RECENT DECISIONS ON EVIDENCE

CRIMINAL LAW MASTERCLASS: PULLMAN HYDE PARK, SYDNEY

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EVIDENCE UP DATE ON THE APPLICATION OF THE RULE OF *BROWNE & DUNN* IN CRIMINAL TRIALS

Introduction

I have focused in this paper on a number of recent appellate cases of note discussing the application of the rule of *Browne v Dunn* in criminal trials.

The Rule

The *"*rule of *Browne v Dunn"* in hearings and trials alike commonly arises across the jurisdictions. It is a rule derived from the civil case of *Browne v Dunn* (1894) 6 R 67 involving an action for defamation tried before a jury. Justice Campbell JA in the case of *Khamis v The Queen* 203 A Crim R 121, referred to it as a *"case far more often talked about than read"*. The relevant passage by Lord Herschell, LC of the judgment at p 70-71 is therefore worth quoting in full:

> ..it 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. My Lords, I have always understood that if 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. Sometimes reflections have been made upon excessive cross-examination of witnesses, and it has been complained of as undue; but it seems to me that cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth, I meant upon a point on which it is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the

> credibility of the story which he is telling. Of course I do not deny for a moment that there are cases in which that notice has been so distinctly and unmistakably given, and the point upon which he is impeached, and is to be impeached, is so manifest, that it is not necessary to waste time in putting questions to him upon it. All I am saying is that it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestions whatever in the course of the case that his story is not accepted.

Although the rule in *Browne v Dunn* was developed as a rule of the common law, it has remained applicable notwithstanding the introduction of the *Evidence Act* 1995 (NSW): *Heaton v Luczka* [1998] NSWCA 104 at 3 per Beazley JA (with whom Cole and Stein JJA agreed).

The rule was restated in *MWJ v The Queen* (2005) 80 ALJR 329; [205] HCA 74 Gummow, Kirby and Callinan JJ stated at [38]:

> The rule is essentially that a party is obliged to give appropriate notice to the other party, and any of that person's witnesses, of any imputation that the former intends to make against either of the latter about his or her conduct relevant to the case, or a party's or a witnesses credit.

When does the duty to put one's case in cross-examination arise?

The rule is often understood in the sense that a cross-examiner must put to the opponent's witness any part of the of the cross-examiner's case on which that witness could give evidence. On one view of the rule, this is the case even if the cross-examiner's case is not inconsistent with evidence that the witness has given (and there is no basis for an imputation against the witness).

The determination of whether a duty arises can be affected by a number of matters. Justice Campbell JA stated at p 123 of *Khamis v The Queen*, that those considerations might include whether a trial is civil or criminal, whether there is a jury of a judge alone deciding the matter and the nature and extent of pre-trial identification of matters in issue or evidence proposed to be called.[1] In *MWJ v*

[1] Citing *West v Mead* (2003) 13 BPR 23, 431 at [94]-[99].

The Queen (2005) 80 ALJR 329 at [18] Gleeson CJ and Heydon J stated that the principle in *Browne v Dunn* needed:

> ..to be applied with some care when considering the conduct of the defence at criminal trials. Fairness ordinarily requires that if a challenge is to be made to the evidence of a witness the ground of the challenge be put to he witness in cross-examination. This requirement is accepted and applied day by day, in criminal trials. However, the consequences of a failure to cross-examine on a certain issue may need to be considered in the light of the nature and course of the proceedings.

Generally, Stephen Odgers in *Uniform Evidence Law* Thomson Lawbook Co at [1.2.4440] states there is no requirement to put the imputation that the cross-examiner intends to rely upon where notice of the imputation arises elsewhere. For example, it may arise in a record of interview, from evidence of another witness, or expert evidence.

The application of the rule is said to involve matters of fact and degree (see Odgers at 1-4103), and that a cross-examination which covers "all possible contingencies" may be impractical or oppressive. The rule is said to be complied with where the substance of the version or submission challenging the witness' evidence is put to the witness. *White Industries (Qld) Pty Ltd v Flower & Hart (A Firm)(*1988) 156 ALR 169 at 217 stated that it was not necessary for every detail of the challenge which will be made to the witness' evidence be put to the witness.[2] A practical consideration of these principles arose in the cases of *Khamis v The Queen* [2010] NSWCCA 179 and *L v The Queen* [2011] NSWCCA 66 (5 April 2011) (cite), which are examined below.

Remedying the breach

In *Khamis v The Queen* the nature of the "detail" provoked the application of the rule, given its particular relevance and significance to the case, at [36]. This was a case involving various complicated versions of events said to have arisen

[2] There was said not to be a breach of the rule if a party is in the process of putting its case to an opposing witness in compliance with the rule and is prevented from doing so after an objection from an opponent: *NSW Police v Winter* [2011] NSWCA 330 at [82]-[86].

following a complaint of an alleged sexual assault within a Somalian family, during which a number of people had been present. It appears clear that there was some difficulty, given the use of a Somalian interpreter, in determining what precisely was said by particular parties at different times. The accused raised in evidence that after one of the parties became aware of sexual contact between the accused and the complainant, the complainant's brother slapped the complainant and made a threat to kill both of them. The evidence was objected to by the Crown on the basis that it had not been put to either the complainant or her brother during their cross-examination by accused counsel. The complainant had denied in evidence that the brother had said anything to her at the time of the slap. The trial judge said, as recorded at [27]:

> Members of the jury, just before you went out the witness started saying Kamal had said something and then the Crown took objection to that on the basis that that proposition of the witness giving evidence about had not been put to the complainant. Now we have a rule, I suppose a rule of evidence, if you like, or procedure that if a witness is going to say something that may be important then that proposition has to be put to the other side, if you like, so that they can give their version of whether that did or didn't happen.
>
> So because that aspect of the accused's evidence was not put to the complainant I have rejected it. So that answer he started giving has been, if you like, struck out and if you remember what it was, I won't repeat it. If you remember what it was, forget it because it is not part of the evidence.

Whealy J writing the lead judgment, stated that the failure of counsel to put the precise threat was an error and a breach of the *Browne v Dunn* rule, as the matter was of great importance and ought to have been put precisely. The consequences of the breach were discussed by his Honour, citing the ability in NSW for a judge to exclude the evidence which is sought to be adduced by or on behalf of other accused person (*R v Schneidas (No 2)* [1981] 2 NSWLR 713; (1981) 4 A Crim R 101)[3]. His Honour found that the evidence was so significant that it was incorrect for the trial judge to have rejected it despite the breach of the rule. Instead the appropriate course was to invoke s 46 of the *Evidence Act*, recall the witness and have the evidence put to them directly, rather than

[3] See also *R v Body* (unreported, Court of Criminal Appeal, NSW, NO 60047 of 1994, 24 August 1994).

exclude the evidence. The failure to do that resulted in a clear miscarriage of justice, see [59].

His Honour interestingly noted (given the comments in *L v Regina* [2011] NSWCCA 66 (5 April 2011)) that the position is different in Victoria, where McGarvie J refused to follow *Schneidas* in *R v Allen* [1989] VR 736 on the basis of his finding that the court did not have the power to refuse to admit defence evidence in a criminal trial, that was not put to prosecution witnesses, the remedy being for counsel for the prosecution and the trial judge to comment on it at the time of final address and summing up.

S 46 provides:

> (1) The court may give leave to a party to recall a witness to give evidence about a matter raised by evidence adduced by another party, being a matter on which the witness was not cross-examined, if the evidence concerned 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.
>
> (2) A reference in this section to a matter raised by evidence adduced by another party includes a reference to an inference drawn from, or that the party intends to draw from, that evidence.

It is noted that this provision allows a witness to be recalled even if there has not been a breach of the rule in *Browne v Dunn*.

How a breach of the rule should be dealt with was considered in *MWJ v The Queen* where at [40] Gummow, Kirby and Callinan JJ stated:

> 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.

Justice Whealy in *Khamis*, said that a trial court in a criminal trial must always endeavour to be "flexible in its response" to the problem before it, at [41] and considered the options courts had to deal with the issue when it arose, see [42]-[45]:

> First, if a witness is not cross-examined on a point, cross-examining counsel may be taken to accept it and may not be permitted to address in a fashion which asks the court not to accept it. That was one of the options suggested by Mahoney JA in *Seymour*, although that was a civil case.
>
> Secondly, if the witness has not been cross-examined on a particular matter, that may be, depending on the circumstances, a good reason for accepting that witness's evidence, particularly if it is uncontradicted by other evidence. Where however, a witness's evidence upon a particular matter appeared to be incredible or unconvincing, or if it were contradicted by other evidence which appeared worthy of belief, the fact that the witness had not been cross-examined might be of little importance in deciding whether to accept his evidence (*Bulstrode v Trimble* [1970] VR 840 at 848-849; *Precision Plastics Pty Ltd v Demir* (1975) 132 CLR 362 at 371).
>
> Thirdly, the trial judge may, on application by counsel for the party who called the witness in respect of whom the rule was broken, accede to the application so that matters not put to the witness earlier may be put (s 46 *Evidence Act 1995* (NSW)). Quite apart from the ability to grant leave under this section, a trial judge may require the relevant witness to be called for further cross-examination or grant an application for the recall of the witness (*Payless Superbarn (NSW) Pty Ltd v O'Gara* at 556; *R v Burns* (1999) 107 A Crim R 330; *MWJ v The Queen* at [40]).
>
> Fourthly, as indicated by cases such as *Schneidas* there is, at least in this State, a power in criminal trials to exclude evidence sought to be relied upon by an accused to support a point not put in cross-examination of a witness called by the Crown. This option, in my opinion, should, (in this situation) generally speaking, be a last option and not one of first resort.
>
> Finally, if an accused's evidence is allowed, and there has been a breach of the rule, there may be a need for appropriately fashioned directions to be given to the jury.
>
> [Emphasis added]

As Whealy J said at [52] of *Khamis*, the rule of *Browne v Dunn* should not be assumed to be a preclusive rule of evidence: *"its breach does not necessarily dictate that evidence may not be called in contradiction"*. At [52] his Honour said:

> 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 to

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

Recent Invention

A further position, alluded to in part in Whealy J's final option, arose in the South Australian case of *R v Manunta* (1989) 54 SASR 17 at p26-38 where failure to cross examine on an issue resulted in the trial judge commenting to the jury that it was a matter for them whether the failure was indicative of "recent invention". King CJ, with whom Bolen J agreed found it was legitimately open for the judge to put this to the jury for consideration but that caution ought to be exercised in the process, see at p23-24:

> It is a process of reasoning, however, which is fraught with peril and should therefore be used only with much caution and circumspection. There may be many explanations of the omission which do not reflect upon the credibility of the witnesses. Counsel may have misunderstood his instructions. The witnesses may not have been fully co-operative in providing statements. Forensic pressures may have resulted in looseness or inexactitude in the framing of questions. The matter might simply have been overlooked. I think that where the possibility of drawing an adverse inference is left to the jury, the jury should be assisted, generally speaking, by some reference to the sort of factors which I have mentioned. Jurors are not familiar with the course of trial or preparation for trial and such considerations may not enter spontaneously into their minds. Whether such matters should be brought to the attention of the jury and the manner in which that should be done are matters for decision by the trial judge in the atmosphere of the trial.

This case was referred to in the well known case of *R v Birks* (1990) 19 NSWLR 677; 48 A Crim R 385 which involved a criminal trial involving serious offences where inexperienced counsel representing the accused failed to cross-examine the complainant with respect to certain matters of considerable significance. It was suggested by the Crown that the complainant had not been cross-examined on the issues because the issues had been fabricated. Gleeson J said that the manner in which the Crown had taken up the failure with respect to the credibility of the accused was "inconsistent with the need for caution" as stressed by King CJ in *Manuta*.

The recent appellate cases dealing with trials where a *Browne v Dunn* issue has led to a claim of recent invention, are largely critical of the practice. The Courts call for caution against assuming a failure to put a version of events to a witness, necessarily

reflects an issue as to credibility of the witness. As stated in *RWB*, error by counsel, regardless of seniority, cannot be overlooked: see p 224-225, and that *"more than one inference may be drawn from non-compliance with the rule"* Simpson J In *RWB* Simpson J observed at [101]:

> "These authorities make it very plain that a trial judge should exercise great caution in directions to the jury concerning the failure of an accused's counsel to comply with the rule in *Browne v Dunn*. *Browne v Dunn* is an ancient and useful rule of practice and casts a considerable burden of care on counsel. But counsel are fallible and more than one inference may be drawn from non-compliance with the rule. Opposing counsel will always suggest that the only, or the proper, inference is that the client (or witness) failed to include the contentious matter 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."

The Victorian appeal court decisions have followed the same reasoning stating that only "rare cases" would warrant a direction suggesting that *"non-compliance with the rule could support recent invention and thereby affect the credibility of the accused"*: *R v Morrow* [2009] VSCA 291 at [62]-[70]; *RR v The Queen* [2011] VSCA 442 at [68]. In *RWB* (at p225), a further course for remedying the allegation of recent invention was to consider calling other witnesses under s 108 of the *Evidence Act* to bolster the credit of the witness that the version of events had been told to another person (or, one would infer, by tendering documents to that effect).

In *L v Regina* [2011] NSWCCA 66 (5 April 2011)[4] an issue arose after the close of the evidence in the trial (regarding an allegation of sexual assault) as regards a failure by counsel for the appellant to put particular details as to the appellant's case to the complainant in cross-examination. The accused had in evidence given details about the precise manner in which a particular item of clothing worn by the accused at the time of the alleged assault, had been removed by the complainant. The Crown, after the evidence had been given, challenged the accused as to why such a precise version had not been put to the complainant in cross-examination. Under cross-examination, the Crown asked the accused:

[4] This case has been taken off the Austlii and other websites. I have referred to it simply by initial only.

CROWN: *Would you agree, ...that when [the complainant] was being cross-examined , it was never suggested to her in cross-examination that [puts the details raised in his evidence] that you've described for us just a little while ago?*

COUNSEL FOR THE ACCUSED: *I object to that*

HER HONOUR: *No, I'll allow it.*

WITNESS: *How do you mean, sorry?*

CROWN PROSECUTOR: *I'll just put the proposition to you again. Would you agree that in cross-examination of [the complainant] it was never suggested to her that she actually* [puts details raised in evidence] *in the manner that you've just described?*

WITNESS: *Yes.*

Later in re-examination counsel for the accused asked the accused the following questions:

COUNSEL: *you are being asked questions about in my cross-examination and whether I cross-examined [*the complainant*] about the fact that* [details put as to evidence*], do you remember that?*

A: *Yes*

COUNSEL: *and being asked of you that I didn't put that to her, do you remember that?*

A: *I do*

COUNSEL: *Did you give me some written instructions about that?*

A: *I did*

COUNSEL: *In those written instructions did you say this:* [reads details of manner of undress]

A: *I did*

COUNSEL: *That was before I started cross-examining wasn't it..*

…
A: *Yes*

The difficulty that arose was that the jury proceeded to ask questions as to counsel's obligations to have put the details of the evidence, and whether counsel: *"could make statements or infer certain things took place if they know them to be false. Do their code of ethics mean that they are bound by the same oath as the witnesses?"* Later, they asked: *"if [Counsel] knows some evidence to be*

untrue, for example, [the accused's evidence as to the manner the complainant undressed him], is he restricted by ethics to suggest it is true?"

In the context of what followed it was clear, at least to the judge and the Crown, that the failure to put the evidence had simply been an oversight by counsel for the accused. The trial judge directed the jury as follows:

> "*now when [the accused] was giving evidence he said that [the complainant's description of removal of clothing with her feet] and the Crown asked him "well, you didn't hear that put to the [complainant] …and [the accused] agreed that he had a long time ago told [counsel] that she had [removed his clothing in the manner suggested] now the situation is, members of the jury , counsel are human and sometimes they just forget things. It's up to you if you think that's what has happened here…it's a matter for you whether you think [counsel] might have just overlooked that detail when he was going through that*…"

Hall J, with whom McClellan CJ at CL agreed, at [90] commented that there was no breach of the rule in *Browne v Dunn* as counsel for the accused had "squarely" put that the complainant had removed the accused's clothing, and the means by which she did so was incidental only. Given that the Crown's questioning of the accused was suggestive of recent invention, his Honour found it ought to have been clearly corrected at the time the questions were asked in cross-examination (if not before): "*the Crown, in my opinion, ought to have made it unambiguously clear, that no point or criticism (including a submission as to recent invention) would be made"*. His Honour went on: *"the jury ought to have been told that it had no significance whatsoever"* at [93].

Garling J went further, being directly critical of the Crown's questioning. His Honour at [137] summarised the principles he said derived from a number of cases on the issue[5]:

> (a) where a defence counsel has failed to put something to a prosecution witness in cross-examination, it may be legitimate, depending on the

[5] *R v Dennis* [1999] NSWCCA 23 at [35]-[37] per McInerney J, at [45]-[51] per Spiglelman CJ *R v Abdallah* [2001] NSWCCA 506 at [19]-[24] per Sheller JA; *Picker v R* [2002] NSWCCA 78 at [38][62] per Smart AJ; *R v Scott* [2004] NSWCCA 254 at [41]-[63] per Hulme J; *R v Banic* [2004] NSWCCA 322 at [23]-[29] per Barr J; RWB v R [2010] NSWCCA 147 at [63]-[102] per Simpson J.

circumstances of the case, to draw appropriate conclusions from that failure: *R v Manunta; R v Birks* at 690-692 per Gleeson C; *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] HCA 42; (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 the range of possible explanations for a failure by defence counsel to put something to prosecution witness: *R v Manunta; R v Abdullah* at [24[per Sheller JA; *Picker v R* at [47]-[62] per Smart AJ.

His Honour found that there had been a clear breach of all of these principles, and that there had been no obligation on counsel for the accused to put to the complainant the "precise detail" of the way in which she had assisted the accused to undress. In these circumstances he agreed with McClennan CJ at CL and Hall J that there was no basis for an inference of recent invention, at [139]. Thirdly, he commented that the asking of a question requiring either directly, or in re-examination, a person to reveal their instructions was "fundamentally unfair", at [140], and the questions ought not have been allowed. The trial was unfair and the conviction was set aside.

In *Lysle v R* [2012] NSWCCC 20 a not dissimilar situation arose during the cross-examination of the accused, after the accused had suggested a detail not previously put to the complainant in cross-examination by the accused's counsel. At [32] the following transcript of the trial was recorded:

> *Q. Had you told your barrister about that episode before (the complainant) gave evidence?*
> A. Absolutely no denial at all and I have told him.
>
> *Q. Did it concern you that he didn't ask her any questions about that when he was cross-examining her?*
> A. That's not for me to say.
>
> *Q. Did you bring to his attention when he was cross-examining her that he hadn't ever put to her that there was an occasion where you had carried her from her bed up --*
> A. That's not for me to say.
>
> Q. Now, tell me, was that something that you had discussed at all with (N) before you did it?
> A. Beg yours? I didn't quite hear you, sorry.
>
> Q. No, I'm going back to 1981, this occasion that you've now given some evidence that there was an occasion that you took (the complainant) out of her bed.
> A. Yes, I don't deny it.
>
> Q. Did you talk to (N) about that before you did it?
> A. No.
>
> Q. Did you understand from Joy that she'd spoken to (N) about it before you did it?
> A. I presumed that (N) knew about it, yes, from Joy.
>
> *Q. And, again, did it concern you that your barrister didn't -*
>
> *EDWARDS: Well, I object to that. It's a presumption. He's being asked a hypothetical, you Honour. He's not given any evidence about any direct conversation that he heard. A presumption is not something that can be - it's not admissible.*
>
> *CROWN PROSECUTOR: I'm entitled to ask the question I was about to ask, your Honour*
>
> *HER HONOUR: Yes, no, I will allow it, thank you, Mr Crown.*
>
> *CROWN PROSECUTOR*
>
> *Q. Did it concern you that your barrister didn't ever put to (N) that she was aware that you were going to go into the caravan and take (the complainant) out?*
>
> *A. It didn't concern me, no.*
>
> [Italics added]

On appeal the appellant argued that the questioning was a challenge to his credibility and was unfair, and compounded by the way it was handled in the Crown address and the summing up. His Honour RS Hulme J, with whom Basten JA and Schmidt J agreed, stated at [34] that there was nothing inherently wrong with challenging the credibility of the appellant in the given circumstances. However, the further questioning, involving matters of privileged communications ought not to have been asked, at [34]:

> an accused person should not be asked, certainly for the first time in the presence of a jury, as the content of conversations with his legal advisers. For an accused to deal with such a question properly, he is entitled to legal advice and the potential for prejudice if either the accused or his counsel raise this need in the presence of the jury in preference to the question being answered is obvious.

His Honour commented that the further questions, as to whether the questioning of the complainant, "concerned" the appellant were simply irrelevant, at [37], and whilst there were errors as to how this ought to have been handled, they were inconsequential and did not result in a miscarriage of justice. His Honour also distanced himself from Garling J's comments in *L v Regina*, stating at [44]:

> It may be that the caution that Crown Prosecutors have been told to exercise should inspire them to first raise the issue of any explanation for a contrast between the silence of an accused's counsel and evidence of an accused in the absence of the jury or, if they do not adopt that course, of going little or no further than drawing the contrast, merely asking an accused if he can give any explanation for the difference, and suggesting he has made up his evidence on the topic. Any explanation may involve a waiver of the confidentiality of communications by an accused with his legal advisers and that argues for at least some aspect of the matter being first raised in the absence of the jury. However, in an appropriate case the Crown is entitled to the benefit of the rule and, as was said in *R v Scott* , this requires that an accused be given an opportunity to provide an explanation. Nor should the Crown be obliged to lose such advantage as the rule provides by forewarning an Accused of too much in the absence of the jury.

Careful consideration must therefore be exercised in criminal matters in determining firstly, whether there has in fact been a breach of the rule, which is of significance to the issues in the case (comparing *Khamis* to *L*). Secondly, where the rule has been found to be breached, the "boots and all" approach of inferring, or putting, "recent invention" must be approached cautiously, and at least initially raised in the absence of the jury. Although not discussed in *L* or

Lylse, the option of recalling a witness, as suggested by Whealy J in *Khamis*, and as provided by s 46 of the *Evidence Act*, remains an available option for dealing with the issue when it arises.

Sophia Beckett
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