BROWNE v DUNN

PUTTING A DANGEROUS WEAPON

IN THE HANDS OF A PROSECUTOR

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Introduction

1. Apart from perhaps mention of the name '*Birks'* [1] there are few words that strikes more fear into the hearts of trial counsel than a reference by an opponent, casual or otherwise, to the case of *Browne v Dunn*. [2]

2. The final appeal in *Browne v Dunn* was heard and adjudicated upon by the English House of Lords on 28 November 1893, with counsel for the respondent not being called upon by the bench, so hopeless were the grounds. [3]

3. Boiled down to its essence, what emerged from *Brown v Dunn* to spread its wings far and wide, in civil and criminal cases throughout the common law world, is a rule of so-called '*fairness'*, [4] which requires a party to put witnesses on notice of matters of contention, for comment in advance of a submission that the evidence is not to be accepted ('*the Rule'*). So famous is the Rule that it even has its own, albeit modest, website. [5]

4. However, since then, courts of appeal have regularly issued warnings about the (mis)application of the Rule, and the High Court of Australia has questioned its very use in criminal trials.

5. In practice, the Rule causes problems to this very day, often by either defence counsel's misunderstanding as to the nature and width of the Rule, or by a prosecutor's

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[1] *R v Birks* [(1990) 19 NSWLR 677] ironically, a cautionary tale itself concerning the operation of the eponymous rule, or if you live in South Australia, the word '*Manunta'* [*R v Manunta* (1989) 54 SASR 17, which was decided along the same lines] although these days '*Nudd'* [*Nudd v The Queen* [2006] HCA 9] might give them both a run for their money.

[2] (1893) 6 R 67 – described by Campbell JA in Khamis v R [2010] NSWCCA 179 at [2] as *'a case far more talked about than ever read'*.

[3] Per Lord Chancellor Herschell, Lords Halsbury, Morris and Bowen variously describing the appeal as '*hopeless'*.

[4] Or as esteemed advocacy lecturer Hugh Selby would have it, in practice, sometimes a rule of *un*fairness.

[5] www.brownevdunn.com which was created due to difficulties practitioners had in locating a copy of the original judgment, it being reported in the very short-lived series '*The Reports'*.

misunderstanding of the operation *and* limitations of the Rule. In the hands of an inexperienced, or excitable prosecutor with blood in the nostrils, the Rule can be a dangerous weapon with miscarriage of justice being the potential consequence.

6. The aim of this paper is to explain the metes and bounds of the Rule, particularly in the context of a criminal trial; to demonstrate what the Rule does and does not require in practice; and to educate prosecutors as to the correct manner in which to deal with evidence which might, at first blush, appear to be adduced by a defendant in breach of the Rule.

Birth of the Rule

7. The examined facts of *Browne v Dunn* certainly justify judicial action of some sort. In August 1891 a group of 9 Hampstead residents approached local solicitor Cecil W Dunn, to act for them in an application before the Hampstead Police Court against well-known troublemaker James Loxham Browne, seeking that he be bound over to keep the peace and cease his annoyances of the other residents. Dunn drew up a document in order to obtain the residents' authority to act. When Browne became aware of the document, he brought or threatened actions of libel against all parties to it, including Dunn.

8. At the trial before Mathew J, several of the signatories were called to give evidence. Some were not cross-examined at all, and others were questioned only as to the nature of various quarrels they had with Browne.

9. Whilst it was not suggested to any of the signatories that the document was a sham, and that there was no such agreement with Dunn to act on their behalf, but rather the whole thing was driven by the solicitor's spite, this was the very basis for the case that Browne's counsel put to the jury, which incredibly (with a hindsight lens) was accepted by them with damages awarded damages to Browne.

10. Unsurprisingly, given the rather odd result, Dunn's appeal was successful, but the ever persistent Browne took the matter to the House of Lords.

11. After pronouncing that Browne's appeal was hopeless, Lord Chancellor Herschell then set out the following:

> [I]t seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that

> imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. . . . **[I]f you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him;** and, as it seems to me, that is not only a rule of professional practice in the conduct of a case; but is essential to fair play and fair dealing with witnesses. [6]

12. Lord Halsbury agreed, adding his own gloss as the undesirability of incessant litigation resulting from allowing a party to litigate on one basis, then only later to raise questions about others, citing Dr Blake Odgers in *Martin v Great Northern Railway* to the effect:

> '[y]ou cannot take advantage afterwards of what was open to you on the pleadings, and what was open to you upon the evidence, if you have deliberately elected to fight another question, and you have fought it, and have been beaten upon it'. [7]

13. Whilst concurring with the result, Lord Morris struck a note of caution as to whether it was desirable to *have 'any hard and fast rule as regards cross-examining a witness as a necessary preliminary to impeaching his credit'*:

> **I can quite understand a case in which a story told by a witness may have been so incredible and romancing a character that the most effective cross examination would be to ask him to leave the box. I therefore wish it to be understood that I would not concur in ruling that it was necessary, in order to impeach a witness's credit that you should take him through the story which he had told, by giving him notice by the questions that you impeached his credit.** [8]

14. It is this last observation by Mord Morris that often vexes trial counsel: how much is enough, or too much? Boiled down to its brutalist roots, the Rule is often misinterpreted as requiring a party to '*put'* each and every one of its contrary propositions to all witnesses, in a mechanistic manner. Such an approach, whilst familiar to jurists, must perplex juries, and usually acts to the disadvantage of an accused person, with it being the last thing they hear from any particular witness. It is to be discouraged. [9]

15. As Cox J said in *Ivanoff v Urie*:

[6] At 70-71
[7] At 76
[8] At 79
[9] See: *Ivanoff v Urie* per Cox J (SC(SA) 14 July 1987, unreported) and *R v Costello* (CCA(NSW) 15 December 1995 unreported) both quoted in *Australian Criminal Trial Directions,* Lexis Nexis at [4-1900-20]

> I find myself listening … quite often to a lengthy and detailed recital of the defence case being put for the fourth of fifth time to various prosecution witnesses when it is perfectly plain to everyone …precisely what the issues are. **What is more important is that the defendant should put his version of the facts to the prosecution witnesses in a sufficiently explicit form to enable any answer that is available to be made whilst those witnesses are still in the box.** [10]

16. Even more strongly, in *R v Costello* the NSW Court of Criminal Appeal said:

> The [Rule] does not impose any obligation upon counsel to challenge every word of a witness' evidence upon pain that any word not so challenged will be given greater weight or cogency by reason of his failure to do so. Many counsel appear to think that it does, and a great deal of time is wasted at trials while counsel for the accused suggests that each phrase used or statement by a crown witness is untrue. That has never been necessary, and Crown Prosecutors who submit to juries that any particular phrase or statement not specifically challenged in cross examination should be taken as having been accepted as true, even when the issue has been taken in a general way, misunderstand the rule. [11]

17. In *Thomas v Van Den Yssel* Bray CJ explained:

> And in many other cases the witness must know that the other side will contend that he is not telling the truth, and even in some cases that he is deliberately not telling the truth. I cannot assent to the proposition that counsel cannot argue, or the court find that a witness is deliberately giving false evidence unless the witness is asked some such question as *'I put it to you that your evidence is false'* or *'I suggest that that is a deliberate lie'* or the like. **Indeed, a successful objection might be taken to such as question as needlessly offensive.** [12]

The Rule Far and Wide

18. Almost all common law jurisdictions have adopted the Rule, although all of which have adopted to a greater or smaller degree the cautionary approach of Lord Morris such that its operation is not considered to be *'hard and fast.'* [13] It has been variously described as a

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[10] SC(SA) 14 July 1987 unreported
[11] CCA(NSW) 15 Dec 1995, unreported
[12] (1976) SASR 205 at 207 – in an eerie prelude to s.41 Evidence Act 2011
[13] Other common law nations such as Canada, South Africa, New Zealand, New Guinea, Barbados, Hong Kong, and the island nations of the South Pacific also apply the Rule in general situations involving discrepancies between a witness's testimony and the version presented by the cross-examining counsel. These countries generally apply this rule in a flexible manner that takes into consideration the circumstances of individual cases (cited in Townsend, Susanne*, "To What Extent Is ICTY Rule 90(H)(Ii), ICTR Rule 90(G)(Ii), Or The Rule From Browne V. Dunn, Followed In The Laws Of Different Nations?"* (2006). War Crimes Memoranda. 141. https://scholarlycommons.law.case.edu/war_crimes_memos/14. Of all common law countries, the United States of America stands alone in not recognising the Rule, although the USA does have its own similar statutory rule in limited situations involving prior inconsistent statements and witness 'bias.'

'rule of fairness' or a *'rule of professional practice'* [14] or *'a rule of conduct which is essential to fair play'.* [15]

19. Over the years a number of courts in Australia and elsewhere have pondered over whether the Rule has any proper application in criminal trials. In Scotland it has been held to not operate [16] but in England it does. [17]

20. In Canada the question has only come before the Supreme Court on two occasions. In both cases the court made it clear that, whilst it does apply in criminal trials, flexibility in application is required and in effect, there is no such '*rule'*. [18] In New Zealand, the Rule is said to apply in the administration of criminal justice, which as well as being accusatorial, is also adversarial. [19]

21. In Australia the Rule has been held to operate with particular caution in criminal trials, due to the onus of proof, and its implications for legal professional privilege. [20]

22. In 2004, in *Liristis v R* [21] the NSW Court of Criminal Appeal was asked to rule on a '*radical'* argument that any obligation for an accused to '*put'* his case to crown witnesses is incompatible with the presumption of innocence and the right of an accused not to give or call evidence at trial.

23. Support for this proposition was said to be implied by the High Court decisions of *Azzopardi v The Queen* [22] and *Dyers v The Queen*, [23] both of which decisions dealt with an accused person's right not to give evidence. Kirby J pointed out that the problem with the radical submission, which otherwise had *'much to commend it'* was that the Rule had already been affirmed and reaffirmed in Australia. [24]

24. The 2005 case of *MWJ v R* in the High Court makes it clear that the Rule does indeed apply to criminal proceedings, albeit it must be applied cautiously *'having regard to the essential accusatory character of the criminal trial in this country'*. [25]

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[14] *Birks* at 686E.
[15] *R v LG Wilson* (CCA, NSW, 31 March 1995, unreported, per Hunt J at 17.
[16] *McPherson v Copeland* 1961 SC(J) 74.
[17] *Fenlon* (1980) 71 Cr App R 307 and *R v Lovelock* noted in (1997) Criminal Law Review 821.
[18] In *Palmer v The Queen* [1980] 1 SCR 759 at 781-782 the court agreed with Lord Morris in *Browne v Dunn that 'the effect to be given to the absence or brevity of cross-examination depends upon the circumstances of each case. There can be no general or absolute rule'.* In *R v Lyttle* [2004] 1 SCR 193 at [64] – [65] the court cautioned that the rule is not fixed: *'the extent of its application is within the discretion of the trial judge after taking into account all the circumstances of the case'.*
[19] *Gutierrez v R* [1997] 1 NZLR192
[20] See MWJ v The Queen
[21] (2004) 146 A Crim R 547; [2004] NSWCCA 287
[22] (2001) 205 CLR 50
[23] (2002) 210 CLR 285
[24] *See Peter Schneidas (No 2)* (1981) 4 A Crim R 101; *R v Zorad* (1990) 47 A Crim R 211; and *Birks*.
[25] (2005) 222 ALR 436 per Gummow, Kirby & Callinan JJ at [41]

25. The plurality in that case also noted that the Rule can no more be applied, or applied *'without serious qualification'*, to an accused in a criminal trial than can the not dissimilar rule in *Jones v Dunkel*. [26]

26. In 2018 the High Court again affirmed operation of the Rule in *Hofer v The Queen* [27] noting that:

> [a]s a general rule, defence counsel should put to witnesses for the Crown for comment any matter of significance which is inconsistent with or contradicts the witness's account and which will be relied upon by the defence. [28]

What the Rule Does and Doesn't Require in Criminal Trials

27. Reflecting the different roles in the criminal justice system, the Rule operates on both the prosecution and the defence, although sometimes in different ways. It is essential that prosecutors clearly understand the metes and bounds of the Rule, so, not only do they understand their own responsibilities, but also so that inappropriate responses to perceived breaches by defence counsel do not occur. History tells us that inappropriate prosecutorial responses often do not end well for either side.

<u>The Rule and the Defence:</u>

28. *First,* where the defence is based on denial of the charge, there is no obligation to put to a witness matter of dispute in the evidence which have already been made clear. Thus, whilst very common, either in summary proceedings, or by inexperienced practitioners, the following style of cross examination is neither required, nor desirable:

[26] (1959) 101 CLR 298 and the discussion of that case in *RPS v R* (2000) 199 CLR 620 at [27] – [29] and *Dyers v R* (2002) 210 CLR 285 at [120] – [123], noting that in 2008 the High Court also effectively did away that the rule as it applies to prosecution witnesses in M*ahmood v State of Western Australia* (2008) 237 CLR 397
[27] (2018) 274 CLR 351
[28] Ibid at [18]

Q. That's because Ms [redacted] there wasn't any argument at all in the park was there?
A. Yes there was.

Q. And Mr [redacted] didn't assault you at any time during that, when you were in the park did he?
A. Yes he did.

Q. He didn't kick you?
A. Yes he did.

Q. He didn't push you at any time?
A. Yes he did. Yes he did.

Q. He didn't hit you over the head with a phone?
A. Yes he did.

Q. You didn't fall to the ground at any point did you?
A. Yes I did. Yes I did.

Q. He didn't punch you to the face at all.

[redacted] 32 [redacted] XXN

29. *Secondly,* in keeping with the general caution to be taken and leeway to be given to an accused, it may not be necessary to cross examine to a level of detail, unless it rises to a *'matter of significance'* that would require it as a matter of fairness. [29]

30. In *Llewellyn v R* [30] the NSW Court of Criminal Appeal dealt with a matter in which a sexual assault complainant was cross examined to the effect that she had assisted the accused in removing his pants (to support a claim of consent). The accused gave evidence that the complainant had used the soles of her feet to facilitate that action, but that detail was not put to the complainant in cross examination. The accused was cross examined on his counsel's failure to put that detail.

31. On appeal Hall J said that there had been no breach of the Rule as counsel had put the substance of the allegation to the complainant about her assistance in removing the pants, which was only the means that had been employed. [31] Garling J agreed that there

[29] In conformity with *Hofer* at [18]
[30] [2011] NSWCCA 66
[31] Ibid at [91]

was no obligation on defence counsel to put to the complainant the precise detail of the means by which she assisted the accused in the removal of her clothes. [32]

32. *Thirdly*, there is no obligation by defence counsel to put to any witness a version that arises from another prosecution witness which is inconsistent with the witness' account.

33. In *MWJ v R* [33] the High Court dealt with a sexual offence trial in which only three witnesses gave evidence: the complainant, her mother and the appellant. The mother gave complaint evidence that was somewhat inconsistent with that of the complainant, in that she referred to several incidents at different locations and times, when the complainant gave evidence of only one. The complainant was not asked in chief, or cross examination about the additional incidents.

34. At his trial the appellant sought to rely on the inconsistency, even though he did not cross examine the complainant on that issue. The trial judge took the view that the appellant's failure prevented him from relying on the inconsistency. The High Court disagreed. In this regard the plurality held that it is not for the defence to clear up or resolve inconsistencies in the case for the prosecution. [34]

<u>The Rule and the Prosecution</u>

35. The Rule can cause problems for prosecutors in four main ways:

    a. failing to cross examine a defence witness on a particular issue;

    b. failing to cross examine a prosecution witness (see *MJW* and s.38 cases); and

    c. most problematically – cross examining an accused on matters not put to prosecution witnesses; and

    d. in making submissions about the effect of defence counsel's breach (apparent or otherwise) of the Rule.

[32] ibid at [138]
[33] (2005) 222 ALR 436
[34] At [41] but see what follows from such a situation 'As soon as the inconsistency emerged, and the trial judge rejected the appellant's objection to the evidence intended to be adduced by the complainant's mother, it was open for the prosecution to offer to tender the complainant for further cross examination.

As to (a):

36. In *King v Chief of Army* ADFDAT observed that there is nothing in any authorities to suggest that the rule does not apply equally to both defence and prosecution. [35] In that case the appellant had been charged, inter alia with prejudicial conduct for comments he allegedly made in respect of an impending IGADF Inquiry to a fellow soldiers.

37. The appellant denied that he made some of the comments and challenged the context of some of the other comments. He gave evidence accordingly. Before the DFM he was cross examined but no questions were put to him concerning one of the comments to the effect that his intention was to intimidate one of the more junior officers. The DFM rejected the appellant's evidence.

38. In the view of the Tribunal fairness required the prosecutor in that matter to put to the appellant that the purpose of his comments was to intimidate the soldier, as was ultimately found by the Defence Force Magistrate, and that was in breach of the Rule.

39. However, the Tribunal then went on to consider the implications of the failure to cross examine the appellant on the conversation and found that in the circumstances there had been no denial of procedural fairness.

As to (b):

40. This is a more complex area. Generally speaking, there is no obligation on a prosecutor to put differences of a witness' evidence to that of evidence given by other prosecution witnesses.

41. Indeed, unless permitted to cross examine a witness under s.38 Evidence Act I would suggest that a prosecutor should not do so. It is the duty of the prosecutor to call all relevant and admissible evidence, whether it assists the crown case or not. Often witnesses will vary in their evidence, be it as to observations or what was said and by whom. It is the task of the tribunal of fact to assess all of that evidence accordingly.

42. In the event that a prosecutor wishes to make a submission that the tribunal of fact might reject the evidence of a witness it would be necessary to seek leave to cross examine the witness under s.38 Evidence Act for the purpose of complying with the Rule. As we know the circumstances in which such an application may be made extend to the following:

[35] [2012] ADFDAT 4 at [49]

a. evidence given by the witness which is unfavourable to the prosecution;

b. a matter of which the witness may reasonably be supposed to have knowledge and about which it appears to the court the witness is not, in examination in chief, making a genuine attempt to give evidence; or

c. whether the witness has, at any time, made a prior inconsistent statement.

43. As cross examination under s.38 requires leave of the court and is informed by s.192 considerations, I would suggest that specific advice should always be taken from the DMP prior to embarking on that course.

<u>As to (c):</u>

44. It is this aspect that causes the greatest problems. Cross-examining an accused on matters that were not put by defence counsel is highly dangerous and often is the subject of a deserved complaint on appeal. A number of cases illustrate this point:

45. In *Llewelyn*, the accused was cross examined on his counsel's failure to put to the complainant the means it was alleged the complainant used to assist in the removal of his pants. The cross examination necessarily impacted on the credit of the accused and led to two questions from the jury.

46. The first question being as to whether the crown and defence counsel could make statements or infer that things took place if they knew them to be false, and whether their code of ethics meant that they (counsel) were bound by the same oath as witnesses, [36] a question described by the trial judge as a '*doozy'*. The judge answered this question somewhat opaquely to the effect that counsel act on instructions and issues of honesty, accuracy and reliability are matters for the jury (which no doubt led to speculation as to whose honesty was in issue).

47. The second question drilled further into the ethics of trial counsel and asked whether if he knew something that was untrue (e.g the pulling down of the pants) whether he was restricted by his ethics to suggest that it was true.

48. In answer to this the trial judge infelicitously said something along the lines that *'counsel are human and sometimes they just forget things. It is up to you if you think that is what has happened here'*. [37] The difficulty with that direction was that trial counsel had already

[36] op cit at [60]
[37] Ibid at [76]

dealt with the matter in re-examination of the accused, who had confirmed that he had actually given counsel instructions about the use of the complainant's feet, and that he, as counsel had overlooked that detail when asking questions of the complainant. In short, there was **no issue** ultimately raised by the crown as to whether the accused engaged in a recent invention, but the damage was already clearly done.

49. As has been pointed out above the Court of Criminal Appeal was of the view that this detail was not significant and there had been no breach of *Browne v Dunn*. The impact of the cross examination was considered to be highly prejudicial and condemned by the court.

50. Garling J summarized a number of authorities thus:

    a. where a defence counsel has failed to put something to a prosecution witness in cross-examination, it may be legitimate, depending on the circumstances of the case, to draw *appropriate* conclusions from that failure: *R v Manunta* ; *R v Birks* at 690-692 per Gleeson CJ; *R v Scott* at [41]-[63] per Hulme J.

    b. to suggest that the *only* appropriate conclusion to be drawn is that the accused's evidence should be disbelieved, perhaps as a recent invention or as part of an attack on the credibility of the accused, is a process of reasoning that is fraught with danger and must be approached with caution. There could be many reasons why a defence counsel chose to conduct cross-examination in a particular way: *R v Manunta; R v Birks* at 691-692 per Gleeson CJ; *RWB v R* at [101] per Simpson J.

    c. before a crown prosecutor makes such a suggestion, either in cross-examination of the accused or in summing up to the jury, the crown prosecutor must have a proper basis for it. This is consistent with the specific duties owed by prosecutors, and also the general duties of all barristers: *Whitehorn v The Queen* (1983) 152 CLR 657 at 663-664 per Deane J; rr 35 & 62-64, *NSW Barristers' Rules*.

    d. except in the rarest of cases and only where a proper basis exists, cross-examination of the accused in this manner is highly and unfairly prejudicial to the accused, with the potential to undermine the requirements of a fair trial: *R v Birks* at 703D per Lusher AJ; *R v Dennis* at [45]-[46] per Spigelman CJ; *Picker v R* at [41]-[42] per Smart AJ.

    e. it is unsatisfactory for a crown prosecutor to embark upon this type of cross-examination without a proper basis, and then to rely upon a defence counsel in re-examination or address, or the trial judge in directing a jury during the summing up to try to mitigate the prejudice to the accused. However, if left in this position, the trial judge must, along with giving the usual directions as to the drawing of inferences against the accused, give clear directions to the jury as to the range of possible explanations for a failure by defence counsel to put something to a prosecution witness: *R v Manunta* ; *R v Abdallah* at [24] per Sheller JA; *Picker v R* at [47]-[62] per Smart AJ. [38]

51. Regrettably, the decision in *Llewelyn* did nothing to deter another NSW crown prosecutor from attempting to make something of a failure to put matters to a prosecution witness.

52. In *Hofer v the Queen* [39] the accused gave evidence of eight matters, some more significant than others, that had not been put to the complainant, two of which were alleged to have been made up during the cross examination.

53. Again, in a word against word case the credibility of an accused must be a central issue once they have given evidence. Defence counsel had instructions about a number of these matters, and made forensic decisions to not raise some of them. He did not object to the cross examination.

54. The High Court again was critical of such cross examination: [40]

> The reasoning behind a decision to cross-examine the accused in pursuit of this purpose may readily be inferred. It commences with the fact that a matter is not put by defence counsel; it assumes that the reason for the omission is that counsel was unaware of the matter and that counsel was unaware because the accused had not given an account of it in his or her instructions. The conclusion reached is that the accused must now be making the evidence up.
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> In *R v Manunta*, King CJ observed that an examination of an accused person which proceeds by reference to there being but one reason why a matter has not been put to a witness is "fraught with peril". As his Honour there observed, there may be many explanations for the omission which do not reflect upon the credibility of the accused. His Honour gave as examples defence counsel misunderstanding the accused's instructions or where forensic pressures may have resulted in looseness in the framing of questions. To these may be added the possibility that defence counsel has chosen not to advance certain matters upon which he or she had instructions because they were unlikely to assist the defence.
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> Where there remains a number of possible explanations as to why a matter was not put to a witness, there is no proper basis for a line of questioning directed to impugning the credit of an accused. Except in the clearest of cases, where there are clear indications of recent invention, an accused person should not be subjected to this kind of questioning. The potential for prejudice to an accused is obvious.

[38] At [137]
[39] (2021) 274 CLR 351
[40] At [31] – [34]

> Proceeding on the basis of a mere assumption as to lack of instructions is likely to be productive of further unfairness in the course of the cross-examination. The assumption will inevitably lead to impermissible questions of the accused, put expressly or arising implicitly, as to the actual instructions he or she gave.
> An accused person faced with questioning of this kind is likely to feel obliged to attempt to explain by reference to the instructions he or she in fact gave when in reality the accused carries no such onus. Questioning of this kind may result in the need for counsel or the solicitor for the defence having to disclose those instructions. This is a circumstance which should not arise.

What to do with Defence Evidence apparently in breach of the Rule

55. Because breach of the Rule might have different consequences in different cases, the law has recognized that there needs to be a flexible approach to remedy any prejudice occasioned. In summary these include:

    a. refusal to allow evidence in breach of the Rule;

    b. permitting cross examination by a prosecutor of an accused;

    c. giving appropriate directions to the jury concerning the breach;

    d. permitting the crown to recall a witness to permit the impugned evidence to them.

Refusing an accused to give evidence in breach of the Rule

56. As extreme as a remedy this may sound, there has been some judicial support for this approach, although, at least in NSW it appears that this approach is no longer in favour, for obvious reasons.

57. Peter Schneidas was a notorious criminal who murdered a prison guard. He was described as the *'most hated prisoner'* in NSW.

58. At his trial Scheidas was unrepresented and conducted his own defence. He cross examined a crown witness to the effect that the witness had told three other prisoners that the only reason he was giving evidence was because he didn't like Schneidas. The accused then sought to adduce evidence from the three prisoners as to the specifics of the conversations, but was not permitted to do so.

59. The Court of Criminal Appeal upheld the ruling based on unfairness to the crown, which could have been cured by the crown recalling the witness in reply. [41] The court appeared to be influenced by Schneidas' skill in cross examining. As I said, he was very much hated and no one was willing to give him a hand.

60. Victorian courts have refused to follow *Schneidas*, ruling that there is no power of a court to reject evidence of an accused even if adduced in breach of the Rule. [42]

61. In 2010 this issue came to a head in NSW in *Khamis v Regina*. [43] The trial conducted by Murrell DCJ involved a prosecution solicitor trial advocate and an inexperienced defence barrister.

62. The crown case was that the accused, a Sudanese refugee had sexually assaulted a family friend in her bedroom. The complainant, after finding semen in her underwear, alerted her brother and his girlfriend who were in the house. They confronted the accused and the brother threatened to get a knife. The accused admitted some sexual activity but denied penetration. He said he would marry the complainant.

63. The accused's case was that he went to the complainaint's bedroom and spoke of marriage. She seemed happy with this and she initiated sexual activity. He touched him and he ejaculated. There was no penetration and the activity was consensual. He said that the family tried to extort money from him and when he refused, the police were called. He denied that he had admitted to the brother that to 'correct a wrong' he would marry the complainant. His case was that the brother had slapped the complainant on the face.

64. Defence counsel cross examined the complainant and she agreed that her brother had slapped her although she denied that the brother had said anything to her at the time. The brother and his girlfriend denied the slap occurred and were not cross examined about any conversation that might/might not have occurred at that time.

65. The accused gave evidence. He said the brother had slapped the complainant and said at the time *'you have to say you had sex with [Khamis] or otherwise I will kill you both'.* At this point the trial advocate objected, as the content of the conversation had not been put to the complainant or her brother (or the girlfriend who appeared to be there at the time).

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[41] (1981) 4 A Crim R 101
[42] See *R v Allen* (1989) VR 736 and *Tomasevic v Travaglini* [2007] VSC 337
[43] [2010] NSWCCA 179

66. The trial judge refused to allow the evidence of the accused to stand.[44]

67. On appeal, the CCA held that the allegation was so significant that it should have been put precisely to the complainant, her brother and his girlfriend. Whealey J however noted that there are a number of sanctions that are available for a court's consideration when there has been a breach of the Rule including:

   a. if a witness is not cross examined on a point, opposing counsel may have been taken to have accepted it and may not address to ask the court to not accept the evidence (citing a civil case);

   b. if a witness is not cross examined on a point, there may be a good reason to accept it, particularly if not contradicted by other evidence – unless of course it is inherently unbelievable; [45]

   c. the trial judge can accede to an application to recall the witness under s.46 Evidence Act so that matters not put, should be put to that witness; OR the trial judge might REQUIRE that the witness be recalled; [46]

   d. as in Scheidas, '*at least in this State'* the evidence might be disallowed – although in his Honour's view ***'this should be the last option and not one of first resort';*** and

   e. there may be a need for appropriately fashioned directions, subject to care caution, as was discussed in *RWB v R* [2010] NSWCCA 147. The form of the appropriately cautious direction is set out in the CJA's Bench Book, and attached to this paper.

68. Whealy J held that:

> The [R]ule is not a preclusive rule of evidence. Its breach does not necessarily dictate that evidence may not be called in contradiction. [47] A rule that is grounded in fairness should not be used, except as a last resort, to exclude evidence going to the question whether a person is guilty or not guilty of a criminal charge. That would be to respond to procedural unfairness by imposing substantive unfairness. It is, of course, recognised **in this State** that a power to exclude the evidence exists but, in my opinion, in a criminal trial, concerning evidence that an accused seeks

[44] It appears that the point was not well argued at that stage, and the trial judge did not refer to Schneidas or other conflicting authorities (again – the dangerous weapon had discharged it seems)
[45] As per Lord Morris in *Browne v Dunn* at p8
[46] Quoting *Payless Superbarn (NSW) Pty Ltd v O' Gara* (1990) 19 NSWLR 556 at 557 and *R v Burns* (1999) 107 A Crim R 330
[47] *Scalize v Bezzina* [2003] NSWCA 362

to adduce, it is a power that should, generally speaking, be used sparingly, and only in circumstances where no other option is available.

69. His Honour favoured permitting the evidence subject to the crown recalling the witnesses for further cross examination, for reasons set out below. [48]

Permitting cross examination of an accused

70. For the reasons set out above as discussed in *Llewelyn* and *Hofer* this is a very dangerous course, and potentially productive of unfairness. It is suggested that specific instructions should be sought from the DMP if this course is being considered.

Giving appropriate directions

71. In *R v Abdallah* [49] the court dealt with a case in which a highly experienced QC failed to re-examine his client on an apparent discrepancy between what he had opened to the jury about what he anticipated the evidence would be and what the client said in cross examination. Scheller J said:

> As a practical matter, I do not think that this Court should assume that a barrister even of [Queen's Counsel's] experience could not make such a mistake. Experience does not, unfortunately, preclude error. More importantly, as was noted above, this Court is not primarily concerned with the actual cause of the inconsistency.
>
> Even if the chance of the inconsistency being due to an error or misunderstanding on the part of counsel for the appellant at trial was small, this should none the less have been suggested as a possibility to the jury. The comment of the trial Judge here, though, allowed for no such possibility. The trial Judge's statement that **'you might expect counsel or certainly competent Queen's counsel, to open the case on what he expected the accused to say'** is significant.
>
> This statement was both factually questionable, since even eminent and experienced counsel on occasion make mistakes, and more importantly, inappropriate given the caution recommended in approaching this subject in Birks and Manunta. The emphasis given to [Queen's Counsel's] competence could only have served to reinforce to the jury that the only explanation for the inconsistency was that the accused had changed his story. [50]

72. Various cases have considered what directions might be given when there has been a breach of the Rule which appears to be attributable to an error of counsel.

73. In *Foley v R* [51] the Queensland Court of Appeal said:

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[48] At [52]
[49] [2001] NSWCCA 506
[50] At [27]
[51] [2000] 1 Qd R 290

Sometimes the reason for the omission is itself explored at trial, and it can be seen that the omission reflects only on counsel (or solicitor) and not the accused, then the only available comment would relate to the potential disadvantage to the witnesses or to the crown's case from the omission, with an express statement that this was not the fault of the accused but rather or counsel'. [52]

74. In *RWB* Simpson J similarly observed that:

> Counsel are fallible and more than one inference can be drawn from noncompliance with the [R]ule. Opposing counsel will always suggest that the only, or the proper, inference is that the client (or witness) failed to include the contentious mater in his/her instructions or statement. But the reality is that that is far from the only available inference, and it may be, and often is, quite unfair to suggest to a jury that that is the only inference, or the inference that they should draw'. [53]

75. In *Llewellyn*, as been observed above, as defence counsel had made it clear that the oversight in failing to question the complainant about the detail was his and his alone and as the crown prosecutor had accepted this explanation, then the trial judge should have directed the jury that no issue arose from it, and that they should completely put it out of their minds. Instead it appears that she left the matter to the jury to determine, seemingly, the credit of the accused through the words of his counsel.

76. The authorities make it clear that it is only in circumstances where it is patently obvious that an accused has engaged in recent invention should a court direct a jury in terms adverse to an accused.

Permitting the crown to recall a witness

77. In *Khamis*, Whealey J discussed the evidentiary basis of this approach. In doing so he referred to s.46 Evidence Act, which states:

> (1) The court may give leave to a party to recall a witness to give evidence about a matter raised by evidence presented by another party, and on which the witness was not cross-examined, if the evidence has been admitted and—
>
> (a) it contradicts evidence about the matter given by the witness in examination-in-chief; or
>
> (b) the witness could have given evidence about the matter in examination-in-chief.

[52] At 292
[53] At [101]

(2) A reference in this section to a matter raised by evidence presented by another party includes a reference to an inference drawn from, or that the party intends to draw from, the evidence.

78. His Honour noted that the section appears to have been designed to bring about a consequence that non-compliance with the Rule will not result in the exclusion of the evidence, although a curious aspect of s.46 is that it places the burden of rectifying a breach of the Rule on the innocent party, and not the party in breach. [54]

79. In *MJW* the plurality noted:

> Reliance on the rule in *Browne v Dunn* can be both misplaced and overstated. If the evidence in the case has not been completed, a party genuinely taken by surprise by reason of a failure on the part of the other to put a relevant matter in cross-examination, can almost always, especially in ordinary civil litigation, mitigate or cure any difficulties so arising by seeking or offering the recall of the witness to enable the matter to be put. In criminal cases, **in many jurisdictions**, the salutary practice of excusing witnesses temporarily only, and on the understanding that they must make themselves available to be recalled if necessary at any time before a verdict is given, is adopted.
>
> There may be some circumstances in which it could be unfair to permit the recalling of a witness, but in general, subject to the obligation of the prosecution not to split its case, and to present or make available all of the relevant evidence to an accused, the course that we have suggested is one that should be able to be adopted on most occasions without injustice. [55]

80. Finally, when *Hofer* was before the NSW Court of Criminal Appeal Fullerton J proposed the following procedure when the Rule had not been complied with:

> Where the prosecutor identifies in the accused's evidence a fact or state of affairs not put to crown witness for comment, before embarking on cross examination of an accused, the prosecutor should seek leave to re-open the crown case for the limited purpose of having the witness recalled. This will allow cross examining counsel to put the matter to the witness, or, if counsel does not wish to (for valid forensic reasons), for the crown to invite the witness to comment on the matter volunteered by the accused, including by way of permitted leading questions.

[54] At [51] quoting ALRC Report on Evidence No 38 Ch 7, item 115(h)
[55] At [40]

> In making the application to recall the witness, the circumstances underpinning the failure to cross examine will be exposed, either deliberate or inadvertence or carelessness. [56]

Conclusion

81. The Rule is not a **hard and fast rule**; it is more of a tradition to ensure fairness.

82. It operates differently in civil and criminal cases, particularly due to the accusatorial nature of criminal proceedings.

83. When confronted with an apparent breach of the Rule by defence counsel, a prosecutor should calmly consider the reasons for, and impact of the possible breach, and not blithely embark upon a cross examination, which properly considered may not have a reasonable basis, and which might lead to incurable prejudice.

84. The best course of action is perhaps that suggested by Fullerton J in Hofer and Whealy J in Khamis, i.e to recall the witness and make them available for further cross examination, and if the issue remains unexplored to invite the witness to comment on the impugned evidence.

85. Exclusion of evidence adduced in breach of the Rule should not be sought (except perhaps as a case of last resort).

86. A judge should give appropriate, and measured directions about the implications of any such breach of the Rule, including to the effect that no one – even defence barristers – are perfect and mistakes and omissions can occur.

Presented to the ODMP on 22 January 2025

[56] [2019] NSWCCA 244 at [113]-[114]