

## **Defendant’s silence as an admission (other than the exercise of a right to silence during a police interview, or in the face of an accusation made by a person in authority)**

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### **Commentary**

This chapter applies to evidence of a defendant’s silence in the face of an accusation by a lay witness.

It does not apply to a defendant who declines to answer a question or questions or remains silent when a complainant’s accusations are put to them by police, during a formal interview or otherwise (for example, “in the field”).

Nor does it apply where a defendant is silent in the face of an accusation by a “person in authority” for the purposes of section 10 of the *Criminal Law Amendment Act 1984*.

The prosecution may wish to lead as an admission (by conduct) a defendant’s silence in the face of an accusation.

As explained by Livesey JA in *R v BEC* [\[2023\] QCA 154](#) at [87]:

Evidence about a statement which has been made to or in the presence of an accused, which went unanswered by the accused, may or may not be associated with a real risk that the jury could use that evidence as in some way implicating the accused in the offending alleged. Each case must necessarily depend on its own facts and circumstances, particularly the matters in issue and precisely what it is contended was said to or in the presence of the accused. Where the statement made to or in the presence of the accused is clearly referable to the allegations made against the accused, as in *R v Lester*, the trier of fact might well regard any failure by the accused to respond with a denial as a matter of some significance. Indeed, the more stark the statement of accusation made to the accused, the more significant will be the evidence concerning any response made by the accused, even if little is made of the issue in addresses.

The suggested direction, if one is called for, is drawn from paragraph [99] of his Honour’s reasons.

An accusation may be express or implied.

It will be necessary for the Crown to identify the content of the accusation said to have been made.

The relevant response to the accusation said to amount to an admission may be silence or some other response.

As always, the suggested direction must be adapted to the facts of the case.

## **Suggested direction**

[Again, judges are reminded that this direction does not apply to a defendant who is being questioned or interviewed by police or a “person in authority” for the purposes of section 10 of the *Criminal Law Amendment Act 1894*.]

**You have heard evidence that the defendant was silent in the face of [X’s] accusation that he had [repeat accusation].**

**Before you can use his silence in support of the prosecution case, you must be satisfied of the following matters.**

- 1 You accept X’s evidence as to what X said to the defendant and his silence in response to it.**

[If the defendant has challenged X on this point, and has put forward an alternative “innocent” version of the conversation, add: **If you accept the defendant’s version of his conversation with X, or you consider his account of it a reasonable possibility, then you cannot use X’s evidence about his silence as an admission of his guilt]**

- 2 If you accept X’s evidence about the conversation and the defendant’s silence:**

**You are satisfied that the defendant heard and understood the accusation.**

**If you consider it reasonably possible that the defendant did not hear the accusation, or did not understand it as an accusation, then you cannot use his silence in the face of it as an admission of his guilt.**

- 3 If you are satisfied that the defendant heard and understood the accusation as an accusation:**

**You are satisfied that, in the circumstances, the defendant could have been expected to deny the accusation and his silence is only explicable as an admission of his guilt.**

**You will need to consider whether the defendant’s silence might be explicable as the product of panic, embarrassment, or fear of a false accusation.**

**If you think such an innocent explanation for the defendant’s silence is reasonably possible, then you cannot use the defendant’s silence as an admission of his guilt.**

**In other words, you cannot use the defendant’s silence as evidence in support of the prosecution case unless you are satisfied:**

- **Of X's account of the conversation and the defendant's silence;**
  - **That the defendant heard and understood the accusation made;**
- and**
- **That the defendant should have responded to it with a denial - but did not do so for any other reason than an acceptance of the accusation.**