

UNFAVOURABLE WITNESSES S.38



Introduction



- Hailed as:
- “Getting to the truth of the matter.”
- “One of the most worthwhile achievements of the UEA.”\
- Obviously, s.38 mostly used by prosecutors.
- Has probably modified the prosecutor’s obligation to call all relevant witnesses.

Common Law – Hostile Witness Rule



***"Your honor, please have it be noted
that Mr. Jones is a hostile witness."***

- Where the witness
 - Deliberately withholding or lying.
 - Prior inconsistent statement.
- Enabled cross examination at large.

Section 38

- Now 'unfavourable' evidence;
- Not making a genuine attempt in examination in chief;
or
- Prior inconsistent statement.
- Cross examination 'limited' to these matters and to credibility; s.38(3).

The Prosecutor's Obligation

- ALRC: s.38 encourages parties to call all relevant witnesses.
- Must establish leave on the balance of probabilities in the absence of the jury.
- Opportunity for advance ruling: see *R v McCrae*.
- Cases have examined the prosecution obligation for fairness.
- e.g. 'Unfavourable' is a test of evidence, not merely case theory: see *R v Kneebone* (1999) 47 NSWLR 450.
- Disadvantage may not equal "unfavourable".
- The prosecution can call an unfavourable witness with a view to adducing a prior inconsistent statement to discredit the witness: see *Adam v R* (2001) 207 CLR 96.
- Timing of the use of s.38 – the Courts discourage the use as a tactical weapon.

General Notes

- Does not permit a right to open slather cross examination. May be an appellable error to do so: see *Hogan* [2001] NSW CCA 292.
- If the prosecution does not seek leave to xxn, it will probably be an error if the Crown then addresses that a witness “should not be believed”.



Limits on Cross Examination

- Note the words of s.38(1): “...may question the witness about...”.
- Cross examination is limited to the three areas; and
- S.38(3) credibility.
- Whilst not an occasion for open slather cross examination, it should not be too narrowly confined: see *R v Le* (2002) 54 NSWLR 474, Heydon JA.

'Unfavourable'

- The term is not defined.
- Does not mean adverse; just 'not favourable' see *R v Souleyman* (1996) 40 NSWLR 712; *R v McCrae*.
- ALRC and Victoria favour this broad approach to its meaning.
- Unfavourable may mean:
 - Portions of evidence going against the prosecution case.
 - Omissions of evidence that would help a case – faulty memory.
 - Rather than hostile/adverse.
 - Fail to come up with a prior statement.
 - Adding to evidence to help an accused but in an untruthful way.
 - Motivated by a desire to help the accused.
- It must detract from the case of the party calling them.
- Not simply neutral.

Not Making a Genuine Attempt

- It would appear to only arise once giving evidence.
- Again it may be merely unco-operative rather than untruthful: *Saunders v R* (2004) 149 A Crim R 174.
- May therefore cross examine on a witness's relationship to the party's conduct, in court, demeanour.
- 'Can't remember' – may be a classic example of not making a genuine attempt



Prior Inconsistent Statement

- Must be an implicit or ‘substantial inconsistency’.
- The fact of a prior inconsistent statement needs to be established on a voir dire.
- Leave to cross examine about the prior inconsistent statement should not simply limit cross examination to the fact of the making of the statement.
- Rather, the cross examiner may explore the background to the statements, and the reasons for the change.
- Note: s.43 deals with prior inconsistent statements and how they are proved.
- Importantly a statement admitted under s.43 is now admitted as to the truth of the statement **and** the credibility of the witness.

Witness Credibility

- Part 3.7, s.101A*ff* deal with credibility evidence.
- If a prosecutor wishes to question a witness solely on credibility under s.38(3), then must comply with Part 3.7 and in particular cross examination must be capable of 'substantially affecting the assessment of the credibility of the witness': s.103(1).
- s.103(2) the evidence:
 - Tends to prove the witness knowingly or recklessly made a false representation;
 - The period of time which has elapsed since the act/evidence to which the evidence relates.
- Counsel should expect these to be covered in the leave application.

The Order of Cross Examination under s.38

- s.38(4): the ordinary course is for the cross examination to occur before defence counsel/other parties' cross examination.
- Where the Crown cross examines first, it retains a right to re-examination.
- The order of cross examination may be displaced by direction of the Court.
- It is not limited to cases where unfavourable evidence emerges unexpectedly in cross examination by defence counsel.
- It may be appropriate to hear the whole explanation/description of the unfavourable evidence, and then allow the prosecutor to challenge by cross examination.

The Order of xxn under s.38 (cont.)

- A Judge may direct that defence counsel may further cross examination after the s.38 prosecutor's cross examination.
- It has been observed that it is not an abuse for a prosecutor to apply to cross examine after the defence cross examination where:
 - “A truer picture was presented to the jury than would have been the case if the Crown had been refused leave to cross examine.”
 - See *R v Parkes* (2003) 147 ACrimR 450.
- Courts must however exercise caution in this respect. The NSW CCA has warned against prosecutors using this simply as a tactical weapon which may result in unfairness: see *Burrell* [2007] NSW CCA 65.
- In those circumstances it would be proper to allow defence to further cross examine after the Crown.

The Application for Leave to Cross Examine

- s.38(6) early notice lessens the disadvantage to defence counsel, but failure to give notice is not fatal.
- The factors in s.192.
- Exclusion of evidence under the discretions ss.135-137.
- Then, if leave is granted, the Court must consider the extent (without being prescriptive) of the cross examination.

Limits on Re-examination s.39

- There is no real change to the law here.
- However where a prosecutor has cross examined a witness first under s.38, there is no bar to re-examination.

