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THE DECLINE OF THE RIGHT TO SILENCE: RECENT DEVELOPMENTS IN ENGLAND

INTRODUCTION

In England the right to silence has been diminished, if not abolished, by the enactment of the Criminal Justice and Public Order Act 1994.[1] In spite of the fact that the right existed as the suspect's common law right in pre- 1994 English law,there was a great deal of argument for changing the existing law. Before attempting to examine these arguments, it is essential to clarify that the right in question may be applied by the suspect during the police questioning before the trial (out-of court silence)and at the trial (in-court silence) It seems to me that they need separate consideration to be given. This article will focus on the right in question in the police station rather than in court.

The right to silence may be defined in various ways. Taking a narrow view, the right in relating to pre-trial matters refers to the principle that no legal obligation is imposed upon the suspect to answer questions from the police, whether before or after arrest. To take a broader view, it means that not only is the suspect not required to answer police questions, but also the suspect's failure to answer police questions should not lead to drawing adverse inferences later at his trial. As far as the letter view is concerned it is said that the right loses its substance if the trial of fact is to be invited or allowed to draw adverse inferences.

Although nobody has suggested silence itself should be a crime and should be punished[2] opinions are sharply divided as to whether it should be exercised at the risk that adverse inferences might be drawn where it is proper. To express the issue more clearly, written or oral confessinos could be made expressly or impliedly. An express confession occurs where the person

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1 Enacted on November 3, 1994, Section 34.

2 In the case of Rice v. Connolly -(1966) 2QB414-it was held that refusal to answer police questions cannot to amount the offence of obstruction of a constable.
In some exceptional cases such as serious fraud investigations failure to answer questions may result in imprisonment. See R v. The Director of the Serious Fraud Office ex p. Saunders, (1988) **The Times**, 29 July. This case won backing from the European Commission of Human Rights on Septmber 19th 1994 for the defendant contention that it was unfair to use the statements obtained under the legal threat of imprisonment.

confesses to the committal of the offence in a very direct manner. A confession may be implied where it is the only inference to be drawn from words used in particular circumstances. Naturally, in the presence of any ambiguity such an inference cannot be drawn. The Turkish Court of Appeal, for instance, held that the offer by the suspect to pay the value of a ram in the face of an accusation of theft cannot be taken as an implied confession[3] However, in some cases where the accused raises a defence, a confession could be implied. For example, in the case of rape accusation, the fact that sexual intercourse took place could be inferred from a defence by the suspect that the woman consented. The crux of the matter with regard to the right to silence is wheteher silence in response to an accusation gives rise to an inference that the accused accepts the truth of the accusation.

PRE-1994 LAW

The individual's right to remain silent when accused an offence has been accepted as being consistent with the centuries old doctrine of *nemo tenetur seipsum accusare,*[4] commonly known as the privilege against self-incrimination. This privilege is enunciated by international covenants,[5] national constitutions,[6] and judiciaries.[7] In England, the privilege against self-incrimination became part of the common law as a result of popular support, not by statute or by judicial decision, in the 17th century following the collapse of the political courts of Star Chamber and Commission which possessed the power to compel individuals to incriminate themselves.[8] This privilege is obviously derived from the need to prevent one from being subjected to coercive and arbitrary powers of the state and therefore does not itself gurantee the prohibition of drawing adverse inferences from the silence unless we accept that such a possibility as suggested by the Royal Commission, compel the suspect to incriminate himself.[9]

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3 Mehmet Case, Yargitay Ceza Kurulu (The General Assembly of Court of Appeal), E. 1993 6-67 K.108 T,19,4.1993, 19 **Yargitay Kararlari Dergisi** (The Journal of the Court of Appeal Decisions), October 1993, p.1564.

4 "No one is required to accuse himself".

5 See the International Covenant on Civil and Political Rights, adopted by the United Naations General Assembly on 16 December 1966 and came into force in 1976, Article 14/3(g).

6 See The Turkish Constitution, Aticle 38/5; Fifth Amendment of the United States; The Canadian Charter of Basic Rights and Freedoms, Article 11(c).

7 Sang (1979) 2 All E. R 1 222 at 1230, Lord Diplock used in Sand another Latin maxim nemo debet prodere se ipsum.

8 Wigmore, **A Treatise on Evidence,** (Boston, The McMaughton Revision, Little Brown, 1960, Vol VIII, &2250

9 Views may differ as to what compel the suspect to incriminate himself. One may claim that permitting the suspect to be questioned itself may be compelling, let alone violence, oppression, or even deception. Indeed, by analyzing the police custodial interrogation process The Supreme Court of America in Miranda 384US at 467- concluded that "the environment contains inherently compelling pressures which works to undermine the individual's will to resist and compel him to speak where he would not

By prohibiting the prosecution from commenting on the defendant's failure to give evidence The Criminal Evidence Act 1898 section 1 clarified that the suspect had a right to silence. Furthermore it has been accepted by the common law that an accused is entitled to refrain from answering questions put to him for the purpose of discovering whether he has committed a criminal offence.[10] The Codes of Practice also required the police to caution the suspect, in the following terms "you do not have to say anything unless you wish to do so, but what you say may be given in evidence"[11] If the meaning of the caution was not clear to the suspect, it should be explained to him that he "need not to answer any questions or provide any information which might tend to incriminate him and that no adverse inferences from his silence may be drawn at any trial that takes place."[12] The function of the caution was to remind the accused of the right in question which he already enjoyed at common law; accordingly not being cautioned had no effect on exercising this right.[13]

Although this right, in principle, existed at that state of English law, it was subject to statutory and judicial exceptions. The clear illustration of the former exceptions is, firstly, section 2 of the Criminal Justice Act 1987 which requires a suspect to give written notice of the nature of his defence in serious fraud cases. Secondly, section 11 of the Criminal Justice Act 1967 also requires the suspect to give notice to the prosecution of an alibi defence before trial. The courts also have made contribution towards limiting the right in question. In **Chandler,** for example, it was held that if a solicitor is present during questioning the defendant's silence is capable of forming the basis for drawing adverse comment on the ground that the presence of a solicitor puts the suspect and the officer on equal terms.[14]

THE CHRONOLOGY OF CONTROVERSY

Dispute over the right in question is traced back to the 19th century and Jeremy Bentham's view[15] is taken as a starting point of discussion. However, it can be said that his views do not directly, for a number of reasons, address the current problem over the right to silence, We ought, firstly, to beer in mind

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otherwise do so freely". Also research for the Royal Commission on Criminal Procedure (1981) found that questioning itself develop forces on many suspects which cause them to speak when they would otherwise stayed silent. Irving and Hilgendort, **Police Interrogation: The Psychological Approach,** Research Study 1 HMSO, 1980.

10 Chiristie (1914) A.C. 545; Hall (1971) W.L.R. 231; Chandler (1976) 1 W.L.R. 589
Code C 10. D; Code E 4.3

12 Code C 10 D; Code E 4. D

13 Hall (1971) 1 W.L.R. 299

14 Chandler (1976) 1 Weekly Law Reports 585

15 For the criticism of Bentham's views see, Gallian, "The Right to Silence Reconsidered", **Current Legal Problems,** Vol.41, 1988, p. 69-92.

that in Bentham's day an accused was not allowed to give evidence at common law. He believed that the fullest possible disclosure of relevant evidence was likely to lead to the more accurate decision by courts. Therefore he argued that the common law rule restricting evidence being given by the accused should be abolished and conseqently the accused should be permitted to speak.[16].Secondly, since the police's investigative power did not exist at the time of his writing, he is naturally concerned with the position of the accused at the trial rather than the position of the suspect in the face of police interrogation. Thirdly, it has been said that Bentham has been misused by attributing to him untraceable citations.[17]

In 1972 the dispute over the right in question came to the agenda when the Criminal Law Revision Committee published its Eleventh Report on Evidence. The Committe, *inter alia,* proposed that the existing law should be amended in that failure to mention a fact, when being interviewed or being charged, should be capable of giving rise to drawing whatever inferences were reasonable at the trial.[18] The Committee also recommended that the suspect's silence at the police station may amount to corroboration of other evidence.[19] This was partly because of the assumption that the right benefits the professional criminals and terrorists rather than the innocents. In this respect Bentham's view, "innocence never takes advantage of it, innocence claims the right of speaking, as guilt invokes the privilege of silence" was cited.[20] This line of reasoning can be criticised on the ground that it was not based on any empirical evidence. There was very strong reaction to the C.L.R.C's recommendation both within and outside parliament, therefore the law remained unchanged.

The right was then reexamined by the Royal Commission on Criminal Procedure in 1980. Its main concern was to reach a sensible middle point between the conflicting interest of society in fighting against crime and punishing the guilty, and the rights of the individual. The commission was also concerned with the difficulties which could arise if CLRC's recommendations to allow the trier of fact to draw inferences from the failure of the accused to answer questions would be inconsistent with the principle of the presumption of innocence and the burden of proof. The Royal Commission, unlike the CLRC, concluded that "the present law on the right of silence in the face of police questioning after cautioning should not be altered".[21]

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[16] Lewis "Bentham's View of the Right to Silence", **Current Legal Problems,** Vol. 43, 1990, p. 137-144

[17] **Ibid,** p.136

[18] Criminal Law Revision Committee, **Eleventh Report Evidence (General),** 1972, Cmnd 4991, para.32

[19] **Ibid,** p. 40 and 111

[20] **Ibid,** p.18

[21] The Royal Commission On Criminal Procedure, **Report,** Cmnd.8092, 1981, London, para.4.53

Then PACE came into force in 1986 and it has led to a substantial improvement in the protection given to the suspect. The pressure from the Police Foundation for abolishing the right in question continued after PACE and the Home Office Working Group was set up by the Home Office in 1988. They had been given a duty to consider "how to change the law" on the right rather than to investigate whether the law should be changed or not.[22] Before the Working Group completed its consideration as to how to change the law, the Criminal law Revision Committee's recommendation came into force in Northern Irelend by the enactment of the Criminal Evidence (Northern Ireland) Order.[23] Later, similar changes for England and Wales were recommended by the Home Office Working Group in 1989.[24]

The issue was then reconsidered by the Royal Commission on Criminal Justice in 1993 and the view of the 1981 Royal Commission on Criminal Procedure was preferred to that of the 1972 CLRC.[25] This approach is supported by civil libertarian groups,[26] some lawyers' organizations[27] and academics,[28] but not by the present goverment. Thus, the Criminal Justice and Public Order Act enacted on 3rd of November 1994 which allows the trier of fact to draw inferences from the suspect's silence in the face of police questioning. In the light of this change, the caution is likely to be changed: The Working Group already recommended adoption of new caution in the form that,

"You do not have to say anything. A record will be made of anything you do say and it may be given in evidence. So may your refusal to answer any question. If there is any fact on which you intend to rely in your defence in court it would be best to mention it now. If you hold it back until you go to court you may be less likely to be believed".[29]

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[22] Working Group on the Right to Silence, **Report**, 13 July 1989, London, C4 Division Home Office. para ,50

[23] Enacted on November 14, 1988 and came fully into effect on December 15, 1988.

[24] Op. cit. n. 22, para 126

[25] The Doyal Commission on Criminal Justice, **Report**, 1993, Cmnd 2263, para. 22

[26] Thornton, Mallalieu and Serivener, **Justice on Trial**,Report of the Independent Civil Liberty Panel on Criminal Justice 1992, London, Civil Yiberties Trust;Justice & the Committee on the Administration of justice, **Right of Silence Debate; The Northern Ireland Experience**, 1994.

[27] Law Society, **Evidence to the Royal Commission on Criminal Justice**, 1991, London;Legal Action Group, **LAG's Submission to the Royal Commission on Criminal Justice**, 1991, London.

[28] Wood and Crowford, **The Right to Silence**, 1989; Easton, **The Right to Silence**, 1991; Morgan and Stephenson, **Suspicion and Silence: The Right to Silence in Criminal Investigations**, 1994; Greer, "The Right to Silence: A Review of the Current Debate", **The Modern Law Deview**, Vol. 53, 709, 1990

[29] Op. cit n. 22, para 71

CAN SUSPECT BE REQUIRED TO COOPERATE?

The burden of proving guilt rests upon the state as a natural consequence of the presumption of innocence. Accordingly, it is the task of the police and prosecution to establish that the suspect has committed the offence with which he is accused, without requiring the police or to provide evidence against himself. Therefore, the suspect should not be called to explain his actions in the face of police questioning and failure to do so should not lead to adverse inferences.[30] This argument is supported by saying that the duty to help the police with their inquires is a moral rather than a legal duty.[31] However, the general proposition that a citizen has no legal obligation to answer questioning from the public authorities has several important exceptions.[32] Thus, it can hardly be said that the suspect's freedom of no cooperation is absolute. However, if there are no reasonable grounds for believing that the suspect committed an offence, the duty to answer questions should not be imposed. It goes without saying that giving the power to the police to interrogate the citizen without reasonable grounds and imposing on them a duty to answer these questions, could lead to random arrest of suspects on the grounds that they may yield an inculpatory statement. However if there are reasonable grounds for believing that the suspect committed an offence, it is hardly possible to justify the suspect's non-cooperation during the police questioning.

Since the police, at present, do not have to give any information to the suspect apart from stating the offence which he is suspected of committing, it might be unrealistic to expect from the suspect to answer every question put to him without exactly knowing its relevance and its significance to the present case. It seems to me reasonable to suggest that no worthwhile inferences could be drawn unless information was disclosed.

By being aware of this point the Royal Commission expresses the view that changing the existing law relating to the right could be accepted only with the condition that the suspect is given at all stages of investigation full information of the rights and evidence against him.[33] Contrary to the Royal Commission's recommendation the Working Group recommended not only

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[30] Op.cit n. 21 para 1.6;R.v. Hall (1971) 1 **All England Reports** 322

[31] Rice v. Connolly (1966) 2 **Q.B.**p.414

[32] The obligation to give notice of alibi defence-Criminal Justice Act 1967 s. 11-, the obligation to make pre-trial disclosures in fraud cases-Criminal Justice Act 1987- For a detailed examination of such requirements see Fletcher and Ingram", The Right of Silence, Does it Exist in Major Investigations", **The Law Society Gazette,** 24 January 1990, p.19

In Turkey the interviewee and the suspect are legally bound to correctly answer questions related to their identity (CMUK 135/1) Failure to do so constitutes a crime (Turkish Criminal Code, Article 343 and 528)

[33] Op. cit, n. 21, para. 4.52

that failure to answer police's questions should not be required to inform the suspect of the case against him, apart from telling him the reason for his detention.[34] As Zuckerman pointed out, such a practice "forces the suspect to cooperate with his interrogators without placing proper limits on the power of the police to demand cooperation".[35]

IS AMBUSH DEFENCE JUSTIFIABLE?

The right to silence at pre-trial stage is also criticised in respect to its effect at the trial. It is said that the right gives the suspect an unfair advantage by entitling him to say nothing during police interrogation and withold his defence until the trial. As a result of this the suspect may present an unexpected defence (ambush defence) at the trial, and this will deprive the police of the opportunity of investigating it. In order to prevent the suspect from presenting an ambush defence, the Working Group recommended that failure to answer police questions should be capable of forming the basis for adverse comment against the accused at the trial,[36] and that he should be warned about this possibility when he is arrested.[37]

It is said that since the police investigation has to cover all the relavant aspects of the case it is not clear whether there is a genuine ambush defence problem.[38] However in the real world there may be some cases in which it is hardly possible to investigate all possibilities of the case. For instance, where the defence calls a new eye witness who, if known in advance, might be proved not to have been there.

One may ask whether it is unfair to adopt a strategy to press "one's opponent at the vulnerable and unexpected point",[39] this kind of strategy should be used by both the defence and the police. However, the English judiciary has already declared that the suspect should not surprise the prosecution at the trial. In the case of **Ryan** [40] it was maintained that the suspect's initial failure to speak is capable of giving rise to undermine the credibility of his defence at trial.

It may be said that it is unrealistic to expect the suspect to disclose all his defence before trial, since the interrogation stage, at present, may not enable a fair opportunity to the suspect to defend himself. The police's concern at

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[34] Op. cit p.22, para. 90-91

[35] Zuckerman, "Trial by Unfair Means: The Report of the Working Group on the Right of Silence"(1989), **Crimianal Law Review**, p. 865

[36] Op. cit n. 22, para ;110

[37] Op cit p. 22, para;71

[38] Op cit. n. 35, p. 858

[39] Op. cit.35, p;860

[40] (1966) 50 **Cr. Ap. Rep.**9; see also Foster (1975)R.T.R. p.553

this stage is to gather evidence rather than trying the suspect. The suspect is assumed to have committed the crime in question. There is no doubt about the fact that guilt or innocence will be determined by a public trial According to this argument, nothing is wrong in requiring the prosecution and defence to disclose the essence of their cases before the trial, as long as the sides are on equal terms.

DOES SILENCE PROTECT SUSPECTS FROM ABUSES OF THE POLICE?

Traditionally the right has been considered as a device for protecting the suspect from arbitrary and excessive police pressure which is aimed at obtaining incriminating statements. Since there is a great deal of pressure upon the police to bring criminals to justice by public, interrogation may be susceptible to abuse by police to obtain false conviction. In this respect the right is justified by stating that it will protect the suspect from improper police pressures. This line of argument is criticised on the ground that the right to silence is not necessarily an effective device to protect the suspect, since the suspect still has an option to waive it. Thus, the interrogator may use pressure in order to make the suspect waive.[41] This criticism, however, does not justify abolition of the right in question, instead it suggests that more consideration should be given to developing some other device to provide genuine waiver. For example, further attention could be given to the presence of a solicitor during interrogation, to the requirement confirming the custody record by the suspect that it is his free choice, or requirement to do so by handwriting.

On the other hand it is a fact that very low percentage of suspects remain silent in practice; in Softley's study[42] 12 per cent of suspects refuse to answer questions and research by Sanders[43] reveals that 8 per cent of suspects exercised their rights in questions. In the light of these studies it is clear that the right in question does not offer any protection for the great majority of suspects.

WHAT IS FUNCTION OF THE RIGHT TO SILENCE?

The function of the right to silence has been extremely controversial for many years. The right is strongly criticised on the grounds that it leads to the acquittal of people who are in fact guilty or even to a decision not to prosecute them, while supporters of the right argue that it protects the

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[41] Zuckerman, **The Principles of Criminal Evidence**, 1980, p.318

[42] Softley, **Police Interrogation:an Observational Study in Four Police Stations**, 1980 p. 74 Solicitor Scheme, 1989, p. 135

[43] Sanders and others, **Advice and Assistance at Police Stations and the 24 Hour Duty Solicitor Scheme**, 1989, p. 135

innocent from convictions. The former view is clearly expressed, in the words of Bentham "can it be supposed that the rule in question established with the intention of protecting the innocent? They are the only persons to whom it can never bu useful".[44] Similarly CLRC took the view, without providing any empirical evidence, that "hardened criminals often take the advantage of the present rule to refuse to answer any questions at all and this may greatly hamper the police or even bring their investigation to a halt".[45] From this perspective the right is a serious threat to effective crime control. However it is necessary to clarify the importance of confession to successful prosecution and conviction. According to Baldwin and McConville's study the impact of confessions on the outcome of cases is less significant than it is usually assumed, and thus silence does not significantly obstruct justice.[46] In the majority of cases police can obtain evidence from independent sources which are nore safe. Even if there is a problem of wrongful acquittas, it might not be in consequence of exercising the right in question. Instead, it might be because of inadequate police investigation.[47] Furthermore, removal of the right is unlikely to be effective against terrorists or professional criminals due to the fact that they may try some other tactics such as false alibis in order to escape from conviction.

WHAT DOES SILENCE PROVE?

Even before the enactment of the Criminal Justice and Public Order Act 1994, the prohibition of adverse effect has not received support from the English judiciary. In the case of *Christie*[48] it was held that an accusation made in the presence of the accused is not evidence against him unless he accepts the accusation. Acceptance may be in words, conduct, actions or demeanour. As far as silence is concerned, it is assumed that an innocent person faced with an accusation would deny it if it was false. Therefore, failure of the suspect to reply, when an answer could reasonably be expected, is likely to be understood as an acknowledgement of the accusation by conduct. At this point it seems best to ask when an answer could reasonably be expected. In *Mitchell*[49] this point was clarified as follows:

"Undoubtedly, when persons are speaking on even terms, and a charge is made, and the person charged says nothing, and expresses no indignation, and does nothing to repel the charge, that is some evidence to show that he admits the charge to be true".

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[44] Bentham, **A Treatise on Judicial Evidence**, Dumont (ed), 1925 cited by Zuckerman, op.cit.n.41, p.327

[45] Op.cit. n. 18. para 30

[46] Baldwin and McConville, **Confession in Crown Court Trials**, Research study No: 5, 1980, London, Royal Commission on Criminal Procedure.

[47] Easton, op. cit. n. 28, p. 52

[48] (1914)A.C. 545 at 554

[49] (1892)7 Cox CC 503 at 270

Consistent with the ruling in *Mitchell* the Privity Council more recently held in *Parkers*[50] that where parties are on equal terms, staying silent in the face of an accusation may be taken as an acceptance of the accusation. In this case the suspect charged with murder did not reply to an accusation by the victim's mother of having stabbed her daughter. Since the status and the authority of the police in the criminal process is far from being equal to the status of the suspect, this principle will inevitably have difficulties in application to accusations made by the police. However, the Court of Appeal expressed the view in *Chandler*[51] that the presence of the legal adviser places the parties on equal terms and answers to police questions can reasonably be expected.

Although the participation of the suspect's solicitor might provide some assistance towards making the suspect's position better at the interview, the inequalities between the police and the suspect can hardly be made to disappear by such a practice for a number of reasons. First, the suspect and his or her solicitor are not adequately informed about the allegations and the evidence that the police have in their possession. This makes the interrogation, in the words of A.A.S. Zuckerman,"an entirely one-sided process in which the suspect is used as a passive subject around which the police weave the fabric of the damming case".[52] Second, the empirical evidence indicates that, with exceptions, solicitors are not performing their duty efficiently to place the suspect on even terms with the police. In most cases persons with no legal qualifications including former police officers are attended at the police station rather than a qualified solicitor. Moreover, most legal advisers adopt a passive, non-interventionist attitude at police interviews.[53] Third, the fact that interviews take place on the police's territory inherently puts the suspect at a disadvantage.[54]

Silence at the police station may also give rise to the difficulty of believing the defence at the trial.[55] In **Foster,** a drink driving case, where the accused provided a specimen of breath for a breath test at his home, which proved positive; he was arrested. At the trial he revealed for the first time that consumption of alcohol was after the accident and before the breath test.

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[50] R. v. Parkes (1976) 3 **All E.R.** 380

[51] Chandler (1976) 1 **W.L.R.** 585

[52] Zuckerman, "Bias and Suggestibility: Is there an Alternative to the Right to Silence? in **Suspicion & Silence,** ed by Morgan and Stephenson, op. cit. n. 28, p.117

[53] Baldwin, **The Role of Legal Representatives at Police Stations,** 1992, Research Study for the Royal Commission on Criminal Justice, No: 3; McConville and Hodgson, **Custodial Legal Advice and the Right to Silence,** 1993, Research Study for the Royal Commission on Criminal Justice, No:16

[54] For the psychological effect of being in custody see, op.cit n. 9

[55] Alladice (1988) 87Cr. Ap.R 380

It is held that the appellant had really had alcohol after he had arrived home, "it is odd that he did not say so when the breathalyser was presented to him".[56]

CONCLUSION

In the light of the above explanation it is clear that silence, in the present English law, is not free from causing adverse comment at trial. This fact is clearly recognised by the enactment of the Criminal Justice and Public Order Bill 1994.

It is true that there may be many reasons for staying silent other than implying admission of guilt. It is also difficult to determine how much of an accusation is approved by being silent. Having said that, it is hardly possible to prevent judges from drawing adverse inferences from a suspect's failure to answer questions. As far as day to day application of law is concerned, it may be unrealistic to assume that silence will never support of an accusation against the suspect in any legal system.

[56] Foster (1975) **R.T.R.** p.553; for a similar judgement see Ryan (1966) 50 **Cr.Ap.R.** p.144.