[HIGH COURT OF AUSTRALIA.]

CURWOOD . . . . . APPLICANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1944.

SYDNEY, *Dec.* 4, 5.

MELBOURNE, *Dec.* 22.

Latham C.J., Starke, Dixon, McTiernan and Williams JJ.

Criminal Law—Evidence—Cross-examination of accused—Questions tending to show character of accused and previous convictions—"Nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or witness for the prosecution"—Allegation by accused that confession obtained by police officers by duress—Crimes Act 1928 (*Vict.*) (*No.* 3664), *s.* 432 (*e*) (*ii*).

The applicant was convicted upon a charge under s. 42 of the *Crimes Act* 1928 (Vict.) of unlawfully and carnally knowing and abusing a girl under the age of ten years. The case implicating the applicant depended upon a written confession signed by him and proved by the officers of the police who took it. His defence was, *inter alia*, that the confession was not voluntarily made because it was extorted from him by threats and physical violence on the part of the officers of police and he gave evidence to this effect. Upon the application of the Crown prosecutor the trial judge applied s. 432 (*e*) (ii) of the *Crimes Act* and allowed cross-examination of the applicant as to his character. The applicant refused to answer certain questions as to occasions on which it was suggested that he had attacked a woman and a girl on the ground that the answers might incriminate him and the jurors were warned that his refusal should not be allowed to affect their minds in any way. He, however, did say that on the occasion when he signed the confession upon which the prosecution relied he also signed another statement in which he admitted that he was "guilty of the little one but not of the rape."

Held, by *Latham* C.J., *Starke* and *Dixon* JJ. (*McTiernan* and *Williams* JJ. dissenting), that the conduct of the defence was such as to involve imputations on the character of witnesses for the prosecution within the meaning of s. 432 (*e*) (ii) of the *Crimes Act* 1928 (Vict.); therefore the applicant was liable to be cross-examined as to his previous character.

R. v. *Woolley*, (1942) V.L.R. 123, approved.

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R. v. *Hudson*, (1912) 2 K.B. 464, *Stirland* v. *Director of Public Prosecutions*, (1944) A.C. 315, and *R.* v. *Turner*, (1944) K.B. 463, considered.

Special leave to appeal from the decision of the Supreme Court of Victoria (Full Court): *R.* v. *Curwood* (1945) V.L.R. 133, by majority, refused.

APPLICATION for special leave to appeal from the Supreme Court of Victoria.

Ronald Frederick Curwood was charged under s. 42 of the *Crimes Act* 1928 (Vict.) that at Tottenham, Victoria, on 9th September 1944, he did unlawfully and carnally know and abuse a girl under the age of ten years. He was convicted.

There was undisputed evidence for the jury that some person had had connection with the girl. She and other children gave evidence, not all on oath, which, as the trial judge said, could not be relied upon as providing satisfactory identification of Curwood as the man who had interfered with her.

Curwood had on 13th September 1944 signed a full confession of his guilt. The police who had obtained this confession were cross-examined to show that they themselves had suggested the facts appearing therein, and had by violence and threats of further violence procured Curwood's signature thereto. Curwood himself gave evidence and swore that it was in this way the confession was obtained.

The Crown Prosecutor then applied, in the absence of the jury, for leave under s. 432 (*e*) (ii) of the *Crimes Act* 1928 to cross-examine Curwood as to a prior conviction for indecent exposure and as to admissions made by him to the police of attacks on two other young women on or about the same day. Section 432 (*e*) provides: "A person charged and called as a witness in pursuance of this section shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—(i) . . . (ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution: Provided that the permission of the judge (to be applied for in the absence of the jury) must first be obtained." The trial judge, under the authority of *R.* v. *Woolley* (1), granted the application.

Curwood was then cross-examined with regard to his being questioned by the police about an assault on a young woman in August

(1) (1942) V.L.R. 123.

and his admitting that he rushed up and grabbed hold of her. Curwood refused to answer the questions put on the ground that they might tend to incriminate him. He was then asked about his being questioned with regard to an offence alleged to have been committed on 12th September 1944, and whether he had told the police he was with a male friend on the night of 12th September and had signed a statement to this effect. Curwood refused to answer this question about signing a statement on the ground that it might tend to incriminate him. From the cross-examination it appeared that it was at the very same interview with the police on 13th September, at which his confession as to the charge on which he was standing his trial was obtained, that the questioning took place which allegedly led to the admissions about which he was cross-examined, and that it was at this interview that the second statement above referred to had been obtained. He was later asked again about the second statement and he admitted making and signing a second statement. As to it he said the police did not have to punch him to get it, and the following questions and answers followed: Q. "You previously obliged by signing a very long statement for them?" A. "Yes". Q. "They made it for you?" A. "Yes". Q. "Why sign another statement for men who had done this before?" A. "I was guilty of the little one but not of the rape." Curwood's counsel submitted that the matter should not be pursued, and both the trial judge and the Crown Prosecutor said that the answer was unexpected.

The trial judge reported that he did not hear the answer himself and did not know whether the jury heard it; that he told the shorthand writer to strike out the question and answer but apparently did not manage to make his wish clear.

An application for leave to appeal to it was refused by the Full Court of the Supreme Court of Victoria, whereupon Curwood applied to the High Court for special leave to appeal to that Court on the grounds, *inter alia*, that the jury's verdict was (*a*) against the evidence and the weight of evidence, and (*b*) contrary to and wrong in law; that the trial judge should have held that the alleged confession was not a voluntary confession and should have rejected it; that evidence was wrongly admitted, namely, the cross-examination of Curwood in relation to other criminal acts or charges; that the allegations made by Curwood as to the method in which the alleged confession was obtained from him did not cast imputations upon the character of the witnesses for the prosecution or were otherwise such as to entitle the Crown to cross-examine him as to character; that the trial judge was in error in exercising his discretion in favour

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of permitting cross-examination as to Curwood's character; that the trial miscarried because the Crown Prosecutor persisted in cross-examining Curwood as to alleged criminal acts by him after objection had been properly taken by him that such matters were privileged; that evidence of such matters was wrongly admitted in evidence; and that the trial judge failed to direct the jury properly or sufficiently on certain matters not material to this report.

Monahan and *J. P. Bourke*, for the applicant.

Monahan. There must be some limitation placed upon the literal meaning of the words "involve imputations on the character" in s. 432 (*e*) (ii) of the *Crimes Act* 1928 (Vict.) (*R.* v. *Sheean* (1); *R.* v. *Biggin* (2); *R.* v. *Turner* (3); *Stirland* v. *Director of Public Prosecutions* (4)). Those words do not involve an imputation on the prosecutor or his witnesses but on their character, that is, on their general character or general reputation (*R.* v. *Dunkley* (5)). The evidence that the applicant had on the same day made another confession in relation to another girl and in relation to a minor offence was wrongly admitted. The permitting of the cross-examination, whatever it was for, is beside the point. The cross-examination went too far. From it the jury would conclude that the applicant was a man of bad character. Several of the questions put to the applicant should not have been so put because they were either unnecessary or framed in such a way as to prejudice the applicant. The limitation operates where the proper conduct of the defence, as distinct from the nature of the defence, necessitates the making of injurious imputations. It operates to enable an accused person to put forward any defence open to him on the indictment (*R.* v. *Turner* (3)). Section 432 was wrongly construed in *R.* v. *Woolley* (6). In view of the decision and observations in *Stirland* v. *Director of Public Prosecutions* (4) the decision in *R.* v. *Hudson* (7), which was applied in *R.* v. *Woolley* (6), cannot now be regarded as good law. Although not specifically referred to in *Stirland's Case* (4) the reference therein to *R.* v. *Dunkley* (8) shows that *Hudson's Case* (7) was present to the minds of the members of the House of Lords. The veracity or otherwise of an accused's statement does not make cross-examination admissible (*R.* v. *Ellis* (9)). A statement or answer by an accused that a prosecutor or any of his witnesses is a liar in respect of certain facts is not an attack on character of the nature protected

(1) (1908) 21 Cox C.C. 561; 24 T.L.R. 459.
(2) (1920) 1 K.B. 213.
(3) (1944) K.B. 463.
(4) (1944) A.C. 315.
(5) (1927) 1 K.B. 323, at p. 329.
(6) (1942) V.L.R. 123.
(7) (1912) 2 K.B. 464.
(8) (1927) 1 K.B. 323.
(9) (1910) 2 K.B. 746.

by s. 432 (*R.* v. *Rouse* (1)). It is apparent that in *Stirland's Case* (2) the House of Lords thought it desirable to make " a statement of a clear and universal *ratio decidendi* " as referred to in *R.* v. *Dunkley* (3). In *R.* v. *Preston* (4) there was not any imputation as regards character within the meaning of the section. The principles deducible from *R.* v. *Turner* (5) are that the words have some limitation and that an accused person is entitled to raise any ground of defence. The conduct of the defence is the testing of the probative force of allegations against the accused person, including the voluntariness of an alleged confession. *R.* v. *Wright* (6) was wrongly decided. In the circumstances the confession was not made voluntarily by the applicant. The admittance of evidence of other instances of similar conduct was wrong. The questions should not have been put to the applicant (*Maxwell* v. *Director of Public Prosecutions* (7)). Effect should be given to the words " shall not be asked " in s. 432 (*Phipson* on *Evidence*, 8th ed. (1942), p. 449). The limitation operates where the imputation is cast otherwise than independently of the defence (*R.* v. *Bridgwater* (8)). The limitation also operates where the matter is introduced for purposes relevant to the defence (*R.* v. *Biggin* (9)). Further, the limitation operates where the matter raised is not an attack on the prosecutor or his witnesses but is an endeavour to elicit the facts of the matter in controversy (*R.* v. *Westfall* (10) ; *R.* v. *Preston* (4)). Two things follow from *Stirland's Case* (2). Proposition 4 in the speech by Viscount *Simon* L.C. (11) goes beyond what was decided in *Turner's Case* (5) and, in the absence of the more apt words " proper nature of his defence ", cannot be restricted as in the last-mentioned case. Although the decision in *Stirland's Case* (2) was for some months reserved for consideration, doubtless for the purpose of formulating rules governing the admissibility of questions put to an accused person, the rule enunciated in *R.* v. *Hudson* (12) has not been included and, therefore, must be regarded as having been overruled. As regards the propriety of the application, see *R.* v. *Haddy* (13). The conduct of the prosecutor or his witnesses is conduct outside the case, that is, imputed conduct (*R.* v. *Preston* (4)). The words " nature of the defence " and " conduct of the defence " may involve different considerations (*R.* v. *Dunkley* (14)). The word

(1) (1904) 1 K.B. 184.
(2) (1944) A.C. 315.
(3) (1927) 1 K.B., at p. 330.
(4) (1909) 1 K.B. 568.
(5) (1944) K.B. 463.
(6) (1910) 5 Cr. App. R. 131.
(7) (1935) A.C. 309, at p. 322.
(8) (1905) 1 K.B. 131.
(9) (1920) 1 K.B., at p. 220.
(10) (1912) 28 T.L.R. 297 ; 7 Cr. App. R. 176.
(11) (1944) A.C., at p. 327.
(12) (1912) 2 K.B. 464.
(13) (1944) K.B. 442.
(14) (1927) 1 K.B. 323.

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"defence" in "conduct of the defence" cannot mean the same thing as the answer to the essentials or the ingredients of the offence as non-consent in rape, inducement in false pretences, or the existence of the spouse at the date of the ceremony in bigamy (*Stirland* v. *Director of Public Prosecutions* (1)). To limit the meaning of the word "defence" to the answer to the essentials or ingredients of the offence is to complicate the rules of cross-examination by introducing refined distinctions. If the true meaning of the word "defence" is the answer to the essentials or ingredients of the offence then cross-examination or evidence to establish that a confession is not voluntary is not part of the nature or conduct of the defence. If it is part of the proper conduct of the defence then the rule in *Stirland* v. *Director of Public Prosecutions* (1) applies.

J. P. Bourke. The statement relating to the "little one" was improperly admitted. It must be taken into account with what had preceded it. The question was put on behalf of the Crown after proper objection to substantially the same question had been taken. The evidence so wrongly admitted had an important effect upon the jury and their verdict. The privilege of claiming protection is that of the witness and not of counsel: See *Triplex Safety Glass Co. Ltd.* v. *Lancegaye Safety Glass* (1934) *Ltd.* (2). The trial judge did not direct the jury on this point and his direction on the matter of alibi was fundamentally wrong. The jurors were not directed that if the alibi put forward by the applicant raised a reasonable doubt, particularly as to the voluntariness of the confession, then the benefit of that doubt should be given to the applicant.

McMinn, for the respondent. The cross-examination of the applicant as to character was merely a testing of his defence. He was properly asked if he had made another statement. He was not asked if he had committed other offences. The questions put to him did not tend to show that he was a person of bad character, but, in reply, he did voluntarily say something which suggested that he had a bad character. The applicant made a gross and serious attack on witnesses for the prosecutor. That attack was outside the applicant's defence and hence the questions were relevant (*R.* v. *Hudson* (3); *R.* v. *Dunkley* (4)). The application now before the Court is covered by the decision in *R.* v. *Chitson* (5). The words "proper conduct of his defence" in proposition 4 in

(1) (1944) A.C. 315.
(2) (1939) 2 K.B. 395.
(3) (1912) 2 K.B. 464.
(4) (1927) 1 K.B. 323.
(5) (1909) 2 K.B. 945.

Stirland v. *Director of Public Prosecutions* (1) must be limited by the observations in *R.* v. *Turner* (2). That proposition does not apply where the attack or matter is outside the defence of the accused person.

Bourke, in reply. *R.* v. *Chitson* (3) is distinguishable on the facts. The questions put to the applicant were not admissible (*R.* v. *Ellis* (4)).

Cur. adv. vult.

Dec. 22.

The following written judgments were delivered :—

LATHAM C.J. Appellant was charged with the offence of unlawfully and carnally knowing and abusing a girl under the age of ten years—*Crimes Act* 1928 (Vict.), s. 42. He was convicted and applied to the Court of Criminal Appeal for leave to appeal. The application was refused and he now makes application for special leave to appeal to this Court.

There was undisputed evidence for the jury that some person had had connection with the girl. She and other children gave evidence, not all on oath, which, as the learned judge said, could not be relied upon as providing satisfactory identification of the accused as the man who had interfered with her. It was proved that the accused made a written confession which, if true, was a complete admission of the crime charged. His defence was that the witnesses for the prosecution were in error in identifying him as the man who interfered with the girl, that the confession was not voluntary because it was extorted from him by threats and physical violence on the part of officers of police who were called as witnesses for the prosecution, and he set up an alibi.

Upon the application of the Crown Prosecutor the learned trial judge applied the *Crimes Act*, s. 432 (*e*) (ii), and allowed cross-examination of the accused as to his character. He refused to answer certain questions as to occasions on which it was suggested that he had attacked a woman and a girl on the ground that answers to the questions might incriminate him. The judge gave a very strong warning to the jury that his refusal to answer these questions should not be allowed to affect their minds in any way.

The accused, however, did say in answer to a question that on the occasion when he signed the confession upon which the prosecution relied he also signed another statement in which he admitted that he was "guilty of the little one but not of the rape." The

(1) (1944) A.C., at p. 327.
(2) (1944) K.B., at p. 470.
(3) (1909) 2 K.B. 945.
(4) (1910) 2 K.B., at p. 763.

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matter was not further pursued, but when this answer is read in conjunction with the rest of the cross-examination it is evident that the jury might well have drawn the conclusion that his admission related to one or other of the occasions already mentioned when it was suggested that he had attacked a woman and a girl. This particular question and answer should be regarded as tending to show that the accused was of bad character.

The question which arises, therefore, is whether the conditions of s. 432 (*e*) (ii) were satisfied. That provision is in the following terms:—"A person charged and called as a witness in pursuance of this section shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—(i) . . . (ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution: Provided that the permission of the judge (to be applied for in the absence of the jury) must first be obtained".

It is impossible to reconcile all the decisions upon the section. Most of them may be found conveniently set out in *Halsbury's Laws of England*, 2nd ed., vol. 9, pp. 215-217, and Supplement 1943, p. 343. In *Taylor* on *Evidence*, 11th ed. (1920), vol. II., p. 929, it is said of this section: "It is hopeless to attempt to extract any principle from the authorities"; and in articles in the *Law Quarterly Review* Professor *Julius Stone* has demonstrated what are described as "the profound obscurities" of the section (*Law Quarterly Review*, vol. 51, p. 443, at p. 466, and vol. 58, p. 369).

The provision was introduced as part of the legislation permitting an accused person to be a competent witness in his own defence. It is prohibitive in terms. It prevents, not only the answering, but also the asking, of questions tending to show that he has committed or been charged with an offence other than that wherewith he is then charged or that he is of bad character, unless one of the three conditions specified in the section is satisfied. The condition which is relevant in the present case is "the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution." Save in exceptional cases, any defence to a criminal charge involves the allegation that the evidence for the prosecution is not accurate in fact, and very often the imputation that the witnesses for the prosecution are lying.

But it has long ago been decided that the challenging (and the emphatic challenging) of the evidence for the prosecution does not under the section let in evidence of prior convictions or bad character of the accused: See *R.* v. *Rouse* (1); *R.* v. *Cohen* (2).

Difficulty in applying the section arises from the fact that in some circumstances a denial of the evidence for the prosecution involves also an imputation upon the character of a witness. For example, a witness may positively depose to a fact where the circumstances exclude the possibility of honest mistake, so that the witness is either telling the truth or is deliberately lying. If an accused person relies for his defence upon a contention or suggestion that the witnesses for the prosecution are not mistaken but are deliberately (and therefore almost necessarily maliciously) lying, then, according to the ordinary use of language, he by his defence imputes bad character to those witnesses. It has been held on several occasions that such conduct of a defence involves imputations on the character of witnesses so as to let in against the accused evidence of bad character or to expose him to cross-examination as to his own character. In *R.* v. *Rouse* (1) a distinction was taken between a case in which there was an emphatic denial of a charge which did not necessarily make an attack on the character of the prosecutor or his witnesses, and a case in which it was asserted that evidence was "an untruth which the prosecutor had invented." In such a case *Phillimore* J. said that "cross-examination as to previous misconduct might, though I do not say it would, be admissible" (3). See also *R.* v. *Roberts* (4); *R.* v. *Dunkley* (5), to which cases I refer more fully hereafter.

Up to 1912 there were in England two lines of decision upon the section now under consideration. On the one hand it had been held that the section entitled an accused person to defend himself by telling his own story, even if in the course of his defence he made imputations against the prosecutor or his witnesses, without letting in evidence or cross-examination as to his own character, and it was said that imputations which were necessarily involved in challenging the allegations of fact made by the prosecutor or his witnesses were not to be regarded as imputations within the section. The idea underlying these decisions may be not unfairly stated by saying that the accused could safely make any imputations against the character of witnesses which were connected with the facts of the case, but that, if he made what might, by way of distinction, be

(1) (1904) 1 K.B. 184.
(2) (1914) 111 L.T. 77.
(3) (1904) 1 K.B., at p. 187.
(4) (1920) 37 T.L.R. 69.
(5) (1927) 1 K.B. 323.

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called gratuitous aspersions against them, he ran the risk of his own character becoming the subject matter of evidence. Cases in which this view was taken included *R.* v. *Bridgwater* (1), where it was suggested by the court, though not positively decided, that an accused person lost the protection of the section only where imputations were cast by him on the character of the prosecutor or his witnesses " quite independently of the defence raised, either by direct evidence or by questions put to them in cross-examination " (2). It was said that if the questions put to a witness for the prosecution had involved " the imputation that he was guilty of misconduct independently of the defence, or of the necessity for developing the defence, different considerations might arise, for the questions might then perhaps be construed as an attack on the prosecutor's general character " (3).

In *R.* v. *Preston* (4) *Channell* J. said that imputations within the meaning of the section were involved " if the defence is so conducted, or the nature of the defence is such, as to involve the proposition that the jury ought not to believe the prosecutor or one of the witnesses for the prosecution upon the ground that his conduct—not his evidence in the case, but his conduct outside the evidence given by him—makes him an unreliable witness " (5).

R. v. *Westfall* is reported in the *Criminal Appeal Reports* (6), and in the *Times Law Reports* (7), the reports varying in certain particulars. But in both reports it is clear that the court was of opinion that if witnesses for the prosecution were cross-examined in order to " elicit the facts in connection with the very matter with which the prisoner is charged so as to bring his account of those facts before the jury, the circumstance that imputations against a witness for the prosecution were involved in such cross-examination did not let in evidence of bad character of the accused."

Each of these cases expresses the view that, if the defence which is relied upon involves imputations on witnesses for the prosecution in relation to the facts of the case and not outside those facts, the making of such imputations does not deprive the accused of the protection of the section. (It will be seen that later, in *R.* v. *Turner* (8), another and more limited rule was applied, viz., that the imputations which might be made by the accused without letting in evidence against his character are not imputations in relation to the facts of the case (i.e., in relation to anything of which the Crown could give evidence in chief) but imputations involved in a denial of " essential

(1) (1905) 1 K.B. 131.
(2) (1905) 1 K.B., at p. 134.
(3) (1905) 1 K.B., at p. 135.
(4) (1909) 1 K.B. 568.
(5) (1909) 1 K.B., at p. 575.
(6) (1912) 7 Cr. App. R. 176.
(7) (1912) 28 T.L.R. 297.
(8) (1944) 1 K.B. 463.

ingredients of the charge." If the court in *Turner's Case* (1) had approved the more general rule stated in the other cases which have just been mentioned, it would not have been necessary to base the decision upon a principle relating to "essential ingredients of the charge." It would have been sufficient to say that the accused was giving his reply to the evidence for the prosecution, i.e., to all the facts alleged by the prosecution, without inquiring whether, on the one hand, such facts were such essential ingredients or, on the other hand, were facts not constituting such ingredients but relevant to prove one or more of those ingredients.)

On the other hand, as has already been said, in *Rouse's Case* (2) it was apparently thought by the court that a suggestion that evidence for the prosecution had been fabricated, although it related directly to the facts alleged against the accused, might let in evidence of character against the accused. Also, in *R.* v. *Wright* (3) it was held that a suggestion by a prisoner that admissions made by him when in custody were obtained from him by the bribes or threats of a police officer was, where that officer was called as a witness, an imputation within the meaning of the section. *Darling* J. said: "If the appellant puts it that he was improperly induced to make and sign the statement that was produced, it is difficult to imagine anything more like an imputation on a witness for the prosecution. . . . The imputation in the case now before us was that the police inspector was not a fit person to remain in the force; had he done what was imputed to him there is no doubt he could have been dismissed from the force; it is the gravest possible imputation, and cannot be excused by the contention that it was the only way open to the appellant of meeting the case against him" (4). These words appear to me to describe accurately the position in the present case.

Thus on the one hand it had been held that the fact that imputations on the character of the prosecutor or his witnesses were a necessary part of a defence raised did *not* let in evidence adverse to the character of the accused. On the other hand it had been held that the fact that such imputations were a necessary part of the defence raised, was, according to the section, *a positive ground* for admitting such evidence.

In *R.* v. *Hudson* (5) the position created by these contradictory decisions was considered by a bench of five judges. The court adopted the latter view. The cases of *Bridgwater* (6), *Preston* (7)

(1) (1944) 1 K.B. 463.
(2) (1904) 1 K.B. 184.
(3) (1910) 5 Cr. App. R. 131.
(4) (1910) 5 Cr. App. R., at pp. 133, 134.
(5) (1912) 2 K.B. 464.
(6) (1905) 1 K.B. 131.
(7) (1909) 1 K.B. 568.

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and *Westfall* (1) were considered. The actual decisions in these cases were supported on grounds which deprived them of all authority in relation to the question now under consideration. The decision in *Bridgwater's Case* (2) was supported on the ground that the cross-examination of the Crown witness did not involve any imputation of any kind upon his character. The decision in *Preston's Case* (3) was supported not upon the ground stated by *Channell* J. (4) (which distinguished between imputations directly connected with the allegations made against the prisoner and imputations based on matters outside the evidence given by the prisoner) but upon the ground that the crucial statement in the case "was a mere unconsidered remark made by the prisoner without giving any serious attention to it" (5), so that it should not be regarded as a real imputation by the prisoner. *Westfall's Case* (1) was treated as an application of the decisions in the cases of *Preston* (3) and *Bridgwater* (2). The court stated that the three cases mentioned could not be regarded as laying down a general rule, and the court expressly approved a ruling "followed on many occasions," which was illustrated by *R.* v. *Marshall* (6), where it was held that where, in a case of murder, the prisoner in giving evidence alleged that the deceased had been killed by her husband, who had been called as a witness for the prosecution, she could be cross-examined as to previous convictions. In *Marshall's Case* (6) it is plain that the imputation made was connected in a most direct manner with the facts alleged against the accused and relied upon as constituting an ingredient of the offence charged, namely, the killing of the person alleged to have been murdered. In *Hudson's Case* (7) the court concluded its judgment by saying: "We think that the words of the section, 'unless the nature or conduct of the defence is such as to involve imputations,' &c., must receive their ordinary and natural interpretation, and that it is not legitimate to qualify them by adding or inserting the words 'unnecessarily,' or 'unjustifiably,' or 'for purposes other than that of developing the defence,' or other similar words" (8).

This decision construes the words of the section in their ordinary sense without making distinctions between attacks upon or insinuations against character, some of which are *not* to be regarded as imputations because they are directly connected with the case, others of which *are* to be regarded as imputations because they relate to matters which are not part of the facts alleged against the accused

(1) (1912) 28 T.L.R. 297.
(2) (1905) 1 K.B. 131.
(3) (1909) 1 K.B. 568.
(4) (1909) 1 K.B., at p. 576.
(5) (1912) 2 K.B., at p. 470.
(6) (1899) 63 J.P. 36.
(7) (1912) 2 K.B. 464.
(8) (1912) 2 K.B., at pp. 470, 471.

—i.e., in effect, to the character of a witness considered apart from any evidence relating to the facts of the particular case.

R. v. *Biggin* (1) was relied upon by the applicant, but the actual decision in the case has nothing to do with the matter now under consideration. The decision was that a dead man was not a prosecutor, that an imputation against him was not an imputation upon the character of a prosecutor, and that the particular questions asked were not admissible in relation to the credibility of the witness. It is true, however, that the court cited a passage from a judgment of *Channell* J. in *R.* v. *Preston* (2) which restated the doctrine which had been rejected in *R.* v. *Hudson* (3).

In *R.* v. *Roberts* (4) the principle established by *R.* v. *Hudson* (3) was applied in a case where the imputation relied upon as making evidence of the character of the accused admissible was that a witness for the prosecution had said that she was going to have her revenge and have him arrested upon a charge which she knew was false. The court said: "In the present case the imputation on the character of the woman was the whole substance of the defence." On this ground it was held that evidence of previous convictions was rightly admitted, that is, on the ground that the imputation *was* part of the defence and necessarily involved in it. Such a decision applies *R.* v. *Hudson* (3) and is quite inconsistent with the doctrine that the fact that an imputation is necessarily involved in a defence does not deprive an accused person of the protection of the section.

R. v. *Jones* (5) affords another example of the application of the principle of *Hudson's Case* (3). In *Jones' Case* (5) counsel for the accused, acting on instructions, stated that there was no genuine evidence against him, but that the police had manufactured a confession by him and had obtained remands in order to enable them to perfect their manufactured evidence. It was held that it was one thing to deny emphatically the statement which a detective had made, but quite another thing deliberately to say as to the evidence against him "that the whole thing was a wicked fabrication of the police." This was held to be an imputation on the character of the witnesses for the prosecution within the meaning of the section, although it directly related to the evidence which those witnesses had given in the case. The imputation was necessarily involved in the conduct of the defence, and it was held that it operated to let in evidence as to the bad character of the accused. This, like

(1) (1920) 1 K.B. 213.
(2) (1909) 1 K.B. 568.
(3) (1912) 2 K.B. 464.
(4) (1920) 37 T.L.R. 69.
(5) (1923) 39 T.L.R. 457.

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Wright's Case (1), is similar to the present case in that the imputation which let in evidence was an allegation of misconduct in relation to a confession relied upon by the Crown.

In *R.* v. *Dunkley* (2) the principle established by *Hudson's Case* (3) was again applied. In this case it was suggested in the cross-examination of a witness for the prosecution that the evidence of the witness was " not merely a pure invention, but was due to malice " against the prisoner arising out of a past grievance. The suggestion therefore was a suggestion of present malice arising from past facts. The past facts in themselves did not constitute any imputation against the witness. The suggestion of present malice in giving evidence was held to be an imputation which let in cross-examination of the accused in relation to his character.

The authorities mentioned were considered by the Full Court of the Supreme Court of Victoria in *R.* v. *Woolley* (4), where it was said that the case of *Hudson* (3) " expressly repudiated the doctrines suggested from time to time . . . that s. 432 of the *Crimes Act* does not apply to cases in which the imputations on the character of witnesses for the prosecution are necessarily involved in a presentation of the defence." It was pointed out that the decision in *Hudson's Case* (3) was a decision of a special court of five judges convened for the special purpose of dealing with that very point.

In the present case part of the defence of the accused was that he had been forced to sign a confession by the brutal conduct of members of the police force who gave evidence against him. It was held by the learned trial judge that the nature and conduct of his defence was therefore such as to entitle the Crown Prosecutor to cross-examine him as to his character. The decision of the learned judge is in accordance with the decisions in the following cases: *Marshall* (5), *Rouse* (6), *Wright* (7), *Hudson* (3), *Roberts* (8), *Jones* (9), *Dunkley* (2) and *Woolley* (4).

It is said, however, that the authority of all these cases is destroyed by the decision of the House of Lords in *Stirland* v. *Director of Public Prosecutions* (10). In that case *Simon* L.C. stated certain propositions with respect to the legislative provision now under consideration. One of these propositions was in the following terms: " 4. An accused is not to be regarded as depriving himself of the protection of the section, because the proper conduct of his defence necessitates the making of injurious reflections on the

(1) (1910) 5 Cr. App. R. 131.
(2) (1927) 1 K.B. 323.
(3) (1912) 2 K.B. 464.
(4) (1942) V.L.R. 123.
(5) (1899) 63 J.P. 36.
(6) (1904) 1 K.B. 184.
(7) (1910) 5 Cr. App. R. 131.
(8) (1920) 37 T.L.R. 69.
(9) (1923) 39 T.L.R. 457.
(10) (1944) A.C. 315.

prosecutor or his witnesses: *R.* v. *Turner* (1)" (2). *Herring* C.J. pointed out in the Supreme Court that this statement was made by way of *obiter dictum* as the case did not raise any question as to the circumstances which may let in cross-examination as to character, but only a question as to the nature of the questions that might be put in cross-examination. It is contended for the applicant, however, that this Court should adopt and apply the rule stated and that the application of the rule would be decisive in this case in favour of the applicant.

It is argued for the applicant that in the present case the proper conduct of his defence necessitated the challenging of the voluntary nature of the confession which he signed, that he challenged it by alleging threats and violence on the part of the police officers, and that the proposition quoted shows that such a conduct of his defence does not deprive him of the protection of the section.

It is not within the province of any court to dictate to an accused person either the nature or the conduct (within recognized rules) of his defence. It appears to me that logically the contention of the applicant should be a quite general proposition that if an accused person, exercising a right which he undoubtedly possesses, adopts a line of defence which necessitates injurious reflections on the character of the prosecutor or of witnesses for the prosecution, he is at liberty to do so without exposing himself to any cross-examination or evidence as to his own bad character. If the defence which is actually relied upon in fact involves such reflections, it is difficult to see how it can be said that that particular defence does not necessitate them. The adoption of this broad rule in its full generality would mean that even if the defence which was actually put forward depended entirely upon destroying the credit and character of witnesses for the prosecution, yet no evidence of the bad character of the accused could be given. Such a view of the section would deprive it of effect and would involve the overruling of many decisions. The statement of the Lord Chancellor (2) should not, in my opinion, be regarded as laying down a general and very far-reaching proposition which overrules by mere implication and *sub silentio* the many authorities above cited which have adopted the rule that injurious reflections on the character of the prosecutor or his witnesses, even though necessarily involved in the defence actually raised, do operate to admit evidence with respect to the character of the accused.

The proposition stated by the Lord Chancellor (2) expressly refers only to *R.* v. *Turner* (1) and appears to be based upon that

(1) (1944) K.B. 463. (2) (1944) A.C., at p. 327.

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case. This reference makes it possible to interpret the proposition as intended only to state the effect of and to approve the decision in *Turner's Case* (1). That was a decision that where a person was charged with rape, if he alleged that the woman in question consented to intercourse and gave particulars in evidence showing the facts and circumstances of her alleged consent, including allegations of indecent conduct on her part, such evidence amounted merely to a denial of an essential ingredient of the offence and should not be regarded as making imputations against the character of the woman within the meaning of the section. If the proposition quoted from *Stirland's Case* (2) is regarded as only giving approval to this decision, then it cannot be decisive of the present case. The confession relied upon by the Crown in the present case was not an essential element of the offence charged—or an element of the offence at all. The confession was made some days after the date of the alleged commission of the offence. The denial of the voluntary nature of the confession therefore was not a denial of any element in the offence, and accordingly in my opinion *Turner's Case* (1) has no application to the present case.

If the proposition of the Lord Chancellor (2), however, should be accepted in its full generality, without any limitation by reference to *Turner's Case* (1) it is, I think, plainly inconsistent with *Hudson's Case* (3) and many other cases to which no reference is made in *Stirland's Case* (4). The question must arise again, and if then the House of Lords overrules *Hudson's Case* (3) some of the present confusion will disappear.

It has been suggested that the Lord Chancellor's proposition (2) should be interpreted as meaning that an accused person can, by cross-examination of Crown witnesses, or by his own evidence, suggest or give his own account of the facts alleged against him, including any imputations contained in such an account against witnesses for the prosecution, without exposing his own character, but that if he attacks the credit of such a witness for reasons not involving any reference to the evidence of that witness, that is, attacks his reliability as a witness, he loses the protection of the section. The difficulties in the way of so construing the proposition of the Lord Chancellor are that the words used do not draw any such distinction ; that an attack upon the character of an adverse witness is as much part of the conduct of the defence as anything else ; and that this construction gives no effect to the reference in the proposition to the decision in *Turner's Case* (1).

(1) (1944) K.B. 463.
(2) (1944) A.C., at p. 327
(3) (1912) 2 K.B. 464.
(4) (1944) A.C. 315.

In my opinion the proposition in *Stirland's Case* (1) should, in the absence of any clear statement that the other cases mentioned are overruled, be regarded as intended only to state the effect of *Turner's Case* (2) and therefore, for the reasons which I have stated, it is irrelevant to the present case.

In the present case the fact of the confession was part of the Crown case. Such a confession may be challenged in more than one way. An accused person may say that he did not understand it or that there was some mistake about it, without making any imputations on the Crown witnesses. This was not the kind of challenge made in the present case. The applicant Curwood admitted that he made the confession which was put in evidence for the prosecution, but his answer to it was that it was procured by the serious misconduct of two of the detective officers who gave evidence to prove it. When the substantial answer made by the prisoner or his counsel to an incriminating fact or piece of testimony consists in an imputation of misconduct to persons who are witnesses then, in my opinion, the judge's discretion under s. 432 to allow cross-examination as to character arises, notwithstanding that the proof of the misconduct is admissible as relevant to the issues in the case and that the imputation does not merely go to the credit of the witnesses. The application of this proposition is sufficient to decide the present case. It is based upon the authority of *Hudson's Case* (3) and the many other cases to which I have referred, the proposition in *Stirland's Case* (1) being regarded as stating only the effect of the decision in *Turner's Case* (2), and not as overruling *Hudson's Case* (3). It follows that, in my opinion, *Woolley's Case* (4) was rightly decided.

It has been argued that as a matter of principle an accused person should be allowed, if possible, to challenge the voluntary nature of an alleged confession without letting in evidence of his bad character because otherwise police authorities would be tempted to extract such confessions by violence from persons of bad character who were actually innocent of the offence charged because such persons would be prevented from challenging the voluntary character of the statement by fear of letting in evidence of their own bad character. That there is such a possible danger cannot be denied. On the other hand, it should not be forgotten that there are at least some objections to allowing accused persons to make serious and deliberate (not unconsidered and accidental, as in *Preston's Case* (5)) imputations

(1) (1944) A.C., at p. 327.
(2) (1944) K.B. 463.
(3) (1912) 2 K.B. 464.
(4) (1942) V.L.R. 123.
(5) (1909) 1 K.B. 568.

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against the character of the prosecutor or the witnesses against them, whether such imputations relate to the Crown evidence in the case or to other matters, and yet to prevent any attack or reflection upon their own character. The danger of injustice to the accused to which attention has been called is, however, at least to some extent, diminished by the express provision in s. 432 that permission of the judge (to be applied for in the absence of the jury) must first be obtained before questions tending to show previous convictions or bad character of the accused can be asked. This provision should constitute a real safeguard against unfairness in the operation of the section in a particular case (especially in sexual cases). Where cross-examination of the accused or evidence as to his character is relevant only to credibility, the jury should be warned against being misled into thinking that the evidence is relevant to probability of guilt: See *Maxwell* v. *Director of Public Prosecutions* (1).

In the present case the conduct of the defence was such as in my opinion to involve imputations on the character of the witnesses for the prosecution, and the section was rightly applied. As to other points which were argued, I see no reason for adding anything to the reasons for judgment of the Supreme Court. The jury must have been satisfied that the prisoner's confession was voluntary and true. In my opinion no injustice was done in the present case, and other points relied upon with which the Supreme Court has dealt are not such as to justify this Court in granting special leave to appeal.

In my opinion the application for special leave to appeal should be refused.

STARKE J. Motion on behalf of Ronald Frederick Curwood for special leave to appeal from the Supreme Court of Victoria in Full Court, sitting as the Court of Criminal Appeal, refusing him leave to appeal against a conviction for unlawfully and carnally knowing a girl under the age of ten years.

The prisoner has no right of appeal to this Court, and it should not interfere with the administration of criminal justice unless some substantial and grave injustice has been done (*In re Dillet* (2)). That is the rule of the Judicial Committee in cases of applications for special leave to appeal in criminal cases and, though this Court has an unfettered discretion (*Eather* v. *The King* (3); *In re Eather* v. *The King* (4)), as has the Judicial Committee, that discretion should be exercised on the same wise principles.

(1) (1935) A.C., at p. 321.
(2) (1887) 12 App. Cas. 459, at p. 467.
(3) (1914) 19 C.L.R. 409.
(4) (1915) 20 C.L.R. 147.

The argument in the present case took some considerable time, but perhaps not longer than the gravity of the case required. The prisoner signed a document in which he fully confessed the charge made against him. But he deposed that the confession was not voluntary, that police officers knocked him about and hurt him so much that in order to stop them he signed the confession, which was untrue. All the police officers denied the allegation. This kind of allegation has, I gather, been put forward in Victoria in recent years on various occasions and become almost a commonplace. The trial judge had no doubt that the confession was voluntary but the fact, however, was for the jury to determine in the last resort.

At the trial the trial judge ruled that the conduct of the defence was such as to involve imputations on the character of the police officers who were witnesses for the prosecution and therefore permitted the prisoner to be cross-examined as to his character but not as to any conviction for indecent exposure: See *Crimes Act* 1928 (Vict.), s. 432. The prisoner was then examined as to assaults upon young women, rushing up and grabbing hold of them, but he refused to answer those questions on the ground that they might incriminate him. The trial judge directed the jury that a refusal to answer such questions was not an admission of guilt, was no proof of guilt or of bad character whatsoever, and that the jury should so treat the matter. But it is contended for the prisoner that the conduct of the defence was not such as to involve any imputations on the character of the police officers and consequently that the questions should not have been asked.

The Supreme Court, following its own decision in *R.* v. *Woolley* (1) and several English decisions, ruled that the conduct of the defence did involve imputations on the character of the police officers and that cross-examination of the prisoner as to character was therefore admissible.

An imputation on the character of a person attributes some misconduct or fault to him, and the ruling of the Supreme Court seems plainly right. But it is contended for the prisoner that the House of Lords in *Stirland* v. *Director of Public Prosecutions* (2) has established a rule of law directly contrary to the decision of the Supreme Court.

The Lord Chancellor *Simon* propounded the following proposition: —"An accused is not to be regarded as depriving himself of the protection of the section, because the proper conduct of his defence necessitates the making of injurious reflections on the prosecutor or his

(1) (1942) V.L.R. 123. (2) (1944) A.C. 315.

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witnesses: *R.* v. *Turner* (1)" (2). But the Lord Chancellor, to my mind, said and meant no more than that there were cases in which imputations or reflections on the character of a witness were so connected with the substance of the charge that a prisoner was not deprived of the benefit of the section, whilst there were other cases in which imputations or reflections on the character of a witness were so disconnected and aside from the substance of the charge that a prisoner lost the benefit of the section. The Lord Chancellor cited *R.* v. *Turner* (1) as an illustration of the former class of case and *R.* v. *Hudson* (3) might, I suppose, have been cited as an illustration of the latter class. But I take it that the Lord Chancellor relies upon the experience, the good sense, and the discretion of those administering criminal justice to ascertain on which side of the line any given case falls, always giving the benefit of any real doubt to the prisoner. Indeed, there seems implicit in the proposition of the Lord Chancellor that which is express in the Victorian Act, that the trial judge should exercise his discretion, not of course arbitrarily, but within the bounds of reason and of justice. It may be that the sections in the English and the Victorian Acts do not expressly so provide, but, if the Court of Criminal Appeal in England and the House of Lords apply the section in that manner, a torrent of words from this Court cannot further elucidate the matter and may easily embarrass those who have to administer criminal justice in Victoria.

Again, assuming, for the purpose of argument, that the trial judge should not have allowed the questions challenged in this case to be asked, still has there been any grave and substantial miscarriage of justice in the relevant sense? It must be remembered that the Act, though prohibiting questions being asked, does not provide that a conviction shall be bad if they are asked (*Barker* v. *Arnold* (4)). But the asking of such questions is an important matter for the consideration of a Court of Criminal Appeal (*R.* v. *Ellis* (5); *Maxwell* v. *Director of Public Prosecutions* (6)), but hardly a matter for granting special leave to appeal by this Court, for no grave or substantial miscarriage of justice in the relevant sense has taken place when the questions were not answered and the trial judge warned the jury against drawing any inference from them adverse to the prisoner. And still less can it be said that such a miscarriage has taken place when the Supreme Court has after a full and careful consideration thought the questions legitimate in the special circumstances.

(1) (1944) K.B. 463.
(2) (1944) A.C., at p. 327.
(3) (1912) 2 K.B. 464.
(4) (1911) 2 K.B. 120.
(5) (1910) 2 K.B., at pp. 763, 764.
(6) (1935) A.C., at pp. 322-324.

Another ground in support of the motion for special leave to appeal was that the prisoner was cross-examined upon another statement which he had made to the police. The substance was that, though his confession already mentioned had been extracted by force, yet he had made another statement soon after that confession concerning his behaviour towards young women voluntarily and without the exercise of any improper pressure on the part of the police. This examination was admissible and falls within another proposition enunciated by the Lord Chancellor in *Stirland's Case*: "He" (the accused) "may, however, be cross-examined as to any of the evidence he has given in chief, including statements concerning his good record, with a view to testing his veracity or accuracy or to showing that he is not to be believed on his oath" (1).

The following questions were asked and answered:—

Q. You previously obliged by signing a very long statement for them? A. Yes.

Q. They made it for you? A. Yes.

Q. Why sign another statement for men who had done this before? A. I was guilty of the little one but not of the rape.

The prisoner's counsel submitted that the matter should not be pursued, and both the Crown Prosecutor and the trial judge said that the answer was unexpected. The trial judge reported that he did not hear the answer himself and did not know whether the jury heard it, that he told the shorthand writers to strike the question and answer out, but apparently did not manage to make his wish clear. And no more seems to have been heard of the matter until application was made for leave to appeal to the Supreme Court. One is reminded of the story of a judge who, not hearing what a prisoner (giving evidence on his own behalf) said, innocently asked:—"What did you say: what was your last sentence," and obtained the unexpected answer: "Six months." But, if in such a case the trial judge did not think proper to discharge the jury and directed them that no attention should be paid to the matter, it would be surprising if a Court of Criminal Appeal interfered with the prisoner's conviction and still more surprising if a tribunal having authority to grant special leave to appeal in the last resort regarded the incident as a grave and substantial miscarriage of justice.

Special leave in the present case should be refused.

DIXON J. In my opinion we ought not to grant special leave to appeal against the order of the Supreme Court unless we think that proviso (*e*) to s. 432 of the *Crimes Act* 1928 (Vict.) was contravened.

(1) (1944) A.C., at p. 326.

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In the circumstances of this case the remaining grounds argued would not, by themselves, warrant the exercise of our discretion in favour of the prisoner.

It is clear that on his trial the prisoner was in fact asked questions tending to show that he had committed an offence or offences other than that wherewith he was charged and some of the questions he was required to answer. A question which was not directed to that purpose but which, on the whole, I think had that tendency, elicited an answer, unexpected because of its candour, to the effect that he had committed another offence. That being so, it becomes necessary for the Crown to bring the case within par. (i) or par. (ii) of proviso (*e*) to s. 432.

It was contended that so much of the cross-examination as needs the justification of one or other of these paragraphs fell within the first, that is to say, that the proof that he had committed the offence or offences was admissible evidence to show that he was guilty of the offence wherewith he was charged. The argument was that, upon the question of guilt or innocence, it became material to investigate the circumstances in which the prisoner came to sign the written statement relied upon as a complete confession of guilt and that this could not be done without cross-examining the prisoner as to what had passed during a time when in fact he was making confessional statements, under the questioning of the police, with reference to another or other offences. Just as direct evidence of admissions by a prisoner relevant to the crime charged would not be rendered inadmissible merely by the circumstance that they included inseparable references to another or other offences (*R.* v. *Marley* (1)) so, it was contended, cross-examination of the prisoner concerning the circumstances of making a confession, which he repudiated on the ground of duress, was none the less relevant to the crime charged because inseparable from it was the disclosure of confessions concerning other offences. It is, I think, a sufficient answer to this contention that, during the cross-examination of the prisoner, questions were asked directed to his actual guilt of other offences, as distinguished from his making statements to the police about them, and he was obliged to claim protection from incrimination. One of the questions, as already stated, brought forth an admission that he had committed another offence. In this and other respects the cross-examination went beyond matters relevant to the commission of the crime charged. In other words in strictness some of it could be justified only because it went to the prisoner's credit as a witness. Before he embarked upon it, the learned prosecutor for

(1) (1932) 47 C.L.R. 618.

the King foresaw that this would or might be so and, accordingly, he applied for and obtained the leave of the judge under par. (ii) of proviso (*e*).

The real question in the case is whether the material condition expressed in that paragraph of the proviso was fulfilled. The material condition requires that " the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution."

The case implicating the accused depended upon a written confession signed by him and proved by the officers of police who took it. The defence at the trial was an alibi and a denial of the truth of the confession, the signing or making of which was explained on the ground that it was extorted by violence, or threats of violence, on the part of the officers of police or some of them. Counsel for the prisoner preferred not to raise the admissibility of the confession, that is, its voluntariness, as a question for the separate determination of the presiding judge and he, after hearing the evidence on the indictment, left the confession to the jury as admissible evidence.

Both at the trial and in the Full Court of the Supreme Court the allegation that the police officers who testified to the confession had extorted it by intimidation was treated as clearly forming part of the nature and conduct of the defence, with the consequence that the nature and conduct of the defence were held to be such as to involve imputations on the character of those witnesses for the prosecution.

It is quite plain that whatever answer the prisoner offered to the incriminating force of the confession must form a central part of his defence. It is true that confessional evidence ranks as a medium of proof. Its authenticity and value go only to the proofs of the case. They are not facts put in issue by the plea of not guilty. But " the defence " is the prisoner's case in answer to the incriminating circumstances or testimony adduced by the prosecution. For the purpose of considering whether the defence in this sense is of such a nature or is so conducted as to involve imputations on the character of the prosecutor or his witnesses, no assumption can or should be made as to the truth or untruth, validity or invalidity, of his case. That is the matter into which the jury must inquire. The prisoner, therefore, cannot be treated as having " chosen " or " elected " to put forward this or that allegation in answer to the case for the Crown as an alternative to some other possible answer or answers. For, if the facts he relies on in answer to the charge are true, he is impelled to put them forward.

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Here, as an indispensable part of his case answering the incriminating evidence adduced by the prosecution, the prisoner imputed to police witnesses the extortion of a confession by duress. Does that satisfy the critical words of the second paragraph ? There is one interpretation of that part of the proviso, which, if adopted, would require the answer that it does not satisfy the requirement it expresses. It is an interpretation which restricts the application of the words " imputations on the character of the prosecutor or the witnesses " to what is advanced for the purpose of destroying or impairing confidence in them as persons who would tell the truth. In other words, it restricts the application of the words to the cross-examination of the witnesses for the prosecution in relation to matters not relevant to the issues under the indictment, except in so far as they affect the credit of the witnesses by injuring their character, and to attempts to discredit them on like grounds by other means, such as, for example, by assertions by the prisoner whether from the dock or from the witness box. There is, I think, a distinct line of cases in which this interpretation was adopted, though its statement has taken various forms. It is the view of the provision rather suggested by the expressions of Lord *Alverstone* C.J. in *R.* v. *Bridgwater* (1) when he said that the imputations that the witness was guilty of misconduct independently of the defence, or of the necessity of developing the defence, would raise different considerations because then they might be construed as an attack on the general character of the witness. But the interpretation was first definitely formulated by *Channell* J. in *R.* v. *Preston* (2) in delivering the judgment of himself, Lord *Alverstone* C.J. and *Walton* J. After saying that the foregoing statement (3) of Lord *Alverstone* seemed to explain the principle upon which evidence of previous convictions is admissible, he stated that the latter part of the section appeared to mean this :—" that if the defence is so conducted, or the nature of the defence is such, as to involve the proposition that the jury ought not to believe the prosecutor or one of the witnesses for the prosecution upon the ground that his conduct —not his evidence in the case, but his conduct outside the evidence given by him—makes him an unreliable witness, then the jury ought also to know the character of the prisoner who either gives that evidence or makes that charge, and it then becomes admissible to cross-examine the prisoner as to his antecedents and character with the view of showing that he has such a bad character that the jury ought not to rely upon his evidence. That is the general nature of the enactment and the general principle underlying it " (4).

(1) (1905) 1 K.B., at p. 135.
(2) (1909) 1 K.B., at pp. 574, 575.
(3) (1905) 1 K.B., at p. 135.
(4) (1909) 1 K.B., at p. 575.

In *R.* v. *Westfall* (1) *Hamilton* J. referred to the same principle when he spoke of " that class of question which had to be asked if the facts alleged were to be properly investigated, and was directed not to impugning the character of the witness with a view to showing that he was an unreliable witness, but to illustrating the facts which the prisoner alleged to have taken place in connection with the very matter with which he was charged." See too *R.* v. *Biggin* (2) and *R.* v. *Malcolm* (3).

I should regard this interpretation of the provision in question, if it were accepted, as a satisfactory solution of the difficulties that arise upon the enactment. It depends upon an everyday distinction between cross-examining to the issue and cross-examining to credit that could readily be applied and it would operate fairly to the prisoner. But I think that it is an interpretation which encounters difficulties in the text of the provision and is inconsistent with another and more formidable line of authorities. The text of the section does not speak of cross-examination, but speaks of the nature or conduct of the defence. It may be suggested that it does so only because it was thought wise to extend the principle of inquiring into or examining the credit of both sides beyond cross-examination, for fear that the prisoner or his counsel attacked the credit of those giving evidence for the prosecution in some other manner, as, for instance, by a statement from the dock. But the provision goes beyond witnesses and includes the prosecutor, who of course may or may not be a witness.

On the language of the provision it would appear to include, not only cases where the character of a witness is impugned for the purpose of affecting his credit as a witness, but also cases where the misconduct imputed to him arises on the facts of the case, that is, where it is a fact relevant to an issue. In *R.* v. *Marshall* (4), very shortly after the passing of the enactment, *Darling* J. acted upon this view of it. For he overruled a contention that the clause means an imputation having reference to something that took place before and independently of the facts being inquired into and held that a defence that one of the witnesses for the prosecution was the actual culprit who had committed the offence charged was an imputation within the meaning of the provision. In *R.* v. *Jones* (5) *Channell* J. himself ruled that a defence by the prisoner that the charge against him had been invented by the mother of the victim, a child, involved an imputation within the clause and his ruling was sustained.

(1) (1912) 107 L.T. 463; 28 T.L.R. 297.
(2) (1920) 1 K.B., at p. 221.
(3) (1919) V.L.R. 596.
(4) (1899) 63 J.P. 36.
(5) (1909) 74 J.P. 30; 26 T.L.R. 59.

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In *R.* v. *Hudson* (1) the question again was whether an attempt on the part of the prisoner to fasten the crime on one of the witnesses satisfied the condition expressed in the clause. Because of certain expressions in *Bridgwater's Case* (2) and in *Preston's Case* (3) it was thought desirable that this point should be argued before a court of five judges (4). Lord *Alverstone* gave their reasons for deciding that such a defence did expose the prisoner to cross-examination about prior convictions. He said that the ruling of *Darling* J. in *Marshall's Case* (5) had been followed on many occasions and that in *Preston's Case* (3) the court had no intention of overruling it (6). Of *Bridgwater's* (2), *Preston's* (3) and *Westfall's* (7) cases he said that they might well be supported on grounds not touching the case before him, but they could not be treated as laying down a general rule applicable to all cases and they are not a complete enunciation of the law under the section. He added that the court thought that " the words of the section, 'unless the nature or conduct of the defence is such as to involve imputations, &c.', must receive their ordinary and natural interpretation, and that it is not legitimate to qualify them by adding or inserting the words 'unnecessarily,' or 'unjustifiably,' or 'for purposes other than that of developing the defence,' or other similar words " (8). It appears to me that this view has been followed or applied in *R.* v. *Wright* (9), in *R.* v. *Jones* (10), in *R.* v. *Dunkley* (11), in *R.* v. *McLean* (12) and in *R.* v. *Pollinger* (13). It is true that in *Jones' Case* (10) the passage set out above from the judgment of *Channell* J. in *Preston's Case* (14) was quoted ; but the court proceeded to distinguish between words amounting merely to an emphatic denial of evidence for the prosecution and words involving imputations. The decision would cover the present case, because it related to a confession which the prisoner said had been manufactured. So would *Wright's Case* (9), which was based on a suggestion by the prisoner that admissions proved against him had been obtained from him by bribes and threats on the part of the policemen who gave evidence. These cases show, in my opinion, that the provision has received an interpretation by which it applies not only to attempts by cross-examination, or otherwise, to destroy or weaken confidence in the prosecutor and others as witnesses by imputations affecting their

(1) (1912) 2 K.B. 464.
(2) (1905) 1 K.B. 131.
(3) (1909) 1 K.B. 568.
(4) (1912) 2 K.B., at pp. 467, 468.
(5) (1899) 63 J.P. 36.
(6) (1912) 2 K.B., at pp. 469, 470.
(7) (1912) 28 T.L.R. 297.
(8) (1912) 2 K.B., at pp. 470, 471.
(9) (1910) 5 Cr. App. R. 131.
(10) (1923) 39 T.L.R. 457 : 17 Cr. App. R. 117.
(11) (1927) 1 K.B. 323.
(12) (1926) 134 L.T. 640.
(13) (1930) 22 Cr. App. R. 75.
(14) (1909) 1 K.B., at p. 575.

character, but also to charges of misconduct which, while injurious to the character of the prosecutor or the witnesses, are yet relevant to the issues under the indictment, because forming part of the circumstances on which the proof or disproof of the crime may depend. But even so it is not every assertion by an accused man injuriously reflecting upon the prosecutor or upon witnesses that fulfils the conditions giving rise to the trial judge's discretion to allow cross-examination of the prisoner concerning other offences or to character. In the first place, the injurious reflections must really form part of the nature or conduct of his defence: Cf. *R.* v. *Everitt* (1).

In the next place, the word "involves" does not seem to have been given the full and extensive application of which it might be capable. There is much authority to show that a denial by the prisoner of incriminating facts, notwithstanding the clear implication must be that the witnesses for the Crown are lying, does not "involve" an imputation. Further, it makes no difference that the denial is vigorous and even disparaging in its expression or that the imputation of deliberate untruthfulness is explicit.

Again, it seems to have been repeatedly held that for a prisoner on a charge of rape to say that the prosecutrix consented "involves" no imputation upon her (*R.* v. *Sheean* (2); per *Avory* J. in agreement in *R.* v. *Biggin* (3)). And the case is not altered because he describes the circumstances attending her consent, and, if true, they show her to be of low character (*R.* v. *Turner* (4)). *Humphreys* J., in giving the reasons of the Court of Criminal Appeal in that case, dwelt upon the injustice of allowing the prisoner to deny an essential ingredient of the charge only upon pain of submitting to an attack on his general character and to a disclosure of any prior convictions. His Lordship said:—"In our opinion, this is one of the cases where the court is justified in holding that some limitation must be put on the words of the section, since to decide otherwise would be to do grave injustice never intended by Parliament" (5). This observation is not easy to reconcile with the statement in *Hudson's Case* (6) that the words must receive their ordinary and natural meaning and must not be qualified by, for example, "for purposes other than developing the defence," or other similar words. But, however that may be, the distinction is clearly maintained between denying facts forming part of the Crown case, notwithstanding that injurious implications, inferences, or deductions, must

(1) (1921) V.L.R. 245.
(2) (1908) 24 T.L.R. 459.
(3) (1920) 1 K.B., at p. 217.
(4) (1944) K.B. 463.
(5) (1944) K.B., at p. 469.
(6) (1912) 2 K.B. 464.

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follow, and making a defence the nature or conduct of which involves imputations on character.

In the propositions concerning the section, which the Lord Chancellor has recently formulated in *Stirland's Case* (1), there is one that generalizes *Turner's Case* (2). Viscount *Simon* says:—"An accused is not to be regarded as depriving himself of the protection of the section, because the proper conduct of his defence necessitates the making of injurious reflections on the prosecutor or his witnesses: *R.* v. *Turner* (2)."

Counsel for the applicant relies upon this as covering the position he takes, namely, that the denial of the truth of the confession on the ground that it was extorted is the substance of his defence and the proper conduct of that defence necessitates the injurious reflections made on the police witnesses. To read the Lord Chancellor's proposition in this way is to make it almost the contradictory of the enactment. The enactment makes it a condition that the conduct (an expression that must include proper conduct) of the defence shall not involve (and what is necessitated is necessarily involved) imputations upon the character of the prosecutor or the witnesses. "Injurious reflections", perhaps, is a wider and milder term, but covers an impeachment of character. I take the Lord Chancellor to be speaking of logical necessity. He is referring to the logical consequences of negativing ingredients in the crime charged and perhaps evidentiary facts alleged by the Crown. He says that it is not enough that the logical consequence of doing so is necessarily to reflect upon witnesses or the prosecutor. The Lord Chancellor did not intend to overrule *Wright's Case* (3), nor *Jones' Case* (4), nor *Robert's Case* (5). In the two latter cases the distinction is made between, on the one hand, the denial of facts evidentiary or ultimate, and, on the other hand, the setting up of a defence the basis of which is misconduct imputed to witnesses. In *Robert's Case* (6) *Darling* J. says:—"In the present case the imputation on the character of the woman was the whole substance of the defence, and all the cases seemed to show that it came within" the condition of the proviso. The imputation was that through malice the woman invented the charge. In *Jones' Case* (7) Lord *Hewart* L.C.J. described the allegation that the confession had been wickedly fabricated as "the very scheme and framework of his defence."

Where the injurious reflections are not more than consequential upon or incidental to the due presentation of the accused's denial

(1) (1944) A.C., at p. 327.
(2) (1944) K.B. 463.
(3) (1910) 5 Cr. App. R. 131.
(4) (1923) 39 T.L.R. 457; 17 Cr. App. R. 117.
(5) (1920) 37 T.L.R. 69.
(6) (1920) 37 T.L.R., at p. 70.
(7) (1923) 39 T.L.R., at p. 458.

of the incriminating facts, the case will fall under Lord *Simon's* fourth proposition (1), read as it should be with reference to the case he mentions. But where the prisoner's answer rests upon the misconduct imputed, is based upon the imputation on character, as it must be where the defence is that evidence is fabricated, that witnesses conspire, that there is a malicious or revengeful attempt to implicate the prisoner, that the true author of the crime is a witness, or that a confession is obtained by fraud, bribery or intimidation by the witnesses who prove it, then it appears to me that it is a misreading of the Lord Chancellor's meaning to attempt to apply his fourth proposition (1) to such a case. Doubtless these instances form but specific grounds assigned in support of the prisoner's denial of evidentiary facts or of facts in issue. But they fall within the very words of the proviso and they are also covered by the decided cases.

It follows that in the present case the conduct and nature of the defence did involve imputations upon the character of witnesses for the prosecution.

In my opinion the application for special leave to appeal should be refused.

McTIERNAN J. This application for special leave to appeal raises the important question whether upon the true construction of s. 432 (*e*) (ii) of the *Crimes Act* 1928 (Vict.) the applicant did deprive himself of the protection which s. 432 (*e*) gives to an accused person in the witness box. Speaking of s. 1 (f) of the *Criminal Evidence Act* 1898 (Imp.), which is similar to s. 432 (*e*), Viscount *Simon* said in *Stirland* v. *Director of Public Prosecutions* (1): "An accused is not to be regarded as depriving himself of the protection of the section, because the proper conduct of his defence necessitates the making of injurious reflections on the prosecutor or his witnesses: *R.* v. *Turner* (2)." This statement is the fourth of the six propositions set forth in that case. Its effect is to put a limitation upon the words "the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution", which are in s. 1 (f) (ii) of the English Act and in s. 432 (*e*) (ii) of the Victorian Act. The result of limiting the words in this way is that although such imputations are made in a case, the condition which the words express should not be held to be fulfilled if the proper conduct of the defence necessitates the making of the injurious reflections on the prosecutor or his witnesses.

(1) (1944) A.C., at p. 327.

(2) (1944) K.B. 463.

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"The proper conduct of the defence" is an expression which, in its ordinary meaning, would extend to the process of proving at the trial that force was used to obtain a confession upon which the prosecution relies to prove that the accused is guilty. Viscount *Simon's* words cover cross-examination of witnesses for the prosecution and the giving of evidence by the accused or any of the witnesses called on his behalf.

In the present case the applicant's defence was an alibi and it was also his defence that the confession, which the police gave evidence to prove that he made, was untrue and that the confession was obtained from him by force.

It must be held that injurious reflections were made on a detective and a constable who gave evidence for the prosecution. Those reflections were cast on them by the cross-examination whereby the applicant's counsel tried to prove that each of these witnesses used violence against the applicant while he was undergoing interrogation at the detective office, to force him to confess his guilt, and by the evidence, which the applicant gave, that such violence was then used for that purpose. Apart from the evidence given in the case there is no basis for any opinion on the question whether violence was used. It was for the jury to decide that question upon the evidence.

There is ample justification for holding that the proper conduct of the defence necessitated the making of the injurious reflections which the above-mentioned cross-examination and evidence cast upon the detective and the constable. The result is that the condition which is contained in the words that have been quoted from s. 432 (*e*) (ii) was not fulfilled.

The applicant was asked questions which were within the scope of s. 432 (*e*) upon the footing that the condition was fulfilled. If it is right to hold that the condition was not fulfilled, it was a breach of the section to ask the applicant those questions while he was in the witness box.

Upon the citation of *R.* v. *Turner* (1) at the end of the Lord Chancellor's fourth proposition there is based the argument that the proposition is limited to cases in which the denial of one of the ingredients of the offence necessitates the making of the injurious reflections. But the proposition is not in terms limited to those cases. It is evident, I think, that the Lord Chancellor approved of the principle underlying the limitation which *R.* v. *Turner* (1) imposed upon the words: "the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the

(1) (1944) K.B. 463.

witnesses for the prosecution." This principle equally requires that the Lord Chancellor's proposition should apply to a case in which the denial of any incriminating fact which is introduced by the prosecution—for example the fact that the accused voluntarily confessed his guilt—necessitates the making of the injurious reflections. It seems to me that *R.* v. *Turner* (1) is cited to illustrate the proposition, not to restrict its clear general words.

The passage which precedes the statement of the six propositions in *Stirland's Case* (2) indicates, I think, that they were intended to replace the " multi-coloured lights " of the decided cases. They profess to be a restatement of " the rules which should govern the cross-examination to credit of an accused person in the witness box " and " to cover the ground." The fourth proposition is authoritative upon the interpretation of the words " the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution " and supersedes any inconsistent rule which is in any decided case for the interpretation of those words. For this reason I do not make a survey of the decided cases in order to gather the rule of interpretation to be applied in order to solve the present problem. In any case a survey is made in the reasons for judgment of other members of the Court and it is unnecessary to repeat it. There is no ground for the assumption that the Lord Chancellor intended to preserve the authority of the line of cases of which *R.* v. *Hudson* (3) is representative rather than that of the line of cases of which *R.* v. *Preston* (4) is representative. Indeed, the rule of interpretation laid down in *R.* v. *Hudson* (3) cannot, I think, be reconciled with the fourth proposition in *Stirland's Case* (5).

The decision of the present case should be governed by the Lord Chancellor's fourth proposition rather than by *R.* v. *Jones* (6), *R.* v. *Wright* (7), or *R.* v. *Woolley* (7). The facts of *R.* v. *Wright* (7) are like those in the present case. That case, like the present, turned upon the meaning of the words " the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution." The report of the statements that were made in argument by the judges who decided that case indicates that the decision may have been governed by a view opposite to that which was adopted in *R.* v. *Turner* (1). *Darling* J. stated : " it might be his only way of defending himself,

(1) (1944) K.B. 463.
(2) (1944) A.C., at p. 326.
(3) (1912) 2 K.B. 464.
(4) (1909) 1 K.B. 568.
(5) (1944) A.C., at p. 327.
(6) (1923) 39 T.L.R. 457; 17 Cr. App. R. 117.
(7) (1910) 5 Cr. App. R. 131.
(8) (1942) V.L.R. 123.

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but it is none the less the same thing as an imputation" (1). This statement is not consistent with the Lord Chancellor's fourth proposition (2).

The conclusion which I reach is that s. 432 was infringed at the trial. It was infringed by asking the applicant questions tending to show that he had attacked two other females. The questions were asked in the presence of the jury. The applicant did not answer any of these questions. He refused to answer on the ground that his answer might incriminate him. The applicant was informed when each of the questions was asked that he could refuse to answer it on that ground.

The introduction of the suggestion that the applicant had made other criminal attacks on females led to his giving at a later stage an irrelevant answer within the scope of s. 432 (*e*); the question, however, to which he made that answer was not within the scope of that section and was admissible.

But, having regard to the nature of the offence with which the applicant was charged, it is not improbable that the subject matter of the questions, which I think were a breach of the terms of the section, might have influenced the jury against the applicant when they were considering their verdict. The learned trial judge clearly directed the jury that they ought not to be influenced against the applicant by his refusal to answer the questions. But I think that in the present case the asking of the questions which were in my opinion inadmissible in law might have seriously prejudiced the fair trial of the issues.

For these reasons I should allow this application for special leave.

WILLIAMS J. The appellant was tried in the Supreme Court of Victoria before *Gavan Duffy* J. and a jury of twelve upon the charge under s. 42 of the *Crimes Act* 1928 (Vict.) that he did unlawfully and carnally know and abuse a certain girl under the age of ten years and was convicted and sentenced to death. He applied to the Full Court for leave to appeal against the conviction but his application was refused. He has now applied to this Court for special leave to appeal against the order of the Supreme Court.

There was ample evidence upon which the jury could find that the child had been raped; indeed the accused scarcely contested the case for the prosecution on that issue; his substantial defence was an alibi.

The child in her unsworn evidence said that she was lured away by a man on a bicycle who asked her to help him find a little white

(1) (1910) 5 Cr. App. R., at p. 132. (2) (1944) A.C., at p. 327.

dog, but that she did not think that the appellant was the man or that the bicycle belonging to the accused in court was the same bicycle. The case for the Crown upon identification depended entirely upon a statement in writing made to the police by the appellant in which he gave an account admitting in considerable detail the manner in which he had committed the crime. In one important detail at least this account differs from that given by the child. The appellant, who gave evidence, did not deny that he had signed the confession, but his counsel cross-examined the police officers concerned who gave evidence, in an attempt to prove that they had called him a rat and a liar, had punched him in the stomach, and pushed him about until he felt sick and weak, and had then dictated what he was to say, and he himself gave evidence that he had been treated by the police in this way. The purpose of this cross-examination and evidence was, of course, to prove that the confession was not voluntary because it was obtained by what he called "sheer force."

The Crown Prosecutor then applied to the learned trial judge, in the absence of the jury, under s. 432 of the *Crimes Act* for permission to cross-examine the appellant under sub-s. (*e*) on the ground that the nature or conduct of the defence was such as to involve imputations on the character of these police officers who were witnesses for the prosecution. This section, so far as material, provides that every person charged with an offence shall be a competent witness, provided that (*e*) a person charged and called as a witness shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless (ii) . . . the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution: Provided that the permission of the judge (to be applied for in the absence of the jury) must first be obtained. Permission having been obtained, the Crown Prosecutor asked the appellant questions couched in such a form that they tended to show that, shortly before the offence wherewith he was then charged, he had committed two other similar offences. The appellant, who was warned that he could refuse to answer questions on the ground that the answers might incriminate him, refused to answer some of these questions, but at a certain stage of his cross-examination admitted that he had on the same day signed another statement that he had been "guilty of the little one but not of the rape."

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The crucial question is whether the trial judge was right in ruling that the case for the defence had been so conducted that he had a discretion under the section to permit the Crown Prosecutor to cross-examine the accused in this manner. In so ruling he followed the decision of the Full Court of the Supreme Court of Victoria in *R.* v. *Woolley* (1), so that, since it is clear that if that decision was correct the ruling was right, it will be necessary to express an opinion upon its correctness.

It is to be noted that the section, by forbidding the asking of a question tending to show that the accused has committed a previous offence, although he denies it or refuses to answer on the ground that it might incriminate him, clearly recognizes the prejudice an accused may suffer by a mere suggestion made by the Crown to this effect.

The offence with which the appellant was charged was one of a class in which there is always a grave risk that a jury, however carefully directed, will regard answers to questions tending to show that an accused has committed other sexual offences as evidence that he was probably the person who committed the offence for which he is being tried and not as affecting only his credibility as a witness, so that it would be impossible, in my opinion, for a court of criminal appeal to be satisfied in the present case that if the learned judge was wrong in giving permission to ask the questions there has nevertheless been no miscarriage of justice, because a reasonable jury, if the questions had not been asked, would or could not have given any other verdict than that of guilty (*R.* v. *Haddy* (2); *R.* v. *Turner* (3)).

As the Chief Justice has said, most if not all of the decisions of the English Court of Criminal Appeal upon the proper construction of the corresponding English legislation contained in the *Criminal Evidence Act* 1898 have been collected in *Halsbury's Laws of England*, 2nd ed., vol. 9, pp. 215-217, and the 1943 Supplement, p. 343. To these cases there must be added the recent decisions of that Court in *R.* v. *Turner* (3) and of the House of Lords in *Stirland* v. *Director of Public Prosecutions* (4). Lord *Simon* in his speech in *Stirland's Case* (5), which was concurred in by the other noble and learned Lords, laid down six propositions governing the cross-examination to credit of an accused person in the witness box which, his Lordship said, "seem to cover the ground." The fourth proposition is as follows:—"An accused is not to be regarded as depriving himself

(1) (1942) V.L.R. 123.
(2) (1944) K.B. 442.
(3) (1944) K.B. 463.
(4) (1944) A.C. 315.
(5) (1944) A.C., at pp. 326, 327.

of the protection of the section, because the proper conduct of his defence necessitates the making of injurious reflections on the prosecutor or his witnesses: *R.* v. *Turner* (1)." The only previous decision, therefore, to which Lord *Simon* has specifically referred is *R.* v. *Turner* (1). In that case the prisoner had been accused, as in the present case, of rape, but the woman was of an age to consent and his defence was that she had done so. It was held by the Court that the evidence which the accused gave to prove consent, although it involved an imputation on the character of the prosecutrix, was not sufficient to expose him to cross-examination under the section. *Humphreys* J., who delivered the judgment of the Court, which consisted of five judges, pointed out that what is commonly referred to as the defence of consent in rape is in truth nothing more than a denial by the accused that the prosecution has established one of the two essential ingredients of the charge, and that it is and must be the prosecution which introduces the question of consent or non-consent. He also pointed out that for centuries the law had jealously guarded the right of an accused person to put forward at his trial any defence open to him on the indictment without running the risk of his character, if a bad one, being disclosed to the jury, so that it was apparent that some limitation must be put on the words of the section, since to decide otherwise would be to do a grave injustice which Parliament could never have intended. The cases prior to *R.* v. *Turner* (1) can be roughly separated, I think, into those decided prior to *R.* v. *Hudson* (2) and those subsequently decided. Prior to *R.* v. *Hudson* (2) it had been held on several occasions that the section should not be construed as showing an intention to deprive the accused of his ordinary right, without exposing his character to cross-examination, to cross-examine the prosecutor and his witnesses on the whole of their evidence in the case, and to give evidence himself to meet and rebut that evidence. So in *R.* v. *Rouse* (3), where the defendant who was charged with conspiring by false pretences to induce the prosecutor to sell a mare, was called as a witness for the defence and was asked in cross-examination: "Did you ask the prosecutor to sell you the mare in April for £19, or has he invented all that?" and replied: "No. It is a lie, and he is a liar," it was held that the defendant's answer amounted only to an emphatic denial of the truth of the charge against him and that the nature or conduct of the defence was not such as to involve imputations on the character of the prosecutor (and cf. *R.* v. *Jones* (4); *R.* v. *Parker* (5)), although to call a witness for the prosecution

(1) (1944) K.B. 463.
(2) (1912) 2 K.B. 464.
(3) (1904) 1 K.B. 184.
(4) (1909) 26 T.L.R. 59; 74 J.P. 30.
(5) (1924) 18 Cr. App. R. 14.

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" a horrible liar " was held to involve an imputation on his character (*R.* v. *Rappolt* (1)). In *R.* v. *Preston* (2) one of the issues was whether the defendant was the man who was seen near the place where the offence was committed. The defendant was placed in a row with a number of other men and the prosecutor's wife and another witness identified him as the person whom they saw there. A third person failed to identify him and picked out another man instead. An inspector of police, who was present when the last-mentioned person failed to identify the defendant, was called as a witness for the prosecution. The defendant in evidence said that (the inspector) " sent a fellow out to fetch the man in, and he said deliberately ' the second ' and the man came in and pointed to the second and picked the other man out. I was second from the other end, not that end." The Court held that this was not conducting the defence so as to involve an imputation on the character of the inspector within the meaning of the section. *Channell* J., in delivering the judgment of the Court, said that it appeared to the Court that the section means " that if the defence is so conducted, or the nature of the defence is such, as to involve the proposition that the jury ought not to believe the prosecutor or one of the witnesses for the prosecution upon the ground that his conduct—not his evidence in the case, but his conduct outside the evidence given by him—makes him an unreliable witness, then the jury ought also to know the character of the prisoner who either gives that evidence or makes that charge, and it then becomes admissible to cross-examine the prisoner as to his antecedents and character with a view of showing that he has such a bad character that the jury ought not to rely upon his evidence. That is the general nature of the enactment and the general principle underlying it " (3). Later he said, in referring to the defendant's evidence, that " the allegation was made with reference to a matter which could not be said to be irrelevant. The prisoner was almost bound to give some evidence upon the subject of his identification at the police station . . . the making of such an imputation was not in any way the substance of the defence ; it was not part of the nature or conduct of the defence . . . it is connected with relevant matter " (4).

Two cases which are similar to *R.* v. *Preston* (2) on their facts are *R.* v. *Bridgwater* (5) and *R.* v. *Westfall* (6). All three cases were referred to by the Court of Criminal Appeal consisting of five judges in *R.* v. *Hudson* (7). There the appellant was charged

(1) (1911) 6 Cr. App. R. 156.
(2) (1909) 1 K.B. 568.
(3) (1909) 1 K.B., at p. 575.
(4) (1909) 1 K.B., at p. 576.
(5) (1905) 1 K.B. 131.
(6) (1912) 28 T.L.R. 297 ; 107 L.T. 463.
(7) (1912) 2 K.B. 464.

with having stolen money and a bank book from the prosecutor in a public house. The appellant and several other men were present at the time of the theft and the bank book was found in the appellant's pocket. The defence set up was that one or more of the other men had committed the theft, and had put the bank book into the appellant's pocket, and when two of these men were called as witnesses for the prosecution they were asked questions by the appellant's counsel with a view to showing that they had committed the theft. It was held that the nature and conduct of the defence was such as to involve imputations on the character of these witnesses, and that therefore the accused could be cross-examined as to previous convictions. Lord *Alverstone* C.J., in delivering the judgment of the court, said that the words of the section must receive their ordinary and natural interpretation, and that it is not legitimate to qualify them by adding or inserting the words " unnecessarily " or " unjustifiably " or " for purposes other than that of developing the defence ", or other similar words (1). But he also said that the decisions in *R.* v. *Bridgwater* (2), *R.* v. *Westfall* (3) and *R.* v. *Preston* (4) " may well be supported on grounds which do not touch the question raised in the present case " (5).

The distinction between *R.* v. *Hudson* (6) and these three cases appears to me to be that in *Hudson's Case* (6) there was no evidence which could be given by the accused or any witness whom he could call on his behalf that either of these witnesses for the prosecution had been seen stealing the bank book or placing it in his pocket, so that the nature and conduct of the defence was to make an imputation to that effect against them unsupported by any evidence to be tendered by or on behalf of the accused and seek to establish it by cross-examination, whereas in the other three cases all that the accused by his counsel was doing was to put to the witnesses for the prosecution the evidence which he proposed to give himself in what Lord *Sumner* (then *Hamilton* J.) in *R.* v. *Westfall* (7) stated to be " an endeavour to elicit the facts which the appellant said took place in connection with this very matter."

Subsequent decisions to *R.* v. *Hudson* (6) are *R.* v. *Roberts* (8), *R.* v. *Jones* (9), *R.* v. *Pollinger* (10) and *R.* v. *Dunkley* (11). In all these cases the defence was conducted in such a way that the imputations against the prosecutor or his witnesses were made outside any

(1) (1912) 2 K.B., at p. 471.
(2) (1905) 1 K.B. 131.
(3) (1912) 28 T.L.R. 297; 107 L.T. 463.
(4) (1909) 1 K.B. 568.
(5) (1912) 2 K.B., at p. 470.
(6) (1912) 2 K.B. 464.
(7) (1912) 107 L.T., at p. 464.
(8) (1921) 37 T.L.R. 69.
(9) (1923) 39 T.L.R. 457.
(10) (1930) 22 Cr. App. R. 75.
(11) (1927) 1 K.B. 323.

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evidence which they had given or the accused could give in the same way as in *Hudson's Case* (1).

The two cases that appear to be closest to the present application on their facts are *R.* v. *Westfall* (2) and *R.* v. *Jones* (3). In *R.* v. *Westfall* (2) the fact that the accused gave evidence that a constable who arrested him and gave evidence had used undue violence was held to be evidence of the facts of the case and not to raise an imputation against the character of the constable within the meaning of the section. In *R.* v. *Jones* (3) the prisoner was accused of burglary, the only evidence against him being that of a detective who said that he had made an oral confession that he had committed the crime. The accused denied that he had ever made the confession, so that it would only have been necessary, in order to elicit the relevant facts, to cross-examine the constable as to the occasion upon which the confession was alleged to have been made, and for the accused to give his account of what then occurred, including an emphatic denial of the making of the confession. But the accused, who had been remanded four times, went much further and stated by his counsel that his case was that the whole of the evidence against him had been manufactured, and that it was for this purpose that the police had obtained the four remands. It was held, therefore, that the very " scheme and framework of the defence " was that the case for the Crown was a wicked fabrication, and that this involved a serious imputation upon the character of the police.

When the whole of the authorities are examined they show, I think, a more consistent approach by the courts to the construction of the section than is apparent at first sight. Upon a criminal trial the onus is on the Crown to prove beyond reasonable doubt all the facts which are essential ingredients in the offence with which the accused is charged. There may be direct evidence to prove or disprove these facts, but there may also be facts which are relevant to their proof or disproof, in that they are capable of affording a reasonably conclusive inference with respect thereto. In addition to these facts, either the Crown or the accused may seek to prove facts which are only admissible in cross-examination to impeach the credibility of the witnesses called by the other side. The character of all the witnesses other than the accused is equally open to attack on the ground of credit. But the character of the accused is only open to attack to the extent permitted by the section, which in effect provides that it is not to be open to attack unless the

(1) (1912) 2 K.B. 464.
(2) (1912) 28 T.L.R. 297; 107 L.T. 463.
(3) (1923) 39 T.L.R. 457.

accused elects to give evidence of his own good character, or to conduct his defence in such a way as to involve imputations upon the character of the prosecutor or his witnesses. The conduct of the defence may involve imputations within the meaning of the section, whether the questions are put to the prosecutor or a witness for the prosecution as part of his conduct in relation to the case but outside the evidence which he has given or the accused can give in an attempt to establish a relevant fact, as, for instance, in *Hudson's Case* (1), that the witness and not the accused committed the offence, or they are put in an attempt to impeach the credit of the prosecutor or his witnesses. But such imputations as necessarily arise out of the examination and cross-examination of these witnesses by counsel for the accused upon the facts in issue or relevant to the issue to which they have testified, or out of his counsel putting to them his version or his giving his evidence of that version, have never been considered, so far as I can see, to cause the defence to be of such a nature or so conducted as to involve imputations upon the character of the prosecutor or his witnesses within the meaning of the section, but have always been regarded as relating to matters referred to by the prosecution, and designed to rebut the facts sought to be established by the prosecution (*R.* v. *Watson* (2); *R.* v. *Cohen* (3)). This follows from what *Channell* J. said in *R.* v. *Preston* (4), and any doubt that was thrown upon what he there said by *R.* v. *Hudson* (1), although the above passage in his judgment has been frequently cited since *R.* v. *Hudson* (1), has been removed, to my mind, by the reasoning of *Humphreys* J. in *R.* v. *Turner* (5) and by Lord *Simon's* statement of the law in his fourth proposition (6).

In the present case all that the accused did was, by his counsel, to cross-examine the police witnesses, and to give evidence himself upon the facts which he said occurred at the making of the confession. The proper conduct of his case necessitated the placing of his version of these facts before the jury. If the evidence had related to a fact in issue, it is clear from his Lordship's reference to *R.* v. *Turner* (5), that it would have been within the fourth proposition. But I am unable to believe that Lord *Simon*, by his reference to this case, intended the proposition to be confined to injurious reflections necessarily arising out of evidence of the facts in issue, and not to include evidence relating to facts relevant to prove or disprove the facts in issue. If he had intended to hold that such cases as

(1) (1912) 2 K.B. 464.
(2) (1913) 109 L.T. 335, at p. 337.
(3) (1914) 111 L.T., at p. 79.
(4) (1909) 1 K.B., at p. 575.
(5) (1944) K.B. 463.
(6) (1944) A.C., at p. 327.

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R. v. *Bridgwater* (1), *R.* v. *Westfall* (2) and *R.* v. *Preston* (3) were wrongly decided, then he would, I think, have expressly said so, instead of leaving it to implication.

It follows from what I have said that, in my opinion, *R.* v. *Woolley* (4) was wrongly decided, and that the trial judge fell into error when, in reliance on this case, he allowed the cross-examination.

For these reasons I would grant special leave to appeal; and, as the Crown was represented on the application and the matter was fully argued, I would allow the appeal, quash the conviction, and order a new trial.

Special leave to appeal refused.

Solicitors for the applicant, *N. H. Sonenberg & Co.*, Melbourne.

Solicitor for the respondent, *F. G. Menzies*, Crown Solicitor for Victoria, by *A. H. O'Connor*, Crown Solicitor for New South Wales.

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(1) (1905) 1 K.B. 131.
(2) (1912) 28 T.L.R. 297; 107 L.T. 463.
(3) (1909) 1 K.B. 568.
(4) (1942) V.L.R. 123.