CREDIBILITY EVIDENCE

ATTACK AND DEFENCE
EA: S 103 & 104

BY

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Contents

INTRODUCTION

This paper is about credibility evidence. It has two objects:

1) to identify some of the boundaries for defence lawyers when attacking the credibility of crown witnesses; and

2) to provide guidance in understanding when an attack on a crown witness will expose the accused to evidence that is adverse to his or her credibility (especially his / her criminal record)

Hence this paper focuses on sections 103 and 104 of the Evidence Act. The paper is in three parts. Part 1 focuses on section 103. Part 2 focuses on section 104. Part 3 includes some miscellaneous points.

PART 1: ATTACKING THE CREDIBILITY OF CROWN WITNESSES

1) The credibility rule

A defence lawyer will often challenge the credibility[1] of a crown witness. This usually occurs during cross-examination.

A defence lawyer may only do this by adducing evidence that is admissible.

The credibility provisions of the Evidence Act (Part 3.7) will often determine whether or not such evidence is admissible.

The credibility rule (s 102) prohibits evidence that is only relevant because it affects the assessment of the credibility of a witness.

Prosecutors, therefore, will often use the credibility rule to justify an objection to certain cross-examination. Defence lawyers will need to respond to these objections by making one of two arguments:

a) the evidence is relevant for another purpose i.e. not just because it affects the credibility of the witness (so the credibility rule does not apply); or

b) the evidence can "substantially affect" the credibility of witness (so an exception to the credibility rule applies: s 103)

These arguments are discussed further below.

[1] "Credibility" is defined in the dictionary of the Evidence Act. See also further discussion of the definition in *R v XY* [2013] NSWCCA 121 per Basten JA at [49].

2) Arguing that the credibility rule does not apply (circumventing the rule)

If evidence is relevant for a reason other than just the credibility of a witness, it will not be excluded because of the credibility rule.

This is provided that the evidence is admissible when adduced for that other purpose.[2]

Thus, lawyers that can identify an additional permissible reason for adducing certain evidence will avoid the evidence being excluded by s 102.

A simple example illustrates this point. Assume that X is charged with assaulting Y. The issue is self-defence. A witness testifies that X committed an unprovoked assault on Y. The defence lawyer then adduces a contemporaneous prior statement made by the witness where he asserted that X only assaulted Y after being repeatedly punched and kicked by Y.

The prior inconsistent statement would (1) be relevant to the credibility of the witness; and (2) also be relevant in determining whether or not X acted in self-defence. The evidence would therefore not be excluded by the credibility rule.

Thus, in many cases, lawyers will be able to circumvent the credibility rule by identifying proper alternative reasons for adducing the evidence.[3]

If, however, the rule cannot be circumvented, defence lawyers will need to rely on an exception to the credibility rule, usually that created by section 103.

3) Arguing that an exception to the credibility rule applies: s 103

Section 103 permits a cross-examiner to adduce credibility evidence if the evidence could substantially affect the assessment of the credibility of the witness.

This means the admissibility of certain evidence will often turn on the degree to which it can affect the witness's credibility.

Section 103 provides limited guidance as to what "substantially affect" means. Some relevant considerations are listed in section 103(2) which says:

(2) Without limiting the matters to which the court may have regard for the purposes of subsection (1), it is to have regard to:

[2] See Evidence Act s 101A which was inserted as a response to Adam v The Queen (2001) 207 CLR 96.
[3] There is often no clear dividing line between evidence relevant to a fact and evidence relevant only because it affects the credibility of a witness. See for example, what was said in *Peacock v R & Peacock v R* [2008] NSWCCA 264 [27] – [61]; *Palmer v The Queen* [1998] HCA 2 at [51] – [53].

> *(a) whether the evidence tends to prove that the witness knowingly or recklessly made a false representation when the witness was under an obligation to tell the truth, and*
>
> *(b) the period that has elapsed since the acts or events to which the evidence relates were done or occurred.*

No authority precisely defines the meaning of the phrase "substantially affect" in s 103. However, some guidance is offered by cases that discussed the previous version of s 103 which included the phrase "substantial probative value" rather than "substantially affect" etc. For instance in *R v RPS* (CCA unreported 13 August 1997) the Court said (at [29]):

> *The addition of the word "substantial" nevertheless imposes a limitation upon the common law, when almost anything was allowed upon the issue of credit unless it clearly had no material weight whatsoever upon that issue. That limitation is an important one.*

In *Stanoevski v The Queen* [2001] HCA 4 the Court said at [35]:

> *presumably the adjective "substantial" calls for something more than mere probative value.*

In *R v El-Azzi* [2004] NSWCCA 455 the Court said at [183]:

> *In my opinion, for this evidence to have had substantial probative value within the meaning of s103(1), it must have had the potential to have a real bearing upon the assessment of the appellant's credibility – and, particularly, to the appellant's credibility in relation to the evidence he had given, or would give, at the trial. It cannot have had substantial probative value for the purposes of s103(1) unless it was capable, in a significant way, of bearing upon that assessment.*

In *Regina v Lodhi* [2006] NSWSC 670 Whealy J said at [19] – [20]:

> *To my mind, there must be such a connection between the evidence to be admitted and the credit of the witness at the time of giving the evidence that the former is likely to affect the latter in a substantial way. That seems to me to be the import of the matters set out in s 103(2) to which the Court must have regard when determining whether the evidence is of sufficient probative value so as to justify admission, notwithstanding the credibility rule.*
>
> *Those matters set out in sub-ss 2(a) and (b) in s 103 are not the only matters the Court may take into account when determining whether to admit the evidence, but they do highlight the fact there must be a real correlation between the evidence to be admitted and the credit of the witness. In*

> *addition, they are reliable indications as to the type of evidence that will satisfy the statutory hurdle.*

It is unlikely that a clear line of demarcation will ever be defined between evidence that can and cannot "substantially affect" the credibility of a witness. With this in mind, lawyers may benefit from becoming familiar with previous examples where the section was applied.

Examples (not involving dishonesty)

Some examples that are likely to "substantially affect" the assessment of a witness's credibility include (Nb: this list was largely based on Odgers, S *Uniform Evidence Law* 9th Ed, Thomson Reuters, p 503):

- Bias (see for example Kamm v Regina [2008] NSWCCA 290)
- Motive to be untruthful (see for example R. v. Sullivan [2003] NSWCCA 100 see [108])
- Opportunities of observation
- Reasons for recollection
- Powers of perception and memory
- Prior inconsistent statements (this might include an alibi notice: see *Regina v Toai* Siulai [2004] NSWCCA 152)
- Internal inconsistencies and ambiguities in testimony
- Prior discussion about the facts of the case (see for example *Day v Perisher Blue Pty Ltd* [2005] NSWCA 110)

Anyone who has watched cross-examination would have routinely seen some of the above topics explored without any objection from the other party. In some instances, these matters would not even be caught by the credibility rule.

Examples (involving dishonesty)

Greater difficulty arises when considering prior acts of dishonesty. This difficulty is explained by Whealy J in *Regina v Lodhi* [2006] NSWSC 670 at [23] – [24]:

> *The Crown concedes, and I think very fairly so, that not every lie that is told has substantial probative value. Far from it. We are all familiar with little white lies that are told, sometimes to get people out of an embarrassing situation, sometimes even to avoid hurting or confronting other people. Those sort of lies stand at one end of the spectrum. At the other end, there are the*

*types of lies that are envisaged in sub-s 2 of s 103 of the **Evidence Act**. I gave an example during the course of the argument that seems to me to have some substance: where, for example, a person may fill out the form required for the provision of a pension or social services and, in that form, make deliberately false and misleading statements, in circumstances where if the truth were told the person would not be entitled to the pension or social benefit concerned. Such a lie stands at the opposite end of the spectrum. The question which arises here is, what are we really dealing with?*

Authorities reveal the following matters have satisfied s 103 (either under the current or former wording of the section):

- A false statement in a previous job application by the accused: *R v Lodhi* [2006] NSWSC 670

- Previous fraud convictions: *R v Ronen & Ors* [2004] NSWSC 1290

- Previous convictions for 'goods in custody' and supplying drugs: *R v Lumsden* [2003] NSWCCA 83 (CCA majority 2 -1)

- Previous convictions for dishonesty offences : *R v Burns* [2003] NSWCCA 30 (CCA majority 2 – 1)

- Lies about other damages in a tort claim: State *Rail Authority of NSW and Anor v Brown* [2006] NSWCA 220

- A previous criminal conviction for corruption: *R v El-Azzi* [2004] NSWCCA 455. Although note in this case the witness (who was the accused) was a former police officer. While the Court was satisfied that the criminal conviction for corruption did satisfy s 103, two internal departmental charges involving dishonesty did not.

Before attacking the credibility of a crown witness on subjects such as those listed above, however, it is important to consider the consequences for the accused. This is governed by the next section of the Evidence Act - section 104.

PART 2: PROTECTING THE ACCUSED

Introduction

An accused may become more vulnerable to attacks on his/her own credibility as a result of a defence lawyer's cross-examination of a crown witness.

This has traditionally been referred to as the accused "throwing away his/her shield."

The Evidence Act ensures that that the accused will only "lose the shield" in certain circumstances.

This is because section 104 of the Evidence Act creates various restrictions on the prosecutor:

104 Further protections: cross-examination as to credibility

(1) This section applies only to credibility evidence in a criminal proceeding and so applies in addition to section 103.

(2) A defendant must not be cross-examined about a matter that is relevant to the assessment of the defendant's credibility, unless the court gives leave.

(3) Despite subsection (2), leave is not required for cross-examination by the prosecutor about whether the defendant:

(a) is biased or has a motive to be untruthful, or

(b) is, or was, unable to be aware of or recall matters to which his or her evidence relates, or

(c) has made a prior inconsistent statement.

(4) Leave must not be given for cross-examination by the prosecutor under subsection (2) unless evidence adduced by the defendant has been admitted that:

(a) tends to prove that a witness called by the prosecutor has a tendency to be untruthful, and

(b) is relevant solely or mainly to the witness's credibility.

(5) A reference in subsection (4) to evidence does not include a reference to evidence of conduct in relation to:

(a) the events in relation to which the defendant is being prosecuted, or

(b) the investigation of the offence for which the defendant is being prosecuted.

(6) Leave is not to be given for cross-examination by another defendant unless:

(a) the evidence that the defendant to be cross-examined has given includes evidence adverse to the defendant seeking leave to cross-examine, and

(b) that evidence has been admitted.

Section 104 is voluminous. In my view, it is best understood by recognizing that it essentially requires the court to undertake two separate exercises in order to determine the restrictions that will apply to a prosecutor:

1. First, it requires the court to carefully examine the evidence that the prosecutor intends to adduce; and

2. Secondly, (if necessary) it requires the court to carefully examine the evidence adduced by the defence lawyer to impugn the credibility of a crown witness

When these two processes are undertaken, a number of discrete hurdles become apparent. The prosecutor will need to overcome these hurdles before the evidence can be adduced.

These two processes and the various hurdles are discussed further below. There is also a diagram annexed to this paper that attempts to make this clearer. The diagram demonstrates that ultimately there are three possible outcomes:

1. The prosecutor will be allowed to cross-examine the accused

2. The prosecutor may be allowed to cross-examine the accused

3. The prosecutor will not be allowed to cross-examine the accused

Process 1: Considering the evidence that the prosecutor intends to adduce

When the proposed evidence of the prosecutor is properly examined by the court, the prosecutor will face two hurdles:

a) If the proposed evidence cannot substantially affect the credibility of the accused it will be excluded: s 103, s 104(1)

b) If the evidence does not fall within a confined set of subject areas the prosecutor will need to seek leave: s 104(3)

1a) Substantially affect: Section 103, 104(1)

The prosecutor, just like a defence lawyer, is limited by sections 102 and 103 of the Evidence Act. Section 104(1) says this section "applies in addition to section 103."

Thus, if a defence lawyer is able to convince the court that the proposed evidence cannot "substantially affect" the *credibility* of the accused, the evidence will be excluded. The other subsections of s 104 will not need to be examined.

Attempts to elicit previous convictions of the accused, for example, will often fail at this hurdle, especially if the previous convictions do not involve dishonesty.

In *R v Hancock* NSWCCA (unreported 21/11/1996) the crown was erroneously granted leave under section 104 to elicit an accused's previous conviction for assault. Gleeson CJ (with James and Dowd JJ agreeing) said:

> *I have serious difficulty in understanding how the evidence in any respect went to the credibility of the appellant. I cannot understand how it could be described as evidence that was relevant only to the credibility of the appellant.*
>
> *There are, of course, some kinds of prior convictions of an accused person which are relevant, and perhaps relevant only, to the credit of the accused. To take a simple and extreme example, if cross-examining counsel had desired to put to the appellant that she had on a previous occasion been convicted of perjury, that would have been material that went only to her credit. The same might apply if she had been cross-examined about some previous history of dishonesty.*
>
> *I do not suggest that evidence going to credibility is limited to evidence of that kind. I simply give those as examples.*
>
> *Here, however, the prior conviction was a conviction for assault on a previous occasion when the appellant was drunk. That cannot properly be said to have been evidence that went only to her credibility. On the contrary the evidence, in my view, was plainly tendency evidence of the kind the subject of Pt3.6 of the Evidence Act.*

If, on the other hand, the proposed evidence does meet the test in section 103, the court will need to further consider the subject matter of the evidence.

1b) Section 104(3)

If the crown only intends to cross-examine the accused about whether the accused:

> *(a) is biased or has a motive to be untruthful, or*
>
> *(b) is, or was, unable to be aware of or recall matters to which his or her evidence relates, or*

(c) has made a prior inconsistent statement

then leave will not be required: see 104(3). The prosecutor will simply be entitled to cross-examine the accused (subject of course to discretionary exclusion or other rules of Evidence). [See outcome 1 on the attached diagram].

If, however, the prosecutor intends to go beyond these subject matters then the court will need to undertake the second process and analyse the evidence presented by the defence lawyer to impugn the crown witness.

Process 2. Considering evidence adduced by the defence lawyer: 104(4), 104(5)

The court will need to closely examine the evidence presented by the defence lawyer to impugn the crown witness. After considering such evidence the court MUST NOT grant leave to the prosecutor unless the evidence used to attack the crown witness was:

a) actually admitted AND

b) relevant mainly or solely to the witness's credibility AND

c) unrelated to the events surrounding the charge(s) AND

d) unrelated to the investigation of the relevant charge(s)

The four obstacles above provide some points of focus to defence lawyers when arguing that leave must not be granted.

If a defence lawyer successfully argues that one of these hurdles applies then the crown must not be granted leave (see outcome 3 on the diagram).

If defence lawyers are unable to persuade the court that one of these obstacles applies then lawyers cannot submit that leave must not be granted. However, lawyers may still argue that:

e) Leave should not be granted: s 192 and / or

f) The evidence should still not be admitted: s 137

These points (a) – (f) are discussed further below.

2a) The evidence used against the crown witness has to have actually been admitted

A defence lawyer may attempt but fail to elicit material that is adverse to a witness's credibility. For instance, this may occur if the witness refuses to accept certain propositions and there is no other source of the evidence.

If this occurs, a prosecutor will not be entitled to leave under section 104 because no evidence adverse to the witness "has been admitted": see section 104.

2b) The evidence elicited to attack the crown witness has to be relevant mainly or solely to the witness's credibility

If the evidence elicited during cross-examination of the crown witness was not "relevant solely or mainly" to the witness's credibility then leave to the prosecutor must not be granted.

This means if defence lawyers can persuade the court that the evidence he or she elicited was relevant for a purpose other than the witness's credibility, leave must not be granted to the prosecutor.

Some cases will turn on this point. See for instance, the cases of *Hancock* and *Diamond* below.

R v Hancock NSWCCA (unreported 21/11/1996)

The appellant was convicted of assault occasioning actual bodily harm. The case involved a fight between the appellant and the complainant, Rachel Cryer. Self-defence was raised. The case turned on who started the fight.

Trial counsel cross-examined the complainant about a previous incident when she had attacked a man with a hammer. There was no dispute this had happened. There was also no dispute that the appellant was aware of the incident.

On appeal, it was common ground that this was legitimate cross-examination as it was important evidence relevant to the issue of self-defence.

As a result of this cross-examination, the crown was granted leave under s 104 to cross-examine the appellant about a previous conviction for assault.

The court found the granting of leave to be an error. This is because the prior conviction of the appellant was not relevant to the appellant's credibility (Gleeson CJ's comments have already been referred to earlier in this paper.)

However, this appears to be a case where the defence has clearly elicited the material for a purpose other than simply impugning the credibility of the crown

witness. That is, the material was elicited to properly raise and explain self defence. Hence, leave must not be granted.

R v Diamond NSWCCA (unreported 19/6/1998)

The appellant was convicted of wounding with intent to do grievous bodily harm. The appellant and the victim were both prisoners at Long Bay CC. The victim said he was attacked by the appellant in the prison yard. The motive, as presented by the crown, was the victim's failure to obtain drugs for the appellant.

The appellant denied responsibility for the offence and claimed to have arrived at the scene shortly after the attack. The appellant also denied having the suggested motive.

Defence counsel sought to cross-examine the victim about first, his criminal record and secondly, dishonest comments made by the victim to the investigating police in this matter about why he was in jail (essentially he downplayed the seriousness of his past crimes).

Before commencing cross-examination, defence counsel sought a ruling from the Trial Judge as to whether or not this would allow the appellant to be cross-examined about matters relevant only to the appellant's credibility.

Defence counsel argued that such leave should not be granted to the prosecutor because the proposed attack on the victim was not confined to the victim's credibility. That is, the evidence would be relevant in another respect.

Specifically, defence counsel sought to cross-examine the victim about the fact he had raped his ex-wife. Defence counsel argued, that that would make him a popular target in the jail and thus a lot of prisoners (and not just the appellant) would have a motive to assault him.

The trial Judge rejected this argument. The Trial Judge contrasted the victim's offence on his ex-wife with one of child sexual assault (which more commonly attracts reprisal attacks within jails) and ruled that the evidence was relevant mainly to the victim's credibility. Hence, the Judge indicated that this would entitle the crown to cross-examine the appellant on matters relevant only to his credibility.

This decision was endorsed on appeal.

2c) The evidence used against the crown witness has to be unrelated to the events surrounding the charge(s)

2d) The evidence used against the crown witness has to be unrelated to the investigation of the relevant charge(s)

These two obstacles appear to exist to ensure that an accused may only be cross-examined about credibility when crown witnesses are attacked about matters unrelated to the matters before the court. It ensures defence lawyers can properly cross-examine witnesses about the events in question without fearing that their clients' prior convictions will be admitted.

2e) Leave should not be granted: Section 192

If a prosecutor overcomes the above hurdles, it does not mean that leave MUST be granted.

It simply means that the prosecutor has overcome the restriction that leave MUST NOT be granted (ie outcome 2 rather than 3 applies – see diagram).

Hence, the court will need to further consider whether or not leave SHOULD be granted.

This will require consideration of the factors listed in section 192 (listed below).

192 Leave, permission or direction may be given on terms

(1) If, because of this Act, a court may give any leave, permission or direction, the leave, permission or direction may be given on such terms as the court thinks fit.

(2) Without limiting the matters that the court may take into account in deciding whether to give the leave, permission or direction, it is to take into account:

(a) the extent to which to do so would be likely to add unduly to, or to shorten, the length of the hearing, and

(b) the extent to which to do so would be unfair to a party or to a witness, and

(c) the importance of the evidence in relation to which the leave, permission or direction is sought, and

(d) the nature of the proceeding, and

(e) the power (if any) of the court to adjourn the hearing or to make another order or to give a direction in relation to the evidence.

An example where leave might be refused could be where:

- a defence lawyer is well aware of her own client's previous convictions for perjury and is being careful when cross-examining the key crown witness
- the key crown witness falsely and unresponsively asserts that "I have never lied in my life"
- the defence lawyer then introduces the witness's previous convictions for making false statements
- if the prosecutor later seeks leave to introduce the accused's convictions for perjury, it may be appropriate to refuse leave

2f) The evidence should still not be admitted: Section 137

Similarly, arguments can always be made for exclusion under s 137 (although these arguments are usually more effective in Jury Trials than in the Local Court).[4]

[4] Sections 192 and 137 were both considered extensively in *R v El-Azzi* [2004] NSWCCA 455.

PART 3: MISCELLANEOUS

1. Advanced Rulings

Lawyers will often be uncertain about whether or not an attack on a crown witness will expose their clients to certain adverse evidence.

In these situations, lawyers may seek an advanced ruling from the Trial Judge.[5] This is because of s 192A of the Evidence Act which says:

192A Advance rulings and findings

Where a question arises in any proceedings, being a question about:

(a) the admissibility or use of evidence proposed to be adduced, or

(b) the operation of a provision of this Act or another law in relation to evidence proposed to be adduced, or

(c) the giving of leave, permission or direction under section 192,

the court may, if it considers it to be appropriate to do so, give a ruling or make a finding in relation to the question before the evidence is adduced in the proceedings.

2. What direction is required if the adverse evidence is admitted?

If the prosecutor is successful in having material elicited under section 104, a direction will still be required. The direction needs to ensure that the evidence is only used for assessing the *credibility* of the accused. For example, this is part of the direction given at the trial of *El-Azzi*: (at [245]):

> *It is very important that you understand that that cross-examination was directed to the accused's credibility only. I emphasise that the evidence is not to be accepted by you as in any way persuasive of the accused's guilt of any one of the three charges that you are now considering, or as evidence the accused was likely to commit these particular offences. The evidence is there solely for the purpose of permitting you to assess the accused's credibility if you think it is in fact relevant to his credibility. That is all I need say about it at this stage.*

[5] See *R v Kocoglu [2012] VSC 185* for an example of an advanced ruling where these provisions were considered.

3. Is not calling your client a sufficient remedy? Evidence Act 108B

Even when a defence lawyer has determined that his/her client will not be giving evidence, s/he will still need to carefully consider the implications of attacking the credibility of crown witnesses.

This is especially the case if the accused has given a record of interview or other 'out of court statement'.

This is because of section 108B of the Evidence Act: which applies in addition to 108A. This sections govern the admissibility of credibility evidence for witnesses that do not give evidence. Both sections are listed below:

108A Admissibility of evidence of credibility of person who has made a previous representation

(1) If:

(a) evidence of a previous representation has been admitted in a proceeding, and

(b) the person who made the representation has not been called, and will not be called, to give evidence in the proceeding,

credibility evidence about the person who made the representation is not admissible unless the evidence could substantially affect the assessment of the person's credibility.

(2) Without limiting the matters to which the court may have regard for the purposes of subsection (1), it is to have regard to:

(a) whether the evidence tends to prove that the person who made the representation knowingly or recklessly made a false representation when the person was under an obligation to tell the truth, and

(b) the period that elapsed between the doing of the acts or the occurrence of the events to which the representation related and the making of the representation.

108B Further protections: previous representations of an accused who is not a witness

(1) This section applies only in a criminal proceeding and so applies in addition to section 108A.

(2) If the person referred to in that section is a defendant, the credibility evidence is not admissible unless the court gives leave.

(3) Despite subsection (2), leave is not required if the evidence is about whether the defendant:

(a) is biased or has a motive to be untruthful, or

(b) is, or was, unable to be aware of or recall matters to which his or her previous representation relates, or

(c) has made a prior inconsistent statement.

(4) The prosecution must not be given leave under subsection (2) unless evidence adduced by the defendant has been admitted that:

(a) tends to prove that a witness called by the prosecution has a tendency to be untruthful, and

(b) is relevant solely or mainly to the witness's credibility.

(5) A reference in subsection (4) to evidence does not include a reference to evidence of conduct in relation to:

(a) the events in relation to which the defendant is being prosecuted, or

(b) the investigation of the offence for which the defendant is being prosecuted.

(6) Another defendant must not be given leave under subsection (2) unless the previous representation of the defendant that has been admitted includes evidence adverse to the defendant seeking leave.

Conclusion

It is clear from the above that the credibility provisions are nuanced. Careful consideration of the provisions will allow defence lawyers to zealously cross-examine prosecution witnesses without enabling the prosecutor to introduce damning material about their clients.

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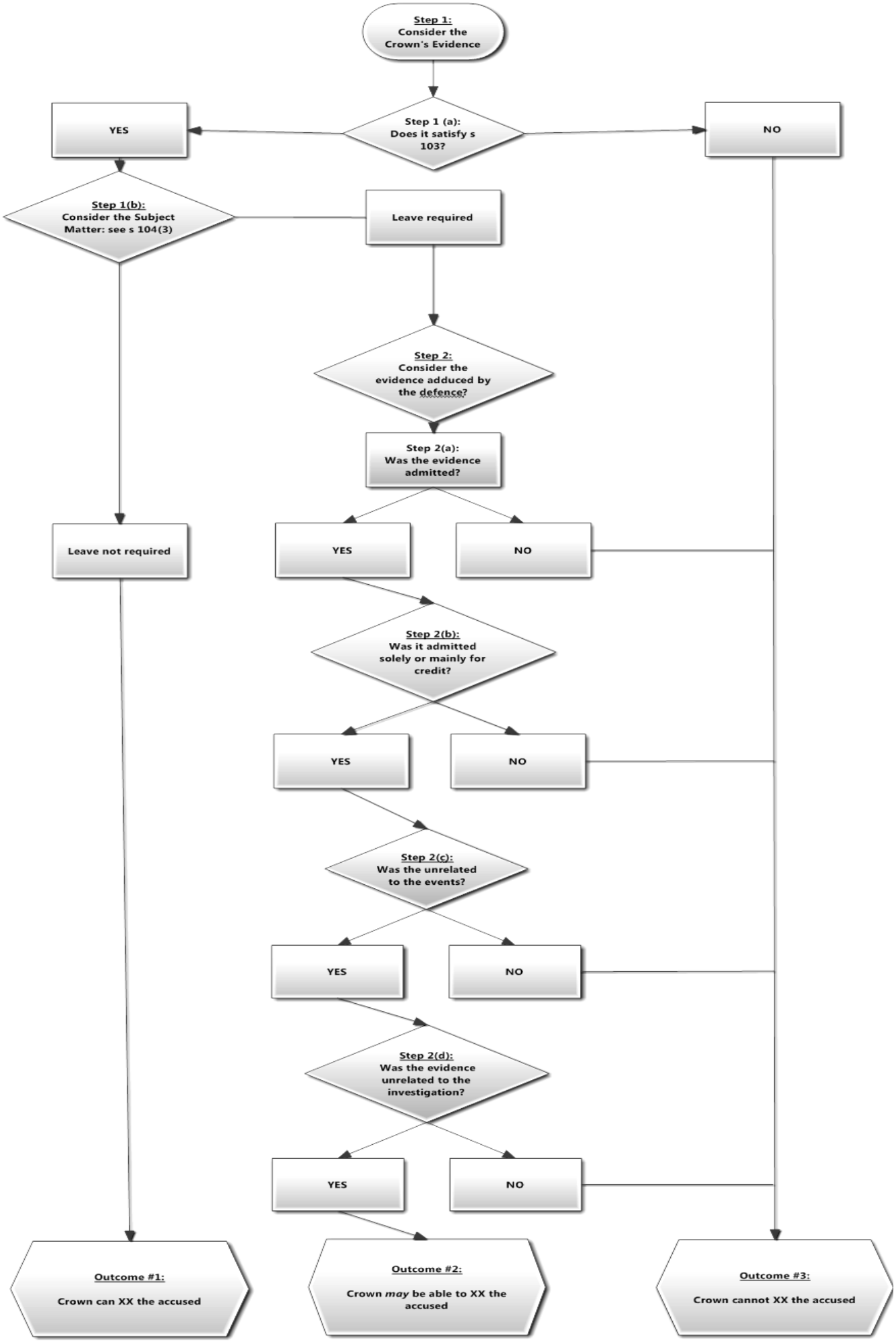
Step 1:
Consider the Crown's Evidence
Step 1 (a):
Does it satisfy s 103?
YES
NO
Step 1(b):
Consider the Subject Matter: see s 104(3)
Leave required
Leave not required
Step 2:
Consider the evidence adduced by the defence?
Step 2(a):
Was the evidence admitted?
YES
NO
Step 2(b):
Was it admitted solely or mainly for credit?
YES
NO
Step 2(c):
Was the unrelated to the events?
YES
NO
Step 2(d):
Was the evidence unrelated to the investigation?
YES
NO
Outcome #1:
Crown can XX the accused
Outcome #2:
Crown may be able to XX the accused
Outcome #3:
Crown cannot XX the accused