**[1991–92 Gib LR 354]**

## R. v. TRINIDAD

SUPREME COURT (Kneller, C.J.): July 7th, 1992

*Evidence—character—previous convictions—cross-examination on previous convictions under Criminal Procedure Ordinance, s.67(f)(ii) permitted to attack accused's credibility, either as to truth of imputations on prosecution character or generally, but not to prove guilt by implying past convictions increase probability that offence committed—court may limit questioning to dishonesty offences*

*Evidence—character—previous convictions—discretion to restrain cross-examination on previous convictions under Criminal Procedure Ordinance, s.67(f)(ii) on ground of fairness, e.g. if evidence more prejudicial than probative as to character*

*Evidence—character—imputation on prosecution witness—imputation requires clear allegation against witness—accused's character not put in issue by imputation on character of non-witnesses*

The accused was charged with the possession of amphetamines and cocaine, and with possession of cocaine with intent to supply it to others.

In a search of the appellant's flat, police found 11g. of (40%) cocaine and some foil wrappers with traces of amphetamine on them in a bag of laundry. On a bedside table, a further 4.33g. of (85%) cocaine were found in plastic wrappers, together various other items associated with drug-use and supply.

The appellant pleaded not guilty, stating that the drugs were not his, that a number of other people had access to the flat, and that damage to an

internal door might indicate a break-in. He did not specifically allege that the drugs had been "planted" by the police or any prosecution witness but said he thought "there was something funny going on." Counsel for the Crown then asked whether he had any previous convictions. The defence objected, and the issue was heard in the jury's absence.

The accused had several previous convictions for drug offences, but the court had been unaware of these, since there was no copy of his record on the court file. Consequently, he had not been warned about the circumstances in which his previous convictions might be adduced in evidence.

The Crown applied for leave to cross-examine the accused about his previous convictions and sentences, on the ground that he had suggested by his defence that the drugs and other objects in his room had been placed there in an attempt to "frame" him. The Crown asserted that his defence thus involved imputations on the character of prosecution witnesses, and evidence of his convictions could be admitted prior to the jury's verdict under s.67(*f*)(ii) of the Criminal Procedure Ordinance, by way of exception to the s.92 prohibition on doing so.

**Held,** making the following ruling:

(1) Although the prohibition on admitting evidence of previous convictions was couched in absolute terms in s.92 of the Criminal Procedure Ordinance, questions about previous offences could be asked by the Crown in certain circumstances listed in s.67(*f*). If the accused invited the jury to disbelieve the prosecution case by making imputations against its witnesses, evidence of his bad character could be admitted to persuade the jury that he was not a reliable witness. The Crown's cross-examination could be directed at the credibility of the imputations cast or of the accused's whole testimony, and the trial judge might limit the kinds of offences that should be raised to those involving dishonesty. Such cross-examination could not seek directly to establish the accused's guilt by suggesting that because of past offences it was more probable that he had committed the offence charged. The court had a discretion to exclude or restrict certain questioning on the grounds of fairness, for example if the evidence would be so gravely prejudicial as to outweigh its probative value (paras. 6–11).

(2) The s.67(*f*)(ii) exception to the prohibition did not arise in this case, since neither the accused nor his counsel had directly suggested that any police witness had planted the drugs. By stating simply that the drugs had not been in his room when he left it and were there when the police entered it in his presence, he had not cast an imputation on the character of a prosecution witness. There was no rule against speculating as to the characters or acts of non-witnesses. In any event, the Crown should not have asked the accused about his previous criminal record without first seeking the court's leave. A copy of the accused's previous criminal record should have been sent to the court registry and the accused warned about its implications for the conduct of his defence. The Crown would

be refused leave to cross-examine him on his record (paras. 12–18).

**Cases cited:**
(1) *Jones* v. *D.P.P.*, [1962] A.C. 635; [1962] 1 All E.R. 569, considered.
(2) *Maxwell* v. *D.P.P.*, [1935] A.C. 309; (1934), 103 L.J.K.B. 501, *dicta* of Viscount Sankey, L.C. applied.
(3) *R.* v. *Burke* (1985), 82 Cr. App. R. 156; [1985] Crim. L.R. 660, *dicta* of Ackner, L.J. applied.
(4) *R.* v. *Cook*, [1959] 2 Q.B. 340; [1959] 2 All E.R. 97, referred to.
(5) *R.* v. *Jenkins* (1945), 31 Cr. App. R. 1; 114 L.J.K.B. 425, referred to.
(6) *R.* v. *Lee*, [1976] 1 W.L.R. 71; [1976] 1 All E.R. 570, applied.
(7) *R.* v. *Preston*, [1909] 1 K.B. 568; (1909), 78 L.J.K.B. 335, *dicta* of Channell, J. applied.
(8) *R.* v. *Smith*, [1989] Crim. L.R. 900, referred to.
(9) *Selvey* v. *D.P.P.*, [1970] A.C. 304; [1968] 2 All E.R. 497, considered.

**Legislation construed:**
Criminal Procedure Ordinance (1984 Edition), s.67:

> "A person charged with an offence . . . shall be a competent witness for the defence at every stage of the proceedings . . .
> Provided that—
> . . .
> (*f*) a person charged and called as a witness in pursuance of this Part 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 of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution . . ."

s.92: The relevant terms of this section are set out at para. 2.

*A.A. Trinidad*, *Crown Counsel*, for the Crown;
*K. Azopardi* for the defendant.

1 **KNELLER, C.J.:** The question for the court to answer now is whether or not to allow Mr. Trinidad, the prosecutor, to put to the defendant his list of previous convictions and sentences. Mr. Azopardi, for the defendant, submits the answer should be "No," and Mr. Trinidad urges the court to say "Yes."

2 The starting point in the law on this issue for our purposes is that the defendant has a shield because "it shall not be lawful, on the trial of any person before any court, for evidence of any previous conviction for any offence to be admitted in evidence before a verdict or finding of guilty

shall have been returned" (see s.92 of the Criminal Procedure Ordinance). The exceptions include circumstances in which "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" (s.67(*f*)(ii)).

3 The defendant has pleaded not guilty to the following: Counts 1 and 2, being in unlawful possession of a controlled drug; and Count 3, being in unlawful possession of a controlled drug with intent to supply it to another or others. The particulars allege that these offences occurred on June 1st, 1991 in Gibraltar. The drug in Count 1 was a preparation weighing 1.26g. containing amphetamine, and in Counts 2 and 3 it was 15.33g. containing cocaine.

4 The defendant's previous convictions and sentences were in the magistrates' court and are said to be as follows:

| *Date* | *Offence* | *Penalty* |
|---|---|---|
| 16.11.71 | Possession of cannabis | Fine £40 |
| 08.05.85 | Possession of drugs | 6 months suspended for 6 months |
| | Possession with intent to supply | No further penalty |
| 10.04.91 | Possession of controlled drug | Fine £15 |
| 10.07.91 | Possession of controlled drug | Fine £15 |

5 The 1971 conviction is nearly 21 years old and for cannabis, not amphetamines or cocaine. The 1985 ones are seven years old and the drugs are not specified. The 1991 ones are recent and do not reveal if they were amphetamines or cocaine. The level of the fines on that occasion does not indicate that the drugs were Category A or that their weights were substantial. The suspended six-months sentence in May 1985 suggests that they were. The courts should be provided with details of the amount and nature of the drugs in future lists. As it is, the list does not contain any conviction for an offence involving dishonesty. It might, however, go to the issue of guilt or innocence.

6 Returning to ss. 92 and 67(*f*)(ii) of the Ordinance, it will be noted that the prohibition is absolute in its terms. It does not, however, exclude questions being put to the defendant in chief concerning his record or the defendant's revealing it when he wishes to do so: see *Jones* v. *D.P.P.* (1) ([1962] A.C. at 663, *per* Lord Reid). He may, in other words, throw his shield away.

7 One of the reasons behind this part of s.67(*f*)(ii) is that if the defence is so conducted, or the nature of the defence is such that the jury is being invited not to believe the prosecutor or the prosecution witness because his or their conduct outside the evidence given by him or them makes him

an unreliable witness, then the jury ought to know the character of the defendant. He can be cross-examined about his antecedents with a view to persuading the members of the jury that he has such a bad character that they ought not to rely on his evidence: see *R.* v. *Preston* (7) ([1909] 1 K.B. at 575, *per* Channell, J.).

8 It is only fair that the jury should have material to enable them to determine whether to believe the accused or the prosecution: *R.* v. *Jenkins* (5) (31 Cr. App. R. at 14–15, *per* Singleton, J.). It is a case of tit-for-tat: see *Cross on Evidence*, 7th ed., at 409 (1990). The cross-examination, if it is allowed, may go to the credibility of the defendant's imputation upon the prosecutors and/or witnesses (*R.* v. *Cook* (4) ([1959] 2 Q.B. at 348)) or, more often, to the credibility of the whole of his testimony (*R.* v. *Preston* (7)). If it goes to the credibility of the defendant it might be that the judge would limit cross-examination to the defendant's convictions for offences involving his dishonesty.

9 Cross-examination on previous convictions could go to the issue of guilt or innocence. The trial judge in *Selvey* v. *D.P.P.* (9) permitted only convictions on similar subject-matter to be put to the defendant. There are decisions and *dicta* prohibiting the use of such cross-examination to show the defendant's guilt directly. It ought not to be permitted if there is any risk of the jury being misled into thinking that it goes not just to whether the defendant or prosecution witness should be believed but to the probability that he committed the offence with which he is charged: see *Maxwell* v. *D.P.P.* (2) ([1935] A.C. at 321, *per* Viscount Sankey, L.C.); and *R.* v. *Smith* (8).

10 There is a discretion to restrain the prosecution from cross-examining a defendant who has dropped his shield by making such imputations if it would be unfair. There are no detailed rules for the exercise of this discretion. ". . . [T]he question is whether *this* attack on the prosecution ought to let in *these* convictions on the particular facts of [this] case . . ." (see *Selvey* v. *D.P.P.* ([1970] A.C. at 360, *per* Lord Pearce)).

11 The court has to secure a trial that is fair to the prosecution and the defence. Normally, the jury should not be left in doubt about the defendant's character if he has attacked the character of the prosecution witness. If the cross-examination is technically admissible it may be unjust to admit evidence of a character gravely prejudicial to the defendant: see *R.* v. *Burke* (3) (82 Cr. App. R. at 161, *per* Ackner, L.J.). Now, in *Burke* the defendant was charged with drugs offences and he alleged that all the prosecution evidence had been fabricated by the police officers who raided his premises. It was considered that, in the circumstances, the probative value of revealing to the jury that he was a convicted criminal outweighed the prejudice that necessarily resulted from the revelation that he had a record for drug-related offences.

12 Mr. Azopardi, for the defendant, never put it to any prosecution witness that he planted the drugs in the defendant's room. He asked if the room was under surveillance by the police before 10.30 p.m. on May 31st, 1991, and the answer was "No." He asked if others also had a key to it and the answer was "Yes, the hotel chambermaids and management, as with all local hotels."

13 My note of the defendant's answers in cross-examination is that he said:

> "I have not stated who went into my flat and put drugs there. Maids in hotels have keys for the rooms. No one put other exhibits there. Mirror belongs to my girlfriend. Others belong to me. I did not tell the police whom I thought had put drugs there. I am not 99.9% sure. Only circumstantial evidence. I am not saying the police put it there. I am not sure. Would you tell the police you thought the police put the drugs there? I suspect something funny going on there. Drugs were not there when I left the room."

At that point Mr. Azopardi intervened to submit that Mr. Trinidad was trying to make the defendant say that the police had planted the drugs and Mr. Trinidad claimed the defendant had made such an allegation. He also asked the defendant if he had previous convictions. Before doing that he should have asked the court for leave to take "a certain course" or use some phrase to veil from the jury that the defendant had previous convictions involving dishonesty.

14 I did not warn the defendant that if the nature or conduct of his defence was such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution he was in danger of being cross-examined about his previous convictions, because I did not have a copy of the list of his previous convictions. I am told it is not in the registry file. It was faxed to Mr. Azopardi at his request on May 21st, 1992 by Mr. Trinidad. A copy should have been sent to the Supreme Court Registry for the trial judge and, I suggest, its receipt recorded in, say, a delivery book, for the prosecutor to rebut any complaint that the registry had not received one for the trial judge.

15 In any event, the defendant so far has not said that the witnesses called by the prosecution planted the drugs in his room. The drugs were not there or in his jeans, he claims, when he left the room at 10 a.m. on May 31st, 1991 but they were when the police prosecution witnesses entered it in his presence at 3.30 a.m. on June 1st, 1991. The defendant may safely attack the character of individuals not called as witnesses for the prosecution. This may be unsatisfactory but it is the law: see *R.* v. *Lee* (6).

16 In *Burke's case* (3) the defendant denied the alleged drug offences, said that the four or five police officers who were witnesses in the case

had made up the evidence, swearing they had found cannabis on the premises he occupied, when in fact they had brought it there and pretended to find it in his possession, and, unless the forensic scientist had concocted his evidence, the officers had deliberately contaminated some of the other exhibits with drugs.

17 Here in this trial this defendant has not gone as far as Burke did, which was to say that the four or five police officers who were witnesses in his case were guilty of a degree of falsification which could only constitute a far-reaching conspiracy by the same police officers. There, the only question the jury had to decide was whether the police had made up all the evidence. Here, the questions are whether the defendant knew the drugs were in his bedroom and he controlled them and intended to supply the cocaine to another or others.

18 In the circumstances, I shall not exercise the discretion vested in this court to permit the defendant to be cross-examined on his convictions.

*Ruling accordingly.*

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