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Providing evidential information to suspects not legally represented: What are the issues?

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Abstract

The introduction of inference from silence from suspect interviews in the U.K. in 1995 caused controversy over the extent of information provided prior to interview. Legal precedence (R v Beckles [2005] 1 WLR 2829) has assisted in providing guidance in cases where a legal adviser is present in the interview, yet, it is the decision of the suspect whether to accept that advice. If they remain silent at interview they cannot solely rely on that advice. There had been no legal precedence regarding suspects' not legally represented until a Court of Appeal case (Saunders: 2012 EWCA Crim 1380) which indicated that an unrepresented suspect should know sufficient information about the nature of the case in order to make an informed decision as to whether they have legal advice or not. Several prior research studies have indicated that suspects are more likely to confess when the evidence is strong. The issue of whether unrepresented suspects' should be provided with evidential information prior to interview is discussed. What information could be provided and the process of providing the information is proposed.

Keywords: *Criminal justice, suspects, legal advice, confessions.*

Introduction

In England and Wales the introduction of the Criminal Justice and Public Order Act 1994 made significant changes to the right of silence of suspects. The suspect's failure during police questioning to mention facts which are later relied upon at trial, or the suspect's failure to testify at court, became subject of comment at trial. The court could draw appropriate inferences of guilt from their refusal to mention facts at interview. The suspect has to consider at time of interview, whether to answer questions or not and appreciate the implications for failing to answer questions. With the right to have legal advice prior to and during interview, issues arose about

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what information the legal adviser would be entitled to be given to advise their client whether or not to answer questions. Subsequent decisions of the Court of Appeal (R v Argent, 1997; R v Imran & Hussain, 1997; R v Kavanagh, 1997; R v Roble, 1997 and many others) set down advice that the police must provide enough information to legal advisers to enable them to advise their clients properly and the police must not actively mislead when providing that evidence. The extent of information supplied to suspects prior to interview has been a controversial subject. There have been many arguments proposed as to whether suspects should be informed about the case prior to interview or not. There have been no similar cases involving suspects not legally represented until a recent case (R v Saunders, 2012). In this article we will propose that consideration should be given to pre briefing of unrepresented suspects in particular circumstances. We will suggest practice for investigators in undertaking briefings of unrepresented suspects.

Legal precedence for represented suspects has indicated that it is the suspect's decision whether they answer questions or not during an interview and they cannot solely rely on the advice of their legal representative. In R v Beckles (2005) 1 WLR 2829 in which the Court of Appeal set out a two stage test for juries to consider before drawing an adverse inference from any silence:

'Did the defendant genuinely rely on the legal advice, i.e. did the defendant accept the advice and believe that he was entitled to follow it? And was it reasonable for the defendant to rely on the advice? By way of example, a defendant may be acting unreasonably if he relied on the legal advice to remain silent because he had no explanation to give and the advice suited his own purposes.'

Reasonableness does not depend on whether the advice was legally correct or whether it complied with the Law Society's guidelines (R v Argent (1997) Crim.L.R. 449 CA and R v Roble (1997) Crim.L.R. 449, CA). In R v Nottle (2004) EWCA Crim 599 the Court of Appeal held: '... There are, we understand, no rules or established procedure about this [pre-interview] disclosure. The quality and quantity of disclosure will depend on the case. The officer must assess the risk of giving inadequate disclosure, namely that no adverse inferences will be drawn.'

Subsequent to these rulings ACPO (Association of Chief Police Officers in England and Wales) issued guidance (Practical guide to interviewing, 1998), Briefing of Legal advisers (2006), Right of silence (2006), Practice advice on the use of CCTV evidence in Criminal Investigations (2011) to police officers in England and Wales. Throughout the guidance it emphasises that there is nothing in the Criminal Procedure and Investigations Act 1996 or Police and Criminal Evidence Act (PACE) (1984) which outlines that the investigator is under an obligation to reveal the prosecution case to the suspect, or their legal representative before an interview begins. This has been reinforced by ACPO (2012) in a Position Statement on voluntary interviews stating 'Pre-interview briefings should not be provided to unrepresented suspects at any time, including when making arrangements with suspects for voluntary interviews' (p4). Yet, a balance must be found between providing sufficient information to enable the suspect to understand the nature and circumstances of the reason why they are being interviewed, the evidence that may indicate their involvement and for the police to retain sufficient information to be able to test the reliability of the suspect's answers. For any adverse inference to be considered at court it has become necessary to record the pre-briefing consultations with legal advisers and recent guidance by the CPS (Crown Prosecution Service) has stated:

'Prosecutors should be made aware of all pre-interview disclosure that takes place in order to assess whether an adverse inference may properly be drawn at trial and to anticipate, and prepare for, any defence arguments on the point' (CPS, 2012).

This is a significant development because the majority of pre interview briefings are conducted verbally. This will encourage interviewing officers to record the information provided. The guidance on the preparation of the any pre interview briefing documentation will need to be explicit to ensure that interviewers fully understand the issue of drawing the adverse inference. Issues may arise regarding adverse inference for suspects who were not legally represented at interviews and whether the procedures adopted by the interviewer were fair in the particular circumstances. This may include whether they were provided with any pre interview briefings.

In the case of Saunders (Court of Appeal 2012 EWCA Crim 1380) the initial trial judge concluded that an adverse inference could be drawn because 'the practice of disclosure is essentially for a purpose of a solicitor, not for the purpose of a defendant. A solicitor is given disclosure in order to enable him to advise his client. Where therefore you have opted to forego the services of a solicitor, the necessity for disclosure does not arise.' However, the Appeal Judges commented:

'We take the view that that is too rigid and inflexible a proposition. There may well be cases where fairness demands that a detainee is afforded pre-interview disclosure, so that he knows sufficiently the nature of the police enquiry and is placed in a position to know whether legal advice would assist or not. The inflexible practice adopted by Detective Constable..... and endorsed by the judge runs a serious risk of depriving a detainee of information he needs before deciding whether to waive or not. In the instant case that risk did not arise, but in other cases it may do. The approach adopted by the police needs to be flexible so that they can be sensitive to the different needs of different detainees.'

This judgement indicates that the issue of pre interview briefing of the evidential material should be considered on a case by case basis for the suspect to make informed decision whether to continue with or without legal advice. This is in conflict with the ACPO Position Statement (2012) that unrepresented suspects should not be briefed prior to interview. Yet, within the position statement it further states 'the need to supply sufficient information for a person to make an informed decision' (p3). The Position Statement clarifies what the suspect should be informed about, but emphasises that 'This does not, however, extend to supplying detailed information about the investigation that has given rise to the reasonable suspicion.' Reasonable suspicion is based on the evidence gathered to date that indicates their involvement in the investigation, without this information the suspect is not in a position to make an informed decision.

Research by Bucke, Street, and Brown, (2000) highlighted concerns about the position of suspects who chose not to seek legal advice at the police station and whether it was fair that inferences should be drawn when the suspect has not had the benefit of advice. To put this into context, it should be noted that the majority of suspects in their research had not obtained legal advice and did not have the benefit of having someone with legal expertise to request pre-interview briefing on their behalf. Unrepresented suspects could, therefore, face police questions while being unsure of the case against them or of the legal implications of exercising silence. The same researchers identified that suspects in 55% of cases confess when interviewed. Principle 5 of the ACPO Investigative Interviewing strategy (2009) states that an early admission has an impact on the criminal justice system, but, any confession must be obtained fairly and within the law.

The importance of a confession depends on the strength of the evidence against the suspect (McConville, Sanders & Leng, 1991). When the evidence is strong then they are more likely to confess (Irving & McKenzie, 1989; McConville et al., 1991; Moston, Stephenson & Williamson 1992). The interviewer has to consider at what stage in the interview process it is appropriate to present the evidence. As identified in the PACE (1984) Codes of practice Code G, note 3:

'.....it is not necessary to disclose any specific details that might undermine or otherwise adversely affect any investigative processes. An example might be the conduct of a formal interview when prior disclosure of such details might give the suspect an opportunity to fabricate an innocent explanation or to otherwise conceal lies from the interviewer'.

This requires the interviewer when planning their pre interview briefing to evaluate the strength of the evidence and the likely explanations that the suspect may construct that would undermine the investigation. This would provide the interviewer with a rationale on a case by case basis on the depth of information provided in pre interview briefings.

Consider the current interview process involving a legally represented suspect and their opportunity to make informed decisions based on the evidence provided prior to interview. Prior to interview the legal adviser is provided with evidential information which indicates the suspects' involvement in the matter under investigation. The Legal adviser has a duty to provide this information to the suspect. The suspect is legally advised on the information provided and has time to consider the information supplied and the advice given. The suspect makes an informed decision based on the evidential information supplied and the advice given. Throughout the interview process the suspect has been provided with the opportunity to consider the information before making a decision regarding whether they will answer questions or not.

In comparison, the suspect that is not legally represented may not be provided with information prior to interview. In 1998, the National Crime Faculty suggested that such suspects should be provided with a form of briefing at the commencement of the interview, but, this has been superseded in the 2012 ACPO Position Statement Thus are the interview procedures fair for the unrepresented suspect? It could be argued that it is their decision and this may be true but it is essential to ensure that it has been based on the evidential information. This may become a particular issue when there are more than one suspect involved in a criminal enquiry and one or more of the suspects are not legally represented. Suspects not legally represented could be supplied evidential information prior to an interview and it is at this juncture they may reconsider whether they require legal advice or not.

The issue of pre briefing of suspects is about drawing the adverse inference at court. Whether a suspect is or is not legally represented pre briefing has evolved to the current practices because of legal precedence and the questioning of interviewers about the strength of evidence by legal advisers. There is no precedence from research to assist interviewers on what information should or should not be provided. The discussions have developed based on little or no legal precedence or research and the guidance produced does not cover all the different interview situations that may occur.

The first question to ask is what explanations if any is the suspect providing during the interview, is it relevant to the case? Would this change if they were made aware of some or all of the evidence prior to interview? By providing pre interview briefings will more admissions be forthcoming or will they keep with the decision they considered prior to the briefing either to provide a fictitious explanation or fail to answer to questions?

In assessing evidence that could be provided prior to the interview we propose there are two elements to consider:

- Is there evidence that proves that the suspect was at or near the scene at the time of the crime (presence), and
- What was the suspect doing or saying at this time (reason or motive for their presence)

Presence

There are four types of evidence that proves presence:

- Arrested or found at the scene by the police
- Witness evidence (Is the suspect known to the witnesses or is identification an issue?)
- CCTV evidence (what is the quality of the images?)
- DNA/fingerprint or other forensic evidence (where was the evidence found and what is the quality of the evidence?)

Failure to provide information that proves the presence of a suspect will probably result in a 'no comment' interview with legally represented or experienced suspects.

Reason or Motive for their presence

This evidence goes to the heart of the culpability of the suspect. It is this information which causes the dilemmas for the interviewer. How do we evaluate the detail and then consider what information to provide? Detail is the action detail of what has occurred, this would include physical and verbal actions and interactions and the thought processes of the suspect at the time. The interviewer has to consider what the likely outcomes of providing this detail are and when may it be appropriate to divulge the detail. There are three issues to consider when providing the detail of the evidence:

- Providing all the evidence.
- Providing some detail of the evidence, or
- Providing no detail of the evidence, but stating the type of offence e.g. ABH.

The implications of providing all the evidence may provide the suspect with the opportunity to provide a false explanation which cannot be investigated. Prior to any briefing prior to interview the evidence should be evaluated and any explanations or defences considered. It is essential to consider the likely impact of providing such information at an early stage in the interview process.

Providing some details of the evidence may give the suspect an opportunity to consider giving an explanation. The interviewer can gather a detailed explanation from the suspect and this may corroborate the evidence, partially corroborate the evidence or be in conflict with the evidence and provide investigative opportunities. Providing no detail is not recommended because the unrepresented suspect will or may not understand the police jargon when describing offences e.g. ABH (Assault occasioning actual bodily harm). This is relevant to all briefings, the use of police jargon, legal descriptions and legal words will or will not be understood by the suspect, particularly the vulnerable suspect. When providing briefings, whether written or verbal, it should be presented in simple and straightforward English.

When providing a briefing to a suspect legally or not legally represented, taking into consideration that some suspects may be vulnerable, should include the following:

1. Outline of the offence(s) in simple English
2. Circumstances of the offence –explaining the evidence of presence and some information regarding motive or reason.
3. Explanation of the implications of the caution
4. For unrepresented suspects the opportunity to have legal advice.

There are three options to providing evidential information to suspects that are not legally represented. There is an opportunity to have a consistent approach by setting out on the Crown Prosecution Service documentation system which informs the suspect of the evidence, explanation of the inference from remaining silence and whether they wish to reconsider obtaining legal advice:

Option 1. Prepare written information, which is provided by the police custody team to the suspect and the custody record is endorsed accordingly.

Option 2. Prepare written information and consider conducting a pre-interview recorded briefing of suspect. At the conclusion of the briefing the interviewee can consider continuing with the interview unrepresented or requesting legal advice.

Option 3. Prepare written information which is provided at the commencement of the interview and the suspect is given the opportunity to continue with the interview, stop the interview to consider the information, and whether they require legal advice or not.

Conclusion

The issue of providing information to suspects has been debated since the introduction of the Criminal Justice and Public Order Act 1994. There has been some legal precedence set, particularly, over the drawing of inferences. This can only be used as guidance. The ACPO guidance is not clear. Each individual case must be considered on the quality of the evidence at the time and are there any particular vulnerability issues regarding the suspect or suspects. We have proposed examining the evidence from two perspectives, presence and motive. Making decisions on these two perspectives may have an impact on what the suspect may say or not. We have suggested that there is a need for a protocol of providing this information to evidence any issues of inference at court. This subject requires further analysis and research.

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