presence of a policeman cannot be an admission of guilt, but it may be doubted whether the spirit of *Hall* is compatible with the application of the *Christie* doctrine to cases where a policeman is present. An inference that silence shows a conciousness of guilt is as dangerous as an inference that it shows an admission when a policeman is present.

The principle here is that normally the urge of self-preservation will induce a man to speak if charged with unlawful conduct; so silence shows that he is conscious of guilt. "In the face of [serious] allegations, men commonly do not remain mute but voice their denials with earnestness, if they can do so with honesty. Culpability alone seals their lips. The law simply recognizes the natural probative force of conduct contrary to that of the ordinary man of integrity."[39] Wigmore remarks that the only dissent from this view seems to be based on "that subtle sentiment of honor (scarcely capable of appreciation outside of the Southern States) which recognizes repugnance that an honorable and sensitive man feels to placing himself in a situation where his word may be doubted because of his interested motives . . . These standards of honor, however, cannot be expected to be considered in the Courts of other communities not affected by them in daily life".[40]

Where silence is consent, a statement made to the party is admitted to prove the truth of its contents; the party has in effect adopted it. But the question may be whether 'the reaction of an accused person to the making of a statement in his presence may afford evidence of something other than the facts suggested in the statement'.[41] This means that it may be difficult to discover what the party is impliedly admitting. If other evidence suggests the accused committed the crime charged, 'any conduct . . . demonstrative of guilt may go far to support a conclusion that the accused committed the very crime charged. But when there is no other

[36] [1914] A.C. 545, 565-6. See also *Chantler* v. *Bromley* (1921), 14 B.W.C.C. 14.
[37] *Op. cit.*, para. 34. The decisions in *Davis* (1959), 43 Cr. App. R. 215; *Hoare* (1966), 50 Cr. App. R. 166 and *Sullivan* (1967), 51 Cr. App. R. 102 seem against the suggestion. These were successful appeals against comments that an innocent man would not stay silent during questioning.
[38] [1971] 1 All E.R. 322.
[39] *A.-G.* v. *Pelletier*, 134 N.E. 407 (1922).
[40] *Op. cit.*, para. 289.
[41] *Woon* (1964), 109 C.L.R. 529, 537 *per* Kitto J.

evidence implicating the accused, an attitude of guilt, without more, may mean only that the accused was a participant in some wrongdoing, not that he committed the crime alleged, in form and manner alleged'.[42]

The inference of consciousness of guilt may be made from silence alone, but it is more commonly made from silence coupled with other conduct. The Supreme Court of Canada once drew the inference from silence followed by contradictory explanations.[43] Where the accused's reply was "What I have to say I will say to the Court", the judge legitimately remarked that the reply was an odd one when court proceedings had not yet been mentioned.[44]

There are many examples where a consciousness of guilt has been detected in silence: where out-of-court silence is followed by a defence at the trial;[45] a pawnbroker's failure to record the purchase of stolen goods in his entry book as required by law;[46] a refusal by one involved in a collision to give his name.[47] The failure of a victim of crime to complain speedily, e.g. the victim of rape, may be evidence of consent, unless there is some good reason for this such as fear of vengeance by the criminals.[48] Essentially silence must be extraordinary, abnormal, unusual or suggestive: so ordinary racegoers do not, without offering any explanation, hurry furtively away during a race to the telephone to utter a few words.[49] As with the case of silence as consent to a statement, a selective refusal to answer questions is more suspicious than a general refusal.[50]

It will be rare for an express admission to have a prejudicial effect exceeding its probative value, but implied admission from silence may be so unsatisfactory as to justify exclusion of the evidence on this ground.[51]

In *Christie* the House of Lords decided that statements made in the presence of a party could be put to the jury before there was evidence of any admission from his conduct, though the contrary procedure was desirable.[52] If there is no evidence of admission, injustice may be caused because the jury become so prejudiced by hearing the statements that they ignore any warning to put them aside.[53] For this reason it is often necessary either to prevent the statement going before the jury or to have a new trial.[54] Rule 5 of the Judges' Rules ameliorates the position slightly by forbidding the police to tell the accused of a co-accused's statement,

[42] *Ibid.*, 540 *per* Windeyer J.
[43] *Hubin* (1927), 48 C.C.C. 172.
[44] *Gerard* (1948), 32 Cr. App. R. 132.
[45] E.g. *Higgins* (1902), 36 N. Br. 18, 24.
[46] *People* v. *Clausen*, 52 P. 658 (1898).
[47] *Jones* v. *Shattuck*, 56 N.E. 736 (1900).
[48] *Gandfield* (1846), 2 Cox C.C. 43.
[49] *Duthie* v. *Brebner*, [1961] S.A.S.R. 183.
[50] *Woon* (1964), 109 C.L.R. 529.
[51] *Starr*, [1969] Q.W.N. 23.
[52] [1914] A.C. 545; see also *Norton*, [1910] 2 K.B. 496; *Grills* (1910), 11 C.L.R. 400.
[53] See *Curnock* (1914), 111 L.T. 816; *Altshuler* (1915), 11 Cr. App. R. 243; *Pilley* (1922), 16 Cr. App. R. 138; *Adams* (1923), 17 Cr. App. R. 77.
[54] *Moore* (*No. 2*), [1968] Crim. L.R. 217.

but permitting them to hand the accused a copy. Breach of the rule may, but will not necessarily, result in the exclusion of any admission made.[55]

(c) *Silence as strengthening inferences from the opposing case*

The judge may warn the jury that they may give greater weight to the case against a silent party because of the absence of any credible defence; and this is so even if a warning of the right to silence has been given.[56] A defence may not be credible because it was raised late,[57] or because its lateness prevented the police checking it.[58] In Napier J.'s phrase "a fishy story is all the worse for being stale".[59]

Various examples of this reasoning may be noted. Silence strengthens the inference that a possessor of stolen goods is the thief or receiver of them.[60] The inference arises because theft or receiving is by far the commonest way of obtaining property unlawfully; so it is not open where the property was unlawfully obtained in some other way unless there are special circumstances, such as an association between the possessor and the person who originally obtained the goods.[61] Silence strengthens the inference of breaking and entering with intent which can be drawn from illegal presence in another's house.[62] Silence strengthens the inferences in favour of the plaintiff who proves facts to which the maxim *res ipsa loquitur* applies. A refusal of blood and urine tests does not strengthen evidence of drunkenness,[63] perhaps because there are many reasons for such refusal other than guilt; but the English Probate Division took account of a failure to comply with an order for medical inspection in deciding that one party had an incapacity to consummate a marriage.[64]

Though comment which does more than suggest that silence strengthens the inferences from other evidence is not permissible if a policeman is present during questioning, it may be permitted if it is "not upon a single refusal to answer, but upon the adequacy of an explanation which the accused had chosen to give for his silence".[65] Thus in *Tune*, where the accused said he would prefer to have advice before explaining the matter in writing, the Court of Criminal Appeal upheld the judge's comment on the defence advanced: "could not that have been said without legal advice?"[66]

[55] *Gardner* (1915), 11 Cr. App. R. 265; *Mills*, [1947] K.B. 297.
[56] *Foster*, [1955] N.Z.L.R. 1194.
[57] *Ryan* (1966), 50 Cr. App. R. 144.
[58] *Parker*, [1933] 1 K.B. 850; *Littleboy*, [1934] 2 K.B. 408; *Bouquet*, [1962] N.S.W.R. 1034.
[59] *Hinton* v. *Trotter*, [1931] S.A.S.R. 123, 127.
[60] *Longmead* (1864), Le. & Ca. 427; *Aves*, [1950] 2 All E.R. 330; *Loughlin* (1951), 35 Cr. App. R. 69; *Seymour*, [1954] 1 All E.R. 1006.
[61] *Nieser*, [1959] 1 Q.B. 254, 266-7 *per* Diplock J.
[62] *Wood* (1911), 7 Cr. App. R. 56.
[63] *Barnett* v. *McGregor*, [1959] Qd. R. 296; *Mahoney* v. *Fielding*, [1959] Qd. R. 479.
[64] *W.* v. *S.*, [1905] P. 231.
[65] *Twist*, [1954] V.L.R. 121, 131 *per* Smith J.
[66] (1944), 29 Cr. App. R. 162.

INFERENCES FROM SILENCE IN COURT

(a) *Silence as amounting to consent*

It is not possible for silence to be taken as consent to the other side's case where the defendant contests all the issues of fact or pleads not guilty;[67] the expressed intention will exclude any implied admission. However, where not every issue of fact is contested in a civil case silence may be an admission. Failure to deny a charge of adultery is not always or by itself evidence of adultery, because there are many reasons for taking this course other than actually having committed adultery; e.g., the supposed adulterer may simply wish to end proceedings quickly and cheaply.[68] But failure to deny adultery may be evidence of it if damages are claimed against the co-respondent, since in such circumstances there is more incentive for an innocent man to deny the charge.[69]

(b) *Silence evidencing consciousness of guilt*

It is clear that the silence of an accused at the trial is not evidence of a consciousness of guilt,[70] but the silence of a party in a civil case may be.[71] The reasons for the distinction probably turn on the importance of a finding of criminal guilt, the high criminal standard of proof, the risk of the accused convicting himself by a bad performance in the box, and the dangers of the accused exposing himself to cross-examination on his record. These points either do not apply in civil cases or are less important.

Silence may evidence guilt in this way: in *Mash* v. *Darley*[72] a putative father did not testify at the assizes that the mother was "fast", though he had done so in earlier proceedings before the magistrates. From this it could be inferred that the statement was a lie and that it proceeded from a consciousness of guilt.

(c) *Silence strengthening inferences from opposing evidence*

A party's failure to testify in a civil case "gives colour to the evidence against him".[73] The same is true in criminal cases: "everybody now knows

[67] *Tumahole Bereng*, [1949] A.C. 253, 270.
[68] *Inglis* v. *Inglis*, [1968] P. 639, 646.
[69] *Pidduck* v. *Pidduck* (1961), 105 So. Jo. 632.
[70] *Waugh*, [1950] A.C. 203; *Jackson*, [1953] 1 All E.R. 872 (it is thought that Lord Goddard C.J.'s suggestion that though a jury could not be told that a failure to testify was corroboration they could properly regard it as such is wrong).
[71] *Taylor* v. *Williams* (1831), 2 B. & Ad. 845, 857; *Melvin* v. *British American Assurance Co.*, [1933] 1 D.L.R. 678; *Kent* v. *U.S.*, 157 F. 2d 1 (1946); *Cracknell* v. *Smith*, [1960] 3 All E.R. 569. Lord Parker C.J.'s distinction in the last case between silence as admissible evidence corroborating other pieces of evidence corroborating the mother, and silence not being admissible as corroboration in the absence of such other corroboration is untenable since the House of Lords in *Kilbourne*, [1973] 2 W.L.R. 254 rejected the fallacious distinction between direct and corroborative evidence; *a fortiori* Lord Parker's distinction is fallacious in distinguishing between pieces of corroboration.
[72] [1914] 3 K.B. 1226.
[73] *Boyle* v. *Wiseman* (1855), 10 Ex. 647, 651 *per* Alderson B.

that absence from the witness box requires a very considerable amount of explanation."[74]

Three conditions must be satisfied before silence in court can be used to strengthen inferences from opposing evidence. First, there must be a case to answer. The trial may be stopped at the close of the proponent's case if it is too weak, and even if it continues on other issues, a non-existent case cannot be strengthened by failure to answer it.[75] Jordan C.J. has shown that to this there is an exception. Sometimes a case supported by some, though not *prima facie*, evidence of facts peculiarly within the defendant's knowledge may be converted into a prima facie case and thence into a conclusive one by the defendant's failure to testify: "very slight evidence [of such facts] may be treated as sufficient to justify a jury in holding that they do exist, if, but only if, there is no explanation of that evidence by the defendant."[76] The second condition is that the silent party must have been capable of answering the case against him. "All evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted."[77] Thirdly, there must be no apparent reason for silence other than inability to answer truthfully the case made. Such reasons include insanity,[78] protection of others, and fear of disclosure of an accused's record.

In England and all Australian states except New South Wales and Victoria judicial comment on the accused's silence is proper,[79] but it is controllable on appeal.[80] In such jurisdictions, if the burden of proof rests on the prosecution, "the accepted form of comment is to inform the jury that, of course, he is not bound to give evidence, he can sit back and see if the prosecution have proved their case, and that while the jury have been deprived of the opportunity of hearing his story tested in cross-examination, the one thing they must not do is to assume that he is guilty because he has not gone into the witness-box".[81]

A comment is unlikely if the prosecution case has been damaged by cross-examination[82] or the defence story has been adequately put through

[74] *Jackson*, [1953] 1 All E.R. 872 *per* Lord Goddard C.J.; *Blank*, [1972] Crim. L.R. 176. See the leading case of *Burdett* (1820), 4 B. & Ald. 95, 121-2, 140, 161-2.
[75] *Lyne* v. *Rutherford* (1963), 36 A.L.J.R. 333.
[76] *De Gioia* v. *Darling Island Stevedoring & Lighterage Co. Ltd.* (1941), 42 S.R.N.S.W. 1, 4.
[77] *Blatch* v. *Archer* (1774), 1 Cowp. 64, 65 *per* Lord Mansfield C.J.; *Corrie* (1904), 68 J.P. 294, 297; *Sanders* v. *Hill*, [1964] S.A.S.R. 327.
[78] *Bathurst*, [1968] 2 Q.B. 99.
[79] *Kops*, [1894] A.C. 650; *Rhodes*, [1899] 1 Q.B. 77.
[80] *Waugh*, [1950] A.C. 203, reversing the earlier view (e.g. *Voisin*, [1918] 1 K.B. 531). In the U.S. comment is unconstitutional (*Griffin* v. *California*, 380 U.S. 609 (1965), though the jury can draw appropriate inferences.
[81] *Bathurst*, [1968] 2 Q.B. 99, 107-8 *per* Lord Parker C.J.; and see *Fisher*, [1964] Crim. L.R. 150; *Pratt*, [1971] Crim. L.R. 234.
[82] *Adams* (1957), S. Bedford, *The Best We Can Do* (London, 1958) p. 249).

other witnesses.[83] It is likely to be made if the facts in issue are peculiarly within the accused's knowledge,[84] e.g. issues of intent,[85] or if the accused advances an innocent explanation of incriminating facts rather than denying the facts themselves,[86] or if the accused is represented.[87] Comment is improper where the defence is insanity or diminished responsibility unless the accused is silent on some point on which he could be of assistance. In these cases where, exceptionally, the burden is on the defence, the comment will be formulated more strongly than normal: it might be that nobody can force the accused "to go into the witness box, but the burden is upon him, and if he does not, he runs the risk of not being able to prove his case".[88]

The position under the New South Wales *Crimes Act*, s. 407(2) and the Victorian *Crimes Act*, s. 399(6), which forbid judicial comment, is interesting. The legislation is presumbly designed to protect the accused by preventing the drawing of any inferences from silence adverse to him. However, it only affects judicial comment; it does not abolish the general law permitting the drawing of some adverse inferences. Hence it tends in fact to increase the danger that the jury will draw improper adverse inferences simply because they have not been told what inferences the general law permits and forbids. The prohibition on judicial comment also looks odd in a legal system strikingly characterized by strong judicial control of the jury.

The English *Criminal Evidence Act* 1898 s. 1(b) (and legislation in all Australian states except Queensland) forbids prosecution comment on the accused's silence but says nothing about comment of counsel for co-accused. It has been held that he has a right to comment on the other co-accused's failure to testify and the judge has no discretion to prevent this.[89] The decision seems justified by analogy with the position under s. 1(f)(iii) of the English Act and its equivalents, by which a co-accused has an absolute right, unfettered by any discretion in the court, to cross-examine a co-accused on his record once he gives evidence against the first co-accused.[90] It may be noted that under the New South Wales *Crimes Act*, s. 407(1), where one co-accused comments on another's silence, the judge may make "such observations to the jury in regard to such comment or such failure to give evidence as he thinks fit".

Probably some judges are less astute to allow a proponent's evidence to be strengthened by his opponent's silence than others. In *The Insurance*

[83] *Waugh*, [1950] A.C. 203; *Bathurst*, [1968] 2 Q.B. 99.
[84] *O'Sullivan* v. *Stubbs*, [1952] S.A.S.R. 61.
[85] *Sharmpal Singh*, [1962] A.C. 188; *Sparrow*, [1973] 1 All E.R. 129.
[86] *Mutch*, [1973] 1 All E.R. 178. This distinction may not always be workable.
[87] *Nicholls*, [1951] N.Z.L.R. 91; cf. *Kelson* (1909), 3 Cr. App. R. 230.
[88] *Bathurst*, [1968] 2 Q.B. 99, 108 *per* Lord Parker C.J.; see too *Batt* v. *Batt* (1916), 27 D.L.R. 718.
[89] *Wickham* (1971), 55 Cr. App. R. 199.
[90] *Murdoch* v. *Taylor*, [1965] A.C. 574.

Commissioner v. *Joyce* Rich J. said: "when circumstances are proved indicating a conclusion and the only party who can give direct evidence of the matter prefers the well of the court to the witness box a court is entitled to be bold."[91] It is probably a difference in temperament rather than in views of the law which led Dixon J. to dissent, saying: "It is proper that a court should regard the failure of the plaintiff to give evidence as a matter calling for close scrutiny of the facts upon which he relies and as confirmatory of any inferences which may be drawn against him. But it does not authorize the court to substitute suspicion for inference or to reverse the burden of proof or to use intuition instead of ratiocination. After all it is better that the due application of the law relating to evidence and burden of proof should produce an automatic result . . . than that the court should hazard an attempt at divination in getting at the facts."[92]

A few examples of how silence can strengthen the opposing case may be noted.[93] Theft has been inferred from the accused's unexplained possession of a cheque drawn by the receiver of stolen goods;[94] inferences from evidence of adultery may be strengthened by a party's silence.[95]

REFORM

Three matters require discussion.

It is often thought that jurymen know an accused has a right to testify, and individual jurymen sometimes show such knowledge.[96] If the judge comments on the accused's silence the jury will be guided as to which inferences are possible and which are inappropriate. If the judge does not comment, the jury may draw all the commonsense inferences, some of which, as we have seen, are impermissible. In New South Wales and Victoria, where the judge cannot comment, this danger is a constant one. There is very little evidence of any requirement that the jury be warned of the dangers of inferring too much, except where the case involves a corroboration rule. Here the judge should say, where appropriate, that certain items of evidence which the jury thinks might be corroboration are in law incapable of being corroboration. In the light of the recent ending of distinctions between corroborative and other evidence,[97] does this suggest that the judge should warn the jury in all cases where they

[91] (1948), 77 C.L.R. 39, 49.
[92] *Ibid.*, 61.
[93] *Nash* (1911), 6 Cr. App. R. 225; *Wilson* v. *Buttery*, [1926] S.A.S.R. 150; *Morgan* v. *Babcock & Wilcox Ltd.* (1929), 43 C.L.R. 163, 178; *Black* v. *Tung*, [1953] V.L.R. 629; *Waddell* v. *Ware*, [1957] V.R. 43; *Jones* v. *Dunkel* (1959), 101 C.L.R. 298; *Purdie* v. *Maxwell*, [1960] N.Z.L.R. 599; *Jensen* v. *Ilka*, [1960] Qd. R. 274, 282; *Miles* v. *Partridge* (1969), 62 Q.J.P.R. 124.
[94] *Kelson* (1909), 3 Cr. App. R. 230.
[95] *Jensen* v. *Jensen*, [1964] 2 All E.R. 231.
[96] *Jones* v. *Dunkel* (1959), 101 C.L.R. 298.
[97] *Kilbourne*, [1973] 2 W.L.R. 254.

might draw an impermissible inference from silence? So long as no direct inference of guilt from the silence of an accused in court or out is permissible, the author favours an increased judicial use of such warnings in appropriate cases. He favours even more strongly abolishing the prohibition on judicial comment in New South Wales and Victoria. The main danger in their use is that they will stress the fact of the accused's silence too strongly to the jury, which will then draw the wrong inferences anyway; but if doubts of this kind are really well-founded, it may be time to devise a better tribunal of fact.

Secondly, the wording of the caution is not apt to indicate the true effect of silence. It says that if the suspect speaks, the answers may be used in evidence. It does not say that his silence may strengthen the inferences to be drawn from the prosecution case. The difficulty is that the point is too subtle to be easily understood by a suspect.

Thirdly, this discussion may have cast light on exactly how far the English Criminal Law Revision Committee propose to change the law.[98] The Committee's critics suggest that a considerable change is proposed, and theoretically this is so. At the moment, silence during police questioning and at the trial does no more than strengthen inferences from the prosecution case. The Committee in effect proposes that the jury should be allowed to draw the commonsense inferences that silence is sometimes consent or sometimes a sign of consciousness of guilt; but they propose no more. Clause 1 of the draft Bills says that if the accused, in pre-trial questioning fails to mention any fact relied on later "which in the circumstances . . . he could reasonably be expected to mention . . . the court or jury . . . may draw such inferences from the failure as appear proper". The effect of clause 5, relating to silence at the trial, is similar. These proposals do not go beyond commonsense inferences; they do not permit silence to be equivalent to or to raise a presumption of guilt. The court or jury will have to bear in mind all those dangers in inferring admissions from silence and all possible innocent reasons for silence which have been examined above.[99]

The proposed change is thus theoretically large, though not of revolutionary proportions. It may be in practice fairly slight, because there is no practice of warning a jury of the limited value of silence. If a critical comment is made, then the jury are properly guided; but often a benevolent judge will make no critical comment, and the jury are free to make inferences which are both impermissible in law and dangerous as a matter of commonsense. There is a number of quite strong arguments against clauses 1 and 5 but they can only be advanced without inconsistency if one is willing to support a much wider warning to the jury on the status of silence than is commonly given at present.

[98] *Op. cit.*, paras. 28-52.
[99] Supra p. 55.