



The curse of the uncooperative Crown witness

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Section 38(1) to 38(3)



38 Unfavourable witnesses

(1) A party who called a witness may, with the leave of the court, question the witness, as though the party were cross-examining the witness, about—

(a) evidence given by the witness that is unfavourable to the party, or

(b) a matter of which the witness may reasonably be supposed to have knowledge and about which it appears to the court the witness is not, in examination in chief, making a genuine attempt to give evidence, or

(c) whether the witness has, at any time, made a prior inconsistent statement.

(2) Questioning a witness under this section is taken to be cross-examination for the purposes of this Act (other than section 39).

(3) The party questioning the witness under this section may, with the leave of the court, question the witness about matters relevant only to the witness's credibility.

Section 102 & 103 (as at 1999)

102 The credibility rule

Evidence that is relevant only to a witness's credibility is not admissible

103 Exception: cross-examination as to credibility

- (1) The credibility rule does not apply to evidence adduced in cross-examination of a witness if the evidence has substantial probative value.
- (2) Without limiting the matters to which the court may have regard in deciding whether the evidence has substantial probative value, it is to have regard to:
 - (a) whether the evidence tends to prove that the witness knowingly or recklessly made a false representation when the witness was under an obligation to tell the truth, and
 - (b) the period that has elapsed since the acts or events to which the evidence relates were done or occurred.

Section 60



60 Exception: evidence relevant for a non-hearsay purpose

- (1) The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of an asserted fact.
- (2) This section applies whether or not the person who made the representation had personal knowledge of the asserted fact (within the meaning of section 62 (2)).
- (3) However, this section does not apply in a criminal proceeding to evidence of an admission.

Section 101A and 102



101A Credibility evidence

Credibility evidence, in relation to a witness or other person, is evidence relevant to the credibility of the witness or person that—

- (a) is relevant only because it affects the assessment of the credibility of the witness or person, or
- (b) is relevant—
 - (i) because it affects the assessment of the credibility of the witness or person, and
 - (ii) for some other purpose for which it is not admissible, or cannot be used, because of a provision of Parts 3.2 to 3.6.

102 The credibility rule

Credibility evidence about a witness is not admissible.

Section 103

103 Exception: cross-examination as to credibility

- (1) The credibility rule does not apply to evidence adduced in cross-examination of a witness if the evidence could substantially affect the assessment of the credibility of the witness.
- (2) Without limiting the matters to which the court may have regard for the purposes of subsection (1), it is to have regard to—
 - (a) whether the evidence tends to prove that the witness knowingly or recklessly made a false representation when the witness was under an obligation to tell the truth, and
 - (b) the period that has elapsed since the acts or events to which the evidence relates were done or occurred.

Section 192



192 Leave, permission or direction may be given on terms

(1) If, because of this Act, a court may give any leave, permission or direction, the leave, permission or direction may be given on such terms as the court thinks fit.

(2) Without limiting the matters that the court may take into account in deciding whether to give the leave, permission or direction, it is to take into account—

(a) the extent to which to do so would be likely to add unduly to, or to shorten, the length of the hearing, and

(b) the extent to which to do so would be unfair to a party or to a witness, and

(c) the importance of the evidence in relation to which the leave, permission or direction is sought, and

(d) the nature of the proceeding, and

(e) the power (if any) of the court to adjourn the hearing or to make another order or to give a direction in relation to the evidence.

Section 38(6)

(6) Without limiting the matters that the court may take into account in determining whether to give leave or a direction under this section, it is to take into account—

(a) whether the party gave notice at the earliest opportunity of his or her intention to seek leave, and

(b) the matters on which, and the extent to which, the witness has been, or is likely to be, questioned by another party.

Section 38(3) & (4)

(3) The party questioning the witness under this section may, with the leave of the court, question the witness about matters relevant only to the witness's credibility.

(4) Questioning under this section is to take place before the other parties cross-examine the witness, unless the court otherwise directs.

Section 192

192 Leave, permission or direction may be given on terms

(1) If, because of this Act, a court may give any leave, permission or direction, the leave, permission or direction may be given on such terms as the court thinks fit.

(2) Without limiting the matters that the court may take into account in deciding whether to give the leave, permission or direction, it is to take into account—

(a) the extent to which to do so would be likely to add unduly to, or to shorten, the length of the hearing, and

(b) the extent to which to do so would be unfair to a party or to a witness, and


(c) the importance of the evidence in relation to which the leave, permission or direction is sought, and

(d) the nature of the proceeding, and

(e) the power (if any) of the court to adjourn the hearing or to make another order or to give a direction in relation to the evidence.

***Kanaan v R* [2006] NSWCCA 109**

[83] Section 38 of the Evidence Act abrogated the common law relating to hostile witnesses, by enabling a party calling a witness to obtain leave to question his own witness as though cross-examining that witness about evidence which is unfavourable to that party - in order, for example, to establish that the witness has made a prior inconsistent statement. The word 'unfavourable' means merely 'not favourable', and it is no longer necessary for the party seeking leave to demonstrate that either the witness or the evidence given is hostile to that party: **Regina v Souleyman** (1996) 40 NSWLR 712 at 715; or that the unfavourable evidence was unexpected: **Regina v Adam** (1999) 47 NSWLR 267 at [99]. Leave to cross-examine, once granted, does not permit the Crown to undertake a general cross-examination; it is restricted initially to the ground on which leave was granted: **Regina v Le** at [55]. However, it may range more widely: *Ibid* at [59], [63]. In the present case, for example, it would have permitted not only cross-examination on any prior inconsistent statement made by Mrs Zahabe in order to prove that the prior statement was true and that the evidence given was false, and also to suggest that bias in favour of the appellants was the reason for the inconsistency: *Ibid* at [67].



[84] *The greater availability of cross-examination of a Crown witness by the Crown prosecutor pursuant to s 38 has obviously placed more emphasis on the Crown's obligation to call witnesses whose main relevance is the availability of their evidence unfavourable to the Crown case. Section 38 is living up to its potential for transforming the traditional procedure in criminal trials: Regina v Parkes (2003) 147 A Crim R 450 at [81], [141]. In Regina v Ronen [2004] NSWSC 1298 at [32], Whealy J observed that the increasingly common use of s 38 has often demonstrated its value in getting to the truth of the matter, although great care must be taken to ensure that the trial does not become side-tracked by a collateral issue carrying with it the real possibility of prejudice to the accused. That observation was correct, but attention is drawn to the accepted interpretation of "unfairly prejudicial" in ss 135-136 and of "unfair prejudice" in s 137, that prejudice to the accused is not unfair merely because the evidence tends to establish the Crown case: Regina v BD (1997) 94 A Crim R 131 at 139; Papakosmas v The Queen (1999) 196 CLR 297 at [29], [91], [98]."*

Section 65(1) & (2)

65 Exception: criminal proceedings if maker not available

(1) This section applies in a criminal proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.

(2) The hearsay rule does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if the representation—

(a) was made under a duty to make that representation or to make representations of that kind, or

(b) was made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication, or

(c) was made in circumstances that make it highly probable that the representation is reliable, or

(d) was—

(i) against the interests of the person who made it at the time it was made, and

(ii) made in circumstances that make it likely that the representation is reliable.

Section 106(1)

106 Exception: rebutting denials by other evidence

(1) The credibility rule does not apply to evidence that is relevant to a witness's credibility and that is adduced otherwise than from the witness if—

(a) in cross-examination of the witness—

(i) the substance of the evidence was put to the witness, and

(ii) the witness denied, or did not admit or agree to, the substance of the evidence, and

(b) the court gives leave to adduce the evidence.



Thank you

If you have any questions, please contact the Public Defenders Chambers or Antony Evers.

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