WHEN THE BITER MAY BE BIT: CRIMES ACT 1958, SECTION 399 (e) (ii)

More: *The Law is a causeway upon which so long as he keeps to it a citizen may walk safely.*

Bolt: A Man for All Seasons.

During the trial of Ned Kelly in 1880, his counsel expressed regret to the presiding Judge, Sir Redmond Barry, that his client's lips were sealed, and that Mr Kelly was unable to put an entirely different complexion on the facts of that case. It seems clear that if the bush-ranger had been allowed to give evidence, he would have been reluctant to have his past character placed before the Court. This article examines the position of the Edward Kelly's of the present and future, and of those who have to defend them, with regard to the effect of section 399 (e) (ii) of the Crimes Act 1958.

I. Historical Background

At common law an accused person was not allowed to give evidence, and in ordinary circumstances, the prosecution was debarred from adducing evidence of the bad character of the accused. This was affirmed in *Regina v. Rowton*,[1] but it was there held that the prosecution could rebut evidence given by the defence of the accused's good character. Eleven of the thirteen judges who heard the case agreed that such rebutting evidence must be confined to evidence of reputation; thus, as a witness had said that he knew nothing about the opinion of the neighbourhood, but gave his own opinion of the accused's poor character, the conviction was quashed.

In *Makin v. The Attorney-General for New South Wales*,[2] the Judicial Committee of the Privy Council held that evidence tending to show that the accused was guilty of other criminal acts was inadmissible unless relevant to an issue, and not just to credibility. It might be relevant to an issue if it bears upon the question whether acts alleged to constitute the crime charged were designed or accidental, or to rebut a defence which otherwise might be open to the accused. On the other hand, an ordinary witness could be cross-examined as to bad character with the aim of weakening his credibility but where he denied previous convictions the other side was bound by his answer.

The right of an accused person to give evidence on his own behalf in Victoria was first provided for in the Crimes Act 1891.[3] In the absence of any statutory provision, the accused would have been in the same position as an ordinary witness, having his character ex-

[1] (1865) Le. & Ca. 520. [2] [1894] A.C. 57. [3] S. 34.

posed to cross-examination. A provision was included that the accused was not to be cross-examined on 'any question not relevant to the particular offence with which he is charged, unless such person has given evidence of good character'.[4]

In 1894, all the Judges of the Victorian Supreme Court signed a report deploring the abuse by prisoners of the protection from cross-examination as to antecedents accorded them by this provision. This same Judges' report was to be used twenty-one years later[5] to urge the Victorian Parliament to adopt the 1898 English Criminal Evidence Act.[6] The Victorian Act,[7] passed in 1915, was an almost exact copy of the English Act which allowed the accused to give evidence on his own behalf as a witness. It laid down the general rule that the accused was not to be cross-examined as to antecedents when he gave evidence on his own behalf as a witness, but to this rule there were four exceptions: one of these exceptions was where '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'. Before the Victorian Act was passed there was bitter controversy in the Legislative Council as to whether the accused should be treated as an ordinary witness if he elected to give evidence on his own behalf.

The Honourable J. D. Brown, Minister of Mines, wanted to know:

> Why should there be any special protection to a man or a woman who might have been convicted times out of number? Why should such persons be regarded as sacrosanct? If a person who was charged with an offence were innocent he would welcome cross-examination, because it would tend to establish his innocence. A man who was charged knew perfectly well whether he was guilty or not guilty, and it might be that the more he was cross-examined, the sooner his guilt would be established.[8]

The Honourable Minister had in mind a recent trial which he did not identify, where A'Beckett J. had told the jury after they had brought in a verdict of 'Not Guilty':

> I have no doubt that a gross miscarriage of justice has occurred, and that a woman who has been assaulted has been subjected to insults from perjured evidence. I may say that I am not supposed to be finding fault with the jury, but with a system which allows them to be befooled, I do not suppose, gentlemen, that if you had known that this man had been convicted in February, 1910, of doing exactly what he did to this unfortunate lady, that you would have accepted his words, his filthy, false statements against the evidence of reputable witnesses. He was convicted for assuming the designation of a member of the force, and he was punished for the offence, which was precisely the same character as that which he committed on this woman.[9]

[4] S. 34 (3). [5] (1915) *Victorian Parliamentary Debates* Vol. 140, 1314.
[6] 61 & 62 Vic. c. 36. [7] Crimes Act 1915.
[8] (1915) *Victorian Parliamentary Debates* Vol. 141, 2580. [9] *Ibid.* 2581.

The English equivalent to the imputations part of the sub-section under consideration was given a far longer debate in the House of Commons than in the Victorian Parliament. The Hon. Mr T. M. Healy saw the danger in the exception:

> . . . this Bill is really a rat-trap, because you are told that under this Bill the prisoner is not to be cross-examined as to his previous character unless the prisoner has himself cross-examined as to character a witness who has been produced on behalf of the prosecution. The Honourable and learned member for Leamington was putting a case of rape or an assault upon women, where of necessity the evidence for the prosecution would be slight and of a personal character, and the prisoner would naturally desire to cross-examine the witness to show that she was a woman of light character. Now, this is fatal under this Bill, because the poor prisoner, although he was not guilty of this rape or assault, may have been guilty of highway robbery, or burglary, or some other form of assault, and the moment he attempts to show that his accuser is a person of light character at that moment he has committed one of the most fatal mistakes it is possible to make. He lets in all his past record so far as there have been any offences against him. That is the rat-trap under this Bill. It is most unfair.[10]

To avoid this very difficulty, a suggested amendment was urged by Mr S. Evans—an amendment to the same effect as the construction of section 1 (f) of the English Criminal Evidence Act 1898 made by a Scottish case in 1948.[11] The Honourable member suggested that the provision be phrased thus:

> . . . the nature or conduct of the defence is such as to involve imputations not merely of want of credibility, but also imputations on the general character of the prosecutor, or the witnesses for the prosecution.[12]

As he went on to explain:

> That would safeguard the right of the advocate for the defence to attack the credibility *qua* the particular charge of the witnesses for the prosecution; and it would also enable the prosecutor to turn the tables on the defendant where he was making a wholesale attack on the prosecutor.[13]

The sub-section, however, was not destined to be expressed in such terms. The English precedent was added to and improved in one significant aspect. In an amendment proposed and vigorously urged by the Honourable Robert Beckett, the Victorian Parliament was moved to insert a proviso to the effect that the permission of the judge (to be applied for in the absence of the jury) must first be

[10] (1898) *The Parliamentary Debates* Vol. 61, 1019 (U.K.). House of Commons.
[11] *O'Hara v. His Majesty's Advocate* [1948] S.L.T. 372. See p. 501 *infra*.
[12] (1898) *The Parliamentary Debates* (Authorized edition); Fourth Series Vol. 62, 736. A slightly modified version of this suggested amendment came close to acceptance.
[13] *Ibid.*

obtained.[14] This discretion has proved valuable in mitigating the hardships which have arisen from the application of the words of the sub-section, and will be the subject of more detailed consideration.

II. Crimes Act 1958, Section 399 (e) (ii)

The current provisions, as far as relevant to protect the accused from his own past, have stood now for nearly half a century in what is now part of section 399 of the Crimes Act 1958:

> (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—
>
> (i) ...;
>
> (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: Provided that the permission of the judge (to be applied for in the absence of the jury) must first be obtained;
>
> (iii) ....

The aim of the provision is to protect an accused called to give evidence under section 399, from cross-examination as to his bad character or prior convictions. Accordingly, an accused is not bound to answer questions of this nature, and further, even the putting of such questions is prohibited, since it was realized that the mere asking of embarrassing questions of the nature specified, could prejudice his position. If details of a prior conviction were sought in cross-examination (and rejected) the jury might well think that such an enquiry would not have been made without substantial grounds.

The asking of such an improper question is a ground for the quashing of a conviction. In *Barker v. Arnold*[15] a question addressed to the accused as to whether he had previously been convicted of a similar offence was disallowed, but the solicitor remarked that he had a certified copy of the conviction. Both the question and the comment were held to be improper, but as the justices had stated that they had ignored the incident in reaching a decision, the conviction was not set aside. A similar decision was reached in *Jenkins v. Feit*,[16] the case being remitted to the magistrates to consider whether the effect of an improper question could be ignored by them, and whether on the admissible evidence, there ought to have been a conviction. The court in *Hewitt v. Lenthall*,[17] having jurisdiction on appeal in questions of fact as well as of law, held that the

[14] (1951) *Victorian Parliamentary Debates* Vol. 141, 2579. [15] [1911] 2 K.B. 120.
[16] (1923) 129 L.T. 95. [17] [1931] S.A.S.R. 314.

evidence, independently of the improper matter introduced by questions as to the accused's character, was sufficient to support the conviction.

These were all cases of appeal from courts of summary jurisdiction, but when an improper question is asked in the presence of a jury, an appellate court is likely to decide it is sufficient ground for the quashing of the conviction, or, in Australia, might send the case back to be tried again.

The various parts and effects of the sub-section may be examined in sequence:

(i) *'a person charged and called as a witness . . .'*

The general principle that evidence of the accused's bad character cannot be adduced by the prosecution was affirmed in *Rex v. Butterwasser*[18] where the defence had attacked the character of prosecution witnesses, but the English equivalent[19] to section 399 (e) (ii) was held to be irrelevant as the accused had not been called as a witness.

Likewise, where the defence makes imputations within the meaning of the section, and the accused makes an unsworn statement only, section 399 (e) is not applicable, as the accused is not giving evidence as a witness under section 399.

(ii) *'. . . shall not be asked . . . any question . . .'*

The wording of section 399 (e) in the form of an absolute prohibition on the asking of certain questions would *prima facie* appear to include questions asked of the accused by his counsel during examination-in-chief, but clearly such a result was not intended. In *Jones v. Director of Public Prosecutions*[20] the accused, in answer to questions put by his counsel as to why he had first given a false alibi, said that he had previously been 'in trouble' with the police, and did not want to be in trouble again. Lord Reid, in the course of his speech, said:

> The proviso is obviously intended to protect the accused. It does not prevent him from volunteering evidence, and does not in any view prevent his counsel from asking questions leading to disclosure of a previous conviction or bad character, if such disclosure is thought to assist in his defence.[21]

(iii) *'. . . tending to show . . .'*

The questions prohibited are ones 'tending to show' previous convictions or bad character of the accused. In *Jones v. Director of Public Prosecutions*[22] three of the five learned Lords said that 'tending to show' meant 'tending to make known', and as the questions

[18] [1948] 1 K.B. 4. [19] Criminal Evidence Act 1898, s. (1) (f) (ii).
[20] [1962] 1 All E.R. 569. [21] *Ibid.* 575. [22] [1962] 1 All E.R. 569.

put in cross-examination did not tend to disclose to the jury any matter concerning prior convictions or bad character of the accused, they were outside the prohibition of the proviso. In the course of the trial, the defence had already revealed the accused's previous trouble with the police, so that the questions of the prosecution could not tend to disclose anything further to his prejudice, and were accordingly admitted. This interpretation might allow the prosecution to highlight in cross-examination a matter to which the jury paid little attention when it was previously referred to by the defence.

(iv) '. . . *that he has . . . been charged . . .*'

Questions prohibited by section 399 (e) include ones tending to show that the accused has committed or been convicted of or been charged with any offence other than that wherewith he is then charged. The word 'charged' here means accused before a criminal court, so that in *Stirland v. Director of Public Prosecutions*,[23] although the accused had once been 'questioned about a suggested forgery' by his former employers, he could not be regarded as having been charged with any 'offence' within the sub-section.

(v) '. . . *the nature or conduct of the defence . . .*'

The accused loses his protection from cross-examination as to bad character if the case falls within one of the exceptions in section 399 (e) (i), (ii) and (iii). The exception to be considered here is that in the latter part of (ii) which covers cases when the defence makes imputations on the character of the prosecutor or the prosecution witnesses. This part has occasioned much difficulty, and the different approaches taken by the courts in interpreting it will be examined later in some detail.

The imputations must be involved in the 'nature or conduct' of the defence. The 'nature' of the defence involves imputations when the actual defence raised, in itself, gives rise to them. Thus the defence that one of the prosecution witnesses committed the crime in question involves an imputation on the character of the witness, and, if it is said that a written confession was concocted by the police, this involves an imputation upon their integrity. Imputations are involved in the 'conduct' of the defence when they are made in the course of putting the defence case, as where an attempt is made to discredit prosecution witnesses by saying they have a reputation of being untruthful.

The accused may answer questions put to him in cross-examination in a manner that involves imputations on character, but *prima facie* such answers form part of the prosecution case, and do not show the

[23] [1944] A.C. 315.

nature or conduct of the 'defence'. Thus, in *The King v. Everitt,*[24] it was held that cross-examination as to convictions should not have been allowed, as it was in answer to questions put in cross-examination that the accused had made imputations. He had said that the prosecution witness was a liar and had suggested that he was an accessory to another person being tried for similar offences. Similarly, in 1923, a conviction for unlawful carnal knowledge of a girl was quashed, the accused having been led to make imputations during cross-examination by questions such as: 'Can you suggest any reason why the girl should invent this story?', and: 'Do you agree that she is trying to shield some boy?'.[25]

However, in some circumstances, imputations arising out of cross-examination may form part of the defence, as when the accused goes out of his way to make an attack on a witness's character. MacFarlane J. said in *The King v. Thomas*[26] that there could be an imputation within the section if

> . . . the prisoner obviously does not answer the question, or what he may fairly be considered to take to be the gist of the question, but merely takes advantage of the occasion of the question being asked, to make a gratuitous attack on the character of the witness in question. . . .[27]

In *The Queen v. Billings*[28] the Full Supreme Court of Victoria expressed the view that answers of the accused in cross-examination are *prima facie,* but not necessarily always, part of the Crown case, and went on:

> . . . it may be that the withdrawal in cross-examination of an allegation made in examination-in-chief will, if genuine, deprive the Crown of the right to apply under the proviso, and on the other hand, that if the accused particularizes in cross-examination and specifically applies to a prosecution witness, an allegation, which in his evidence-in-chief was ambiguous or general, the exception may be attracted.[29]

It was also held that the final address of counsel for the accused to the jury formed part of the defence, and that, as imputations were made in the course of this address, the judge could allow the recall of the accused for cross-examination as to his antecedents.

(vi) '. . . *as to involve imputations* . . .'

A defence may involve 'imputations' on the character of a prosecution witness if it suggests or attributes bad character or convictions to that witness.

So the judge must find something in the defence that amounts to

[24] [1921] V.L.R. 245.
[25] *Rex v. Baldwin* 133 L.T. 191.
[26] [1938] V.L.R. 241.
[27] *Ibid.* 243.
[28] [1961] V.R. 127. See note in (1961) 3 *M.U.L.R.* 249.
[29] *Ibid.* 134.

such an imputation; thus, it was held in *The Queen v. Billings*[30] that he cannot deprive the accused of the protection of section 399 (e) on the basis of an accumulation of incidents in the defence, each insufficient to constitute an imputation. But it would seem legitimate for the judge to consider the effect of an earlier incident, insufficient in itself to amount to an imputation, in determining whether a later incident does give rise to an imputation.[31]

In many cases where there is a plea of not guilty, and the defence denies all or part of the prosecution case, imputations may be found by a process of logical implication. For instance, an accused person might deny having entered a certain house on the night of the crime even though a witness testified to the contrary. It may be possible to accept the denial, and account for the evidence of the witness as being due to mistaken identification or faulty memory. But the circumstances may make such an explanation most improbable, so that by his denial the accused must logically be taken to assert that the witness gave untrue evidence on oath.

However, imputations within section 399 (e) (ii) are not to be found in this manner. Dixon J. said in *The King v. Curwood*:[32]

> There is much authority to show that a denial by the prisoner of incriminating facts, notwithstanding the clear implication must be that the witnesses for the Crown are lying, does not "involve" an imputation. Further, it makes no difference that the denial is vigorous and even disparaging in its expression or that the imputation of deliberate untruthfulness is explicit.

In *Dawson v. The Queen*,[33] Dixon C.J. explained this *dictum* saying that it is clear that what the words 'when the nature or conduct of the defence is such as to involve imputations on the character of the witnesses for the prosecution' refer to:

> . . . is not a denial of the case for the Crown, not a denial of evidence by which it is supported, but 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. The phrase assumes that a denial of the case for the prosecution, although the evidence of the prosecution is necessarily contradicted, does not carry with it an imputation of the kind to which the provision refers. Further, the word "involves" refers to what is a part of the defence or, at all events, an element or ingredient in the defence or what arises from the manner in which the defence is conducted. It is not meant to cover inferences, logical implications or consequential deductions, which may spell imputations against the character of witnesses.[34]

Even when the accused goes as far as to call the prosecutor or a

[30] [1961] V.R. 127. [31] *Ibid.* 131.
[32] (1944) 69 C.L.R. 561, 587. [33] (1961) 35 A.L.J.R. 360. [34] *Ibid.* 362-363.

witness a liar, this may be held to be only an emphatic mode of denial and not an imputation. In *Rex v. Rouse*[35] the accused, in answer to a question said: 'No, it is a lie; he [the prosecutor] is a liar.' This was held to be no more than a plea of not guilty put in forcible language: the court remarking that such a reply is too easily provoked for it to be allowed to operate so as to admit previous convictions.

But in *Rex v. Jones*[36] the words used did not amount merely to an emphatic denial of evidence, but went further, involving serious imputations against prosecution witnesses. The defence counsel had said that there was no genuine evidence against the accused, but that the police witnesses had invented a confession by him, and had obtained four remands to enable them to perfect their scheme. In *Regina v. Clark*,[37] an allegation that a confession had been concocted by police was held to be a serious imputation against them, and not merely a denial of having made the statement.

Most recently, the Full Court in *The Queen v. Billings*[38] took the view that an imputation of perjury against Crown witnesses amounts to an imputation within section 399 (e) (ii), and that when an accused calls a witness a liar, the judge may have to decide whether he is suggesting perjury, or is using the word merely to mean that the witness's evidence is false and not deliberately false. The Court accepted that:

> . . . mere denials by an accused were not to be converted into imputations of perjury by a process of reasoning on the part of the trial judge, to the effect that if the denials are true, the possibility of mistake on the part of a Crown witness or witnesses is so remote that such witness or witnesses must be guilty of perjury.[39]

(vii) '. . . *on the character of the prosecutor or witnesses for the prosecution*'

The imputations referred to in section 399 (e) (ii) are ones on the character of the 'prosecutor or the witnesses for the prosecution'. So if the accused makes imputations on the character of a person who is not the prosecutor or a prosecution witness, he does not risk losing the protection of section 399 (e). The accused in *The King v. Biggin*[40] pleaded self-defence to a charge of murder, saying that the victim had made indecent overtures to him, and on being rejected had violently assaulted him. The accused was exposed to cross-examination as to another offence on the ground that the defence involved imputations on the character of the prosecutor. But on appeal, the con-

[35] [1904] 1 K.B. 184. [36] (1923) 39 T.L.R. 457.
[37] [1955] 2 Q.B. 469. [38] [1961] V.R. 127. [39] *Ibid.* 141.
[40] [1920] 1 K.B. 213.

viction was quashed, as the imputations were on the character of the dead man who was not the 'prosecutor' within the meaning of the section.

Imputations on the character of police who are not called as witnesses do not lose for the accused the protection of section 399 (e). It was said in *The Queen v. Billings*[41] that imputations on the character of police officers other than those called as prosecution witnesses do not come within the exception, even though they may have the effect of casting imputations on the police generally.

It was also held in that case that the word 'prosecutor' did not include counsel for the Crown. The Court observed that in England in 1898 there were no salaried Crown prosecutors, so-called, and that then 'prosecutor' probably referred to the person who instigated a criminal proceedings. Fifteen years previously, Dixon J. in *Curwood v. The King*[42] had pointed out that the 'prosecutor' need not be a witness, but had said nothing to suggest that counsel came within the term. The Court noted that the main object of the provision is to enable the court to redress the balance of credibility of the accused and prosecution witnesses, for the jury's benefit, and commented that:

> . . . no question arises before a jury of the credibility of Crown counsel as a witness, or even of his *bona fides* in relation to the initial commencement of the criminal proceedings.[43]

Crown prosecutors were known in Victoria when the word 'prosecutor' was introduced to the statute in 1915, but in the absence of contrary authority, the court declined to hold that 'prosecutor' bore a different meaning than in England, and in other States.

(viii) *The onus*

The question whether the defence has brought itself within this exception to section 399 (e) is one of law for the judge to decide. In *The Queen v. Billings*[44] the Court said it was necessary and sufficient for the prosecution to show on a balance of probabilities that a reasonable jury would construe as making imputations the matter relied on by the Crown. But the High Court in *The Queen v. Dawson*[45] disapproved of this formulation, Dixon C.J. stating that:

> . . . the question is entirely for the judge . . . the test is whether the defence in fact is of such a nature or so conducted as to involve . . . [imputations].[46]

(ix) *The permission of the judge*

When a defence involves imputations on the character of prosecution witnesses, the final provision in section 399 (e) (ii) requires the

[41] [1961] V.R. 127, 133. [42] (1944) 69 C.L.R. 561. [43] [1961] V.R. 127, 136.
[44] [1961] V.R. 127. [45] (1961) 35 A.L.J.R. 360. [46] *Ibid.* 365.

prosecution to obtain the permission of the judge, to be applied for in the absence of the jury, before it can cross-examine the accused as to his antecedents.

The words of the proviso may seem only to require of the judge a decision whether, as a matter of law, the accused has lost the protection of the statute, but they have been interpreted as vesting a discretion in the judge. Thus, even when the defence involves imputations within section 399 (e) (ii), the judge may refuse to permit cross-examination directed to the accused's past record where he is of the opinion that in the circumstances an application of the sub-section would be an unduly harsh consequence in comparison to the nature of the imputation made. The English Act contains no such provision, but in *Maxwell v. Director of Public Prosecutions*[47] the House of Lords read into it a similar discretion.

The exercise of the discretion was relevant in *Regina v. Flynn*[48] when F, accused of robbing X, said that X had paid him the money in an effort to silence him, after he, X, had made indecent overtures and assaulted the other in a public lavatory. Although the defence made evidence of previous character and convictions legally admissible, it was held that the judge had exercised his discretion wrongly in principle:

> . . . but where . . . the very nature of the defence necessarily involves an imputation, against a prosecution witness or witnesses, the discretion should . . . be as a general rule exercised in favour of the accused. . . .[49]

This, and other recent cases like *Regina v. Cook*[50] and *The Queen v. Dawson*,[51] indicate that the discretion is to be exercised so as to afford a substantial safeguard to the accused. Some considerations for the judge to take into account when exercising the discretion were listed by Smith and Lowe JJ. in *The Queen v. Brown*.[52]

When the trial judge has exercised his discretion in favour of the accused, later incidents not in themselves sufficient to amount to imputations are not to cause a re-exercise of the discretion in relation to the earlier imputation.[53]

In reviewing the exercise of discretion by the judge, the Court in *The Queen v. Billings*[54] was not able to find an imputation in certain words, but it made allowances for the possibility of factors such as intonation, emphasis, gesture or demeanour making an unequivocal imputation out of words which, in themselves, might be equivocal. The inclusion of such indefinite factors among the criteria to be used

[47] [1935] A.C. 309. [48] [1961] 3 W.L.R. 907.
[49] *Ibid.* 914, *per* Slade, Ashburner, Paull, Salmon and Howard JJ.
[50] [1959] 2 Q.B. 340. [51] (1961) 35 A.L.J.R. 360. [52] [1960] V.R. 382.
[53] See *The Queen v. Billings* [1961] V.R. 127, 129.
[54] [1961] V.R. 127.

by the appellate court in reviewing the exercise of discretion would be unsatisfactory, and in *The Queen v. Dawson*[55] the High Court said such speculative hypothesis was inadmissible and that only the positive factors which appear on the record could be referred to.[56]

Where the case comes within one of the exceptions to section 399 (e), as where the defence has made imputations on the character of prosecution witnesses, the accused may lose the absolute protection from cross-examination as to his antecedents. But this does not mean that all questions tending to show he has committed or been convicted of or charged with any other offence become admissible, for the rules of relevancy still apply.

In *Maxwell v. Director of Public Prosecutions*[57] the accused, charged with the manslaughter of a woman by performing upon her an illegal operation, gave evidence of his good character, thus losing for himself the protection of the Act. The following questions, *inter alia,* were put to the accused in cross-examination:

> Q. This is the second time that sudden death has come to a woman patient of yours, is it not? A. Yes.
>
> Q. And were you tried for manslaughter? A. Something like that; I could not tell you exactly.
>
> Q. And you were acquitted by the jury? A. Yes.

The House of Lords held that the admissibility of evidence under the proviso to the sub-section was subject to the condition of it being relevant to the issue or to the credibility of the accused. The fact that the accused had been acquitted on a previous charge of manslaughter was not relevant to the issue before the jury, nor did it tend to destroy his credibility as a witness. The conviction was, accordingly, quashed, since the earlier case was not relevant to the credibility of the accused as he was found not guilty, and it was not permissible for the prosecution to imply that he had been improperly acquitted.

III. Conflict of Interests

A basic principle of our criminal law is that the accused is to be tried on the facts relating to the particular offence and not on his past record or character:

> It is the thesis of English law that the ingredients of a crime are to be proved by direct or circumstantial evidence of the events, that is to say, the parts and details of the transaction amounting to the crime, and not inferred from the character and tendencies of the accused.[58]

[55] (1961) 35 A.L.J.R. 360.

[56] In *The Queen v. Billings* the appellate court heard the tape-recording of the speech of defence counsel which was in question so that intonation and emphasis became positive factors for them to consider.

[57] [1935] A.C. 309.

[58] *The Queen v. Dawson* (1961) 35 A.L.J.R. 360, 365, *per* Dixon C.J.

The imputations clause in section 399 (e) (ii) is an exception to this general rule, and the reasons behind it need to be examined. At the time when accused persons were enabled to testify on their own behalf, there was considerable concern about the danger of allowing this right to be used to damage the reputation of those concerned with a prosecution. This may well have been one of the reasons for the insertion of the imputations clause, but, even at common law, the character of prosecution witnesses could always be attacked in cross-examination. But as the accused is protected by section 399 (e) from having his character probed the rationale of the imputations exception appears to be that the accused who discredits the character of those testifying against him should not be shielded from similar attack if he gives evidence:

> The primary object of the provision is to enable the court to redress the balance of the 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. . . .[59]

It is, of course, clear that the accused is in a particularly invidious situation where there is no protection accorded to either side, since a jury is more likely to believe a well-substantiated criminal record than general or even particular imputations against the prosecution, many of which can be no more than allegations. This is all the more true since the jury is well aware that it is the accused who stands on trial for his freedom, while the prosecution witnesses can be looked at as high-minded citizens performing their social duty. For example, if a jury learns that a person charged with burglary has been previously charged with that offence, it will be difficult for them to confine this knowledge to the consideration of the credibility of the accused, and even if it is so confined, the knowledge of criminal record would outweigh any allegation by the accused that the police are perjurers, or that his confession was extorted, especially as the jury might well think that the accused has a more real interest in making such allegations than has the police witness.

The difference in the position of an accused and an ordinary witness whose character is attacked has been put clearly by Dr Glanville Williams:

> . . . whereas an attack upon the character of an ordinary witness can at most result in his evidence being rejected, an attack on the character of an accused person who gives evidence may in the minds of the jury be regarded as supplementing deficiencies in the evidence for the prosecution.[60]

[59] *The Queen v. Billings* [1961] V.R. 127, 136.
[60] *The Proof of Guilt* (1955) 160.

IV. Three Approaches

The problem of the trial judge is now evident. When asked for a ruling under section 399 (e) (ii), he must strike a balance between the right of the accused to have all the facts laid before the jury, the desire of the prosecution to disclose the truth about the character of the accused, and the right of the accused to have his action tried on its own merits. To escape from this dilemma and to reconcile this conflict of interests is not an easy task, and will depend largely on the particular facts presented to the court. It is possible to discern three broad approaches that have been adopted by the courts in determining how far an accused may go before he lays himself open to retaliation. The courts in the English and Australian hierarchy first sought refuge in what might be called the liberal approach and, more recently, they have adopted a strict approach. Finally, it has been urged that the most satisfactory means of preserving the balance is by use of the discretion vested in the trial judge, expressly in Australia and implicitly in England.

(i) *The Liberal Approach*

Before 1912, there was a line of cases which would seem to establish a distinction between imputations designed to show a witness is unreliable, and imputations connected with the facts of the case. The accused would lose the protection of the section, if the nature or conduct of the defence was:

> . . . such, as to involve the proposition that the jury ought not to believe the prosecutor or one of the witnesses for the prosecution on the ground that his conduct—not his evidence in the case, but his conduct outside the evidence given by him—makes him an unreliable witness. . . .[61]

Thus, where the accused claimed that the constable who arrested him had prompted the person complaining of the larceny, as to how much money had been stolen, and, moreover, had treated the accused with violence, it was held this was not such an imputation as would allow cross-examination of the accused as to previous convictions. In quashing the conviction, the Court of Criminal Appeal said of the accused's claims:

> Instead of being an attack on the character of a witness with the view of shewing that he is unreliable, they are an endeavour to elicit the facts in connection with the very matter with which the prisoner is charged. It was not such an attack as comes within the meaning of the section. . . .[62]

[61] *Rex v. Preston* [1909] 1 K.B. 568, 575, *per curia.*
[62] *Rex v. Westfall* (1911) 7 Cr. App. R. 176, 179.

Four years previously, in *Rex v. Bridgwater,*[63] Lord Alverstone C.J. had been faced with a case where a person charged with being in possession of stolen property claimed that he was acting as an informer for a police sergeant. Included in his judgment was a sentence which could hardly be more clear and emphatic:

> I must repeat what I have said before, namely, that raising a defence, even in forcible language, is not of necessity casting imputations on the character of the prosecutor or his witnesses. No doubt imputations may be cast on their character quite independently of the defence raised, either by direct evidence or by questions put to them in cross-examination.[64]

The conviction was quashed, because the accused made the allegations only to develop his defence.

In 1909, a man was sentenced to twelve months' hard labour for receiving as stolen property a handkerchief, a collar stud and a pencil. As part of his defence, the accused had alleged that a police inspector had misconducted the identification parade; this had been ruled to be an imputation within the meaning of the sub-section and cross-examination as to previous character was allowed.[65] The Court of Criminal Appeal quashed the conviction, saying that although the allegation was a serious imputation on the police inspector, and though the case was a difficult one, the matter was not part of the nature or conduct of the defence. It was a relevant matter, but was made merely as an unconsidered remark. Channel J. seemed to draw a distinction between cases where the whole basis of the defence was an imputation (and cross-examination would be allowed) and cases where this was not so (and cross-examination would not be allowed). Despite this being the basis for Channel J.'s decision, he emphatically approved the rule in *Rex v. Bridgwater.*

It is, perhaps, rather ironic that the broad principle of Lord Alverstone C.J. in *Rex v. Bridgwater,* as an expression of the liberal approach, was discarded by the decision of the Court of Criminal Appeal (led by the same Chief Justice) in 1912. But the rule laid down by His Lordship in *Rex v. Rouse*[66] stands as a principle today, despite the fact that the learned Chief Justice prefaced his remarks with, 'we are not laying down any general rule'.[67]

Hence, it may be said that the pre-1912 cases draw a distinction between, on the one hand, imputations directed solely to credit, and on the other, those related to facts in issue. For example, if *Curwood*

[63] [1905] 1 K.B. 131. [64] *Ibid.* 134. [65] *Rex v. Preston* [1909] 1 K.B. 568.
[66] [1904] 1 K.B. 184: Where it was held that calling the prosecutor a liar, may be only an emphatic denial of the facts he alleged. See p. 494 *supra.*
[67] *Ibid.* 186.

v. The King[68] had come before a court before 1912, it seems likely that it would have admitted evidence as to the acts of violence by the police without permitting cross-examination as to the accused's antecedents.

The Scottish High Court of Justiciary has used a variant of the liberal approach by interpreting 'character' in the imputations part of the sub-section as meaning 'general character' of the prosecution or their witnesses. In *O'Hara v. His Majesty's Advocate*[69] the accused had alleged that the two constables whom he was charged with assaulting had provoked the assault and that one of them was drunk. The conviction was quashed on appeal, on the ground that his allegations were closely connected with the charges on the indictment, and the result of his making them should not have been cross-examination as to his previous convictions.

(ii) *The Strict Approach*

The precursor of the strict approach which replaced the liberal approach was *Rex v. Wright*[70] in 1910. The accused's evidence that admissions were obtained from him by bribes and threats of a police officer was held to have made an imputation within the section. In 1912, the liberal approach to such a situation was examined and disapproved in *Rex v. Hudson.*[71] The defence to a charge of stealing money from a person in a public house was that one of the other men present at the time, all of whom were called as prosecution witnesses, had stolen the money and placed it in the accused's pocket. A court of five judges was specially constituted to consider whether this defence involved an imputation on the character of prosecution witnesses within the meaning of the section. The Court approved the early decision of *Regina v. Marshall*[72] where Darling J. held that a person charged with murder could be cross-examined as to convictions after evidence had been given that the deceased had been killed by her husband, who was a prosecution witness. It was said that *Rex v. Bridgwater,*[73] *Rex v. Preston*[74] and *Rex v. Westfall*[75] did not lay down a general rule but could be supported on other grounds, so that the suggested distinction between imputations directed solely to credit and those related to facts in issue could be rejected. The Court stated that

> . . . the words of the section . . . must receive their ordinary and natural interpretation, and it is not legitimate 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.[76]

[68] (1944) 69 C.L.R. 561. [69] [1948] 5 S.L.T. 372.
[70] (1910) 5 Cr. App. R. 131. [71] [1912] 2 K.B. 464.
[72] (1899) 63 J.P. 36. [73] [1905] 1 K.B. 131. [74] [1909] 1 K.B. 568.
[75] (1912) 107 L.T. 463. [76] [1912] 2 K.B. 464, 470.

This meant that even if the defence necessarily involved imputations, as when self-defence was raised, or improper circumstances surrounding the obtaining of a confession were alleged, the accused would be liable to lose the protection of the section. This exception to the protective provisions of the section was not applicable solely to imputations which were unconnected with the facts of the case itself, and made with the purpose of impairing credit. Since the accused in *Rex v. Hudson* had alleged that a prosecution witness had committed the theft in question, the case was held to come directly within the exception. *Hudson's Case* was followed in Victoria in 1942 in *The King v. Woolley*[77] where the imputations arose in the form of evidence of the use of violence and threats to procure a confession.

A qualification to this strict approach exists in relation to rape cases. The defence of consent to a charge of rape would necessarily involve an imputation against the character of the prosecutrix, but in *Rex v. Sheean*[78] consent was held not to involve an imputation within the meaning of section 399 (e) (ii). This case was decided prior to *Rex v. Hudson* but was approved of in *Rex v. Turner*[79] in 1944. The Court of Criminal Appeal, while bearing in mind the direction in *Rex v. Hudson* about giving the words their natural meaning and not qualifying them, recognized that as lack of consent is one of the elements of the offence of rape, it would be unjust if the accused by alleging consent lost the protection of the sub-section. The Court said:

> . . . this is one of the cases where the court is justified in holding that some limitation must be put on the words of the section, since to decide otherwise would be to do grave injustice never intended by Parliament.[80]

The accused, in alleging consent, said that the prosecutrix had offered to commit an act of gross indecency, but the court held that questions and evidence directed to details or particulars of the conduct of the prosecutrix which, according to the accused, showed that there was consent would not expose the accused to cross-examination and previous convictions.

In 1944 the House of Lords in *Stirland v. Director for Public Prosecutions*[81] stated a proposition which at first sight appeared to revive the earlier liberal approach to the sub-section. However, it was by way of *obiter* as the matter for determination was the nature of questions that could be put in cross-examination when the protection of the sub-section was lost. Viscount Simon L.C. observed that:

[77] [1942] V.L.R. 123.
[78] (1908) 24 T.L.R. 459.
[79] [1944] K.B. 463.
[80] *Ibid.* 469.
[81] [1944] A.C. 315.

> It is most undesirable that the rule which should govern cross-examination to the credit of an accused person in the witness box should be complicated by refined distinctions involving close study and comparison of decided cases, when, in fact, these rules are few and can be simply stated.[82]

and he then attempted to illuminate the intricacies of section 1 (f) of the Criminal Evidence Act 1898. The fourth of his six propositions is the most relevant here:

> 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....[83]

His Lordship cited *Rex v. Turner* as authority for this proposition. The Lord Chancellor seemed to reaffirm the approach by which imputations necessarily involved in the defence do not come within the exception which covers only those unconnected with the facts of the case.

The High Court of Australia considered this judgment of the House of Lords in *Curwood v. The King*,[84] an appeal from a conviction for unlawful carnal knowledge of a young girl. A majority there held that an allegation that a written confession had been extorted from the accused by threats and physical violence by the police did involve an imputation within the meaning of the sub-section.

Latham C.J., observing that only *Rex v. Turner*, out of a long line of authorities, was cited in *Stirland v. Director of Public Prosecutions*, said that the fourth proposition was not intended to lay down a general rule, but should be confined to cases like *Rex v. Turner*, where there was a denial of an element in the offence. The bare citation of *Rex v. Turner* after the fourth proposition is ambiguous, but was probably meant to show a case where a court did not take the strict approach of *Rex v. Hudson*. On the other hand, it is submitted that the Lord Chancellor was laying down broad principles governing the application of the sub-section, and it is unlikely that the proposition relevant to this part was meant to be confined, as Latham C.J. did, to a particularly narrow range of cases.

Dixon J. understood the fourth proposition to mean that it is not enough that the logical consequences of negativing ingredients in a crime and perhaps evidentiary facts alleged by the Crown is to cast injurious reflections; but when the accused makes his answer rest upon the misconduct imputed, or when he alleges that a confession was obtained by fraud, bribery or intimidation by witnesses who prove it, then the proposition is not meant to apply. If a confession

[82] *Ibid.* 326. [83] *Ibid.* 327. [84] (1944) 69 C.L.R. 561.

was obtained by force it would seem that the proper conduct of the defence would necessitate putting in evidence the circumstances surrounding the confession. Dixon J. said, however, that this line of defence would lay the accused open to cross-examination as to his antecedents, as it was founded upon the imputations while the fourth proposition in *Stirland v. Director of Public Prosecutions* was intended to protect the accused only when the injurious reflections were consequential upon or incidental to his defence.

Starke J. agreed that the fourth proposition of Viscount Simon meant that an imputation was sometimes so connected with the substance of a charge that the prisoner did not lose the benefits of the section, as in *Rex v. Turner,* while at other times imputations were so disconnected from the substance of the charge that they operated to call in the exception to section 399 as in *Rex v. Hudson.* It is not clear whether he used the proposition as narrowly as Latham C.J. but apparently he did not regard it as seriously modifying the strict approach.

McTiernan and Williams JJ., dissenting, regarded the fourth proposition as laying down a general principle which overruled *Rex v. Hudson.*

The Court of Criminal Appeal in *Rex v. Jenkins,*[85] a 1945 decision, held that *Rex v. Hudson* remained good law not being affected by what was said in *Stirland v. Director of Public Prosecutions.* It should be noted that even on a liberal interpretation the accused in *Rex v. Jenkins* would have lost the protection of the sub-section as a deliberate attack was made on the character of the prosecutrix in order to harm her credibility. The courts in England and Australia have not felt constrained by the fourth proposition in *Stirland v. Director of Public Prosecutions* to liberalize the approach to the imputations clause in section 399 (e) (ii) as directed in *Rex v. Hudson,* so that in Australia at least, a trial judge may be expected to rule in accordance with the opinion of the majority of the High Court in *Curwood v. The King,* that anything more than a mere denial of the Crown case and evidence consequential on or incidental to such a denial will render the accused liable to cross-examination as to character. Any allegation of misconduct or imputation on the character of a prosecution witness whatsoever, whether it flows logically from the charge or not, will remove the protection of section 399 (e) except in rape cases.

(iii) *The Discretionary Approach*

The English Criminal Evidence Act contains no provision requiring that permission of the trial judge be obtained before the

[85] 31 Cr. App. R. 1.

prosecution may exercise its rights to attack the character of the accused. But the discretion vested in the judge to allow cross-examination as to antecedents was read into the Act in *Maxwell v. Director of Public Prosecutions*.[86] The provisions in the Victorian Crimes Act have also been interpreted as vesting in the judge a like discretion, even though the words of the proviso may seem only to require of him a decision whether, as a matter of law, the accused has lost the protection of the sub-section.

There has been a tendency in recent decisions of the Court of Criminal Appeal to rely on the discretion of the judge for the protection of the accused rather than to pare away the words of the corresponding English section. In *Regina v. Cook*[87] in 1959, the accused claimed that a confession was extorted from him as a result of threats made by the police that they might prosecute his wife. The Court of Criminal Appeal, dismissing his appeal which was founded on wrongful admission of his criminal record, stated:

> The attempt to give the words a limited construction has led to decisions which it is difficult to reconcile; now . . . that the trial judge has a discretion and that he must exercise it so as to secure that defence is not unfairly prejudiced, there is nothing to be gained by seeking to strain the words of the sub-section in favour of the defence.[88]

And later, in delivering the joint judgment of the Court, Devlin J. summed the issue up succinctly: 'The issue, therefore, becomes one of discretion . . .'.[89] In support of this view, the decision in *Rex v. Turner*[90] was cited. A close examination of the judgment in that case, however, reveals that their Lordships considered that the accused in a rape case owes his privileged position, not to an exercise of discretion, but rather to an overriding implication in the section.

In 1960, an accused, Brown, charged with maliciously inflicting grievous bodily harm, claimed that the informant was in fact the aggressor, and had been driving his car under the influence of intoxicating liquor. The Deputy-Chairman of Quarter Sessions accordingly permitted cross-examination as to antecedents. The Court of Criminal Appeal followed the rule laid down in *Regina v. Cook*[91] that discretion was the key factor. The only comment made on the discretion as actually exercised was that:

> . . . the court thinks that there were grounds upon which the Deputy-Chairman could admit the evidence of his previous conviction and, that being so, this Court will not interfere.[92]

In Victoria, the situation is rather different. The Full Court of the Supreme Court in *The Queen v. Billings*[93] preferred the approach

[86] [1935] A.C. 309. [87] [1959] 2 Q.B. 340. [88] *Ibid.* 347.
[89] *Ibid.* 348. [90] [1944] K.B. 463. [91] [1959] 2 Q.B. 340.
[92] *Regina v. Brown* (1960) 41 Cr. App. R. 181, 187. [93] [1961] V.R. 127.

in *Regina v. Cook* so as to rely on the judge's discretion for the protection of the accused, rather than to apply the rather intricate distinctions drawn by Dixon J. when interpreting the section in the earlier case of *The King v. Curwood.*[94] The Victorian Court in dismissing the prisoner's appeal commented:

> But we apprehend that almost every judge who sits regularly in the criminal jurisdiction must have welcomed the decision in *Cook's Case* with a sigh of relief, and a feeling that here at last was authority for determining in a plain common-sense way whether the nature or conduct of the defence would convey to common-sense jurymen imputations on the character of the prosecution witnesses.[95]

But the stifling of this sigh by the High Court was swift and complete, and in *Dawson v. The Queen*[96] in 1962 (where the accused alleged that the police tampered with his question and answer sheet), Dixon C.J. deprecated the approach which seemed to find the real protection of the accused in the exercise of unfettered judicial discretion:

> There is, I know, a notion that the whole question is or should be reduced to discretion. But this is not what the legislature has said, and means re-writing the Statute.[97]

The Court reaffirmed the principles set out in *The King v. Curwood* in 1944 which, they said, were not in conflict with the decision in *Regina v. Cook.*

Hence, one might say that the fortunes in Australia of the discretionary approach have flowed and ebbed, and that the operative words of section 399 (e) must now first be applied in accordance with the directions set out in *The King v. Curwood.* When an application of the Statute permits the admission of questions as to antecedents, then, and only then, may the trial judge use his general discretion to reject evidence whose prejudice to the accused outweighs the value it might have in advancing the Crown case.

V. Conclusions

The imputations clause as strictly interpreted works some obvious injustices for the accused. A defence counsel may have to decide whether to raise a given defence when he knows this could result in the accused being exposed to cross-examination on matters which could be very damaging. Where there is a criminal record or an unsavoury past to be kept from the notice of the jury, it may be necessary to neglect a given defence, or else not exercise the accused's right to give sworn evidence. Also, the defence may know of matters

[94] (1944) 69 C.L.R. 561.
[95] [1961] V.R. 127, 139.
[96] [1961] 35 A.L.J.R. 360.
[97] *Ibid.* 365.

that would undermine the credit of prosecution witnesses, but it may refrain from disclosing such matters for fear of losing the protection of section 399 (e), with the result that the witnesses will be accorded credit they do not deserve.

The arguments of the Court of Criminal Appeal in *Rex v. Turner*[98] indicate that justice demanded that the accused on a rape charge be free to defend himself by alleging consent on the part of the prosecutrix. The same arguments would seem to apply where an accused seeks to allege self-defence or provocation which, unlike consent in rape, only come in issue if raised by the defence, but it seems that such defences in some circumstances might enable the prosecution to cross-examine as to antecedents. Why should a man charged with unlawful wounding who alleged that he caused the wound while defending himself against an attack by the victim not merit the same consideration as that extended to one who alleges consent on the part of the prosecutrix?

The other obvious injustice arises where the accused seeks to reprobate a confession signed under duress. The admission of the confession can be challenged on a *voir dire* proceeding, in the absence of the jury, and at this stage the defence could safely make imputations. But if the judge allows the confession to be put in evidence, the defence would not have the same freedom as any imputations repeated before the jury could expose the accused to cross-examination as to antecedents.

Latham C.J. in *The King v. Curwood*[99] stated that there were other ways of attacking a confession than by alleging intimidation, but the difficulty arises inasmuch as such an allegation may be true. If such be the case, and this assumption is not inconsistent with the basic principles of the common law, it is an affront to justice that the prisoner should have to place his liberty in jeopardy by making the necessary imputations before the jury. The operation of the section in circumstances such as these entails that an accused with prior convictions is prejudiced merely because of his record, a factor which has no relevance to his guilt in the case at bar. Likewise, the provisions seem to imply that any imputations made by the accused with prior convictions are without substance or that they are immaterial to the case, both of which assumptions smack more of the medieval criminal law than of a system which has, since 1898, assumed the possibility of a prisoner speaking the truth sufficiently real for him to be able to give evidence on his own behalf.

Admittedly, the discretion of the trial judge will in most cases palliate these injustices, but judicial discretion seems too uncertain to be the panacea of a defective section of the law, so that the cry

[98] [1944] K.B. 463. [99] (1944) 69 C.L.R. 561.

has often been for the repeal of the latter half of section 399 (e) (ii) pertaining to imputations.[1] This is especially the case since it has been found so difficult to restrict the operation of evidence to antecedents to the area of proving credibility as distinct from its illegitimate effect of proving propensity. Lord Sankey L.C. in *Maxwell v. Director of Public Prosecutions*[2] was well aware of this danger:

> . . . the question whether a man has been convicted, charged or acquitted ought not to be admitted, even if it goes to creditability, if there is any risk of the jury being misled into thinking it goes not to creditability but to the probability of his having committed the offence of which he is charged.[3]

Thus, in a robbery case, the fact that the accused has been previously convicted of larceny and assault must be put to the jury, if at all, not as evidence that the prisoner is a violent and avaricious man and therefore likely to be guilty, but rather as evidence that his imputations against the police witnesses are not true. Such a nice distinction is almost impossible to draw in the course of a trial, and it must be the law rather than the ignorance of juries that must bear the blame if testimony admitted pursuant to section 399 (e) (ii) is accepted improperly as evidence of criminal propensity.

At this stage then, the very existence of the imputations provisions may be questioned. Nowadays it is realized that an accused is not readily believed when he makes slanderous remarks about the prosecutor, even if they are admitted by the judge. For, despite the legal fiction to the contrary, the prisoner in the eyes of the jury is not in the same position as a Crown witness. There is no true balance at the commencement of the trial, and there seems little reason to suspect that the judge would permit the balance to tip excessively against the Crown, even if the accused could effect this. Moreover, it is not at all clear what good effect the admission of prior convictions can have. Apart from the ambiguous nature of the evidence noted above by Lord Sankey, it has not been shown that the adduction of antecedents can achieve anything but obscurity in a case which, after all, is a question of whether the accused, whatever his character, performed such and such an act. And it must be remembered that the Crown may sometimes adduce evidence to answer imputations relating to matters in issue, so that the conflict of fact may be determined in the usual way by the jurymen.

Assuming that some provision is necessary, it would appear that some distinction should be drawn between imputations which involve the impeachment of the credibility of witnesses by impugning their reliability generally, and those which arise necessarily from

[1] Williams, *Proof of Guilt* (1955) 162; Cross, *Evidence* (1958) 325.
[2] [1935] A.C. 309. [3] *Ibid.* 321.

issues raised by the case. In *The King v. Curwood,* Dixon J. recognized this distinction which would provide 'a satisfactory solution to the difficulties which arise upon the enactment . . . [and which] could readily be applied and . . . would operate fairly to the prisoner'.[4]

Such a distinction would enable the accused to defend himself properly by, for example, alleging duress in the signing of a confession which is raised against him, and which the judge has allowed in on a *voir dire.* The police, of course, may rebut this allegation, and the jury can make up its mind unhampered by the nasty 'irrelevancies' of bad character thrown in from both sides. Nor would the accused be in a more favourable position than that enjoyed by the police with regard to their respective trustworthiness, but, as has been suggested, the contrary is probably nearer the truth. For the argument of Lord Goddard C.J. in *Regina v. Clark*[5] is, with respect, not a convincing one, for it appears to prejudge the issue:

> . . . if misconduct is to be attributed to police officers, the jury is entitled to know the character of the man making the imputation; and it is not to be thought that the man who is making the imputation, if he has a string of convictions, stands in the same position as an inspector of police or any officer who must be a man of good character.[6]

Surely such an observation, even if true, is more relevant to weight and would be more properly made in the final summing up rather than in a ruling as to admissibility.

It is conceded, of course, that since *The King v. Curwood* the acceptance in Australia of this, the 'liberal' approach to section 399 (e) (ii), is little more than a fond hope. The case is strong for a legislative amendment to the existing imputations provision—an amendment in the tradition of the suggestion of Mr S. Evans in the House of Commons debate in 1898,[7] so that the amended section would resemble:

> (e) 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—
>
> (i) . . . ;
>
> (ii) . . . the nature and conduct of the defence is such as to involve imputations on the credibility of the prosecutor or 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;
>
> (iii) . . . .

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[4] (1944) 69 C.L.R. 561. [5] [1955] 2 Q.B. 469. [6] *Ibid.* 479. [7] See p. 488 *supra.*