HOUSE OF LORDS

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

Regina *v.* Becouarn (Appellant) (On Appeal from the Court of Appeal (Criminal Division))

[2005] UKHL 55

LORD STEYN

My Lords,

1. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Carswell. I agree with it. I would also make the order which he proposes.

LORD HOFFMANN

My Lords,

2. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Carswell. For the reasons he gives, with which I agree, I would dismiss this appeal.

LORD HOPE OF CRAIGHEAD

My Lords,

3. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Carswell. I agree with it, and for the reasons he gives I too would dismiss the appeal.

LORD SCOTT OF FOSCOTE

My Lords,

4. For the reasons given by my noble and learned friend Lord Carswell, with which I agree, I too would dismiss this appeal and make the order which he proposes.

LORD CARSWELL

My Lords,

5. The appellant Darren Becouarn was on 26 May 2000 convicted in the Crown Court at Liverpool after a retrial before Gray J and a jury on two counts of murder and sentenced to imprisonment for life. His defence involved imputations on the character of the main prosecution witnesses, and accordingly by the nature of the questions asked on his behalf in their cross-examination he put his character in issue. The judge at the previous trial Owen J ruled that his previous convictions could be put to him if he gave evidence. The appellant did not give evidence either at that trial or on the retrial. On the retrial Gray J directed the jury, in accordance with section 35 of the Criminal Justice and Public Order Act 1994 ("the 1994 Act"), that they could, if they thought proper to do so, draw the inference that the only sensible reason for his failure to give evidence was because he could not give an answer to or explanation of the Crown evidence, or none that would have stood up to cross-examination.

6. The appellant claimed in the Court of Appeal and before your Lordships' House that the direction was unfair to him, because at least one of the reasons for his not giving evidence was, or might have been, because he feared the prejudicial effect which could have followed if the jury learned of his previous convictions. It was submitted on his behalf that the judge should have decided either that his convictions should not be put in evidence or that in the circumstances a section 35 direction should not be given. Failing that, it was suggested that he should have given a *Lucas* type direction (*R v Lucas* [1981] QB 720), indicating that there may have been reasons for the appellant's failure to give evidence other than inability to give an explanation or answer.

7. The facts proved by the prosecution at the appellant's trial have been succinctly set out in the judgment of the Court of Appeal and I can summarise them briefly. On 1 October 1998 two men, Kevin McGuire and Nathan Jones, were shot dead in a gymnasium by a gunman who escaped after the shooting on the back of a motor cycle. The appellant, who was arrested some four months later, was identified at an identification parade as the gunman by three witnesses who were in the gymnasium at the time. The appellant's case was that they deliberately made false identifications for their own improper purposes.

8. In addition there was an amount of circumstantial evidence which tended to connect the appellant with the acquisition and disguise of the getaway motor cycle. The Crown also relied on evidence concerning a call made from a mobile telephone traced to the appellant or his family very close to the time of the shooting. The Court of Appeal concluded that the prosecution evidence was such that the jury were quite entitled to convict on it and, since they considered that the jury were properly directed, the prosecution was safe. In my opinion the Court of Appeal was quite correct in this conclusion, subject to the issue about section 35 of the 1994 Act, and I do not regard it as necessary to examine this issue further. I shall instead focus on the main issue argued before the House, the effect of permitting the jury to draw an inference under section 35 in the circumstances of the case.

9. The position of a defendant in a criminal trial and the options open to him in relation to giving evidence have changed in very material respects since the end of the 19th century. Until the passage of the Criminal Evidence Act 1898 ("the 1898 Act") the law did not permit him to give evidence on oath on his own behalf, restricting him to giving an unsworn statement from the dock. That Act made him generally a competent witness in his own defence, but did not make him compellable. From that time the defendant was quite entitled to decline to give evidence – the privilege generally termed the right of silence – but if he did testify, he was liable under section 1(e) of the Act to be asked any question in cross-examination, notwithstanding that it would tend to criminate him as to any offence with which he was charged in the proceedings.

10. Several consequences followed from other provisions in the 1898 Act. First, the prosecution was not permitted to comment adversely on the defendant's failure to give evidence (section 1(b)) and the trial judge's ability to comment on that was fairly closely circumscribed. The judge was in most cases bound to direct the jury that the defendant

was fully entitled to sit back and see if the prosecution had proved its case, and that they must not make any assumption of guilt from the fact that he had not gone into the witness box (see, eg, *R v Bathurst* [1968] 2 QB 99, 107-8, per Lord Parker CJ). The second consequence was that the defendant could not be asked about any previous convictions, unless he had "lost his shield" and incurred liability to such cross-examination by reason of, inter alia, putting his character in issue. This could occur if questions were asked or evidence was given with a view to establish his good character or, most commonly, if he attacked the character of the prosecution witnesses: section 1(f)(ii), and see the decision of the House in *R v Selvey* [1970] AC 304 on the operation of this provision. Thirdly, if the defendant put his character in issue by attacking the character of the prosecution witnesses, but did not himself give evidence, he escaped the consequences of having his convictions put in evidence (*R v Butterwasser* [1948] 1 KB 4).

11. Although practitioners reckoned that the ability to give evidence conferred by the 1898 Act was a not unmixed blessing, it enabled those defendants who wished to put forward their own evidence in support of their case to do so, while those who wished to stay silent and challenge the sufficiency of the prosecution case were able to follow that course. Criticism of the state of the law, not least of the effect of the ruling in *R v Butterwasser*, and the degree of advantage which it conferred on defendants in criminal trials, mounted -- in the Eleventh Report of the Criminal Law Revision Committee (1972) (Cmnd 4991) p 83, para 131 it is stated that "To many it is highly objectionable that the accused should be able to do this with impunity." Eventually Parliament enacted the provisions contained in section 35 of the Criminal Justice and Public Order Act 1994 ("the 1994 Act"), with the objective of redressing the perceived imbalance:

> **35 Effect of accused's silence at trial**
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> (1) At the trial of any person … for an offence, subsections (2) and (3) below apply unless—
>
> (a) the accused's guilt is not in issue; or
>
> (b) it appears to the court that the physical or mental condition of the accused makes it undesirable for him to give evidence;
>
> but subsection (2) below does not apply if, at the conclusion of the evidence for the prosecution, his legal representative informs the court that the accused will give evidence or, where he is

unrepresented, the court ascertains from him that he will give evidence.

(2) Where this subsection applies, the court shall, at the conclusion of the evidence for the prosecution, satisfy itself (in the case of proceedings on indictment, in the presence of the jury) that the accused is aware that the stage has been reached at which evidence can be given for the defence and that he can, if he wishes, give evidence and that, if he chooses not to give evidence, or having been sworn, without good cause refuses to answer any question, it will be permissible for the court or jury to draw such inferences as appear proper from his failure to give evidence or his refusal, without good cause, to answer any question.

(3) Where this subsection applies, the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences as appear proper from the failure of the accused to give evidence or his refusal, without good cause, to answer any question.

(4) This section does not render the accused compellable to give evidence on his own behalf, and he shall accordingly not be guilty of contempt of court by reason of a failure to do so.

(5) For the purposes of this section a person who, having been sworn, refuses to answer any question shall be taken to do so without good cause unless—

(a) he is entitled to refuse to answer the question by virtue of any enactment, whenever passed or made, or on the ground of privilege; or

(b) the court in the exercise of its general discretion excuses him from answering it.

(6) …

(7) This section applies—

(a) in relation to proceedings on indictment for an offence, only if the person charged with the offence is arraigned on or after the commencement of this section;

(b) in relation to proceedings in a magistrates' court, only if the time when the court begins

> to receive evidence in the proceedings falls after the commencement of this section.

12. Very shortly after the 1994 Act came into operation a challenge was mounted to the validity of directions given in pursuance of section 35. In *R v Cowan* [1996] QB 373 the Court of Appeal considered the effect of the section and the specimen direction published by the Judicial Studies Board (JSB) as a suggested model for use by judges when section 35 applied. The specimen direction, set out at pp 380-381, was in the following terms:

> "'The defendant has not given evidence. That is his right. But, as he has been told, the law is that you may draw such inferences as appear proper from his failure to do so. Failure to give evidence on its own cannot prove guilt but depending on the circumstances, you may hold his failure against him when deciding whether he is guilty. [There is evidence before you on the basis of which the defendant's advocate invites you not to hold it against the defendant that he has not given evidence before you namely … If you think that because of this evidence you should not hold it against the defendant that he has not given evidence, do not do so.] But if the evidence he relies on presents no adequate explanation for his absence from the witness box then you may hold his failure to give evidence against him. You do not have to do so. What proper inferences can you draw from the defendant's decision not to give evidence before you? If you conclude that there is a case for him to answer, you may think that the defendant would have gone into the witness box to give you an explanation for or an answer to the case against him. If the only sensible explanation for his decision not to give evidence is that he has no answer to the case against him, or none that could have stood up to cross-examination, then it would be open to you to hold against him his failure to give evidence. It is for you to decide whether it is fair to do so.' (The words in square brackets are to be used only where there is *evidence*.)"

13. The three appellants in *Cowan* were convicted of different crimes in different trials. None of them gave evidence at their trials. In the case of two it was stated to the Court of Appeal that it was because they wished to avoid cross-examination about their previous convictions, and

in the case of the third, who had no convictions, it was alleged that he had a strong but sensitive reason which was not disclosed either to the court of trial or the Court of Appeal. The judge in each case gave the jury a direction that they could draw inferences from the defendant's failure to give evidence. In one case the direction was modelled on the JSB specimen and in the other two the judges used their own wording. It was submitted on behalf of each appellant that the operation of section 35 in those circumstances was unfair and contrary to established principles of the criminal law and that the convictions should be set aside. The content of the individual directions was also attacked. The Court of Appeal rejected the general argument based on unfairness. It upheld two of the convictions, but allowed the appeal in the third case on grounds related to the content of the direction.

14. Counsel for the appellants suggested in argument a number of reasons for silence at trial which might be consistent with innocence, including the existence of previous convictions on which the defendant might be cross-examined. Lord Taylor of Gosforth CJ, giving the judgment of the court, regarded this reason as an insufficient ground for claiming that the jury should not be told that it might draw an adverse inference from the defendant's failure to give evidence, stating at p 380:

> "In particular, we should deal specifically with two of the suggested 'good reasons.' First, the general proposition that a previous criminal record upon which a defendant could be cross-examined(if he has attacked prosecution witnesses) is a good reason for directing a jury that they should not hold his silence against him, would lead to a bizarre result. A defendant with convictions would be in a more privileged position than one with a clean record. The former could avoid submitting himself to cross-examination with impunity; the latter could not. We reject that proposition."

15. Lord Taylor expressed approval of the JSB specimen direction and went on, at p 381, to set out certain essentials for a sound direction on this issue:

> "We consider that the specimen direction is in general terms a sound guide. It may be necessary to adapt or add to it in the particular circumstances of an individual case. But there are certain essentials which we would highlight.

> (1) The judge will have told the jury that the burden of proof remains upon the prosecution throughout and what the required standard is. (2) It is necessary for the judge to make clear to the jury that the defendant is entitled to remain silent. That is his right and his choice. The right of silence remains. (3) An inference from failure to give evidence cannot on its own prove guilt. That is expressly stated in section 38(3) of the Act. (4) Therefore, the jury must be satisfied that the prosecution have established a case to answer before drawing any inferences from silence. Of course, the judge must have thought so or the question whether the defendant was to give evidence would not have arisen. But the jury may not believe the witnesses whose evidence the judge considered sufficient to raise a prima facie case. It must therefore be made clear to them that they must find there to be a case to answer on the prosecution evidence before drawing an adverse inference from the defendant's silence. (5) If, despite any evidence relied upon to explain his silence or in the absence of any such evidence, the jury conclude the silence can only sensibly be attributed to the defendant's having no answer or none that would stand up to cross-examination, they may draw an adverse inference."

He then added, at p 383:

> "Finally, we wish to make it clear that the rule against advocates giving evidence dressed up as a submission applies in this context. It cannot be proper for a defence advocate to give to the jury reasons for his client's silence at trial in the absence of evidence to support such reasons."

16. The decision in *R v Cowan* was followed in *R v Taylor* [1999] Crim LR 77. The appellant, who had previous convictions, did not give evidence, and the trial judge gave a direction in accordance with section 35. The Court of Appeal rejected a submission by the appellant's counsel that the judge should have not have told the jury that they could draw inferences from the defendant's failure to give evidence. Buxton LJ, giving the judgment of the court, referred to *Cowan* and said that even if they were not bound by that decision they would follow it without hesitation.

17. At the first trial of the appellant in December 1999 an application was made on his behalf to the trial judge Owen J to exercise his discretion not to allow cross-examination of him in relation to his previous convictions. The judge gave a considered ruling, in which he took into account the impact of section 35 of the 1994 Act. He ruled that the convictions could be put in, with the exception of a recent one which included two counts of possession of a firearm with intent to commit an indictable offence, on the ground that if that conviction were revealed to the jury they might well, despite warning, consider propensity rather than credibility. The jury at that trial failed to agree and when his retrial took place before Gray J the appellant's counsel did not seek to challenge or vary the ruling made by Owen J.

18. When summing up to the jury Gray J gave them the following direction concerning the appellant's failure to give evidence:

> "I now turn to the defence case. I cannot summarise the defence evidence because, as you know, the defence has not called Darren Becouarn to give evidence, nor have witnesses been called on his behalf. Nor, you have been told, did Darren Becouarn answer the questions that were asked of him during several police interviews. That, members of the jury, is [his] right. It is his right not to answer questions asked of him in interview and it is his right to remain silent at the trial and to require the prosecution to prove the case against him if they can.
>
> You must not assume, members of the jury, that he is guilty just because he has not given evidence because a failure to give evidence cannot on its own prove guilt. However, as the defendant has been told, depending on the circumstances you may take into account his failure to give evidence when deciding on your verdict.
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> In the first place when considering the evidence that you have heard from the prosecution side you may bear in mind that there is no evidence from the defendant himself which in any way undermines or contradicts or explains the evidence that has been laid before you by the prosecution.
>
> In the second place if, and I stress the word, if, if you think in all the circumstances it is right and fair to do so you are entitled, when deciding whether the defendant is guilty of the offences with which he is charged, to draw such inferences from his failure to give evidence as you

think proper. In simple terms that means that you may hold his failure to give evidence against him.

You will want to know what inferences can properly draw from the defendant's decision not to give evidence. You should not start to consider whether to draw an adverse inference from the defendant's failure to give evidence until you have concluded that the prosecution case against him is sufficiently compelling to call for an answer from him. So if you do not think the prosecution case is sufficiently compelling to call for an answer, then you should not consider drawing any adverse inference against him from his failure to give evidence.

If, and only if, you conclude that there is a sufficiently compelling case to call for an answer by him then you may think that if he had an answer to it he would have gone into the witness box and told you what that answer is.

If, in your judgment, the only sensible reason for his decision not to give evidence is that he has no explanation or answer to give, or none that would stand up to cross-examination, then it would be open to you to hold against him his failure to give evidence. That is to take it into account as some additional support for the prosecution case. You are not bound to do so, it is a matter for you to decide whether you should do so."

Counsel acknowledged before the House that that was a proper direction, given the existence of the decision in *Cowan*, which was binding upon the judge.

19. Before the Court of Appeal (Tuckey LJ, Keith J and Sir Brian Smedley) counsel for the appellant invited the court to re-examine the decision in *Cowan*, which he submitted was wrong. He argued that the direction was misleading: the judge may believe from the course taken that the defendant has not given evidence because of his previous convictions, accordingly to direct the jury that they may infer that the only sensible reason is that he has no answer to the prosecution case will mislead them and is unfair. He submitted in the alternative that the judge should have given a direction akin to a *Lucas* direction on the reasons for lying, on the lines that there may be various possible other reasons why the defendant did not give evidence, as to which they cannot speculate. The court rejected both these arguments, holding that the direction was sound and in accordance with authority, and dismissed the appeal.

20. The Court of Appeal certified that two points of law of general public importance were involved in its decision, but refused leave to appeal. The certified questions were as follows:

> "1. Where an accused has previous convictions and knows that as a result of the application of section 1 of the Criminal Evidence Act 1898 (as amended) he is liable to be cross-examined so as to elicit those convictions, is it always appropriate to give the jury a direction under section 35 of the Criminal Justice and Public Order Act 1994 that an adverse inference may be drawn against him if he decides not to give evidence; and if so
>
> 2. What should be the terms of such direction?"

21. Mr Edis QC for the appellant argued that unfairness resulted from the appellant's being faced with an impossible dilemma, which required him to make an invidious choice. If he did not give evidence, his convictions would not be mentioned, but the judge would direct the jury that they could draw an inference that the only sensible reason for his failure to give evidence was that he could not face cross-examination on his case. This might only be one of several reasons, and possibly a minor one, but his counsel could not put forward possible reasons, while prosecuting counsel could make very damaging comments about the defendant's silence. If, on the other hand, he did give evidence, so avoiding the damaging inference, he could be cross-examined about his previous convictions. That should in theory be done only for the purpose of damaging his credit, the principle being that since he has sought to undermine the credit of the prosecution witnesses it would be inequitable if the jury were allowed to entertain the impression that he was a person of good character deserving of credit. It is, however, a matter of notoriety that juries in practice are likely to regard them as indicators of propensity and so supportive of guilt. That piece of folk knowledge received some verification from a study commissioned by the Home Office and based on research carried out on the effect of bad character evidence on mock jurors (Sally Lloyd-Bostock, *The Effects on Juries of Hearing about the Defendant's Previous Criminal Record: a Simulation Study* [2000] Crim LR 734).

22. Mr Edis accordingly submitted that the judge in a case such as the present should either refuse to allow the defendant's convictions to be put to him or decline to make or permit adverse comment on his failure to give evidence. In the alternative, he repeated the suggestion

which he had advanced in the Court of Appeal that the judge should give the jury a *Lucas*-type direction about possible reasons why the defendant may have wished to avoid giving evidence.

23. I am unable to accept that the operation of the law as contained in the decision in *Cowan* is unfair, certainly not to a degree which would require that law to be changed. It has to be remembered that the defendant's convictions can be put to him only in the defined circumstances set out in section 1(f) of the 1898 Act, the material one for present purposes being when he has attacked the character of the prosecution witnesses. In those circumstances it would in my view be altogether wrong if he could avoid having his own credibility undermined by the omission of reference to his previous convictions when he gives evidence. That would be misleading to the jury in a case where their decision may depend to a material extent on assessing the credibility of the prosecution witnesses and that of the defendant. It would be equally wrong if he could stay out of the witness box but still avoid having legitimate comment made about his failure to give evidence. It would also create the quite unjustifiable distinction between defendants with previous convictions and those with none to which Lord Taylor of Gosforth CJ referred in *Cowan* [1996] QB 373. I would affirmatively agree with his remark at p 380 of that case, which he repeated in *R v Napper* (1995) 161 JP 16, 22, that the operation of section 35 is not to be reduced or marginalised.

24. I do not find the suggestion made on behalf of the appellant of a *Lucas* type of direction helpful. Allusive hints of the nature contained in the suggested draft direction put forward in the appellant's printed case would be likely either to signal to jurors that the defendant has previous convictions or to set them off on a trail of unfounded speculation about the existence of other imaginary reasons. Secondly, fear of allowing in his convictions may be one element in his decision not to give evidence, but reluctance to face cross-examination may be another and much more predominant element. There does not appear to be any good reason why a defendant should shelter behind the suggestion that there may be some compelling reason for his failure to give evidence other than fear of cross-examination, when that may be quite misleading. I entirely agree with the observations of Tuckey LJ at paras 26 and 27 of his judgment in the Court of Appeal:

> "26. The problem about this is that it does not cure the ill from which the current directions are said to suffer. It is misleading because in a case such as the

present it does not and cannot suggest the reason why the defendant had not given evidence. We are not, therefore, persuaded that a modified direction of the kind suggested should be given in a case of this kind or should have been given in this case.

27. So what of this case? If ever there was a case for allowing cross-examination of the appellant on his previous convictions, this was it. It would have been quite unfair for him to have been allowed to attack the character of the prosecution witnesses in the way he did without the jury knowing about his character if he chose to give evidence. He did not, however, have to give evidence. The Act preserved his right of silence. No one knows why in fact the appellant decided not to give evidence. When he made this decision, for whatever reason, he knew what the consequences would be as a result of Owen J's ruling and the statutory warnings which the judges at his trials were required to and did give him."

25. I would regard the specimen JSB direction on drawing inferences as sufficiently fair to defendants, emphasising as it does that the jury must conclude that the only sensible explanation of his failure to give evidence is that he has no answer to the case against him, or none that could have stood up to cross-examination. This direction has been used for some years and appears to have stood the test of time. It goes without saying, however, that trial judges have full discretion to adapt even a tried and tested direction if they consider that to do so gives the best guidance to a jury and fairest representation of the issues.

26. I accordingly consider that the decision in *Cowan* was correct and that the Court of Appeal correctly decided the present case. I would dismiss the appeal. I would answer the first certified question in the affirmative, qualifying it by deleting the word "always", since there is an overriding discretion in the trial judge to decline to allow convictions to be put or inferences to be drawn where he thinks it unfair in the circumstances of the particular case: see *R v Cowan* [1996] QB 373, 380, 381-382 and cf *R v Napper* 161 JP 16, 22, per Lord Taylor of Gosforth CJ. The second question then does not arise.

27. It only remains to add that section 101 of the Criminal Justice Act 2003, which came into force on 15 December 2004, has effected a

material change in the law which will generally make the problems considered in this appeal no longer material. It is not necessary in this appeal, however, to explore that development and I would reserve further comment on the effect of the 2003 Act until the matter arises for determination.