PROPOSED REFORMS OF THE LAW OF EVIDENCE IN CRIMINAL CASES IN ENGLAND AND WALES

Introductory matters

It is tempting to say that all England is divided into three parts. There are those who regard the Report of the Criminal Law Revision Committee on *Evidence (General)*[1] as an unacceptable attack upon civil liberties. In particular any encroachment upon the long-cherished right of silence must be rejected in principle. The Committee's proposals threaten harassment of the citizen and his unjust conviction. There are those, secondly, with an unshakable conviction that radical measures are called for by the ability of sophisticated criminals to take advantage of the restrictive rules of the game that we call the criminal process and thereby to secure unjust acquittals (even, it may be, to avoid trial). Thirdly, there are those who have actually read the Report. By this exhausting feat (the Report runs to over 160 pages of difficult argument and explains the divided counsels that bore fruit in a draft Bill of 47 clauses) they have been led to recognise: first, that the Report concerns a wide range of evidential issues and that it recommends reforms favouring now the prosecution and now the defence; secondly, that matters that occupied this expert, though wholly legal, part-time Committee[2] on and off for eight years are not properly to be disposed off by the consultation of a prejudice; thirdly, that there turn out to be persuasive arguments pro and con, generously canvassed in the Report, that make it on many issues as difficult to make up one's mind having read the Report as its authors found it to be when preparing it. The neatness of this classification is of course spoiled by the existence of a fourth class: there are those who have read the Report and who, having done so, do not doubt that first thoughts are best.

Such an opening paragraph may be thought unduly ironical, not to say facetious. But it seeks to reflect a sad tendency in public discussion both since the Report was published in June 1972 and during a period of inaccurate anticipation of it, to speak from prepared positions without due regard to the text and scope of the Report and with scant

1 11th Report: Cmnd. 4991.

2 See note 19, below, for the composition of the Committee.

attention to opposing arguments. The level of some of the discussion may be illustrated by reference to a radio current affairs programme put out on the day the Report was published. A Police Federation spokesman was asked about the effect of the Judges' Rules.[3] His answer was that the police operated as it were with one hand tied behind their backs. A prominent civil liberties spokesman followed. What, he was asked, would be the effect of the implementation of the Committee's proposals? The defence, he said, would be acting as though with one hand tied behind its back. One listener at that point switched off his radio and awaited his copy of the Report.

The Committee's instructions "to review the law of evidence in criminal cases" were received from the Home Secretary in September 1964. They were to consider

> whether any changes are desirable in the interests of the fair and efficient administration of justice; and in particular what provision should be made for modifying rules which have ceased to be appropriate in modern conditions.

It is worth noticing that these terms of reference imposed an artificial constraint upon the Committee. Criminal evidence was for consideration, but criminal procedure was not. An exclusionary rule of the law of evidence may exist because admission of the evidence is thought hazardous in a trial by jury or by lay justices of the peace; a principle of the law of evidence may be appropriate to an adversary system of trial in which the main ingredient is the examination and cross-examination of witnesses by opposing counsel, though it would be inappropriate to a judicial inquiry conducted according to methods adopted elsewhere. The fact is that the Committee's task was to propose, not the most rational and efficient law of evidence, but a law best serving a system of trial that may in important respects be itself irrational and inefficient.

The Committee have an interesting passage[4] on "General Principles", in which they state considerations by which they have in general been guided. They give reasons for regarding the situation of the defence in criminal trials as being relatively much stronger than in former times. And they make, among others, the following points: that "it is right to extend admissibility as far as is possible without the risk of injustice to the accused"; that fairness in the

[3] For the 1964 version of the Rules, see [1964] 1 W.L.R. 152; [1964] 1 All E.R. 237.

[4] Paras. 14 to 27. Of the quotations that follow, the first is from para. 20 and the remainder from para. 27.

context of a criminal trial ought to mean "that the law should be such as will secure as far as possible that the result of the trial is the right one"; that they disagree entirely with the "idea that the defence have a sacred right to the benefit of anything in the law which may give them a chance of an acquittal, even on a technicality, however strong the case is against them"; and that it is "as much in the public interest that a guilty person should be convicted as it is that an innocent person should be acquitted." It is significant both that these things needed to be said and that the Committee should give them such prominence.

The "right to silence": the suspect in the police station (clause 1 of the draft Bill) *and the accused in court* (clauses 4 and 5)

The most controversial proposals of the Report are those affecting the right of a suspect or an accused person to maintain silence in the face of interrogation, or when charged, or in court. In fact this so-called "right" is not *directly* attacked by the recommendations. What is suggested is rather that in limited circumstances adverse inferences may be drawn from a failure to speak and that warnings should be given to this effect at appropriate times.

However difficult the Committee found it to come by agreement on other issues, there seems to have been unanimity to this extent:

> In our opinion it is wrong that it should not be permissible for the jury or magistrates' court to draw whatever inferences are reasonable from the failure of the accused, when interrogated, to mention a defence which he puts forward at his trial. To forbid it seems to us to be contrary to common sense and, without helping the innocent, to give an unnecessary advantage to the guilty.[5]

It is therefore proposed that a court or jury may draw proper inferences from an accused's failure, when questioned, or when charged or officially informed that he may be prosecuted, to mention "any fact relied on in his defence" (subject to a vital qualifying phrase to be mentioned below). It is a corollary of this that the present cautioning obligations contained in the Judges' Rules would be abolished. In fact the Rules would need complete reconsideration and should, in the Committee's opinion, be replaced, so far as thought desirable, by administrative directions emanating from the Home Office with the approval of the judges. Those directions should require that when the accused is charged or told that he may be prosecuted he be given a written notice advising him of the possible danger involved in not

[5] Para. 30.

mentioning a fact that he intends to rely upon in his defence. (But is it not odd to talk of such "intentions" at that stage?)

The Committee brush aside any suggestion that their proposal is unfair to a guilty person as obliging him "to choose between telling a lie and incriminating himself."[6] The real problem is presented by the innocent person. Will he be endangered by the greater freedom accorded to the police? Three members of the Committee clearly thought that he might be, for, on a number of grounds extensively stated in the Report,[7] they held the view that the proposal should not be implemented until provision has been made for the tape-recording (to be statutorily required) of interrogations in police stations in major centres of population. The majority reject this suggestion on a number of practical grounds (though they would encourage the use of tape recorders experimentally). They appear to be unimpressed by the fears of the minority, which they do not expressly answer.

The main proposal contains the crucial qualifications that the only fact failure to mention which might justify the drawing of adverse inferences would be a fact relied on in the accused's defence "being *a fact which in the circumstances existing at the time he could reasonably have been expected to mention* when . . . questioned, charged or informed [that he might be prosecuted]." This would seem to be fertile ground for forensic debate; and the satisfactory operation of the proposed rule might to a large extent depend upon the ability of advocates to understand, and to assist in conveying to tribunals of fact, the nature of their clients' experiences under interrogation and at the time of being charged. A defendant's inadequacy or state of shock or fear, for instance, could in the particular circumstances be a reason for failure to offer an exculpatory fact that would otherwise cry out for mention.

In the same spirit as the proposal so far related is the proposal to require the court at an accused's trial to call upon him to give evidence.[8] If he refuses to be sworn or, without good cause, to answer a

6 Para. 31.

7 Para. 52. The arguments in this important paragraph include: the dangers of bullying, brutality and subtler means of persuasion; of fabricated confessions and "verbals"; and of the failure of a statement, written down for a suspect by a police officer, to accurately reflect what the suspect said. The minority also apparently perceive, though they do not identify, other dangers in giving "some kind of statutory sanction to the practice of police questioning."

8 Unless the court rules that there is no case to answer, or the court is informed that the accused will give evidence or "it appears to the court that the physical or mental condition of the accused makes it undesirable for him to be called upon to give evidence."

question, proper inferences will be capable of being drawn; and when being called upon he would be told of this danger. Prosecuting counsel would be able (as he is not now[9]) to comment on an accused's decision not to testify. The right to make an unsworn statement[10] (otherwise than by way of advocacy in the absence of a professional advocate), and thus to avoid cross-examination, would be abolished.

Confessions (clause 2)

Changes are proposed in the rule relating to the admissibility of confessions. At present evidence of a confession made by an accused person is excluded unless the judge is satisfied beyond reasonable doubt that it was "voluntary"—that is, "that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression."[11] This exclusionary principle has been applied to cases where quite trivial inducements have been used, and the judges, somewhat mechanically following precedent in the matter, have criticised the results achieved by their own decisions. What is now proposed is that the rule shall be maintained essentially in its present form but so as to apply only in the case where the confession was "obtained by oppressive treatment of the accused" or "made in consequence of any threat or inducement of a sort *likely, in the circumstances existing at the time, to render unreliable* any confession which might be made by the accused in consequence thereof." There is no limiting reference to threats or inducements "held out by a person in authority." The result will be to make the law less technical and more flexible.

Similar facts and previous convictions etc. (clauses 3, 6 and 7)

> "The question how far evidence should be admissible to show that the accused has been guilty of misconduct other than the offence charged has proved far the most difficult of all the topics which we have discussed."[12]

Conjecture before the Report was published anticipated a revolution on this question, and much flexing of muscles took place in preparation of a defence for the sacred principle that an accused's bad character should be kept from the jury. Some of the public discussion has seemed to ignore existing exceptions to the principle; and objec-

9 Criminal Evidence Act 1898, s. 1, proviso (*b*).
10 So far preserved by *ibid.*, s. 1, proviso (*h*).
11 This formulation is that in principle (*e*) in the introduction to the Judges' Rules.
12 Para. 70.

tions to the changes proposed have similarly tended not to notice suggested modifications that would improve the defence position. This is an area where passions run high. Opinions are widely divided. So they were among members of the Committee and those whom they consulted.

The present law denies admissibility to evidence of other misconduct of the accused, as part of the prosecution case, where such evidence tends merely to show a disposition to commit the kind of offence charged or to commit crimes generally. Such evidence, though logically probative, has been regarded as carrying a danger of undue prejudice: a lay tribunal, to put it frankly, may give it more weight than it deserves. So evidence of other misconduct is admitted only where it tends in a special way to connect the accused with the crime charged (for instance, because it shows "a disposition to commit [the kind of offence charged] in a particular manner . . . or . . . in respect of the person in respect of whom he is alleged to have committed the offence charged"—in such cases, in the words of clause 3 (2), the evidence is "of particular relevance to a matter in issue in the proceedings"), or where it tends to disprove a defence of accident, absence of *mens rea,* innocent association or the like.

Many suggestions for the reform of this principle were available to the Committee. They included thoroughgoing proposals, acceptable to some members, for the unrestrained admissibility of previous convictions of offences of the same class as that now charged; or for the reading out, at the beginning of the trial, of the accused's record as background to the evidence to follow. (The Committee studied the operation of the latter procedure in the French system.) Such radical options were rejected by the majority. Instead, two less dramatic adjustments to the present law are offered. First: (1) if an accused admits the conduct in respect of which he is charged but denies that in the circumstances it constituted an offence, evidence of other conduct tending to show a disposition to commit the kind of offence charged would become admissible (without any nexus, in similarity or otherwise, between that other conduct and the offence charged) for the purpose of proving *mens rea* or the absence of lawful justification or excuse. Secondly: (2) where evidence of other conduct is admissible, evidence of a resultant conviction would be admissible either in conjunction with evidence of the relevant facts or, in a case under (1) above, with or without evidence as to the facts. Apart from these adjustments, clause 3 is limited more or less to a modified codification of the common law rule.

Similarly, clauses 6 and 7 propose amendment rather than radical reform of the rules as to cross-examination of the accused about other misconduct. The present position is that the accused, if he gives evidence, may be cross-examined about his bad character or a previous conviction only if (i) proof of the previous offence is admissible to prove the present offence; or (ii) the accused has cross-examined, or given evidence, as to his good character, or his defence has involved imputations on the character of the prosecutor or prosecution witnesses, or (iii) he has given evidence against another person charged with the same offence.[13] Relevant case law is profuse and complex.

The major problem is that presented by imputations on the character of prosecution witnesses. It is here that the Committee were sharply divided between the obvious available courses of: treating the accused like any other witness (favoured by a minority)—so that he would be fully open to cross-examination, directed to his credibility, on other misconduct; protecting the accused completely from cross-examination about (otherwise inadmissible) misconduct, unless he claims to be of good character (favoured by another minority); and adopting a compromise after the style of the 1898 solution (the majority preference). One strong, though not undisputed, reason for rejecting the first course is that it would run counter to the policy, embodied in clause 5, of encouraging an accused person to give evidence in answer to a prima facie case.

The majority decision to preserve the imputations rule, much amended in its verbal form, is subject to the important qualification that cross-examination about other misconduct would be attracted only by an imputation whose "main purpose . . . was to raise an issue as to the witness's credibility"; and the retaliatory question to the accused should not be allowed "unless . . . the question is relevant to [the accused's] credibility as a witness." This is a substantial pro-defence amendment, though the Report rehearses strong minority arguments for saying that it does not go far enough.[14]

The problem of the accused who seeks to establish his good character is not controversial. It provides an occasion for light relief. The Committee tell of two men with long records charged with conspiracy to rob. One of them wore a dark suit and looked like a respectable business man.

"When asked by his counsel when and where he met his co-

13 Criminal Evidence Act 1898, s. 1, proviso (*f*).
14 Para. 123.

> accused, he said: 'About eighteen months ago at my golf club. I was looking for a game, The secretary introduced us.' "[15]

Cases such as this persuade the Committee to extend the "good character" exception so that it will deal with the accused who seeks to establish his "good disposition or reputation" (the preferred phrase) "directly or by implication". (But what if he did meet him at his golf club and always dressed smartly?)

Hearsay evidence (clauses 30 to 41)

The longest part of the Report concerns proposed reform of the hearsay rule, anticipated for civil cases by the Civil Evidence Act 1968. Opinions differ as to the quality of the Committee's decisions on this topic, but there should be nothing but praise for the care and skill with which they have examined the problem and explained their proposals. These proposals are very complicated and it is not easy to achieve a summary that is both short and accurate. I have to insist that the following does the subject less than justice.

It is proposed in particular:

(1) to admit, as evidence of a fact stated in it, the first-hand out-of-court statement

(a) of a witness;

(b) of a person who, being a compellable witness, refuses to be sworn;

(c) of a person who (i) is dead or unfit to attend as a witness, (ii) is abroad, (iii) not being compellable, refuses to give evidence, (iv) cannot be identified, or (v) cannot be found;

(d) of an accused person, as evidence against a co-accused

(but, in particular: the proof of evidence of a witness will be admissible only by special leave of the court; statements within (b) and (c) (other than (c) (i)) above will not be admissible if made after the accused was charged or informed that he might be prosecuted, or after the issue of a summons; and at a trial on indictment a statement within (c) above will not, without leave, be admissible unless a notice complying with detailed requirements has been served on other parties within seven days of the end of the committal proceedings, so as to permit inquiries to be made as to the identity or availability of the alleged maker and as to the statement's contents);

(2) to admit,[16] as evidence of facts stated in it, a statement in a documentary record made in the course of duty from information

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15 Para. 135.

16 Reproducing in substance the Criminal Evidence Act 1965.

given by a person who either is within categories (a) to (c) in (1) above or cannot be expected to remember the matters dealt with in the statement;

(3) to admit, as evidence of facts stated in them, statements contained in documents produced by computers, subject to detailed conditions;

(4) to restate the *res gestae* rule and to declare that statements admitted under the rule as restated shall be evidence of the facts stated in them;

(5) to admit hearsay evidence by agreement of the parties made at the hearing, all accused persons being represented;

(6) to limit the exceptions to the hearsay rule, as that rule is restated in clause 30, to the exceptions stated by or under statute, including a list of common law exceptions referred to in clause 40.

Attacks on the Report naturally include animadversions against some of these proposals. The Committee's discussion of them, however, is so full and the relevant draft clauses so complex, that it must be doubtful whether critics have yet taken adequate notice of the supporting arguments or the mitigating safeguards.

Other important proposals

Finally (though omitting several matters of substance) I mention the gist of the Committee's proposals on some other important matters.

It is proposed that, with two specialised exceptions, the defence should have no persuasive *burdens of proof,* but evidential burdens only (clause 8).

It is proposed that the *spouse of the accused* should be a competent, though not in general a compellable, witness for the prosecution in all cases, and in all cases a compellable witness for the accused (clause 9).

It is proposed to abrogate the rules relating to *corroboration* of the evidence of accomplices and of the evidence of children in non-sexual cases, and to have no special rules requiring a judicial warning about the need for caution before convicting on such evidence uncorroborated; to require a judicial warning about "a special need for caution" before convicting on the evidence of the victim alone in the case of a sexual offence against a victim fourteen years of age or older;[17] and—very important[18]—to require a judicial warning as to

17 In the case of a child victim, the rule requiring corroboration would be preserved. (It is separately proposed that child witnesses—i.e., those under fourteen—should always testify unsworn: clause 22 (2).)

18 "We regard mistaken identification as by far the greatest cause of actual or possible wrong convictions." (Para. 196.)

the special need for caution before convicting in reliance on evidence of identification where the prosecution case depends wholly or substantially on such evidence (clauses 17 to 21).

The Committee under fire

On the whole the Report has had a bad press. The composition of the Committee has been attacked: it contained no non-lawyers and no one currently acting as a defence advocate.[19] It is accused of relying on assumptions unsupported by hard evidence or by the analysis of available data. In particular, statements about the ability of professional criminals to "play the system" rest upon impression and anecdote and probably (though not expressly) upon acquittal rates that have caused concern but whose interpretation has recently been questioned in some quarters. I am not myself confident that any reliable data were available to the Committee or, considering the nature of the subject-matter, that much hard evidence to support their assumptions and impressions could be expected. There may, on the other hand, be something in the complaint that the Committee[20] take inadequate account of the reality of police practice. And perhaps the Committee can be read as making naive assumptions about the rationality, and the power to control himself and the situation, of a person, even an innocent person, who is in police hands.

The critics, however, are not without their faults. There has been a distasteful tendency to refer to controversial proposals by a system of half-statement, so that the safeguards intended to soften a bold initiative are omitted or distorted in the critique. The problem is, of course, that most attacks on the Report are intended for a lay or political audience, for whom full, properly qualified reference to the proposals would be unpalatable. Another difficulty, I believe, and one for which neither the Committee nor the critics are responsible, is that part of the battle is being fought on the wrong ground. I think that an unspoken and often unperceived reason why some of the

19 The signatories to the Report are: Lord Justice Edmund Davies (Chairman), Sir Frederic (formerly Lord Justice) Sellers, Lord Justice Lawton, Sir Donald (formerly Mr. Justice) Finnemore, Mr. Justice James, Mr. J. M. G. Griffiths Jones (Common Serjeant), Professor Rupert Cross, Sir Kenneth Jones (Legal Adviser to the Home Office), Sir Frank Milton (Chief Metropolitan Magistrate), Judge Malcolm Morris Q.C., Mr. A. C. Prothero (Solicitor), Sir Norman Skelhorn Q.C. (Director of Public Prosecutions) and Professor Glanville Williams.

20 Rather, perhaps, the majority: see note 7, above.

proposals are so hotly rejected is that basically we do not trust our tribunals of fact.

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Postscript (December 1972)

This article was written in August 1972, soon, perhaps too soon, after the publication of the Report. Since then the Report has been the subject of massive comment, almost uniformly critical, e.g. Mr. Justice MacKenna at [1972] Crim. L. Rev. 605 and Tapper at (1972) 35 M.L.R. 621. I am now doubtful about the acceptability of the proposals in clause 1 of the Draft Bill in the absence of adequate control of police practice in interrogation, and doubtful whether a form of caution cannot be retained ("you need not speak . . .") consistently with the main proposal of clause 1 (". . . but it might be against your own interest not to mention any fact you know of that might show you to be innocent of the offence").

E.G.

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