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Court of Appeal: Privilege, Waiver, and Recent Fabrication--*Wilmot* Clarified

R v Seaton [2010] EWCA Crim 1980

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The appellant had been convicted of murder. This appeal relates to a comment made by the Crown when the appellant failed to call his solicitor to give evidence on his behalf that his version of events at trial was not a recent fabrication albeit being significantly different from what he had said at the police station. Counsel for the appellant contended that the comment amounted to an infringement of legal professional privilege. Although part of the question raised is confined to the particular facts of the case and the changing course of the appellant's evidence, it also raised a number of questions about the interpretation of an earlier decision of the Court of Appeal, *R v Wilmot* (1989) 89 Cr App R 341.

The relevant evidence at issue in this case related to the appellant's initial claims regarding his whereabouts at the time of the killing and when and how he sustained injuries to his hands, evidence that he later altered at trial. The appellant's original version of events was that he had arrived home from Germany late on the evening of 24 September 2008, had been met by friends who had taken him to their home in Romford to collect his own car and he had driven straight home to Woolhampton, but was very delayed by motorway accidents. This was the account he gave to a friend at work and to the police. This journey would not have taken him anywhere near Luton, the place where the appellant's friend had died from multiple stab wounds.

By the time of the trial it was clear from the evidence that the appellant had been in Luton at the relevant time, including evidence that the appellant's freshly spilled blood had been found in the deceased's flat. At trial he admitted visiting the deceased, but stated he had left him alive and well. The Crown asserted that this change in account had been forced on him by the evidence, but the response of the defence was that he had lied because he had not wanted to reveal he had been to the flat to deliver a package of drugs.

A substantial amount of the appellant's blood had also been found in his own car. The Crown had argued that his injuries were sustained whilst using one of the weapons in the stabbing of the victim. He had claimed that his injuries had arisen innocently and that he had cut one hand before he visited the deceased. These injuries to his hand had been observed on his arrest, three days after the murder. In police interviews, with his solicitor present, he chose not to answer any of the questions asked following legal advice, but through his solicitor he gave the police two statements which had been prepared at the police station during consultations between interviews. The prepared statements, one presented in the third interview and the other in the fourth, volunteered information concerning the injuries to his hands. He had signed each declaring his agreement with them, but admitted he had not read the first one. The first statement suggested he had cut his hand shortly after arrival at Stansted airport when a woman passenger had dropped her bag on his hand. At trial he said this was wrong as he had cut his hand on departure at Lubeck airport when a fellow passenger dropped a sharp piece of luggage on his hand.

His second statement had been prepared during a 30-minute consultation with his solicitor between the third and fourth interviews. Although it included information as to other injuries to his hands, it did not mention any airport injury nor correct what the appellant was now saying at trial was an accidental misstatement in the first statement.

The Crown saw this as a further instance of the appellant changing his evidence to meet the indisputable facts. It was clear that the prosecution considered that this particular alteration of the appellant's story had no plausible explanation and went to his truthfulness. When questioned by his own counsel he said he had considered correcting the error after the interview, but decided not to because he thought it was irrelevant and that any change might delay his release. Upon cross-examination it became clear that the appellant was blaming his solicitor for the error in the first statement. Counsel for the Crown indicated that his conversations with his solicitor were privileged and that he could not and, indeed, did not ask to see the solicitor's notes.

The trial judge ruled that the prosecution were able to comment on the fact that the appellant's solicitor did not give evidence. Counsel for the Crown did so and the appellant appealed contending, *inter alia*, that this comment was inappropriate.

Held, dismissing the appeal, this was a clear case of waiver by the defendant during evidence-in-chief and once this had happened the comment by counsel for the Crown was wholly justified. *Wilmot* is not authority for the proposition that there is no question of privilege or waiver when a defendant gives evidence that he told his solicitor an account which he is now producing at trial.

Commentary

The particular facts of the case are discussed above. The issue of privilege arose unexpectedly and the trial judge was referred only to the commentary on *R v Wilmot* contained within *Archbold: Criminal Pleading Evidence & Practice.* Given that there had been debate as to what proposition *Wilmot* is properly authority for, even though neither interpretation would affect the result in the present case, the court took the opportunity (at [16]) to set out its analysis of the decision because it appears to have been accepted in subsequent cases that it said something which 'it is not at all clear that it did say'.

Wilmot had been charged with six rapes and changed his account with regard to the complainants. When first arrested he said he had nothing to do with them, then he confessed to the rapes, but the next day when interviewed with his solicitor present he reverted to his original story. At trial, however, his evidence was that he had had consensual sex with each of the complainants, followed by a dispute. Counsel for the Crown alleged that this was a recent fabrication designed to accommodate the evidence against him and asked him: 'Did you tell your solicitor the truth?'. The defendant did not answer and subsequently counsel for the Crown had commented on the absence of his solicitor from the witness box. The jury were advised by the judge that until such an allegation is made, private communications between a defendant and his solicitor or counsel are inadmissible as evidence. However, following an allegation 'an accused is entitled to give and call evidence in proof of the fact that he had indeed said what he is now saying to you at a much earlier date ... and his solicitor is entitled to come in to the witness box and say the same thing'.

In the present case, Hughes LJ noted (at [20]) that when counsel for the Crown had asked Wilmot the question, the accused had made no reference whatever to his solicitor, discussions with him, or when he had first offered this new version of his evidence. Counsel's question 'went directly to a privileged occasion', there had been no waiver of privilege by the accused, 'and when asked the question, the defendant had declined to answer'. So what is the effect of this decision, what is it authority for?

Hughes LJ (at [21]) observed that one possible view is that 'it is authority for the proposition that no question either of privilege or waiver arose in the circumstances of that case', but he noted that 'it is by no means clear that this is what the court meant to say'. Confusion may have arisen because of the wording of part of the headnote for *Wilmot* in the Criminal Appeal Reports which reads:

(2) The case did not raise a question of breach of privilege at all. The privilege prevented the prosecution from calling the solicitor to give evidence but the appellant was entitled to call him, just like any other witness, to rebut the allegation of recent fabrication.

Although the second sentence is clearly correct, the first is plainly inaccurate as the question by counsel for the Crown had clearly intruded on privilege and was 'roundly criticised' (at [27]) as a result. The court had 'specifically, and emphatically' held that the question ('Did you tell your solicitor the truth?') ought *never* to be asked as it placed the defendant in 'an impossible position'. This was because at the time it was asked the accused had done nothing to waive his legal professional privilege and 'it wrongly forced him either to waive privilege or to suffer the criticism that he must be untruthful because he had not' (at [24]).

In later cases, *Wilmot* has been interpreted (without detailed analysis) as standing for the proposition that a defendant accused of recent fabrication 'can call his solicitor without that constituting any element of waiver of his privilege'. Hughes LJ noted that in *Wilmot* there was no discussion of waiver at all--an unsurprising omission as, rather than waiving privilege, Wilmot had claimed it. Accordingly, the Court of Appeal turned its attention to four subsequent cases, all concerning s. 34 of the Criminal Justice and Public Order Act 1994 and adverse inferences.

The first is *R v Condron and Condron* [1997] 1 Cr App R 185 where the Court of Appeal gave guidance on the application of the new section. It had also made the following propositions, noted at [31] of the present case, about legal professional privilege (at 197A-G):

> (i) Communications between an accused and his solicitor at the police station are privileged.
>
> (ii) The defendant can waive the privilege but his solicitor cannot do so without his authority.
>
> (iii) If an accused gives as a reason for not answering questions that his solicitor advised him not to do so, 'that advice, in our judgment, does not amount to a waiver of privilege'.
>
> (iv) But if, as will often happen, the defendant wishes to put in evidence not merely the fact that he has received such advice but the reasons for it, that (although the point was not fully argued) 'may well amount to a waiver of privilege'. ...
>
> (v) Where a defendant is accused of subsequent fabrication of the explanation he is now advancing at trial,
>
> 'it is always open to the party to attempt to rebut this inference by showing that the relevant facts were communicated to a third person, usually the solicitor, at about the time of the interview (see *Wilmot*). This does not involve waiver of privilege if it is the solicitor to whom the fact is communicated; the solicitor is, for this purpose, in the same position as everyone else.'

Hughes LJ drew attention to the fact that (v) contains two statements, the first is clearly correct and derives from *Wilmot*, but the second, in the last sentence, is an incorrect addition as *Wilmot* said nothing about waiver.

The second case to be scrutinised was *R v Bowden* [1999] 2 Cr App R 176 where the Court of Appeal had held that s. 34 had not altered the law on legal professional privilege. The court had also confirmed the distinction from *Condron* that adducing that legal advice had been given to remain silent did not waive privilege, but adducing the reason that advice was given did. However, the Court of Appeal in the present case was concerned that the court in *Bowden* had also made a general observation at 182C, that where a

defendant seeks to rebut an accusation of recent fabrication '*no waiver of privilege is involved even if evidence is given (by him or by his legal adviser) that this disclosure was made to his legal adviser. Such an accusation was made against the defendant in Wilmot* ...' (at [36], the court's own emphasis). Hughes LJ (at [36]) found that the emphasised words are clearly said to be based on *Wilmot*; the court had derived the same proposition from *Condron*, 'which it treated as having in turn derived it from *Wilmot'*, perpetuating the error.

In *R v Wishart* [2005] EWCA Crim 1337, the appellant had done nothing to waive privilege, but had been asked by the Crown whether he had told any of his legal advisers the evidence he was now giving at trial--exactly the same question as had been roundly disapproved in *Wilmot*. In referring to the judgments in *Wilmot*, *Condron* and *Bowden*, the Court of Appeal had cited the passage (v) from *Condron* and the emphasised words from *Bowden* (above) and had commented that it was arguable that, in such circumstances, a defendant waives privilege by volunteering information from privileged communications, but the court was bound to follow these authorities, even if it thought there was reason to doubt the line of authority. After *Wishart* came *R v Loizou* [2006] EWCA Crim 1719, where the court assumed, on the basis of *Wishart* that no waiver of privilege was involved if an accused called his solicitor to rebut an allegation of recent fabrication of evidence, although this issue was not actually relevant to the case. However, Hughes LJ (at [41]) felt the importance of the decision in *Loizou* was the 'scholarly analysis', beginning at [66], demonstrating that 'waiver ... is not all or nothing' and is often partial. Deciding what evidence waiver has let in 'is determined by the test of fairness, or, to put it another way, what is necessary to avoid there being left a misleading impression by revelation of part only of the privileged communications ... the essential question is whether the partial disclosure has actually led to unfairness or prejudice' (at [41], *per* Hughes LJ). His Lordship stated that this is 'not the exercise of s 78 Police and Criminal Evidence Act jurisdiction as this section only applies to evidence which the Crown seeks to adduce' (at [41]), whereas deciding what has been let in by waiver could arise where there are co-defendants.

For the reasons outlined above, the Court of Appeal stated (at [42]) that *Wilmot* is authority for the proposition that a defendant who volunteers evidence of his communications with his solicitor does not *breach* privilege; the privilege is his to waive. It is incorrect to suggest that such communications are not privileged, and to assume that volunteering such evidence in order to rebut allegations of recent fabrication involves no element of waiver. The Court of Appeal came to a number of conclusions (at [43]), which are summarised below:

a) Legal professional privilege is of paramount importance.

b) '... in the absence of waiver, no question can be asked which intrudes upon privilege. That means, inter alia, that if a suggestion of recent fabrication is being pursued at trial, a witness, including the defendant, cannot, unless he has waived privilege, be asked whether he told his counsel or solicitor what he now says is the truth. Such a question would require him either to waive his privilege or suffer criticism for not doing so. If any such question is asked by an opposing party (whether the Crown or a co-accused) the judge must stop it, tell the witness directly that he does not need to answer it, and explain to the jury that no one can be asked about things which pass confidentially between him and his lawyer. For the same reasons, in the absence of waiver, the witness cannot be asked whether he is willing to waive.'

c) The defendant can adduce evidence of his privileged communications, but this is not a question of breach of privilege, rather he is waiving his privilege.

d) If the defendant does give evidence of privileged communications 'he is not thereby waiving privilege entirely and generally. He may well not even be opening up *everything* said on the occasion of which he gives evidence, and not on topics unrelated to that of which he gives evidence. The test is fairness and/or the avoidance of a misleading impression.'

e) 'If a defendant says that he gave his solicitor the account now offered at trial, that will ordinarily mean that he can be cross examined about what exactly he told the solicitor on that topic, and if the comment is fair another party can comment on the fact that the solicitor has not been called to confirm something which, if it is true, he could easily confirm. If it is intended to pursue cross examination beyond what is evidently opened up, the proper extent of it can be discussed and the judge invited to rule.'

f) 'A defendant who adduces evidence that he was advised by his lawyer not to answer questions but goes no further than that does not thereby waive privilege. This is the ratio of *Bowden* ...'

g) Where a defendant goes further than this and 'adduces evidence of the content of, or reasons for, such advice', he waives privilege 'at least to the extent of opening up questions which properly go to whether such reason can be the true explanation for his silence: *Bowden*. That will ordinarily include questions relating to recent fabrication, and thus to what he told his solicitor of the facts now relied on at trial: *Bowden* and *Loizou*.'

h) 'The rules as to privilege and waiver, and thus as to cross examination and comment, are the same whether it is the Crown or co-accused who challenges the defendant.'

In the present case, the Court of Apeal found a clear case of waiver by the appellant during evidence-in-chief. When he said that his first statement contained an error, but he had signed it without reading it, he was suggesting that the error was the solicitor's mistake as he had told her something different. He had then stated that he had discussed correcting it with her. As Hughes LJ observes (at [46]) the appellant 'had put before the jury the plainest possible suggestion that he had not changed his account but had given the solicitor the same one as he was giving the jury. That inevitably must be characterised in law as a waiver'. Once this occurred the Crown's comment was wholly justified on the facts, and was not impermissible. Accordingly, the conviction was safe and the appeal was dismissed.