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SILENCE AS AN ADMISSION IN A CRIMINAL TRIAL IN PENNSYLVANIA

By

Lindley R. McClelland*

A typical scene: Two men are suspected of having committed a crime. They are arrested and arraigned before an Alderman. Thereafter, the police take written statements from each accused. Defendant No. 1 says that he saw Defendant No. 2 commit the crime, but that he, Defendant No. 1, had nothing to do with it. This statement by Defendant No. 1 is read to Defendant No. 2, who remains silent.

I pose two questions: First:—To what extent is this, or a similar case of silence, evidence against a defendant as an admission of guilt in his criminal trial in Pennsylvania? Second:—To what extent should silence be construed to be an admission of guilt against a defendant in any criminal case?

The general rule, as stated by Wharton is "That, when a statement is made in the presence and hearing of an accused, incriminating in character, and such statement is not denied, contradicted, or objected to by him, both the statement and the fact of his failure to deny are admissible in a criminal trial as evidence of his acquiescence in its truth."[1]

Of course, the accusatory statement standing alone is hearsay so it is admissible, not as evidence of the truth of the facts stated, but to show the defendant's admission by silence.[2]

At least as early as 1881, the Supreme Court of Pennsylvania uttered the famous maxim, "Silence, under certain circumstances, may amount to a tacit admission of guilt."[3] Only a few years ago, this maxim was repeated, with apparent approval, by Chief Justice Maxey.[4] Recently Mr. Justice Horace Stern clearly elaborated the general rule in Pennsylvania in these words, "When a statement made in the presence and hearing of a person is incriminating in character and naturally calls for a denial but is not challenged or contradicted by the accused although he has opportunity and liberty to speak, the statement and the fact of his failure to deny it are admissible in evidence as an implied admission of the truth of the charges thus made."[5]

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1 "Evidence in Criminal Cases" by Francis Wharton, 11th Edition, § 656, p. 1089.
2 Commonwealth v. Vallone, 347 Pa. 419, 32 A. 2d 889 (1943).
3 Ettinger v. Commonwealth, 98 Pa. 338 (1881).
4 Commonwealth v. Petrillo, 341 Pa. 209, 19 A. 2d 228 (1941), opinion by the now Chief Justice Maxey.
5 Commonwealth v. Vallone, 347 Pa. 419, 32 A. 2d 889 (1943), majority opinion by Mr. Justice Horace Stern.

To this general rule, there are many exceptions or, at least, limitations. For example, silence standing alone raises no legal presumption of guilt. There must be other evidence of guilt before mere silence in the face of an accusatory statement is admissible. As former Chief Justice Kephart revealed, "Ordinarily silence when one is charged with a crime should not be received as evidence of guilt and is not admissible for any purpose unless there is other evidence in the case from which guilt may be inferred."[6] Also, if the circumstances indicate that the defendant failed to understand the accusatory statement, the defendant's silence cannot be construed as an admission of guilt.[7] Thus an accusation made in the English language to a person who understood only the Polish language could not, in all fairness, be made the basis of an admission by silence. Furthermore, if the defendant did not hear the accusatory statement, it would be unfair to consider his silence as an admission of guilt. Whether the defendant heard the accusatory statement "is a question of fact, unless it is shown positively that he was within hearing distance, and there is no evidence that his hearing was impaired."[8]

If the defendant is not "at full liberty to speak" his silence is inadmissible.[9] Hence, a defendant surrounded by several tough police officers who threaten violence if he speaks might well consider it discreet to remain silent in the face of any accusation. Nevertheless, the mere fact that a defendant was not present voluntarily does not render his silence inadmissible if he was at full liberty to speak.[10] As a matter of fact, most defendants are not present in jail, or police offices or district attorney offices voluntarily; no doubt, they would much prefer to be elsewhere. However, as long as full liberty to speak is granted a defendant, he cannot complain because he is present involuntarily.

The accusatory statement must be such as would naturally call for a denial and it must be reasonably apparent to the defendant that he is at full liberty to deny it.[11] This would seem to mean, at the very least, that the accusatory statement must imply, directly or indirectly, that the defendant is guilty of the crime charged. Anything less might be a compliment and only the most modest of defendants might see fit to deny it.

Silence, under the circumstances, must lead to the inference of the defendant's assent to the correctness of the accusatory statement; if the defendant denies the

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[6] Commonwealth v. Karmendi, 325 Pa. 63, 188 A. 752 (1937), opinion by former Chief Justice Kephart.

[7] Commonwealth v. De Palma, 268 Pa. 25, 110 A. 756 (1920); Commonwealth v. Brown, 264 Pa. 85, 107 A. 676 (1919).

[8] 22 Corpus Juris Secundum § 734, p. 1261.

[9] Commonwealth v. Aston, 227 Pa. 112, 75 A. 1019 (1910)

[10] Ibid; also see wealth of authority cited in Commonwealth v. Vallone, 347 Pa. 419, 32 A. 2d 889 (1943).

[11] Commonwealth v. Coyne, 115 Pa. Super. 23, 175 A. 291, (1934); Commonwealth v. Karmendi, 325 Pa. 63, 188 A. 752 (1937); Commonwealth v. Turza, 340 Pa. 128, 16 A. 2d 401 (1940).

correctness of the accusatory statement, it is not admissible.[12] But the statement must be "promptly and explicitly denied"[13] because "evasive and equivocal responses are tantamount to absolute silence."[14]

In Pennsylvania a defendant in a criminal case cannot be compelled to testify and his neglect or refusal to testify cannot create any presumption against him, or be adversely referred to by the court or the attorneys during the trial.[15] As a result, it is no surprise to learn that a defendant may remain silent in the face of an incriminating statement made at a judicial hearing, and his silence is not admissible in evidence against him.[16] Regardless of the law in other jurisdictions, however, the fact that the defendant has been arrested and is in custody does not affect his silence as an admission.[17] Only the further factor of silence during a judicial hearing renders such evidence inadmissible.[18]

Such a brief resume of the law on this subject in Pennsylvania appears incomplete without special attention being directed to the case of *Commonwealth v. Vallone.*[19] Apparently, there is no doubt that in April, 1941, Joseph Vallone knowingly transported a female for the purpose of prostitution contrary to the Penal Code of Pennsylvania.[20] After he was arrested, Vallone was brought from the jail to the district attorney's office where, in the presence of a state policeman, a local policeman, a county detective, and the district attorney's secretary, the prostitute told in detail about her criminal experiences with Vallone. Vallone sat through the meeting in silence. At the trial, the state policeman described the above scene and the lower court allowed it in evidence as an admission by silence. Vallone was convicted and sentenced. He appealed to the Superior Court of Pennsylvania and on January 28, 1943, they reversed the judgment of the lower court.[21]

Judge Kenworthey, in discussing what he called "the doctrine of assenting silence," revealed that "the rule, to be sound in application to particular cases, must be critically examined in the light of the peculiar circumstances of each case by judges who assume somewhat the role of clinical psychologists."[22] Vallone's silence was not admissible against him, asserted Judge Kenworthey, because of these aspects of the case: ". . .(1) the meeting was deliberately staged for the

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12 Commonwealth v. Johnson, 213 Pa. 607, 64 A. 82 (1906); Commonwealth v. Mazarella, 279 Pa. 465, 124 A. 163 (1924).

13 Commonwealth v. Westwood, 324 Pa. 289, 188 A. 304 (1936).

14 Commonwealth v. Turza, 340 Pa. 128, 16 A. 2d 401 (1940).

15 Act of May 23, 1887, P. L. 158, 19 P. S. 631.

16 Commonwealth v. Brown, 158 Pa. Super. 226, 44 A. 2d 524 (1945); Commonwealth v. Zorambo, 205 Pa., 109, 54 A. 716 (1903).

17 Commonwealth v. Vallone, 347 Pa. 419, citing a legion of cases on p. 422, 32 A. 2d 889 (1943).

18 Commonwealth v. Zorambo, 205 Pa. 109, 54 A. 716 (1903).

19 Commonwealth v. Vallone, 151 Pa. Super. 431, 30 A. 2d 174 (1943), reversed in Commonwealth v. Vallone, 347 Pa. 419, 32 A. 2d 889 (1943).

20 Act of June 24, 1939, P. L. 872 § 517, 18 P. S. 4517.

21 Commonwealth v. Vallone, 151 Pa. Super. 431, 30 A. 2d 174 (1943).

22 Ibid.

purpose of procuring evidence, (2) the meeting was a relatively formal proceeding, (3) appellant had been charged with the crime and was under arrest, (4) he was present at the meeting under guard and under compulsion, (5) the only persons present were hostile to him, and (6) he was not asked any questions until after the meeting had been concluded."[23]

The Commonwealth's appeal to the Supreme Court of Pennsylvania was allowed and on June 30, 1943, they reversed the Superior Court.[24] Mr. Justice Horace Stern concluded that the six circumstances cited by Judge Kenworthey "were important factors for the consideration of the jury in determining the weight to be given to the defendant's silence under accusation, but they do not, either singly or collectively, impair the admissibility of the evidence."[25]

As of this date, later cases have followed the Supreme Court's decision in the *Vallone* case without adverse comment[26] except for the opinion of Chief Justice Maxey in *Commonwealth v. Barnak*[27] in which he said the evidence was "much stronger in showing the probative value of unanswered accusations than was the *Vallone* case."

So much for the status of the law in this regard in Pennsylvania; I turn now to a consideration of its validity and suggested reforms.

Basically, the rationale of this rule is found in "the proverbial expression that silence gives consent."[28]

Apparently, Mr. Justice Patterson deems it "the natural reaction of one accused of crime. . .to deny the accusation if it is unjust or unfounded."[29]

Concerning such assenting silence, Mr. Justice Sadler once wrote, "the falsity of the statements would naturally be insisted upon if, in fact, they were untrue."[30]

And Wharton: "The crystallization of the experience of men shows it to be contrary to their nature and habits to permit statements tending to connect them with actions for which they may suffer punishment to be made in their presence without objection or denial by them unless they are repressed by the fact that the statement is true."[31]

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23 Commonwealth v. Vallone, 151 Pa. Super. 431, 30 A.2d 174 (1943).

24 Commonwealth v. Vallone, 347 Pa. 419, 32 A. 2d 889 (1943).

25 Ibid.

26 Commonwealth v. Brooks, 355 Pa. 551, 50 A. 2d. 325 (1947); Commonwealth v. Turner, 358 Pa. 350, 58 A. 2d 61 (1948); Commonwealth v. Sams, 62 D. & C. 79 (1947).

27 Commonwealth v. Barnak, 357 Pa. 391, 54 A. 2d 865 (1947).

28 "Pennsylvania Trial Evidence", by George M. Henry, 3rd Edition, § 74, p. 116.

29 Commonwealth v. Turza, 340 Pa. 128, 16 A. 2d 401 (1940), opinion by Mr. Justice Patterson.

30 Commonwealth v. Lisowski, 274 Pa. 222, 117 A. 794 (1922), opinion by Mr. Justice Sadler.

31 "Evidence in Criminal Cases", by Francis Wharton, 11th Edition, § 656, p. 1092.

And Mr. Justice Horace Stern: "The justification of this rule is to be sought in the age-long experience of mankind that ordinarily an innocent person will spontaneously repel false accusations against him, and that a failure to do so is therefore some indication of guilt."[32]

But Chief Justice Maxey, "I do *not so read* the record of 'the age-long experience of mankind'[33] and I am equally convinced that the cliche 'silence gives consent' is an unreliable basis for a rule of evidence." For example, in his blistering dissent to the *Vallone* case, the Chief Justice reviewed the record of history from the silence of Christ before Pilate through the silence of Washington to the charges leveled against him by Thomas Paine, and many more instances, only to conclude that "*many* persons will *never* answer *any* accusations made against them (unless called upon to do so at a formal trial)." The Chief Justice cited various authorities from other states "to the effect that a person in custody charged with crime is under no duty to speak and that his silence shall not be counted as giving assent."[34] The Chief Justice asserted, "If the ruling of the majority opinion is the law of this Commonwealth, then any citizen no matter whether his repute be high or his repute be low, is liable to find that if he hears with silent contempt, or silent caution until he can consult with counsel, an accusation made against him by even the most disreputable of individuals, his very silence will be construed at his trial as an admission of the truth of these accusations." And, as I view it, he concluded that prior Pennsylvania cases did not require the result of the *Vallone* decision.

Finally, in order "to bring our law on this subject in accord with sound reasoning and the weight of authority," the Chief Justice suggested: "First, that the silence of a person under arrest, in the face of accusations made against him by a third party, shall not be used against him at his trial. . .; Second, that if there are some extraordinary circumstances which make a defendant's silence in the face of accusations against him consistent only with his acquiescence in them so that no other explanation of his silence is reasonable, the evidence of silence may be admitted, but in that contingency the jury must be carefully instructed as to how to weigh that evidence."

Personally, as I view it, silence, under these circumstances, is so tenuous and of such slight probative value and there are so many reasons other than guilt which may cause a man accused of crime to remain silent that, I contend, such silence should not be admissible. Even where such silence is coupled with extraordinary circumstances which make the said silence consistent only with guilt,

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[32] Commonwealth v. Vallone, 347 Pa. 419, 32 A. 2d 889 (1943), opinion by Mr. Justice Horace Stern.

[33] Commonwealth v. Vallone, 347 Pa. 419, 32 A. 2d 889 (1943); dissenting opinion by Chief Justice Maxey. All further quotations of the Chief Justice are from this famous dissent.

[34] People v. Pignataro, 263 N. Y. 229, 188 N. E. 720 (1934), is indicative of the many decisions.

it would seem that the silence is cumulative only and that the proof of extraordinary circumstances alone would suffice.

Only in this way, I think, can we maintain inviolate the cardinal principle that "evidence must be such as to exclude to a moral certainty, every hypothesis but that of guilt of the offense imputed."[35]

For who can deny that silence *per se* is a neutral factor and, as such, is equally consistent with guilt or innocence?

[35] Commonwealth v. Benz, 318 Pa. 465, 178 A. 390 (1935).