THE QUEEN v. BILLINGS[1]

Criminal law—Cross-examination of accused as to prior convictions and bad character—Imputations on character of Crown witnesses—'Nature or conduct of the defence'—Crimes Act 1958, section 399 (e) (ii)

Billings had suffered because of his not unblemished record. He had been tried before Smith J. in the Supreme Court at Geelong and convicted of factory-breaking and stealing. The Crimes Act 1958, section 399, provides that:

> (e) a person charged and called as a witness in pursuance of this section 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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> (i) . . .
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> (ii) 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: Provided that the permission of the judge (to be applied for in the absence of the jury) must first be obtained . . . .

His defence was an alibi requiring denial of a written confession. In evidence-in-chief, he alleged that a police officer had threatened to 'pin' additional charges on him unless he confessed. The Crown prosecutor applied for leave to cross-examine, but the trial judge, although satisfied that the answers attracted the exception by reflecting unfavourably on the police generally, exercised his discretion in favour of the accused. But his counsel, in his final address, both suggested unfair tactics on Crown counsel's part, and made remarks capable of suggesting that Crown witnesses had committed perjury. When he concluded, Smith J. granted a second application, after considering the cumulative effect of all three incidents.

The accused now applied for leave to appeal against conviction and sentence, but the Full Court delivered a single written judgment dismissing both applications.

The formula contained in section 399 (e) is modelled on section (1) (f) of the Criminal Evidence Act 1898 (Eng.),[2] and was adopted in Victoria by the Crimes Act (No. 2) 1915; but the Victorian Act expressly required the permission of the trial judge to be obtained. In New South Wales, a general discretion to allow cross-examination as to antecedents was created by statute[3] but English courts were quite slow to recognize any judicial discretion. Professor Julius Stone has compared the kinds of evidence admissible against the accused at common law with the matters cross-examination was able to raise under the early English application

[1] [1961] V.R. 127. Supreme Court of Victoria; Lowe, Sholl and Pape JJ.
[2] 61 & 62 Vict. c. 36.
[3] Crimes Act (N.S.W.) s. 407.

of the section,[4] which, it was later said, was enacted because '. . . the jury is entitled to know the *credit* of the man on whose word the [Crown] witness's character is being impugned'.[5]

The Full Court, in defining 'the defence', ruled that cross-examination of the accused was *prima facie* part of the Crown case. This is the accepted view,[6] particularly where an answer is forced from the accused,[7] or an imputation is invited.[8] The Court reached its decision without relying on cross-examination, but held that counsel's final address was part of 'the defence'.[9]

But did the defence 'involve' imputations? The accused is normally entitled to confine the issue 'within the four corners of the indictment'[10] and, if honest, has no real choice of defence.[11] Accordingly, English courts, anxious to allow due freedom to the defence, first held imputations 'involved' only where they attacked a person's general character,[12] or his conduct outside the evidence,[13] for it was said that there existed a class of questions which had to be asked if the facts alleged (by the defence) were to be properly investigated.[14] Imputations against general character may still plainly attract the exception.[15] It was also early agreed that the most emphatic denial incurred no penalty,[16] for mere denials suggest no cause for the discrepancy in evidence,[17] even where there is an implication that witnesses are lying, provided that an apparent denial is not also a discrediting counter-assertion.[18]

But the firm principle that anything touching the issue could be explored with impunity was weakened by *Rex v. Wright,*[19] where a plea that an allegation of misconduct was the only challenge open was rejected, and abruptly shattered by *Rex v. Hudson,*[20] where a specially constituted court declared that the exception was to receive its ordinary natural interpretation unqualified by such words as 'unnecessarily' or 'unjustifiably'. *Rex v. Hudson*[21] was applied in *Rex v. Roberts,*[22] *Rex v. Jones,*[23] and *Rex v. Dunkley.*[24]

The matter was raised before the House of Lords in *Maxwell v. D.P.P.,*[25] where Viscount Sankey L.C. acknowledged a judicial discretion for the first time in England.

In Victoria, *The King v. Woolley,*[26] a decision of the Full Court, applied *Rex v. Hudson,*[27] affirming the *Wright* doctrine that it did not absolve the accused to claim that an imputation was unavoidable.

[4] (1935) 51 *Law Quarterly Review* 443; (1942) 58 *Law Quarterly Review* 369.
[5] *Regina v. Cook* [1959] 2 Q.B. 340, 348, *per* Devlin J.
[6] *The King v. Everitt* [1921] V.L.R. 245.
[7] *Regina v. Jones* (1901) 3 Cr. App. R. 67.
[8] *The King v. Thomas* [1938] V.L.R. 241.
[9] [1961] V.R. 127, 141.
[10] *O'Hara v. H.M. Advocate* [1948] S.L.T. 372, 375.
[11] *Curwood v. The King* (1944) 69 C.L.R. 561, 583.
[12] *Rex v. Bridgewater* [1905] 1 K.B. 131.
[13] *Rex v. Preston* [1909] 1 K.B. 568.
[14] *Rex v. Westfall* (1912) 107 L.T. 463.
[15] *Regina v. Clark* [1955] 2 Q.B. 469.
[16] *Rex v. Rouse* [1904] 1 K.B. 184.
[17] *Rex v. Baldwin* (1925) 133 L.T. 191.
[18] [1961] V.R. 127, 140.
[19] (1910) 5 Cr. App. R. 131.
[20] [1912] 2 K.B. 464.
[21] *Ibid.*
[22] (1920) 37 T.L.R. 69.
[23] (1923) 39 T.L.R. 457.
[24] [1927] 1 K.B. 323.
[25] [1935] A.C. 309.
[26] [1942] V.L.R. 123.
[27] [1912] 2 K.B. 464.

In 1944, the House of Lords, in *Stirland v. D.P.P.*,[28] deliberated for some time before Viscount Simon L.C. set out six general principles, one of which was:

> 4. An accused is not to be regarded as depriving himself of the protection of the section, because the proper conduct of his defence necessitates the making of injurious reflections on the prosecutor or his witnesses: *R. v. Turner.*[29]

Since *Rex v. Turner*[30] was a case of rape, where the Court of Criminal Appeal had held that, since non-consent of the prosecutrix must be proved by the Crown, the prisoner's alleging consent was a mere denial of an essential element of the charge, it was a rather special case. It therefore became necessary to decide whether Viscount Simon's proposition was intended merely to state the effect of *Rex v. Turner*,[31] or to state a general principle (citing *Rex v. Turner*[32] as an illustration only), impliedly overruling *Rex v. Hudson.*[33]

The High Court of Australia considered this problem in *Curwood v. The King*,[34] a case which, like the present, concerned the repudiation of a confession. The Court discussed the question extensively before refusing leave to appeal, but could not formulate a clear rule. Latham C.J. and Dixon J. felt bound by authority to restrict the proposition; McTiernan and Williams JJ. thought that way the propositions had been set out demanded a broad reading; while Starke J. saw the statement as distinguishing inescapable reflections from positive attacks. Consequently, since Starke J. joined Latham C.J. and Dixon J. in holding that the protection of the section had been lost, it would seem that *The King v. Woolley*[35] was approved, to the great disadvantage of an honest accused genuinely aggrieved by misconduct. The clearest rationale appears in the judgment of Dixon J. who said that where the prisoner's answer really rests on misconduct imputed[36] being more than merely incidental, it does not fall within the *Stirland* proposition. Further, it matters not that the allegation touches the issue and not merely credibility,[37] provided that it really forms part of the defence,[38] that it is involved by more than mere implication[39] and subject to the curious concession in rape cases.[40]

The Court of Criminal Appeal also restricted the proposition in *Rex v. Jenkins*,[41] and affirmed *Rex v. Hudson*[42] relying partly on the fact that the House of Lords had considered the other limb of the exception. In *Regina v. Cook*,[43] five members of the Court of Criminal Appeal emphatically stated that the now clearly-established discretion obviates any need to limit the *Hudson* principle.

Although the law in England is now similar to that in Australia, in Scotland Lord Thomson, the Lord Justice-Clerk, argued in *O'Hara v. H.M. Advocate*,[44] not from the word 'involves', but on 'character' suggest-

[28] [1944] A.C. 315. [29] *Ibid.* 327. [30] *Ibid.* [31] *Ibid.* [32] *Ibid.*
[33] [1912] 2 K.B. 464. [34] (1944) 69 C.L.R. 561. [35] [1943] V.L.R. 123.
[36] *Curwood v. The King* (1944) 69 C.L.R. 561, 589. [37] *Ibid.* 586.
[38] Citing *The King v. Everitt* [1921] V.L.R. 245. [39] (1944) 69 C.L.R. 561, 587.
[40] *Loc. cit.* [41] (1945) 31 Cr. App. R. 1. [42] [1912] 2 K.B. 464.
[43] [1959] 2 Q.B. 340. [44] (1948) S.L.T. 372, 375.

ing that since it clearly means general character on the first limb, it should also in the second. But since the Court there identified itself with the condemned pre-*Hudson* theory the argument is unlikely to succeed in Australia.

The Full Court here preferred *Regina v. Cook*[45] to the complex analysis of *Curwood v. The King*[46] observing that the choice threw much responsibility on to the trial judge.

Some cases, particularly in English courts, suggest that 'imputations' is a term of art, while some textbooks[47] list tables of allegations 'held to be imputations'. The Full Court here cited cases where a similar imputation had been held to be involved in the defence.[48] But it seems likely that there is no legal question as to what is an imputation,[49] but only as to the stage where it becomes 'involved' in the defence.[50]

Since the exercise of discretion proved sufficiently hazardous even when the scope of the section was restricted, it is difficult to see how the Full Court's decision to rely completely on the trial judge's discretion rather than search further for serviceable criteria, which is involved in following *The Queen v. Cook*[51] can lead to anything but less reliable protection for the accused. While recent decisions, notably *The Queen v. Brown*,[52] have discussed factors which should influence discretion, it would allow greater certainty if the scope of the exception were clarified. In passing over the 'difficult distinctions' outlined by Dixon J. in *Curwood v. The King*[53] and preferring a wide discretion 'from the point of view of the everyday administration of the criminal law',[54] the Full Court opened itself to the inference that the convenience of the trial judge was thought more sacred than the protection of the accused.

A similar criticism might be made of the Court's treatment of counsel's final address, which included the remark 'They are the men who are telling the truth here' after an invitation to find the confession was not made as alleged. The Court doubted whether such equivocal language could be safely understood to impute perjury, but was not prepared to disagree with the judge's opinion that tone and demeanour made the language unequivocal.[55] If such elusive factors as tone and demeanour are to affect the construction of the damning statements the judge's impression will often not be open to review. The ruling also seems to conflict with the spirit of *The Queen v. Brown*[56] where it was said that imputations might be involved by logical necessity.

The Full Court rejected the argument that reflections on the Crown Prosecutor's fairness cast imputations on 'the prosecutor'[57] holding that the informant-victim of the original formula was the 'prosecutor'. This accords both with the accepted object of the section—maintaining the balance of credibility—and the customary meaning in the cases.

The finding that an imputation on the police generally offended, was

[45] [1959] 2 Q.B. 340. [46] (1944) 69 C.L.R. 561.
[47] Archbold: *Criminal Pleading and Practice* (34th ed. 1959) 500 *ff.*
[48] [1961] V.R. 127, 133. [49] *Rex v. Dunkley* [1927] 1 K.B. 323.
[50] *Curwood v. The King* (1944) 69 C.L.R. 561, 589. [51] [1959] 2 Q.B. 340.
[52] [1960] V.R. 382. [53] (1944) 69 C.L.R. 561. [54] [1961] V.R. 127, 139.
[55] *Ibid.* 141. [56] [1960] V.R. 382. [57] [1961] V.R. 127, 136.

overruled on the ground that the person attacked must be a witness.[58] But the Court was itself satisfied that the allegation concerned a witness, and agreed that the accused had lost the protection of the section.[59]

With regard to procedure, the Court held that, when applying, Crown counsel must satisfy the judge on the balance of probabilities that a reasonable jury would construe as making an imputation the matter concerned.[60] This approach is most difficult to understand, particularly since, in England, where a similar interpretation is applied, and where a similar discretion is acknowledged, it seems that an application is not invariably necessary.[61] The inference would seem to be that, in England, the question whether the exception has been attracted is essentially a question of law, and not a fact to be proved by the adducing of evidence or argument upon it. There is no apparent reason why the express requirement of an application should go further than to prevent damage being done by over-eager counsel before the discretion is exercised. As the Court pointed out, a ruling requires consideration of matters of fact and law. But if 'imputations' is to bear a natural meaning, and if imputations are to be involved by logical necessity, it is likely that the factual question will always be one of pure construction, and the legal problem will concern the degree to which the allegation is the substantial answer. In these circumstances, no evidence or argument seems necessary, and the Act gives no ground for interfering with judge's power to rule on the scope of the exception, or fettering his discretion by establishing an onus of persuasion on the Crown. *Curwood v. The King*[62] was a similar case where no such suggestion was advanced. Moreover, the effect on the jury should logically go to discretion only, a discretion which the judge, in presiding at the trial, is presumably better able to exercise without assistance.

An accumulation of insufficient incidents did not, in the opinion of the Court, attract the exception.[63] This proposition is certainly logical, although earlier statements, themselves insufficient, might perhaps influence the construction of evidence on a later application. In any case, it appears proper that discretion exercised at a late stage should estimate the effect of the offending material on all features of the trial to that stage, including loose remarks. But the Court felt that later insufficient incidents should not allow the re-exercise of discretion exercised in the accused's favour.

The recall of a witness to give further evidence at a later stage is apparently allowed if it precedes the judge's summing-up.[64] But it seems both a rather tenuous extension of this rule and a doubtfully fair one, for the Court to order the recall of the accused himself to answer cross-examination. The accused might then find himself deprived of his counsel's assistance in this moment of greatest need.

The Full Court, having decided that both the evidence-in-chief and final address had brought the accused within the exception, refused leave to appeal.

A. X. LYONS

[58] *Rex v. Westfall* (1912) 7 Cr. App. R. 176.
[59] [1961] V.R. 127, 133. [60] *Ibid.* 132. [61] *Maxwell v. D.P.P.* [1935] 1 A.C. 309.
[62] (1944) 69 C.L.R. 561. [63] [1961] V.R. 127, 142.
[64] *Rex v. Sullivan* [1923] 1 K.B. 47; *Regina v. McKenna* (1956) 40 Cr. App. R. 65.