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Evidence and Criminal Law--Admission by Silence

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Evidence and Criminal Law—Admission by Silence

H and *N* were indicted and jointly tried for the unlawful sale of narcotics. They were found guilty and sentenced to confinement in the state penitentiary for a term of not less than fifteen nor more than twenty years. While in custody, *H* had accused *N* of committing the crime in question and *N* had made no response to the accusation. The fact of *N*'s silence was admitted in evidence as an implied admission of guilt. *Held*, where a person is accused in the presence of others and the tendency of a reasonable man would be to deny the accusation, the silence of the accused is admissible as an implication of guilt because it gives rise to an inference of the truth of the accusation. *People v. Norman*, 190 N.E.2d 819 (Ill. 1963).

Much attention has been focused upon the question of whether one who is in custody or under arrest should be deemed to have impliedly admitted his guilt by his silence after having been confronted with incriminating statements. A wide divergence of opinion is noted regarding the admissibility of such an admission by silence. Annot., 115 A.L.R. 1517 (1938); Annot., 80 A.L.R. 1259 (1932); 20 AM. JUR. *Evidence* § 574 (1939).

The view opposed to the admission of such evidence is based upon the theory that it is the common knowledge and belief of men that silence is the proper conduct while in custody or under arrest in order to protect against self-incrimination. 2 JONES, *EVIDENCE* § 389 (5th ed. 1958); Annot., 80 A.L.R. 1262 (1932); 20 AM. JUR. *op. cit. supra*. Jurisdictions favoring admission of this evidence declare that the fact that one is in custody at the time does not affect admissibility. 2 JONES, *op. cit. supra*; 4 WIGMORE, *EVIDENCE* § 1072 (3d ed. 1958); 80 A.L.R. 1259 (1932); 20 AM. JUR. *op. cit. supra*.

It is not altogether clear which view has the support of more authority. Jones clearly states that such evidence is inadmissible "by the weight of authority". 2 JONES *op. cit. supra*. The author in 20 AM. JUR. *op. cit. supra*, states that "many" authorities follow this view.

The case of *Pinn v. Commonwealth*, 166 Va. 727, 729, 186 S.E. 169, 170 (1936), pronounces that such evidence, "by the great weight of authority", is admissible. Among other supporting citations, the Virginia court lists the case of *State v. Brooker*, 68 W. Va. 8, 69 S.E. 295 (1910), in which the court announced that "the fact that he was under arrest or in custody at the time is not of itself

excuse for his failure to speak in denial." See also, 7 M.J. *Evidence* § 231 (1949); 80 A.L.R. 1259 (1932).

While West Virginia appears to be committed by the *Brooker* case to the view that such evidence is admissible, it is not quite as apparent just what weight this evidence is to be given. This issue was raised in the principal case when the accused, according to the reported facts, was convicted and sentenced to fifteen to twenty years imprisonment upon the corroborating testimony of an addict-informer and the implied admission by silence. Under Illinois law, as reported by the court, the testimony of one credible witness is sufficient to support a conviction for the unlawful sale of narcotics.

The *Brooker* case involved homicide rather than the unlawful sale of narcotics. The record presented to the court did not purport to contain all the evidence adduced at the trial and thus the court assumed that sufficient evidence existed. However, dicta in the *Brooker* case presented the issue as to the quantum of evidence, if any, necessary in addition to the admission by silence to support a conviction. The court stated that, alone, such an admission may be insufficient to convict. While the court recognized the duty of the jury to determine the weight to be accorded the evidence, it nevertheless indicated that, as a matter of law, it may be necessary that such an admission have the support of other evidence.

Thus, it appears debatable as to how much corroborating testimony will be necessary to carry the issue to the jury. Standing alone, an admission by silence might readily be challenged as insufficient evidence to constitute proof beyond a reasonable doubt and to support a conviction and severe sentence. The testimony of an addict-informer was sufficient corroborating testimony in the principal case to support a conviction and heavy sentence. The West Virginia court has indicated accord on the question but no clear and positive ruling has been rendered.

Charles David McMunn

Federal Courts—Diversity Jurisdiction of Foreign Corporation

P, a resident of Maryland, brought a libel action against *D* news service, a New York corporation, in the United States District Court for Vermont. Service was made upon an employee of *D* in Vermont.