

COMMENT

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CROSS-EXAMINATION OF AN ACCUSED AS TO COLLATERAL CRIMES RELEVANT TO GUILT

Corak and Palmer v R

Many statutory provisions have modified the common law principles of evidence. Among the more important of these are the ubiquitous provisions regulating the competence and compellability as witnesses of defendants in criminal cases and the related provisions limiting the extent of permissible cross-examination of accused persons who choose to give evidence under oath at their own trial. The provisions controlling the cross-examination of defendants have proved particularly troublesome in many respects. In this article, there will be an analysis of the difficulties provoked by the relevant statutes insofar as they operate on the cross-examination of an accused as to his discreditable antecedents for the purpose of inviting or assisting an inference of guilt, as opposed to cross-examination for the purpose of merely impairing the credibility of the accused as a witness.

The recent decision of the Court of Criminal Appeal of South Australia in *Corak and Palmer v R*¹ demonstrates that there still prevails considerable uncertainty as to the permissible limits on the cross-examination of an accused, whether by the Crown or by a co-defendant, as to collateral criminal conduct relevant to main issues. This uncertainty arises out of the very structure of the relevant statutory provisions. The Parliament of South Australia has recently modified the statutory rules regulating the cross-examination of an accused. However, the recent legislative amendments have only partially clarified the accused's position when under cross-examination as to main issues, that is, issues relevant directly to guilt as opposed to issues as to the credibility of the defendant as a witness.

In South Australia, the examination and cross-examination of the accused at his trial are principally regulated by the Evidence Act 1929-1983 s18(1). Prior to the 1983 Amendment Act, s18 contained the following paragraphs:

"V. A person charged and being a witness in pursuance of this Act may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged:

VI. A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked, shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless —

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1 (1982) 101 LSJS 1.

- (a) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or
- (b) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or
- (c) he has given evidence against any other person charged with the same offence: . . .”²

The 1983 Amendment Act³ was principally concerned to further restrict, first, cross-examination of an accused for the purpose of discrediting him,⁴ and secondly, the extent of permissible disclosure of the sexual history of a complainant in a trial for rape.⁵ However, the Amendment Act repealed subpara (a) of para VI and replaced it with the following subpara:

“(a) the evidence to be elicited by the question is admissible as tending to show that he is guilty or not guilty of the offence with which he is charged. . .”

It will be seen that while this amendment is a step in the direction of clarity it will not remove the practical difficulties inherent in the co-existence of what are now s18(1)V and s18(1)VI. These practical difficulties can usefully be illustrated by reference to the facts in *Corak and Palmer*.⁶

The Facts in *Corak and Palmer v R*

The appellants, along with two other persons named Waters and Cil, had been charged with possession of indian hemp for the purpose of trading, contrary to s5(4) of the Narcotic and Psychotropic Drugs Act 1934-1978 (SA). Waters pleaded guilty. The charge related to an occasion when the four defendants went through the motions of agreeing to sell hemp to a police officer (Elliott) acting in the role of an *agent provocateur*. The transaction was halted moments before consummation by the arrest of Waters and Palmer, who, on the Crown case, were the principal sellers. Corak and Cil had driven a motor vehicle laden with the hemp to a place where Palmer, Waters and Elliot might collect it in order to complete the sale.

Corak admitted his presence at the place of collection of the hemp by Waters and Palmer but claimed to have been ignorant of any criminal

2 Section 18V and VI of the Evidence Act reproduce s1(e) and (f) of the Criminal Evidence Act 1898 (UK). Those provisions have their counterparts in all Australian jurisdictions except New South Wales (as to which, see Crimes Act 1900 s413A); Crimes Act 1958 (Vic) s399, Evidence Act 1910 (Tas) s85; Evidence Ordinance 1971 (ACT) ss69, 70, 74; Evidence Act 1977 (Qld) s15; Evidence Act 1906 (WA) s8. The English provisions are discussed in Pattenden, “The Purpose of Cross-Examination under Section 1(f) of the Criminal Evidence Act 1898” [1982] Crim L Rev 707.

3 Evidence Act Amendment Act 1983.

4 Section 2(b), (c) and (e) of the Amendment Act removed and replaced the “imputation limb” of s18VI(b).

5 Section 3 of the Amendment Act added restrictions on the liberties of a defendant making an unsworn statement. Section 4 amended s34i of the Act.

6 *Supra* n1. The trial took place before the 1983 Amendment Act became operative.

conduct or intention on the part of Palmer, Waters and the *ageni provocateur*; his evidence was that he had arranged to meet Palmer at the relevant place in order only to buy furniture from him. Cil was Corak's sister-in-law and her defence was that she took part in the crime under duress. Palmer's defence was that his physical association with Waters in the place where the offence was perpetrated was innocent. All defendants were convicted.

The ground of appeal which generated argument as to limits on the cross-examination of a defendant as to collateral crimes relevant to guilt was the fourth ground in Palmer's notice of appeal. In substance, this ground was that the trial judge erred in permitting cross-examination of Palmer in relation to photographs which showed Palmer holding either a real or imitation pistol and standing near indian hemp. The photograph had been taken many years before the events in question in the present trial. The relevant cross-examination had been conducted by counsel for Cil in an attempt to support evidence from Cil that, at all material times, she was or might reasonably have been in fear of Palmer. In other words, the cross-examination went squarely to a fact in issue as between the Crown and Cil and was therefore, *prima facie* permissible. Unfortunately, however, a co-defendant was the cross-examined witness and the evidence while not *tendered* to show nevertheless *tended* to show that Palmer had, on an occasion other than that charged, committed a criminal offence. In this latter aspect, the evidence was *prima facie* inadmissible by virtue of s18VI of the Evidence Act 1929, now s18(1)VI.

The Court held that the cross-examination was authorised by subpara (c) of s18VI, which permits cross-examination of a co-accused by another defendant in exception to the prohibition in s 18VI if the former "has given evidence against any other person charged with the same offence". Implicit in this decision is the view that s18VI(c), now s18(1)VI(c), authorises cross-examination as to main facts, and not merely to credit. Clearly, as indeed the Court held, Cil and Palmer were charged with "the same offence". Further, the Court applied the broad test laid down by the House of Lords in *Murdoch v Taylor*⁷ and held that, against the background of the evidence given by the Crown, Palmer's evidence constituted "evidence against" Cil, notwithstanding that Palmer did not, in his evidence, explicitly incriminate Cil.⁸

The Reasoning of the Court of Criminal Appeal

While King CJ and Mitchell J reached the same conclusion on this ground of appeal, their reasons disclose a striking difference of opinion.⁹ Mitchell J held, by the way, that the cross-examination objected to was in any event authorised quite independently of s18VI(c) because it was directly relevant to proof of main issues.¹⁰ Mitchell J relied on the decision in *Attwood v R*,¹¹ where the High Court was called upon to

7 [1965] AC 574.

8 *Supra* n 1 at 9, 21. In addition the Court confirmed the view adopted in earlier decisions that a trial judge has no discretion to stop cross-examination under s18VI(c). Contrast the approach in *R v Darrington* [1980] VR 353 to the question whether the trial judge has a discretion to reject evidence tendered by one accused (in the case in chief) in disproof of guilt which may incidentally put a co-defendant at a disadvantage in the eyes of the jury.

9 Zelling J, the third member of the Court, merely concurred in the order of the Court

10 *Ibid* 22.

11 (1960) 102 CLR 353, 361-362. In *Jones v DPP* [1962] AC 635, 699, Lord Devlin came to a conclusion contrary to that in *Attwood*.

interpret the meaning of the phrase “bad character” in the prohibitive part of s18VI and its equivalents. The High Court held that that phrase embraced only bad character which was relevant merely to the witness’ credibility and did not prohibit cross-examination as to bad character directly relevant to the charge against the accused-witness.

Here, the questions put to Palmer were relevant, not to his guilt of the crime charged, but to the guilt or innocence of Cil. They were, therefore, not authorised by s18V. Nor were they authorised by the reasoning in *Attwood*. However, Mitchell J held that the cross-examination was proper merely because it related to “strictly relevant facts”. With respect, the approach taken by Mitchell J involved a misinterpretation both of what the High Court decided in *Attwood* (where one defendant alone was on trial) and of s18V. A defendant has a common law right to cross-examine every defendant-witness as to matters sufficiently relevant to the innocence of the cross-examiner;¹² but that right is fettered by the prohibition in s18VI, now s18(1)VI. The view of Mitchell J is tantamount to the assertion that the common law right prevails over the statutory restriction. That assertion is obviously erroneous.

In this case, the cross-examination of Palmer tended to reveal the commission by the accused-witness of an offence other than that charged. It was therefore presumptively prohibited by s18VI. It was not authorised by s18VI(a) because it was not tendered to prove Palmer’s guilt of the crime charged.¹³ If, for the sake of argument, one assumed — as Mitchell J did — that s18VI(c) was not available to the cross-examiner, then, on a literal interpretation of s 18, the cross-examination of Palmer must have been improper. This is the contrary of Mitchell J’s conclusion, which was, of course, explicitly unnecessary to Her Honour’s reasoning on this ground of Palmer’s appeal. If Her Honour’s view is right, then not only does s18(1)VI serve no useful purpose as between an accused-witness and a cross-examining defendant where the cross-examination is directed to proving the innocence of the cross-examiner but, in addition, an accused-witness is in a worse position than an ordinary witness when being cross-examined by a defendant.

The latter proposition may be illustrated by slightly adapting the facts of the case under discussion. Assume that Cil’s defence was that, not Palmer alone, but Palmer and Waters in combination, had brought duress to bear on her. Assume that Waters (having pleaded guilty and having been sentenced) gave evidence for the Crown. Assume that the objectionable photograph had shown both Waters and Palmer holding firearms and possessing illicit drugs on an occasion other than that charged. As a witness, Waters would be entitled to rely on the general privilege against self-incrimination to resist cross-examination by Cil about the contents of the photograph to the extent that the cross-examination might expose him to a penalty for a crime for which he had not be charged, for s18(1)V does not apply to Waters. Palmer, however, who is standing trial and has, therefore, a greater need for protection cannot, on Her Honour’s view, resist cross-examination to a main issue by Cil, whether or not Palmer and Cil are charged with the same

¹² *R v Hilton* [1972] 1 QB 421.

¹³ The same conclusion would be true against the background of s18(1)VI(a) as amended in 1983.

offence, even if that cross-examination reveals the commission of a prior crime on Palmer's part for which he has not been brought to justice; in other words, on the view of Mitchell J, Palmer has lost his privilege against self-incrimination either completely or to the extent necessary to permit the proof of "strictly relevant facts". Thus, Palmer is not only put at a disadvantage at his trial, but is jeopardised further because evidence extracted from him by Cil about crimes on other occasions is admissible against him on his subsequent trial for those other crimes. It will be submitted later that Mitchell J's approach is not one which the Evidence Act authorises.

King CJ took a rather more cautious approach. In his view, the cross-examination was authorised by s18VI(c) but on no other basis. His Honour did not express a concluded opinion against the view expressed by Mitchell J and was content to "merely draw attention to certain difficulties which (that view) raises".¹⁴ While accepting the decision in *Attwood* in relation to the "bad character" limb of the prohibitive part of s18VI, His Honour preferred the interpretation that questions tending to show that a defendant-witness had committed or been convicted of a collateral offence, if prohibited by s18VI, were not permitted by s18V or by the common law where the cross-examiner's purpose was to show, not the guilt of the witness, but the innocence of the cross-examiner:

"That this interpretation might have serious consequences for the presentation of a defence is undeniable. If an accused's defence were one of duress by threats by a third person made in the presence of a co-accused and in the course of the commission of a crime in which this co-accused was implicated, it would be extremely difficult for his counsel to elicit from the co-accused evidence that he was present when the threats were made without disclosing the commission of an offence by the co-accused. Similarly, if an accused's defence were one of duress by threats by a co-accused made in the course of the commission of another offence, it might be extremely difficult for his counsel to cross-examine the co-accused to establish the defence without disclosing the commission of the other offence. If, in the present case, Palmer had not given evidence against Cil, counsel for Cil would, presumably, not have been able to elicit the evidence...In the view which I have taken, however, it becomes unnecessary to resolve these difficulties in the present case."¹⁵

Where Mitchell J was concerned to extend the rights of the cross-examining defendant, the Chief Justice was troubled by the need to protect an accused-witness.

The Relationship Between Act s18(1)V and s18(1)VI

Corak and Palmer is yet another case in which the troublesome relationship between s 18(1)V and s 18(1)VI, insofar as those provisions regulate cross-examination to main facts, has gone unresolved. Further legislative interventions may be required, for certain difficulties are endemic in these provisions and in their equivalents in other jurisdictions in Australia with the exception of New South Wales. Many of the

¹⁴ *Supra* n 1 at 9.

¹⁵ *Ibid* 10.

problems generated in practice by the drafting of these sections may not be able to be resolved by a process of interpretation alone.

The threshold problem is that both sections seek to deal with the same subject-matter in contrary ways. Section 18(1)V is facultative. It authorises the cross-examination of the accused—witness notwithstanding that the answers may incriminate him on the present charge. It abrogates the privilege against self-incrimination in respect of the present charge¹⁶ but in respect of that charge alone. Section 18(1)VI, on the other hand, is restrictive. It seeks to deal not only with cross-examination as to main facts (subpara (a)) but also with cross-examination as to credit (subpara (b)). In addition, s18(1)VI(c) has been interpreted as controlling cross-examination both as to main facts and as to credit. Thus, s18(1)VI restricts the two theoretically distinct areas of cross-examination, that is, cross-examination to main facts and cross-examination to credit. Both subpara (a) and subpara (c) of s18(1)VI deal with cross-examination to main facts, as does s18(1)V. The problems generated in practice arise from the dual operation of s18(1)VI and from the attempt by s18(1)V and s18(1)VI to regulate the same field — cross-examination as to main facts — from different perspectives.

Two main areas of difficulty arise: first, in the not infrequent cases where some collateral misconduct is relevant to the accused-witness' guilt on the present charge and not merely to credit; secondly, where as in *Corak and Palmer*, a co-accused seeks to cross-examine an accused-witness as to discreditable collateral matters in order to prove, not the witness' guilt, but the cross-examiner's innocence, of the crime charged. The 1983 Amendment Act has effectively done nothing to alleviate these difficulties.

As far as the first difficulty is concerned, the question becomes: where does the permission (s18(1)V) end and the restriction (s18(1)VI) commence? Can these two sub-sets of areas of cross-examination ever collide as the House of Lords conceived in *Jones v DPP*?¹⁷ In another sense, the question is whether either the permission in s18(1)V or the dual negative in s18(1)VI abrogates the privilege against self-incrimination in relation to collateral offences where proof of those offences would tend to incriminate the accused in the crime charged. These considerable theoretical difficulties disappear for the most part at the practical level only if a strained effect is given to s18(1)VI(a) (so that it is taken to repeal the privilege against self-incrimination in respect of collateral offences) and if one adopts the interpretation placed on the phrase "tending to show" (in s18(1)VI) by the majority in *Jones v DPP*. In that case, the majority held that the phrase "tending to show" means "tending to reveal to the jury for the first time". As will be seen, if this combined mode of interpretation is adopted, then, at least where a single defendant is tried, no question will be authorised by s18(1)V yet prohibited by s18(1)VI.

In s18(1)VI, there are four fields of prohibition (commissions, convictions, charges and bad character). In s18VI(a), there were two grounds of relaxation of the prohibition where the otherwise

16 *R v Wright* [1969] SASR 256, 263, 267, 269, 275-276 (Zelling AJ dissenting); *R v Minihane* (1921) 16 Cr App 38; *R v Toomey* (1969) Tas SR 99, 101.

17 [1962] AC 635. Neither s18(1)V nor s18(1)VI authorises questions which at common law could not be put to an ordinary witness because irrelevant.

objectionable information (commissions or convictions) was tendered to prove the witness' guilt of the present charge. The 1983 Amendment Act ushered in a more general relaxation of the prohibition. Theoretically, a clash between s18V and s18VI was conceivable where a question was authorised by s18V yet fell within s18VI and outside s18VI(a), because relating to a "charge" or "bad character". Can this situation arise in those jurisdictions where the equivalent of s18(1)VI(a) is still confined to convictions and commissions? It is suggested that it cannot.

It is simpler to deal first with the "bad character" field in the prohibitive part of s18(1)VI. Courts in Australia are bound by the decision in *Attwood* that "bad character" in s18(1)VI means bad character relevant only to credibility. That is, it has been decided that the "bad character" field in the prohibitive part of s18(1)VI does not exclude proof of relevant facts which tend to prove the guilt of the accused on the present charge, even if such facts incidentally tend to show the accused to have a bad character. Thus in this respect, no question could be authorised by s18(1)V yet prohibited by s18(1)VI. The 1983 amendment to s18VI(1)(a) entrenches the result attained by a process of interpretation in *Attwood*.¹⁸

The situation as far as concerns "charges" is a little more complex. The law accepts that the mere fact that a person has been charged with a crime is no evidence of that person's guilt of that crime, either directly or via credibility. An unconcluded charge, or a charge concluded in favour of the defendant, is regarded as a misfortune and is not probative.¹⁹ In other words, an unconcluded charge is not a proper *objective of proof*, either in the prosecution case in chief or in the cross-examination of the defendant. In omitting "charges" from s18VI(a), the draftsman was merely acknowledging that, on ordinary principles of relevance, a mere charge for a collateral offence cannot be proved for the purpose of showing that the accused "is guilty of the offence wherewith he is then charged".²⁰

At the same time, the draftsman was confusing *means of proof* with *objectives of proof*, in conditionally prohibiting cross-examination as to convictions and commissions and in absolutely prohibiting cross-examination as to charges. In the same way that a mere charge is not a proper objective of proof, because it is not probative, equally and for the same reason a bare conviction and the mere fact of the commission of a collateral offence and the "bad character" of the defendant are not proper objectives of proof. Evidence of these classes of facts cannot be adduced at common law where the sole purpose of the tender is to prove the conviction, commission, charge or "bad character". However, with the exception of evidence of "bad character" (or bad reputation) evidence of these classes of facts can be admitted at common law if tendered to be used as a step in a chain of inference connecting the defendant with the crime charged in the instant proceedings. In other words, convictions,

18 *Attwood*, however, is not binding authority on the inter-relation of s18(1)V and s18(1)VI(a).

19 *Maxwell v DPP* [1936] AC 309; *R v Bradshaw* (1978) 18 SASR 83, 91. Cross-examination as to a charge is authorised where it is merely a step in the attempt to prove a relevant fact. See eg *G (an infant) v Coltart* [1967] 1 QB 432, 439-440; *R v Ollis* [1900] 2 QB 758, 783.

20 *R v Cokar* [1960] 2 QB 207 is perhaps the best example of this. See the critique of this case by Cross, "The Criminal Evidence Act 1898, s1(f)(i)" (1960) 76 LQR 537.

commissions and charges can, in some circumstances, be proper *means of proof* of relevant facts. As such, they can be proved by the Crown in its case in chief.

Cases in which evidence of the commission by the defendant of a collateral offence has been admitted as part of the Crown case in chief in order to connect the defendant with the crime charged are legion. They were numerous even before s18VI was first enacted. That, no doubt, explains why s18VI(a) authorised cross-examination of the defendant as to "commissions". The draftsman perceived that it would have been absurd to have prohibited cross-examination as to matters already properly in evidence as part of the Crown case.

A bare conviction cannot normally be tendered in proof of facts,²¹ either in civil or criminal trials. Generally, a bare conviction is not probative at all. However, where the Crown is relying on the defendant's *commission* of a collateral crime, as a step in a chain of inference connecting the defendant with the instant crime, the Crown can properly adduce evidence of the commission complemented by evidence of the defendant's conviction for that collateral crime, in its case in chief, and can cross-examine the defendant as to the conviction.

While charges are, in general, not probative, special situations can be imagined where the Crown may be acting properly in adducing evidence of collateral charges against the defendant in its case in chief. For example, the Crown may anticipate that a defendant will be relying on an alibi. In order to meet the alibi, it would be open to the Crown to adduce evidence that, on the day concerned in the instant charge, the defendant was near the place of the crime by virtue of the fact that the defendant was seen by a witness to appear in answer to a charge (for the collateral offence) in a magistrate's court near the place where the instant crime was committed. In these special circumstances, the charge is offered as a *means of proof* of a relevant fact and not as an *objective of proof*. In such circumstances, logic suggests that such a charge should be able to be the subject of cross-examination of the defendant. However, s18VI did not distinguish between charges which are tendered as means of proof and those which are tendered as objectives of proof. The prohibition in s18VI was, in respect of charges, absolute. Literally interpreted, s18VI prevented the cross-examination of the defendant as to collateral charges whatever the purpose of the Crown in tendering evidence of the charge in its case in chief. In other words, it prevented the Crown from testing, in its cross-examination of the defendant, evidence already adduced in chief. This absurd result was obviated by the interpretation adopted by the majority in *Jones v DPP* of the phrase "tending to show" in s18VI. By the use of that interpretation, the result could be reached that no question relating to the defendant's collateral "charges" could be authorised by s18V yet prohibited by s18VI.

The recent amendment to s18(1)VI(a) removes the confusion between means of proof and objectives of proof manifest in s18VI(a). Under the present paragraph, it is absolutely clear that no question can be authorised by s18(1)V yet prohibited by s18(1)VI. However, further amendment of s18(1)VI is required in order to confine that paragraph

21 *Hollington v Hewthorn & Co Ltd* [1943] 1 KB 587. Only the facts culminating in a conviction, as opposed to the conviction itself, can be probative. Note, however, the probative effect conceded to convictions in *R v Pfitzner* (1976) 15 SASR 171.

solely to cross-examination as to credit. In practice, that paragraph serves no useful purpose in so far as it attempts to regulate cross-examination as to main facts.

Collateral Offences and Privilege

The next question which arises is whether either s18(1)V or s18(1)VI abrogates the privilege against self-incrimination in relation to the commission by the accused-witness of collateral offences. Literally, s18(1)V does not. Strictly speaking, that subsection rescinds that privilege only in respect of the crime charged. "Notwithstanding" in s18(1)V does not mean "if", although there is respectable authority in favour of interpreting the former word to mean "if".²² Equally, s18(1)VI(a) if strictly interpreted could not be regarded as rescinding the privilege in so far as it may be available to an accused-witness in relation to collateral offences. Section 18(1)VI contains a double negative. It extends protection and then provides in subpara (a) for loss of that protection. Yet it does not positively interfere with common law privileges. Accordingly, if s18(1)V and s18(1)VI are interpreted literally, cross-examination of an accused-witness as to collateral offences which have not been made the subject of proceedings can in appropriate cases be opposed by reliance on the common law privilege against self-incrimination.

Soon after the precursor of s18(1) was enacted in England in 1898, the courts seem to have realised that to interpret it literally would produce unacceptable obstacles to the resolution of main issues in criminal trials; accordingly, it was interpreted or, rather, glossed over to mean that s18(1)V, in combination with s18(1)VI(a), allowed cross-examination of the defendant as to main issues (or strictly relevant facts, including collateral crimes) and that s18(1)VI otherwise functioned merely to restrict cross-examination to credit.²³ This interpretation does violence to the words of s18, as the majority in *Jones v DPP* acknowledged, and is tantamount to judicial abrogation of the privilege against self-incrimination in respect of collateral offences. It is the view taken of s18 by Mitchell J, obiter, in *Corak and Palmer*. It may provide a practical, workable and, for the most part, just solution in most cases. But it is not an interpretation of s18. If it is to be persevered with, it is suggested that s18 should be amended, in one of two ways.

First, s18(1)V might be amended to replace "notwithstanding that" by "if" or "for the purpose of incriminating...". Alternatively, it may be simpler to repeal paras V and VI of s18(1) and to replace them with

22 In *Jones v DPP* supra n 17 at 663, 683, Viscount Simonds, Lord Reid and Lord Morris seem to have read "notwithstanding" as equivalent to "if". Such an interpretation does, as their Lordships accepted, create the theoretical possibility of an "insoluble conflict" between s18(1)V and s18(1)VI. Lord Morris appears to have concluded that, where there is a conflict, para VI prevails over para V, that is, that "any question" in para V means "any question not prohibited by para VI". Lord Devlin, with whom Lord Denning agreed, appears to have treated para V as prevailing over para VI: *ibid*, 690-691. Viscount Simonds was of the view that neither para prevailed over the other: *ibid* 658. At 668, Lord Denning implied that s18(1)V abrogated the privilege against self-incrimination in respect of all conduct directly relevant to the offence charged, including conduct tantamount to collateral offences. This view is borne out by *Maxwell v DPP* supra n 19 at 318-319.

23 *Jones v DPP* supra n 17 at 701 (propositions 2 and 3), 711. These difficulties (insofar as they result from the use of a double negative) do not arise in the ACT because of the manner in which s70(1) of the Evidence Ordinance is expressed.

separate provisions, the one allowing cross-examination of the defendant on matters relevant to the guilt or innocence of a party (subject only to the overriding discretion of the trial judge to prevent the admission of information of slender weight which is likely to be abused by a jury) and the other allowing restricted cross-examination of the accused for the purpose of discrediting him. Emphasis would shift from the effect of the answers to the purpose of the questions.²⁴

A Single Line of Defence

In practice, the difficulties inherent in the drafting of s18(1) should not arise in a trial where there is a single defendant or in trials where, there being more than one defendant, the cases of the defendants are in substance self-supportive, if the trial judge adheres to the interpretation put on the phrase "tends to show" (in s18(1)VI) by the majority in *Jones v DPP*.²⁵ In every criminal trial, the Crown is both obliged and entitled to adduce, in its case in chief, all evidence relevant to those issues of fact on which it bears the burden of proof and on which it will ask the jury to act, including evidence of the commission by the accused of other specific offences which bears on the accused's guilt on the present charge. In its case in chief, the Crown must present all evidence within its power of the commission by the defendant of those collateral crimes as to which cross-examination of the defendant pursuant to s18(1)VI(a) may subsequently become proper.²⁶ If the view is taken, as it was by the majority in *Jones v DPP*, that "tends to show" means "tends to reveal to the jury for the first time", then s18(1)VI will never be able to be invoked against Crown counsel while cross-examining an accused-witness in relation to prior misconduct admissible in proof of guilt on the present charge because a foundation for the cross-examination will have been laid in the course of the Crown case in chief. The cross-examination will not "tend to reveal" anything to the jury "for the first time" and will not, therefore, be in breach of s18(1)VI. This conclusion will hold true in all but the rare cases where the foundation of the cross-examination is relatively innocuous but where the answers given in cross-examination are devastating. While the *Jones* interpretation of this phrase emasculated s18(1)VI from the point of view of the accused witness, it is a practical and sensible one. The contrary interpretation would artificially prevent the Crown from putting its entire case to the defendant in cross-examination, that is, would prevent the affirmative case and the defence case from meeting head on.

Antagonistic Defendants

At trials where the defendants are united in their defence, none of them will wish to cross-examine the others as to the others' discreditable past by invoking one of the exceptions to the prohibition in s18(1)VI. Where, however, the defendants are seeking to make out antagonistic defences, one of them may wish to adduce evidence with a view to disclosing the discreditable past of one or more of the others. In the abstract, three purposes may motivate such a course. Defendant A may wish to discredit defendant B in order to assist the jury to resolve a

24 See Cross, supra n 20 at 546 and the comments of Mason J in *Donnini v R* (1972) 128 CLR 114, 145.

25 See text following n 17 supra, and *R v Sarek* (1982) 6 A Crim R 241, 250.

26 *Shaw v R* (1952) 85 CLR 365; *Killick v R* (1982) 56 ALJR 35; *R v Jones* [1962] AC 635, 646, 668, 685, 697; *R v Levy and Tait* (1966) 50 Cr App R 198.

conflict of credit between them. Or defendant A may wish to prove collateral misconduct on the part of defendant B in order to assist an inference that B alone is guilty of the crime charged against A and B. Or, as happened in *Corak and Palmer*, A may wish to adduce evidence of misconduct on B's part to support a finding that, irrespective of B's guilt or innocence, A is innocent. This comment is concerned only with the last two hypothetical cases.

In such cases, A will in a practical sense be required to give evidence. In the course of A's evidence in chief, affirmative evidence will be adduced of B's discreditable past. In due course, A may have the opportunity to cross-examine B. At this stage, a number of permutations are possible. If A and B are standing trial charged with "the same offence" and if B has given "evidence against" A within the meaning of s18(1)VI(c), the prohibition in s18(1)VI will not bind A while cross-examining B. Where, however, A and B are not charged with "the same offence", what is the position?

If A has concluded his case before B is cross-examined and if A has, in the course of his case, adduced evidence of B's discreditable past insofar as it is relevant to A's innocence, then s18(1)VI will not effectively bind A in cross-examining B as to B's collateral misconduct because the cross-examination will not tend to reveal anything to the jury for the first time. If, on the other hand, B appears ahead of A in the indictment or information and concludes his case first, A's cross-examination of B as to B's collateral misconduct may tend to show one of the matters prohibited by s18(1)VI. This is the class of case where the second area of difficulty posed by the drafting of s18 arises. If s18(1)VI(c) is not available to A, A may be hindered by s18(1)VI in the conduct of his defence to the extent that he seeks to cross-examine B on matters tending to prove A's innocence but incidentally B's guilt on another occasion or B's discreditable misconduct on another occasion. Because the cross-examination does not tend to prove B's guilt on the present charge, it is not facilitated by s18(1)V. In addition, it is prohibited by s18(1)VI. For the sake of argument, it is being assumed that s18(1)VI(c) is not applicable. It is not clear that s18(1)VI(a), in either its previous or its present form, is available to A.²⁷ At the very most, s18(1)VI(a) will be available to A only if A is seeking to exculpate himself *by incriminating* B. Arguably the intention of the statute is that one defendant should be able to cross-examine co-defendants as to the matters prohibited by s18(1)VI only when the defendants are charged with "the same offence". This phrase has been interpreted very narrowly²⁸ and many defendants will transpire to be co-accused not charged with "the same offence" as the defendant sought to be cross-examined in apparent breach of s18(1)VI.

Where cross-examination of B by A is prohibited by s18(1)VI and where A and B are not charged with the same offence, by what right

27 In *Matusевич v R* (1977) 15 ALR 117, Stephen J (at 121) and Murphy J (at 126) held that s18(1)VI(a) benefits only the prosecution. This view is supported by logic except where a co-defendant alleges that he is innocent *because* the other defendant is guilty: see cases such as *Lowery v R* [1974] AC 85; *R v Moghal* (1977) 65 Cr App R 56; *R v Davis* [1975] 1 WLR 345.

28 In *Metropolitan Police Commissioner v Hill* [1980] AC 26 it was held that the phrase refers to offences similar in time, manner and place of occurrence. This decision has been overcome in England by the Criminal Evidence Act 1979 c 16. It does not apply in the ACT (Evidence Ordinance s70(2)(d)) or Queensland (Evidence Act s15(2)(d)).

can A, in cross-examining B, adduce information probative of A's innocence which is irrelevant to B's guilt on the crime charged, yet which tends to reveal to the jury for the first time that B has been guilty of criminal conduct on occasions other than that charged? Surely the resolution of main issues as between antagonistic co-accused cannot turn on the sequence in which they present their defences. Yet, as has been seen, where A has already concluded his case in chief and has laid a foundation for the cross-examination of B, as he is entitled to do, common sense requires that A be permitted to cross-examine B as to all matters relevant to A's innocence;²⁹ in such a case, it has been shown, s18(1)VI is not a bar to cross-examination. On the other hand, if A's case follows that of B, A may, in cross-examining B as to B's collateral crimes, be impeded by s18(1)VI. Such a cross-examination is authorised by a literal interpretation of neither s18(1)V or s18(1)VI, in the circumstances hypothesised.

Further, despite the view of Mitchell J in *Corak and Palmer*, it seems reasonably clear that B could rely on the privilege against self-incrimination to prevent his cross-examination by A as to such of B's collateral crimes as had not been the subject of charges or proceedings. Section 18 does not expressly rescind the privilege against self-incrimination in respect of collateral crimes. Reliance on the privilege by B may result in manifest injustice to A. One possible solution to this difficulty is to modify s18 so as to authorize cross-examination of all witnesses as to all matters necessary to establish the innocence of the cross-examiner. It must be made quite clear by the amending Act that s18(1)VI does not restrict cross-examination of any witness by a defendant as to main facts. It may be necessary to go further and permit one co-defendant to call fellow accused.³⁰ Even where the facts are such that, for one reason or another, the collateral crimes of B as to which A proposes to cross-examine do not entitle B to rely on the privilege against self-incrimination, it remains true that the prohibition in s18(1)VI confronts A to whom, it is being assumed, s18(1)VI(c) is not available.

In addition to the reforms already mentioned, s18(1)VI(c) should be amended by way of deleting the requirement that the cross-examiner and the accused witness be "charged with the same offence". As has been seen, this reform has already been implemented in England, Queensland and the Australian Capital Territory. If this step is not taken, then justice in particular cases may require that the courts abandon a literal interpretation of s18 and accept, as Lord Denning and Lord Devlin appear to have done in *Jones* and as Mitchell J seems to have done in *Corak and Palmer*, that s18(1)V would authorise cross-examination of an

29 *Reid v Kerr* (1974) 9 SASR 367. In *Corak and Palmer* King C J seemed to accept that the material elicited in Palmer's cross-examination would have been admissible by Cil in her case in chief. If this were so, reason requires that cross-examination of Palmer by Cil on the matter be not only permitted but encouraged. See in this regard the comments of Lord Devlin in *Jones v DPP*, supra n 17 at 692, 696. In *Jones*, the Crown proved a self-contradicted alibi on Jones' part in its case in chief. In cross-examination, it was sought to show that the present alibi was false. The cross-examination was relevant both to a main issue (the jury, if it found a deliberate lie, may have used the lie as evidence of a consciousness of guilt: the lie was, then, a relevant fact and could be proved as such) and to Jones' credit (for Jones would be a self-confessed liar). The majority held that the cross-examination was permitted by s18(1)V and was not prohibited by s18(1)VI. Lords Denning and Devlin, abandoning a literal interpretation, held that the cross-examination was permissible because it was addressed to a relevant fact.

30 Cf Evidence Act (SA) s18I, and note the amendments effected to s21 by Act No 55 of 1983.

accused-witness as to all matters relevant to the innocence of the cross-examiner, including cross-examination as to matters prohibited by s18(1)VI.

To recapitulate: where A and B are standing trial together yet are not charged with the same offence and where A's case succeeds B's, cross-examination of B by A as to B's collateral crimes for the purpose of establishing A's innocence may encounter two obstacles under the present provisions. First, B may rely on the privilege against self-incrimination in respect of such of the collateral crimes as have not been the subject of charges. Secondly, B may rely on s18(1)VI in respect of the matters covered by the prohibitive part of that provision.

The difficulties canvassed above might be diminished, if not displaced altogether, by amending paras V and VI of s18(1) to correspond substantially with s413A of the Crimes Act 1900 (NSW),³¹ provided that it is also made clear that the privilege against self-incrimination otherwise attaching to an accused-witness is abrogated in relation to all offences proof of which tends to show the guilt of the accused-witness or the innocence of a co-defendant. As a complementary safeguard, it might be enacted that the involuntary answers of the accused-witness in respect of criminal conduct on other occasions should not be admissible in evidence against that person at his subsequent trial for those other offences.³²

31 Section 413A provides:

- " (1) Subject to this section and section 413B, where in any proceedings an accused person gives evidence he shall not in cross-examination be asked, and if asked shall not be required to answer, any question tending to reveal to the Court or jury —
- (a) the fact that he has committed, or has been charged with or convicted or acquitted of, any offence other than the offence charged;
 - (b) the fact that he is generally or in a particular respect a person of bad disposition or reputation.
- (2) Subsection (1) shall not apply to a question tending to reveal to the Court or jury any fact such as is mentioned in subsection (1)(a) or (b) if evidence of that fact is admissible for the purpose of proving the commission by the accused of the offence charged.
- (3) Where, in any proceedings in which two or more persons are jointly charged, any of the accused persons gives evidence, subsection (2) shall not in his case apply to any question tending to reveal to the Court or jury a fact about him such as is mentioned in subsection (1)(a) or (b) if evidence of that fact is admissible for the purpose of showing any other of the accused to be not guilty of the offence with which that other is charged.
- (4) Subsection (1) shall not apply if —
- (a) the accused person has personally or by his counsel asked any witness for the prosecution or for a person jointly charged with him any question concerning the witness's conduct on any occasion (other than his conduct in the activities, circumstances giving rise to the charge or his conduct during the trial or in the activities, circumstances or proceedings giving rise to the trial) or as to whether the witness has committed, or has been charged with or convicted or acquitted of, any offence; and
 - (b) the Court is of the opinion that the main purpose of that question was to raise an issue as to the witness's credibility,
- but the Court shall not permit a question falling within subsection (1) to be put to an accused person by virtue of this subsection unless it is of the opinion that the question is relevant to his credibility as a witness and that in the interests of justice and in the circumstances of the case it is proper to permit the question to be put.
- (5) Subsection (1) shall not apply where the accused person has given evidence against any person jointly charged with him in the same proceedings."

Read literally, this provision does not rescind the privilege against self-incrimination at all: see Law Reform Commission of New South Wales, *Working Paper on Evidence of Disposition* (1978) para 5.2.

32 This is the approach taken by Parliament in the case of modern statutory offences: see eg Companies Act 1981 (Cth) s541(12); Trade Practices Act 1974-1981 (Cth) s159; Aboriginal Land Rights (Northern Territory) Act 1976-1982 (Cth) s54(3).

Legislation in these terms would give cross-examining accused proper scope to establish his innocence (which, on a literal view of s18, he is denied if s18(1)VI(c) is unavailable to him as a matter of fact) and would provide the accused-witness with all the protection to which he is reasonably entitled (rather than the lack of protection implied in Mitchell J's view in *Corak and Palmer*).

Summing Up in Relation to Bad Character Evidence

In *Corak and Palmer*, the Court of Criminal Appeal held that, in his summing up, the trial judge should have expressly instructed the jury as to the use which they might lawfully make of the information disclosed by the cross-examination of Palmer as to his collateral crimes. In the unanimous view of the Court, the trial judge was under a duty to instruct the jury that, while they might properly use this evidence as probative of Cil's defence and in assessing Palmer's credibility as a witness – for his cross-examination produced self-contradictory answers – it could not lawfully be used to assist an inference of Palmer's guilt by way of a finding that he had a propensity to commit crime.³³ The Court decided that the trial judge should have given the jury both a positive and a negative direction as to their use of this information and relied in this respect on *Donnini v R*.³⁴ However, while delivering a strong rebuke to the trial judge, the Court held that the judge's omission to warn did not in this case constitute a substantial miscarriage of justice.

A sounder basis than *Donnini* for this ruling is the unpublished part of the judgment of the High Court in *Nicholls v R*.³⁵ There, the defendant had been charged with and convicted of the murder of a young woman (Keys) in a suburb of Canberra. As part of its case in chief, the Crown had proved the commission by the defendant of the theft (on the evening of the murder) of a radio from premises near those in which Keys was killed; the purpose of tendering this evidence was to prove that Nicholls was near the scene of the murder at about the time of the attack on Keys. Nicholls was not presently standing trial for the theft. The Crown was also seeking to prove that Nicholls had stolen money from Keys before or after inflicting on her the wounds from which she died. The trial was complicated by the fact that the defendant had, in making an unsworn statement to the jury and later in his sworn evidence, volunteered information as to his discreditable (petty criminal) past, for the purpose of inducing the jury to find him innocent of murder. The trial judge did not advise the jury not to infer Nicholl's guilt of murder from his prior misdeeds or from his admitted guilt of theft on the evening in question; to the contrary, in certain passages in the summing up, the trial judge implicitly encouraged the jury to conclude guilt from bad character and supposed tendency or propensity.

In allowing an appeal and quashing the conviction on the ground that there had been a misdirection, the Full Court of the High Court said:

“His Honour was dealing with a case where a man who had engaged in certain criminal activities was charged with murder, a charge which was supported by certain confessional evidence that went short of an express admission of the actual commission of

33 *Supra* n 1 at 10, 22-23.

34 *Supra* n 24.

35 12 November 1962, published as to procedural aspects at (1962) 36 ALJR 251.

the crime of murder. The one thing that was important from the accused's point of view was to prevent the jury from saying: 'This is a very bad man, therefore probably he committed the murder'. Unfortunately it seems clear enough that his Honour was here as well as at other points treating tendency or propensity and general bad character as evidence to be used as proof of the commission of a particular crime. That the law does not allow and on the contrary speaking in very general terms it is part of the function of a judge summing up to a jury to try to prevent the jury from treating bad character, criminal tendencies and the like as evidence proving the commission of a specific crime charged. [There were] passages in which bad character and supposed tendency or propensity are referred to by his Honour as grounds for concluding there was an actual commission of crime. This is unfortunate but it is impossible for this Court to allow the error to pass.³⁶

In *Nicholls*, evidence of prior misconduct was put before the jury by the defendant in a vain (perhaps hopeless) attempt to induce an acquittal. In addition, the Crown case in chief contained evidence of a crime collateral to but virtually contemporaneous with the crime charged, to prove a main fact. The defendant's evidence in chief was subject to cross-examination, aimed both at discrediting him and at assisting a direct inference of guilt. The decision of the High Court is, therefore, the most cogent Australian authority in support of the proposition that a trial judge should instruct the jury as to their lawful use of evidence of collateral bad character or misdeeds, whether that evidence is adduced by the defendant to prove innocence or by the Crown to prove guilt. The subsequent decision in *Donnini* related to the duty to warn in respect of evidence of bad character led only to discredit the defendant as a witness in cross-examination, under s18(1)VI(b) and its equivalents.³⁷ There is State Supreme Court authority against the view expressed in *Nicholls* that information as to collateral misconduct adduced either in cross-examination under s18(1)VI(a) or s18(1)V or by the Crown in chief should be subject to a warning when it lends itself to a use which the law does not countenance.³⁸ The position adopted in *Corak and Palmer* conformably with *Nicholls* is to be applauded, given that, in South Australia at least, the trial judge has no discretion to prevent cross-examination under either subpara (a)³⁹ or subpara (c)⁴⁰ of s18(1)VI apart from the general discretion to exclude evidence of insubstantial weight which is likely to be abused by the jury.

36 Transcript of reasons for judgment, 20, 22.

37 In this respect, the decision was followed in *R v White* (1976) 13 SASR 276 and *R v Beech* (1978) 20 SASR 410.

38 *R v Kennewell* [1927] SASR 287; *R v O'Meally* (No 2) [1953] VLR 30, 32-33. In *R v Pfitzner* supra n 21 at 197, Wells J held that there was a duty to give a positive warning to the jury as to the lawful use of such evidence, but no duty to give a negative warning against an improper use. The view of Wells J is supported by the decision in *R v Salerno* [1973] VR 59, 65. See also the speech of Lord Hailsham in *DPP v Boardman* [1975] AC 421, 453 and the judgments in *R v Bradshaw* (1978) 18 SASR 83, 92, 98-99. In *Donnini* supra n 24 at 124-125, 133, 137-138, 146, the High Court refrained from overruling *Kennewell* and *O'Meally*. Given that *Kennewell* is a decision of the Full Court of the Supreme Court of South Australia, it may be regarded as having been overruled in *Corak and Palmer*. However, it was not referred to either by King CJ or by Mitchell J.

39 *R v Brandsen* (1981) 27 SASR 474; contrast *R v Saric* [1982] Qd R 360.

40 *Matusevich v R* supra n 27. The judgments of King CJ and Mitchell J in the case under review also support the proposition in the text: see supra n 8.

In the result, the Court held that the jury would not have been greatly assisted by the required direction and that failure to give it did not cause a substantial miscarriage of justice.⁴¹ The appeals were dismissed.

Conclusion

The extent to which an accused person can be cross-examined as to criminal acts other than those charged, for the purpose of inviting or assisting an inference as to the guilt of the accused on the present charge, remains unclear. Neither the recent judgments of the members of the Court of Criminal Appeal of South Australia in *Corak and Palmer* nor the recent amendments to the Evidence Act (SA) have done anything to reduce prevailing uncertainty as to the limits within which such cross-examination will be permissible.

The difficulties alluded to in this comment arise principally from the drafting of paras V and VI of s18(1) of the Evidence Act (SA) and of their equivalents in other jurisdictions. They are difficulties which have long been widely acknowledged. As is demonstrated by the conflicting speeches of the House of Lords in *Jones* they are difficulties which are incapable of resolution by a mere process of interpretation of the words used in the statute. It may be possible to obtain satisfactory results in particular cases by glossing over the words used in the Act so that s18(1)V is treated as authorising cross-examination of the defendant as to main facts and so that s18(1)VI is treating as controlling nothing apart from cross-examination to credit. Such an approach is not, however, consistent with a strict interpretation of the Act and is not a principled resolution of the problem.

As has been seen, cross-examination of an accused as to collateral crimes relevant to guilt of the crime charged may conceivably be thwarted by reliance on the privilege against self-incrimination in appropriate cases to the extent that the collateral crimes have not been the subject of proceedings against the accused-witness. The privilege in respect of collateral crimes appears to be rescinded by neither s18(1)V nor s18(1)VI. More importantly, however, cross-examination of an accused as to his collateral crimes relevant to the innocence of a co-accused may, where s18(1)VI(c) is not available to the cross-examiner, be thwarted by either the prohibitive part of s18VI or by the common law privilege. That the latter situation may arise is intolerable and requires the immediate amendment of at least s18(1)VI(c).

The recent amendments to s18(1)VI of the Evidence Act have done nothing to correct the underlying tension between s18(1)V and s18(1)VI. The replacement of those provisions has been suggested in the course of this comment. Section 18(1)VI should be replaced by a provision rescinding the privilege against self-incrimination of all witnesses and authorising the cross-examination of all witnesses to the extent necessary to facilitate the proof of the guilt or innocence of a party.⁴² That

41 (1982) 101 LSJS 11, 23.

42 Contrast Royal Commissions Act 1902-1982 (Cth) s6A(2), which provides that a person is not entitled to refuse or fail to answer a question which he is required to answer by a member of a Royal Commission on the ground that the answer to the question might tend to criminate him. The validity of this provision was upheld in *Sorby v Commonwealth* (1983) 57 ALJR 248. A strong case can be made out for the complete abrogation of the privilege against self-incrimination: see eg the address by the Chief Justice of South Australia to the Criminal Investigation Branch of the South Australia Police Force, Adelaide, 22 October 1982, 12-16.

provision should recognise that at a criminal trial all matters which may properly be the subject of evidence in the Crown case in chief or in the case in chief of a co-defendant should be proper subjects of cross-examination of the defendant. To adapt the words of Lord Devlin in *Jones*,⁴³ the Act should embody the principle that the rule in cross-examination is the same as the rule that governs the admissibility of evidence in the case in chief against the accused. This suggestion will not cause any added disadvantage to defendants *vis-à-vis* the prosecution. It would merely confirm the practical result of the interpretation given to the phrase "tends to show" in s18(1)VI. The real advance which it would make would be a clarification of the rights of the cross-examining co-defendant.

In addition to such a provision, there is a need for a replacement of s18(1)VI. One of the radical difficulties with that subsection is that it seeks to regulate both cross-examination as to main facts and cross-examination to credit with a commendable but counterproductive economy of words. There is neither a need nor a justification for a statutory restriction on the proof of facts relevant to the guilt or innocence of a party. The common law rule that evidence is admissible if and only if sufficiently relevant to a fact in issue is a principle which is in general adequate to protect a defendant from unjustifiable exposure, in the case in chief against him, of his discreditable past. The four fields of prohibition in s18(1)VI do not in effect forbid cross-examination as to facts which can be proved at common law as part of the Crown's case in chief. Insofar as s18(1)VI regulates cross-examination as to main facts, its sole conceivable effect could be to prevent cross-examination of the defendant as to matters already properly in proof as part of the case in chief against the defendant. In other words, in that respect, the subsection sought to prevent a head-on clash of the cases of Crown and accused. Such an effect is contrary to the interests of justice because it impedes the satisfactory resolution of main issues at trials. This result is avoided by the interpretation placed on s18(1)VI by the majority in *Jones*. The only defensible aspect of s18(1)VI is its restriction on the proof of the discreditable antecedents of the accused for the purpose of disparaging his credibility as a witness. Evidence tendered for the sole purpose of discrediting the defendant is not in general admissible in the case in chief against the defendant. In practical terms, therefore, the prohibition in s18(1)VI can operate only on collateral facts relevant solely to the credibility of the defendant. The provision should be recast in order to make this explicit.

In their original form, s18(1)V and s18(1)VI were predominantly concerned with protecting the accused-witness from cross-examination by the Crown. They do not adequately address the extent to which an accused-witness should be protected from cross-examination by a co-accused where two or more defendants with antagonistic defences are being tried together. As the reasoning in *Corak and Palmer* shows, the present statutory formulae may produce injustice in particular cases either to the cross-examining accused or to the witness-accused. This aspect of the provisions requires immediate attention.

43 *Supra* n 17 at 696, 711.