CAN THE ACCUSED ATTACK THE PROSECUTION?

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The U.K. Criminal Evidence Act 1898, s. 1(f) provides in part:

A person charged and called as a witness . . . 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—

. . . (ii) . . . 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. . . .

There is equivalent legislation in most Australian states.[1] New South Wales and New Zealand have less detailed provisions preventing cross-examination as to character without the leave of the judge;[2] the New South Wales courts follow English and other Australian decisions on what factors govern the grant of leave,[3] and the New Zealand courts follow the English.[4]

Few evidence statutes have raised more difficulties and divisions than this so-called "second limb of s. 1(f)(ii)". It is appropriate to reconsider them now, partly because there are certain signs of a divergence between the English and Australian courts and partly because the English Criminal Law Revision Committee has recently recommended amendment after being divided three ways on the issue.[5]

The legislation was enacted to make special provision for the accused when his common law incapacity to testify was abolished in most jurisdictions around the end of the nineteenth century. Had the accused been given complete immunity from cross-examination as to character, he would have been much better off than other witnesses, for he would have had a licence to smear his accusers without any sanction other than punishment for perjury, which is little feared by one already being tried for another and perhaps more serious crime. On the other hand, had he been treated as an ordinary witness, he would have been liable to cross-examination on all past convictions to show his lack of *credibility;* and these might have been misused by the jury to prove his *guilt* of the crime charged. In this way a possibly innocent man with a

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[1] Qld.: Criminal Code, s. 618A; S.A.: Evidence Act 1929-69, s. 18(VI); Tas.: Evidence Act 1910, s. 85(1)e); Vic.: Crimes Act 1958, s. 399(e); W.A.: Evidence Act 1906-67, s. 8(1)e). See also South African Criminal Procedure Act 1955, s. 228.

[2] N.S.W.: Crimes Act 1900, s. 407; N.Z.: Evidence Act 1908-66, s. 5(2)d).

[3] *R.* v. *Woods* (1956) 73 W.N.N.S.W. 166.

[4] *R.* v. *McLeod* (1964) N.Z.L.R. 545.

[5] 11th Report on Evidence (General), 1972, Cmnd. 4991, paras. 119-20, 122-30. See also Cross, (1969) 6 *Syd. L.R.* 173; Griew, (1961) *Crim. L.R.* 142, 213; Lanham, (1972) 5 *N.Z.U.L.R.* 21; Livesey, (1968) *C.L.J.* 291; Stone, (1942) 58 *L.Q.R.* 369, at 373-80.

record would have been deterred from doing his case justice by telling his story on oath; the great gift of the right to testify would have been denied to the bulk of accused.

The legislation is thus a compromise. The accused is shielded from disclosure of his record until he "throws away his shield" by casting imputations on the prosecution. The compromise has often been admired, notably by Wigmore,[6] and it is better than either of the extremes it seeks to avoid. But the decisions on it are almost inevitably in a state of hopeless conflict.

Admittedly, there is substantial agreement on many points. If the shield is thrown away, the record is admitted only to prove the accused's lack of credibility, not his guilt.[7] This is a " 'tit for tat' argument. If the accused is seeking to cast discredit on the prosecution, then the prosecution should be allowed to do likewise."[8] Though it is common to warn the jury as to the distinction between using the record on credibility and using it on guilt, there seems to be no duty for the judge to do so.[9] Further, it is unclear whether convictions for crimes not involving perjury or dishonesty can rationally affect credibility, though this is a problem not peculiar to the loss of the accused's shield: the indivisibility of character of all witnesses is a central mystery in the law of evidence.[10] The confusion that juries get into on this question can only be guessed at by examining the difficulties of judges. For example, in *Selvey* v. *D.P.P.* the accused was charged with buggery. He denied the charge and alleged the complainant was a male prostitute. Stable J. held that this was an imputation, and permitted cross-examination as to Selvey's five convictions for indecency with males. He did not allow disclosure of several other convictions for dishonesty. He warned the jury that the only relevance of the convictions was to prove a lack of credibility; yet on this issue convictions of dishonesty are surely more relevant. The indecency convictions could only support an inference that Selvey was a liar *after* the jury had inferred from them that Selvey was guilty because they revealed a disposition towards homosexual crime; they could thus be primarily relevant only to prove guilt.[11]

Some other matters are well settled. Against whom must the imputation be made? "The prosecutor" does not include the victim of murder;[12] "witnesses for the prosecution" do not include magistrates who mishandle committal proceedings, policemen engaged in the case who do not testify,[13] or prosecution counsel, for "the primary object of the provision is to enable the court to redress the balance of evidence as to the credibility of witnesses, so that the jury in weighing the testimony of the prosecution and the accused respectively may not be misled. . . . No question arises before a jury of the credibility of Crown counsel as a witness. . . ."[14] Who can rely on the loss of the shield?

[6] (1935) 51 *L.Q.R.* 467.

[7] *R.* v. *Preston* (1909) 1 K.B. 568, at 575; *R.* v. *Jenkins* (1945) 31 C.A.R. 1, at 15; *R.* v. *Vickers* (1972) Crim. L.R. 101; and see the unreported passages quoted by Cross, *Evidence* (Aust. ed.), p. 449, n. 135. Cf. *R.* v. *Sargvon* (1967) 51 C.A.R. 394.

[8] *Selvey* v. *D.P.P.* (1970) A.C. 304, at 353 *per* Lord Pearce.

[9] E.g. *R.* v. *May* (1959) V.R. 683; cf. *People* v. *Bond* (1966) I.R. 214.

[10] *R.* v. *Winfield* (1939) 4 All E.R. 164; cf. *R.* v. *Shrimpton* (1851), 2 Den. 319, at 322.

[11] *Selvey* v. *D.P.P.* (1970) A.C. 304.

[12] *R.* v. *Biggin* (1920) 1 K.B. 213; *R.* v. *Gillis* (1957) V.R. 91.

[13] *R.* v. *Westfall* (1912), 7 C.A.R. 176; *R.* v. *Billings* (1961) V.R. 127.

[14] *R.* v. *Billings* (1961) V.R. 127 at 136.

A co-accused can cross-examine under s. 1(f)(ii) as well as the prosecution;[15] no doubt the judge has an inherent power to reveal the record if the shield has been thrown away and he feels it proper.

The issue of whether an imputation has been made is decided by the judge[16] on the balance of probability.[17] This standard of proof accords with the Australian view as to confessions, but not with the English, which is that the standard should be beyond reasonable doubt.[18] The argument for the higher standard would be that to lose the shield is a serious matter because it increases the accused's chances of conviction at the hands of a jury who may not receive or understand a direction to use the record only on credibility; so too a confession once admitted virtually ensures guilt. But the argument to the contrary which prevailed was that the higher standard would be pernicious in permitting the accused or his counsel to "say with impunity things which they realized would very probably be misunderstood by the jury as imputations . . . , and which they hoped would be so understood, so long as it was possible to say that there was another and innocent construction of the words reasonably open."[19] The issue of fact thus to be decided by the judge is often a difficult one. To say that a policeman has not been diligent in his search for the true criminal is not an imputation: it is not to say he has a bad character.[20] Nor is an allegation of failure to deliver a bill[21] or of habitual drunkenness,[22] though to call a prosecution witness a "drunken wastrel"[23] is. It is an imputation to say of the victim of theft in whose bedroom the accused's fingerprints have been found that they are there because the victim and the accused have a homosexual relationship; though homosexuality in England is no longer criminal it is ordinarily regarded as immoral, and the fear of such allegations might deter the victims of crime from complaining.[24] If the defence does no more support a prosecution admission that the witness is of bad character, the shield is not thrown away.[25] If the accused reveals his own convictions, then the prosecution is at liberty to cross-examine on the record. The actual decison of the majority of the High Court to this effect in *Donnini* v. *R.* may be doubted, however, for the reasons given in strong dissenting judgments. Walsh J. pointed out that the accused had heard a debate which ended in prosecution counsel being granted leave to cross-examine him on his record, and this must have induced him to volunteer it without waiting to be asked in detail. Mason J. said that the record was extracted by the prosecution and not volunteered because prosecution counsel had asked the accused a question which, though it did not expressly or impliedly refer to prior convictions was one which if answered "directly and

[15] *R.* v. *Lovett* (1973) 1 W.L.R. 241; compare the judge's discretion to prevent cross-examination under s. 1(f)(ii) with his duty to allow it if s. 1(f)(iii) applies, i.e. if one accused person gives evidence against the other.

[16] *Dawson* v. *R.* (1961) 106 C.L.R. 1, where the High Court repudiated the Victorian view that the issue depended on how the judge thought a reasonable jury would decide the issue: see *R.* v. *Billings* (1961) V.R. 127 and *R.* v. *Dawson* (1961) V.R. 773.

[17] *R.* v. *Billings* (1961) V.R. 127.

[18] Cf. *Wendo* v. *R.* (1963) 109 C.L.R. 559 with *R.* v. *Sartori* (1961) Crim. L.R. 397.

[19] *R.* v. *Billings* (1961) V.R. 127, at 133.

[20] *R.* v. *McKenzie* (1962) Crim. L.R. 833.

[21] *R.* v. *Morgan* (1910) 5 C.A.R. 157.

[22] *R.* v. *Westfall* (1912) 7 C.A.R. 176.

[23] *R.* v. *Holmes* (1899) 43 S.J. 219.

[24] *R.* v. *Bishop, The Times,* 14 June 1974.

[25] *R.* v. *Watson* (1913) 8 C.A.R. 249; *R.* v. *Cohen* (1914) 10 C.A.R. 91.

truthfully" was bound to reveal the accused's record.[26]

Beyond this type of decision the effect of the section has depended on serious differences both as to the construction of the section and as to how the court's discretion to prevent the admission of the record if the section is held to apply should be exercised.[27] Let us first consider the orthodox view and the accepted qualifications to it before considering what other views are possible and how the discretion should be controlled.

THE HUDSON DOCTRINE

The orthodox view was stated by a five judge Court of Criminal Appeal in *R.* v. *Hudson.* "We think that the words . . . must receive their ordinary and natural interpretation, and that it is not necessary to qualify them by adding or inserting the words 'unnecessarily', or 'unjustifiably', or 'for purposes other than that of developing the defence' or other similar words".[28] This view was stated at a time when in accordance with what we will call "the pre- *Hudson* doctrine", it was becoming common to assert that any attack on the prosecution which was necessary for the accused's defence to be established was not an "imputation".[29] This liberal construction of the Act produced a fair result in many circumstances but has been found incompatible with the plain words of the section by the bulk of later courts. The *Hudson* doctrine has had its vicissitudes[30] but has now been approved by the House of Lords.[31]

The harshness of the orthodox *Hudson* doctrine is qualified in three main respects, which we might call the *Turner* rule, the *Rouse* rule and the "incidental" doctrine.

In *R.* v. *Turner* a full Court of Criminal Appeal held that for the accused in a rape case to allege consent on the part of the complainant was not an imputation despite the suggestion that the complainant is a dangerous liar and possibly promiscuous. The Court said, in defiance of *Hudson,* that "some limitation must be placed on the words of the section since to decide otherwise would be to do grave injustice never intended by Parliament." Indeed, the case was a strong one since it involved an allegation not only that the victim consented but that she initiated intercourse by an act of gross indecency on the accused. The Court admitted that "it may not always be easy to decide whether the new topic is so closely connected with the defence of consent as

[26] (1973) 47 A.L.J.R. 69 at 78, 82. This was a case on the first limb of s. 1(f)(ii) but the same principles would apply to the second.

[27] The discretion is conferred by statute in New South Wales, Victoria and New Zealand (see nn. 1 and 2 *supra*) but has been assumed by the courts in other jurisdictions.

[28] (1912) 2 K.B. 464, at 470-1 *per* Lord Alverstone C.J. The doctrine had been foreshadowed in *R.* v. *Marshall* (1899) 63 J.P. 36; *R.* v. *Wright* (1910) 5 C.A.R. 131. It has been followed in many cases, e.g. *R.* v. *Watson* (1913) 8 C.A.R. 249; *R.* v. *Malcolm* (1919) V.L.R. 596; *R.* v. *Dunkley* (1927) 1 K.B. 323; *R.* v. *Pollinger* (1930) 22 C.A.R. 75; *R.* v. *Woolley* (1942) V.L.R. 123; *R.* v. *Jenkins* (1945) 31 C.A.R. 1; *R.* v. *Sargvon* (1967) 51 C.A.R. 394.

[29] E.g. *R.* v. *Bridgewater* (1905) 1 K.B. 131; *R.* v. *Preston* (1909) 1 K.B. 568; *R.* v. *Westfall* (1912) 7 C.A.R. 176.

[30] *R.* v. *Biggin* (1920) 1 K.B. 213, at 217, 221 *per* Earl of Reading, C.J.; *Stirland* v. *D.P.P.* (1944) A.C. 315, at 327 *per* Viscount Simon L.C.

[31] *Selvey* v. *D.P.P.* (1970) A.C. 304.

in effect to prove part of it."[32] The merit of the *Turner* doctrine is thus that the accused can advance his entire defence—his view of all the events—with impunity. It has been approved by the House of Lords[33] and appears to apply whenever consent is an issue in a sexual case,[34] but does not apply to similar defences in other cases, e.g. provocation.[35] Three possible bases of the doctrine have been advanced. One is that it is an exception to the *Hudson* doctrine which is *sui generis* because of the peculiar harshness of appyling *Hudson* to rape.[36] But if the basis of *Hudson* is that the courts must obey the clearly expressed will of Parliament, despite any hardship this causes, the same should apply to rape; and if it is legitimate to temper the statutory words in rape cases it must be legitimate to do so elsewhere. The injustice of not being able to run a proper defence in rape is no greater than not being able to run a proper defence to any other crime. A second basis of *Turner* is that since in rape the prosecution must prove non-consent, the accused in alleging consent is doing no more than denying the charge.[37] But why should the accused's right to conduct his defence properly depend on whether an issue is raised on which the prosecution bears some burden of proof rather than he? The third basis of *Turner* is that rape is an area where the court's discretion to prevent cross-examination on the record will always be exercised in the accused's favour;[38] but a discretion always exercised the same way can scarcely be called a discretion. Despite these problems, the existence of the *Turner* qualification is now beyond doubt.

The other major limitation on the *Hudson* doctrine was first clearly stated in *R.* v. *Rouse*. The accused said of the chief prosecution witness's evidence "It is a lie and he is a liar". This was held not to be an imputation because it was "a plea of not guilty put in forcible language such as would not be unnatural in a person in the defendant's rank in life."[39] It is thus possible to plead not guilty, and to deny particular facts alleged by the prosecution. It is even possible to make express attacks on the prosecution that do not elaborate too greatly the inferences often to be drawn from contradicting the prosecution, namely that the prosecution witnesses are lying. Under the orthodox *Rouse* doctrine to allege mistake rather than deliberate lying is clearly not an imputation,[40] nor is the denial of receipt of the proceeds of a

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[32] (1944) K.B. 463, at 470-1. The course of argument was curious, for defence counsel conceded there was an imputation (as, according to *Hudson*, there was) and mainly argued that the judge's discretion should have been exercised in the accused's favour, while Crown counsel conceded that the defence of consent was not an imputation but said the allegation of indecency was. See also *R.* v. *Sheean* (1908) 21 Cox C.C. 561; *R.* v. *Biggin* (1920) 1 K.B. 213, at 217; *R.* v. *Donovan* (1934) 25 C.A.R. 1 at 3. Cf. *R.* v. *Fisher* (1899) 43 S.J. 219.

[33] *Selvey* v. *D.P.P.* (1970) A.C. 304.

[34] *R.* v. *Donovan* (1934) 25 C.A.R. 1, at 3.

[35] *R.* v. *Cunningham* (1959) 1 Q.B. 288. Crown counsel in *Selvey* v. *D.P.P.* (1970) A.C. 304, at 321 appeared to concede that to raise self-defence as an issue by alleging that the prosecution witness struck the first blow in an assault case is not an imputation.

[36] *O'Hara* 1948 J.C. 90; *R.* v. *Cook* (1959) 2 Q.B. 340, at 347.

[37] *R.* v. *Turner* (1944) K.B. 463, at 469.

[38] This was argued by defence counsel in *Turner* (1944) K.B. 463, at 467; and see *R.* v. *Cook* (1959) 2 Q.B. 340, at 347; *Selvey* v. *D.P.P.* (1970) A.C. 304, at 337, 339 and 345 *per* Viscount Dilhorne and Lord Hodson.

[39] (1904) 1 K.B. 184, at 189. See also *R.* v. *Martinelli* (1908) 10 W.A.L.R. 33: *R.* v. *Grout* (1909) 3 C.A.R. 64; *R.* v. *Stratton* (1909) 3 C.A.R. 233; *R.* v. *Morgan* (1910) 5 C.A.R. 157; *R.* v. *Parker* (1924) 18 C.A.R. 14; *Hewitt* v. *Lenthall* (1931) S.A.S.R. 14; *R.* v. *du Preez* 1943 A.D. 562; *R.* v. *Crooks* (1944) 44 S.R.N.S.W. 390; *R.* v. *Woods* (1956) 73 W.N.N.S.W. 166; *R.* v. *Heydon* (1966) 1 N.S.W.R. 708.

[40] *R.* v. *Clark* (1953) N.Z.L.R. 823.

cheque which the prosecution witness was supposed to cash and which the accused was charged with fraudulently converting.[41] To suggest a reason for a prosecution witness's lie is not an imputation unless the reason itself imputes bad character: to say that a witness lied because he wanted his wife to be out of contact with the accused is not an imputation because to be unhappily married is not a sign of a bad character.[42] The more elaborate and explicit the attack, the more likely it is that an imputation has been made. It is not an imputation to call a man a liar, but it is to say "his brother won't speak to him because he is a horrible liar."[43]

However, to impute promiscuity to prosecution witnesses is an imputation even if this purports to explain their behaviour; or casts doubt, not on their general credibility, but on their story as to the particular crime;[44] so too to say a prosecution witness keeps a disorderly house,[45] is a thief[46] or a police agent (and hence biased).[47] To deny making a confession is one thing, because it may simply imply that the police mistook what was said; but it is an imputation to say the police induced confessions,[48] or fabricated them by dictating them and making the accused sign,[49] or obtained remands in order to fabricate evidence,[50] or suppressed evidence favouring the defence,[51] or conspired in advance to concoct a story,[52] or to plant evidence on the accused.[53] To allege a spiteful, vengeful or self-interested motive for the prosecution testimony is an imputation;[54] and so is to say that the prosecution witness took part in the offence.[55] The attribution of drunken and incompetent driving and the abuse of other drivers to the prosecutor is an imputation on him.[56] So though the *Rouse* doctrine permits one to deny an allegation, it does not permit accounts of the details which might make that denial credible. In particular, as Latham C.J. has pointed out, it must tempt the police to extract confessions by violence from persons of bad character who cannot set up the violence at their trial for fear of exposing their records.[57]

Apart from the *Turner* and *Rouse* rules, the *Hudson* doctrine is alleviated in a third way. Many courts have acted on the view that the words "nature or conduct of the defence" require the courts not to act on remarks of the

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[41] *R.* v. *Eidenow* (932) 23 C.A.R. 145.
[42] *R.* v. *Manley* (1962) 46 C.A.R. 235.
[43] *R.* v. *Rappolt* (1911) 6 C.A.R. 156.
[44] *R.* v. *Jones* (1909) 3 C.A.R. 67; *R.* v. *Jenkins* (1945) 31 C.A.R. 1; *R.* v. *Morris* (1959) 43 C.A.R. 206; *R.* v. *Weldon* (1963) 107 S.J. 216; *R.* v. *McLeod* (1964) N.Z.L.R. 545; *R.* v. *Fisher* (1964) N.Z.L.R. 1063.
[45] *R.* v. *Morrison* (1911) 6 C.A.R. 159.
[46] *R.* v. *Morris* (1959) 43 C.A.R. 206.
[47] *R.* v. *Fisher* (1964) N.Z.L.R. 1063.
[48] *R.* v. *Wright* (1910) 5 C.A.R. 131; *R.* v. *Jones* (1923) 17 C.A.R. 117, at 120; *R.* v. *Westley* (1939) V.L.R. 125; *R.* v. *Woolley* (1942) V.L.R. 123; *R.* v. *Curwood* (1944) 69 C.L.R. 561; *R* v. *Cook* (1959) 2 Q.B. 340; *R.* v. *Billings* (1961) V.R. 127; *R.* v. *Ondras* (1962) Crim. L.R. 543; *R* v. *Matthews* (1965) Qd. R. 306.
[49] *R.* v. *Clark* (1955) 2 Q.B. 469; *Dawson* v. *R.* (1961) 106 C.L.R. 1; see also *R.* v. *Dunn* (1958) 75 W.N.N.S.W. 423; *R.* v. *Martin* (1960) 77 W.N.N.S.W. 4; *Carroll* v. *R.* (1964) Tas. S.R. 76; *R.* v. *Levy* 50 C.A.R. 238.
[50] *R.* v. *Jones* (1923) 17 C.A.R. 117.
[51] *R.* v. *Billings* (1961) V.R. 127; *R.* v. *Thompson* (1961) Qd. R. 503.
[52] *R.* v. *Davies* (1963) Crim. L.R. 192.
[53] *R.* v. *Corbishley* (1963) Crim. L.R. 778.
[54] *R.* v. *Roberts* (1920) 15 C.A.R. 65; *R.* v. *McLean* (1926) 19 C.A.R. 104; *R.* v. *Dunkley* (1927) 1 K.B. 323; *R.* v. *McLeod* (1964) N.Z.L.R. 545.
[55] *R.* v. *Marshall* (1899) 63 J.P. 36; *R.* v. *Hudson* (1912) 2 K.B. 464; *People (A.-G.)* v. *Coleman* (1945) I.R. 237; *R.* v. *Manley* (1962) 46 C.A.R. 235; *People* v. *Bond* (1966) I.R. 214.
[56] *R.* v. *Brown* (1960) 44 C.A.R. 181.
[57] *Curwood* v. *R.* (1944) 69 C.L.R. 561, at 577.

accused which are "incidental" to the defence. In a way this is the reverse of the doctrine denied in *Hudson*. The pre-*Hudson* doctrine was that a remark necessary to the defence was not an imputation; this doctrine is that a remark *unnecessary* to the defence is not an imputation. A remark may be incidental for one of several reasons. First, it may be a remark which is not relevant to any issue in the case, as where the accused attacked the conduct of an identification parade which was unsuccessful and on which neither side relied.[58] Second, it may be spontaneous, "a mere unconsidered remark made by the prisoner without giving any serious attention to it."[59] An example is Rouse's remark that the prosecution witness was a liar.[60]

Thirdly, "*prima facie*, answers in cross-examination are part of the case for the prosecution, and do not show the nature or conduct of the defence."[61] So the shield will not be lost where prosecution counsel has deliberately tried to trap the accused,[62] or asked leading questions,[63] or the accused has responded reluctantly to repeated questions. But if the accused under cross-examination where these features are absent deliberately, repeatedly and clearly attacks the prosecution, he will have thrown away his shield, e.g. if under cross-examination he states specifically an allegation which in his evidence-in-chief was ambiguous or general;[64] *a fortiori* if the accused is simply cross-examined in detail about a precise imputation made in chief. Thus in *Selvey* questions to the accused under cross-examination about the appellant's claim in chief that the complainant was a male prostitute "did no more than remove all possible doubt as to whether the appellant was seeking to discredit (the victim) on the ground that he was 'that sort of young man'."[65] Apart from this, it does not matter whether the attack proceeds from defence counsel in his speeches or his questions, or from the accused in answers on examination-in-chief or cross-examination.

The *Hudson* doctrine, as qualified by the *Turner*, *Rouse* and "incidental" rules, is generally thought to be unduly narrow. The effect of *Hudson* is to make it very difficult for the accused to raise a defence in any detail where he contradicts the prosecution, rather than merely explaining away facts which the prosecution allege against him. Before examining how the width of the section is narrowed by discretion, let us see what other possible constructions there are.

APPROACHES OTHER THAN HUDSON

Two approaches slightly wider than *Hudson* have been advanced in Victoria. One, stated in *R.* v. *Billings*, is that allegations "expressly or by plain innuendo" that the prosecution witnesses are lying are imputations unless the word "liar" is used "(as many people loosely do) merely to mean that

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[58] *R.* v. *Preston* (1909) 1 K.B. 568.

[59] *R.* v. *Preston* (1909) 1 K.B. 568, at 576 *per* Channell J.; see also *R.* v. *Westfall* (1912) 7 C.A.R. 176; *R.* v. *Curwood* (1944) 69 C.L.R. 561, at 569; *R.* v. *Jenkins* (1945) 31 C.A.R. 1; *R.* v. *Morris* (1959) 43 C.A.R. 206.

[60] *R.* v. *Rouse* (1904) 1 K.B. 184.

[61] *R.* v. *Jones* (1909) 3 C.A.R. 67, at 69.

[62] *R.* v. *Grout* (1909) 3 C.A.R. 64.

[63] See generally *R.* v. *Everitt* (1921) V.L.R. 245; *R.* v. *Baldwin* (1925) 133 L.T. 191; *R.* v. *Eidenow* (1932) 23 C.A.R. 145; *Curwood* v. *R.* (1944) 69 C.L.R. 561, at 587; *R.* v. *Woods* (1956) 73 W.N.N.S.W. 166; *R.* v. *Brown* (1960) V.R. 382, at 396.

[64] *R.* v. *Billings* (1961) V.R. 127, at 134.

[65] (1970) A.C. 304, at 333 *per* Viscount Dilhorne.

the witness's evidence is false, and not deliberately false."[66]

Smith J. in *R.* v. *Brown* went a little nearer *Rouse* without reaching it by saying that contradictions between prosecution and defence evidence did not "involve" an imputation of deliberate lying unless there was absolutely no risk of error,[67] including errors arising from possible mental disorders, tricks of memory, and, so far as busy policemen are concerned, confusion between the facts of one case and another, acceptance without criticism of colleagues' accounts about events they cannot clearly remember, and assumption that they have always followed routine courses of questioning. But a statement that a prosecution witness was deliberately lying would be an imputation unless made during cross-examination, and in this respect the *Brown* rule is harsher than *Rouse*. These views in *Billings* and *Brown* are justifiable on a strict construction of the section but are even more inconvenient than the existing law in *Hudson*.

The first narrowing of *Hudson* to consider is that worked out by Dixon C.J. in *R.* v. *Dawson*. This doctrine is much-misunderstood and difficult to understand; it is often called the *Curwood* doctrine, but misleadingly, for what was said in *Curwood* was no different from the *Hudson* and *Rouse* doctrines, and *Dawson* contradicts some of what was said in *Curwood*. It is better called the *Dawson* doctrine; it was first stated in that case and has never been repeated. The essence of it is that no imputation exists where the accused states expressly what would follow implicitly from his evidence denying the Crown case and the evidence supporting it. "The question is not one depending on forms of expression, the use of phrases, the stating explicitly what is implicit." An imputation depends on "the use of matter which will have a particular or specific tendency to destroy, impair or reflect upon the character of the prosecutor or witnesses called for the prosecution, quite independently of the possibility that such matter, were it true, would in itself provide a defence."[68] The last words indicate that this is not the pre-*Hudson* doctrine, which depends on attacks necessary to the defence not being regarded as imputations. The effect of the *Dawson* doctrine can best be seen from an example. Assume the accused denies making and signing a long detailed confession of assault, and also says it was fabricated by the police and that his defence is that he had to reject violently the victim's improper advances.

a) According to *Billings*, the bare denial might be an imputation because the innuendo of fabrication is "plain". The rest of the statement is an imputation.

b) According to *Brown*, the bare denial would be an imputation if the innuendo of fabrication is irresistible because no explanation based on honest mistake is possible, as seem likely. The rest of the statement is an imputation.

c) According to *Hudson-Rouse*, the denial is no imputation, but the express statement of fabrication is, as is the claim of self-defence.

d) According to *Dawson*, the express statement of fabrication is not an imputation because it adds nothing to what is implied in the denial, but the claim of self-defence is an imputation because it has a specific tendency to reflect on the prosecutor's character independently of the fact that it provides a defence.

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[66] (1961) V.R. 127, at 140-1; see also *R.* v. *Gramanatz* (1962) Q.W.N. 41.
[67] (1960) V.R. 382, at 394-5.
[68] (1961) 106 C.L.R. 1, at 9-10 and 13-14.

e) According to the pre-*Hudson* doctrine, there is no imputation at all, because everything said is necessary for the proper development of the defence.

The merit of Dixon C.J.'s views in *Dawson* is that they advance to the full logical extent of the position taken up in *Rouse* and stated by him in *Curwood;* they deny the relevance of any distinction between inferring fabrication or lying and expressly stating it. The *Billings* and *Brown* doctrines are at one extreme of literal interpretation and harshness to the accused; *Rouse* represents a practical watering down of that position but with an illogical distinction between inferences from denials and (except in the case of assertions about lies) express statements of impropriety. *Dawson* destroys that illogicality.[69] Thus in *Dawson* itself the accused denied guilt, denied confessing to the police and alleged that the police had invented most of the questions and answers in his record of interview. Dixon C.J. considered the latter remark not to be an imputation because it said no more than could be inferred from the accused's denial of confessing and denial of guilt. The majority disagreed.

Let us now consider the final major position, the pre-*Hudson* position. Essentially this is that any attack on the prosecution which the accused has to make in putting up his defence is permissible. A number of different avenues have been used to reach this destination.

One avenue is frankly expediency. The section would be entirely harsh and unworkable unless something is found to moderate the strictness of the words. The Parliamentary legislation will cause injustice unless it is amended by judicial legislation. It is unwise to rely solely on the use of the judge's discretion for this will vary in its operation from judge to judge. In any event, there was no general discretion to exclude evidence in 1898, so that Parliament must have intended the Act to be made workable in some other way. The only authority for this approach is that which asserts the extreme importance of the accused's record not being lightly introduced.[70]

Another avenue turns on the view that "character" means "general reputation" rather than disposition or conduct. To say a policeman induced a confession is not an attack on his reputation—on what the world thinks—it merely asserts bad behaviour. In 1898 it is very likely that this was the meaning of "character" because the Court for Crown Cases Reserved, with thirteen judges sitting and two dissenting, had decided in *R.* v. *Rowton* that evidence of the accused's "character" must be confined to evidence of reputation.[71] Parliament must have thought that the prosecutor's "character" would have the same meaning; a legislator of 1898 would have seen no point in being more precise. This argument is historically strong, but though it has some followers still,[72] and has been considered intrinsically "formidable", it has been ignored by too large a mass of inconsistent authority.[73]

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[69] The illogicality had been noted by the Full Court in *Billings* in their comments on *Curwood.* They noted that it was odd to distinguish an "explicit imputation of deliberate untruthfulness" from "the defence that evidence is fabricated". See *Curwood* v. *R.* (1944) 69 C.L.R. 561, at 587 and 589 and *R.* v. *Billings* (1961) V.R. 127, at 139.

[70] *Maxwell* v. *D.P.P.* (1935) A.C. 309, at 317 and 321.

[71] (1865) Le & Ca. 520.

[72] *Dingle* v. *Associated Newspapers* (1961) 2 Q.B. 162, at 181 and 195 *per* Holroyd Pearce and Devlin L.JJ.; *Jones* v. *D.P.P.* (1962) A.C. 635, at 710-11 *per* Lord Devlin.

[73] *R.* v. *Dunkley* (1927) 1 K.B. 323, at 329; *Stirland* v. *D.P.P.* (1944) A.C. 315, at 324; *Attwood* v. *R.* (1960) 102 C.L.R. 353 at 359; *Malindi* v. *R.* (1967) A.C. 439, at 451; *Selvey* v. *D.P.P.* (1770) A.C. 304.

A similar avenue has been relied on in Scotland to produce a result different from the English position in *Hudson.* Just as the accused cannot raise his own good character independently of the issues in the case without throwing away his shield under the first limb of s. 1(f)(ii),[74] so he cannot make a general attack on a prosecution witness's good character under the second limb. "But it is one thing to attack the character of a witness generally and another to do so inferentially by asking questions which are relevant to the defence and, indeed, without which the true facts cannot be ascertained."[75] This is essentially the distinction between cross-examining to the issue and cross-examining to credit.

A further avenue depends on the argument that the "nature or conduct of the defence" must refer to "something superimposed on the essence of the defence itself."[76]

It has also been pointed out[77] that the first limb of s. 1(f)(ii), which provides that the shield is lost if the accused gives evidence of his own good character, is not lost if he gives evidence of good character relevant to his defence. In *Malindi* v. *R.* the accused, charged with conspiracy to commit arson, was held by the Privy Council not to have thrown away his shield by giving evidence that at certain meetings he disagreed with and disapproved of violence.[78] If evidence of the accused's good character necessary for the development of his defence can be admitted without loss of his shield under th efirst limb of s. 1(f)(ii), why cannot evidence of a prosecution witness's bad character be admitted under the second?

Though this pre-*Hudson* view is not the law, it is supported by some distinguished authority[79] and is the law in South Africa.[80] The triumph of the *Hudson* view is therefore extensive but not complete.

We should note one attempt to reconcile the authorities: that of Williams J. in *Curwood* v. *R.*[81]. He said that the pre-*Hudson* cases and *Hudson* are correct on the basis that an attack on the prosecution necessary for the defence is not an imputation provided the defence is supported by the evidence of the accused or some other defence witness. Thus in *Hudson* itself there was an imputation because no defence evidence was given that either of the prosecution witnesses whom the accused alleged to be the true criminals had been seen stealing the stolen bank book or planting it in the accused's pocket. In principle there is something to be said for Williams J.'s view, for it distinguishes solidly based defences from those based merely on accusation; but nothing has been made of it in the cases.

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[74] The first limb provides that the shield may be thrown away when the accused "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. . . ."

[75] *O'Hara* v. *H.M.Advocate* 1948 J.C. 90, at 98; *Fielding* v. *H.M.Advocate* 1959 J.C. 101. See also *R.* v. *Preston* (1909) 1 K.B. 568, at 575.

[76] *Selvey* v. *D.P.P.* (1970) A.C. 304, at 354 *per* Lord Pearce; see *O'Hara* v. *H.M.-Advocate* 1948 J.C. 90.

[77] Lanham (1972) 5 *N.Z.U.L.R.* 21, at 34.

[78] (1967) 1 A.C. 439.

[79] Sir Owen Dixon considered it to be "a satisfactory solution": *Curwood* v. *R.* (1944) 69 C.L.R. 561, at 585; and see McTiernan and Williams JJ. at 591 and 599. See also *R.* v. *Bridgewater* (1905) 1 K.B. 131; *R.* v. *Preston* (1909) 1 K.B. 568; *R.* v. *Westfall* (1912) 7 C.A.R. 176.

[80] E.g. *State* v. *V.* 1962 (3) S.A. 365.

[81] (1944) 69 C.L.R. 561, at 599.

A final test of which little has been made is one of proportionality. An attack will not be an imputation unless it is serious enough to justify the accused being subjected to the dangerous consequences of losing his shield.[82] This approach has sometimes been used in connection with the court's exercise of its discretion to prevent cross-examination after the shield has been thrown away. But it seems too uncertain to use as a role of construction; and it is hard to see why the admissibility of the record should be controlled by what the defence is. "If the conduct of the interviewer was criminal, the defendant must impute criminality . . . The defendant does not choose what conduct he will have the police officer adopt in questioning him."[83]

DISCRETION

We have seen that the *Hudson* doctrine is harsh in not often permitting the accused to raise a proper defence. The pre-*Hudson* doctrine would remedy that defect, but would still not allow the accused to show the untrustworthiness of prosecution witnesses by proving their records; and yet such attacks are those which an accused will commonly, and with complete propriety, wish to make. These problems can only be overcome under the present law by the court exercising its discretion against admission of the record. The recognition of the discretion is of relatively recent growth[84] and parallels the use of a judicial discretion to exclude evidence in several other areas of the law of evidence.[85] Sometimes it is said that the search for a fair rule of *construction* should be abandoned and the matter entirely left to the court's *discretion*;[86] but the use of discretion, though now well-established by authority, should be regarded as at most an ancillary aid for the following reasons.[87] It leads to uncertainty in practice and differences from judge to judge: the accused's counsel will therefore never know how far the defence can safely go. Reliance on discretion to solve problems of evidence tends to confuse the actual rules of law and to cause loss of contact with fundamental principle; and it tends towards the reversal of established rules without express recognition of or adequate reason for the change.

Before noting the factors generally acted on by the courts, we should examine two possible divergences between English and Australian law. One factor, usually called the *Flynn* rule, is that the court should refuse to admit the record if the imputation is a necessary part of the defence. This transfer of the pre-*Hudson* doctrine from construction to discretion has been enthusiastically taken up in Australia;[88] but in *Selvey* v. *D.P.P.*[89] the House of Lords said this could only be regarded as one factor, not an overriding one. The

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[82] *R.* v. *Westfall* (1912) 7 C.A.R. 176, at 179; see also *R.* v. *Wright* (1910) 5 C.A.R. 131.

[83] Lanham, *supra* n. 77 at 35.

[84] It was first recognized in *R.* v. *Watson* (1913) 8 C.A.R. 249; cf. *R.* v. *Fletcher* (1913) 9 C.A.R. 53 and see *Maxwell* v. *D.P.P.* (1935) A.C. 309; *Stirland* v. *D.P.P.* (1944) A.C. 315 and *R.* v. *Jenkins* (1945) 31 C.A.R. 1.

[85] Following *R.* v. *Christie* (1914) A.C. 545.

[86] *R.* v. *Cook* (1939) 2 Q.B. 340, at 347; *R.* v. *Billings* (1961) V.R. 127, at 139-40.

[87] Livesey (1968) C.L.J. 290, at 302-309.

[88] *R.* v. *Flynn* (1963) 1 Q.B. 729; and see *R.* v. *Clark* (1962) V.R. 657; *R.* v. *Gramanatz* (1962) Q.W.N. 41; *R.* v. *Matthews* (1965) Qd.R. 306; *R.* v. *Heydon* (1966) 1 N.S.W.R. 708 at 765.

[89] (1970) A.C. 304, at 341, 360; and see the earlier cases of *Ondras* (1962) Crim. L.R. 543 (see *R.* v. *Selvey* (1968) 1 Q.B. 706 at 716) and *R.* v. *Sargvon* (1967) 51 C.A.R. 394, at 397.

impact of this on Australian practice is unclear.[90]

Another possible divergence between England and Australia concerns the Australian view that if there is nothing exceptional in the case the discretion should be exercised in the accused's favour.[91] This too is supported by *Flynn* and though this was not disapproved in *Selvey* v. *D.P.P.* it seems to be little acted on in England.

There is more agreement on the importance of the following factors. The discretion should be exercised in the accused's favour if the damage caused by the defence attack is trivial and his record is bad,[92] particularly if the record contains convictions of crimes similar to that now charged, since the jury may wrongly use them as evidence of guilt; for this reason the judge ought to inform himself of the extent and gravity of the record before it is admitted.[93] The thinness of the main case should be remembered, as well as the weakness of the evidence contradicting the truth of the accused's attack.[94] The discretion is likely to be exercised in the accused's favour if he is not represented[95] or if the attacks made are on memory only and not honesty,[96] or the impropriety imputed is minor, e.g. use of non-violent inducement to get a confession rather than fabrication thereof, or the attack is not directly on the witness but on the police generally,[97] or the charge is not deliberate or elaborated,[98] or if no warning to the accused or his counsel has been given by judge or prosecution counsel as to the conduct of the defence case, particularly if the judge has declined advice when asked for it.[99] The court's leave to cross-examine on the record should always be sought.[100] If an accused is charged on several counts and he makes an imputation against a witness on one count only, the record should not be admitted because it would prejudice him on all counts.[101] The main question to which many of the above matters relate is whether the prejudicial effect of the cross-examination far exceeds "its legitimate evidentiary effect upon credit."[102]

On the other hand, "if there is a real issue about the conduct of an important witness which the jury will inevitably have to settle in order to arrive at their verdict, then . . . the jury is entitled to know the credit of the man on whose word the witness is being impugned."[103] The discretion

[90] However, Mason J., dissenting in *Donnini* v. *R.* (1973) 47 A.L.J.R. 69, at 82 approved Lord Pearce's statement in *Selvey* v. *D.P.P.* (1970) A.C. 304 at 358 that the discretion should be used to secure a fair trial.

[91] *R.* v. *Brown* (1960) V.R. 382; *R.* v. *Dawson* (1961) V.R. 773; at 776; (1961) 106 C.L.R. 1, at 17; *R.* v. *Clark* (1962) V.R. 657, at 664; *R.* v. *Garmanatz* (1962) Q.W.N. 41; *R.* v. *Crawford* (1965) V.R. 586; *R.* v. *Matthews* (1965) Qd. R. 306; *R.* v. *Heydon* (1966) 1 N.S.W. R. 708, at 765; *Donnini* v. *R.* (1973) 47 A.L.J.R. 69, at 82.

[92] *R.* v. *Turner* (1944) K.B. 463, at 470-1; *R.* v. *Jenkins* (1945) 31 C.A.R. 1; *R.* v. *Brown* (1960) V.R. 382; *Dawson* v. *R.* (1961) 106 C.L.R. 1, at 16; *Donnini* v. *R.* (1973) 47 A.L.J.R. 69, at 78 and 82.

[93] *R.* v. *Crawford* (1965) V.R. 586.

[94] *Dawson* v. *R.* (1961) 106 C.L.R. 1, at 16.

[95] *R.* v. *Cook* (1959) 2 Q.B. 340, at 349.

[96] *R.* v. *Brown* (1960) V.R. 382.

[97] *R.* v. *Cook* (1959) 2 Q.B. 340, at 348; *R.* v. *Brown* (1960) V.R. 382, at 397.

[98] *R.* v. *Cook* (1959) 2 Q.B. 340, at 348.

[99] *R.* v. *Brown* (1960) V.R. 382; see also *R.* v. *Morris* (1959) 43 C.A.R. 206; *R.* v. *Cook* (1959) 2 Q.B. 340; *R.* v. *Davies* (1963) Crim. L.R. 192; *Carroll* v. *R.* (1964) Tas. S.R. 76; cf. *R.* v. *Coman* (1955) V.L.R. 289. The warning should obviously not be given in open court: *R.* v. *Weston-Super-Mare Justices, ex p. Townsend* (1968) 3 All E.R. 225.

[100] *R.* v. *McLean* (1926) 19 C.A.R. 104; *R.* v. *Turner* (1944) K.B. 463; *Carroll* v. *R.* (1964) Tas. S.R. 76.

[101] *R.* v. *Corbishley* (1963) Crim. L.R. 778.

[102] *R.* v. *Brown* (1960) V.R. 382, at 398.

[103] *R.* v. *Cook* (1959) 2 Q.B. 340, at 348 *per* Devlin J., approved by Viscount Dilhorne in *Selvey* v. *D.P.P.* (1970) A.C. 304 at 341.

should also be exercised against the accused if he alleges that a prosecution witness is an accomplice in an attempt to gain the advantage of the rule requiring that the jury be warned of the danger of convicting on accomplice evidence without corroboration.[104] The record is more likely to be admitted the more it consists of crimes of dishonesty rather than violence, because the former are more relevant to credibility.[105]

THE FUTURE

Let us review briefly the problems of the section. The *Hudson* doctrine tends to prevent an accused with a record proving misconduct in the prosecutor or the prosecution witness or police impropriety in the making of a confession either of which may be necessary to the accused's defence. It shares with the pre-*Hudson* doctrine the difficulty that the accused is deterred from attacking the prosecution's general credibility when this is, because of an undoubtedly bad record, highly suspect, particularly since the judge has no duty to acquaint the jury with a prosecution witness's record if defence counsel has chosen not to.[106] The *Hudson* rule is also unworkable: the decisions of several full English Courts of Criminal Appeal and one of the House of Lords have not sufficed to make it easy for trial judges to apply.[107] It depends on a distinction between using the record to attack credibility and prove guilt which is unlikely to be grasped by juries. "The jury must not infer that the accused is guilty because he is the kind of man who would do the kind of thing charged, but they may disregard his protestations of innocence because he is the kind of man who would make false imputations against others."[108] Further, the law has made a general decision as to which evidence should be excluded because it is too dangerous for a jury. It is strange that the decision should be reversed merely because the accused attacks the prosecution. The *Hudson* rule is an exception, against the accused, to the normal rules encouraging full freedom of speech in court. It is anomalous in being limited by the *Turner* and *Rouse* doctrines. The prosecution may reveal the bad character of their own witness to the jury,[109] but the accused ought not to have to rely on the prosecution's discretion. One purpose of the rule is to ensure "fairness to the impugned witness. A respectable man who is obliged to give evidence against his assailant or traducer may well feel a deep sense of injustice if he is subjected to a series of unfounded accusations by someone whom practically everyone except the jury before whom the farce is enacted knows to be a man with a criminal record."[110] This may make respectable people unwilling to complain of crime and act as witnesses. But this problem is probably better handled in some other way. The judge has power to stop defence counsel offending in this way.[111] Cross suggests that it might be desirable for the jury which tried the case to be reconvened to decide the further question of whether the accused committed perjury, or for the court to take irrespon-

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[104] *R.* v. *Manley* (1962) 46 C.A.R. 235.
[105] *R.* v. *Heydon* (1966) 1 N.S.W.R. 708, at 733 and 735.
[106] *R.* v. *Carey* (1968) 52 C.A.R. 305.
[107] E.g. *R.* v. *Hudson* (1912) 2 K.B. 464; *R.* v. *Turner* (1944) K.B. 463; *R.* v. *Cook* (1959) 2 Q.B. 340; *R.* v. *Flynn* (1963) 1 Q.B. 729; *Selvey* v. *D.P.P.* (1970) A.C. 304.
[108] Cross (1969) 6 *Syd. L.R.* 173, at 182. See Kalven and Zeisel, *The American Jury*, at 178-80, and (1973) *Crim. L.R.* 208.
[109] Humphreys (1955), *Crim. L.R.* 739, at 742.
[110] Cross, *supra* n. 108 at 181.
[111] *R.* v. *Billings* (1961) V.R. 127, at 136-7.

sibility in conducting the defence into account in determining the sentence.[112] But to rely on loss of the shield as a disincentive to perjury is unsatisfactory.

Some members of the English Criminal Law Revision Committee which considered these arguments recently were not persuaded by them and indeed would have preferred the accused to be treated in every respect as an ordinary witness. The majority were against this for the above reasons and on the additional ground that such a change would, as in Canada and the United States, induce the accused with a record not to testify and thus reduce the value of the trial as a means of determining the truth. Another minority favoured the complete repeal of the second limb of s. 1(f)(ii). But the majority favoured amendment of s. 1(f)(ii) so that the accused would only throw away his shield by asking questions of which "the main purpose . . . was to raise an issue as to the witness's credibility." If the shield is thrown away, the cross-examination of the accused must be relevant only to his *credibility*, which may be intended to suggest that for this purpose his character is divisible, so that only lying or dishonest conduct can be put to him. The final suggested change is that imputations on the *prosecutor*, as opposed to prosecution witness, should no longer cause the shield to be thrown away.[113]

The N.S.W. Crimes and Other Acts (Amendment) Act 1974, inserts into the Crimes Act 1900, ss. 413A and 413B, which have the effect of substantially enacting the above proposals. Welcome though these proposals would be elsewhere, the case for going further and allowing the accused to indulge in normal cross-examination of prosecution witnesses as to their credit would seem to be strong in all jurisdictions.

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[112] Cross, *supra* n. 108 at 181.
[113] *11th Report on Evidence*, 1972, Cmnd. 4991, para. 128.