

## **Bad Character/ Previous Convictions**

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### **Bad Character/Previous Convictions of Witness**

**Evidence has been given that [X], who gave evidence for the prosecution (or defendant), has previous convictions. That is something you can take into account when considering his credibility and the weight to be given to his evidence.**

**The fact that someone has previous convictions does not necessarily mean his evidence has to be rejected out of hand. It is a matter for you what weight you give to the fact that he has been previously convicted.**

**In deciding that, you look at the rest of the evidence, including any evidence that supports his evidence independently, and weigh his evidence and the fact that he has convictions in that context.**

**If after you have done that, you are satisfied that he is a truthful and accurate witness you can act on his evidence notwithstanding that he has previous convictions**

**[Where explicit warning as to dangers warranted]: The fact that someone has a history of criminal behaviour does not necessarily mean he is lying on this occasion. But because of the extent of his criminal record, and the kind of offences for which he has been convicted, you should keep in mind the dangers in accepting him as a truthful witness. You have to exercise caution before you act on his evidence.**

**[Refer to any independent evidence supporting his evidence]**

**But, if you are satisfied he is a truthful witness after having seen him give evidence and having considered his evidence in conjunction with the other evidence and given due weight to the dangers about acting on his evidence, you can act on the version of facts he has given.**

There is no general rule that a warning should be given of the dangers of convicting on the uncorroborated evidence of witnesses possessing bad character or a criminal record. It is a question to be considered in any case as to whether the witness' record or the circumstances of the case are such as to make an explicit warning necessary. <sup>1</sup>

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<sup>1</sup> *R v Sinclair and Dinh* (1997) 191 LSJS 53.

## Bad Character/Previous Convictions of Defendant<sup>2</sup>

1. Evidence as to the defendant's previous convictions or bad character where he has made an issue of his own character or that of prosecution witnesses.

**Evidence has been given that the defendant has convictions for .....**

**That fact must not be used by you to say that because he has committed offences before, therefore he must be guilty of the present offence.**

**Its use is more limited than that. It is this. The manner in which the defence has been conducted has involved a challenge to the truthfulness of prosecution witnesses. In evaluating the defendant's evidence and determining what impact it has on your assessment of the truthfulness of the prosecution witnesses, you are entitled to take into consideration that the defendant is a person who has convictions for offences of [.....].**

**A finding that you reject his evidence and accept that of the prosecution witnesses may lead you to find him guilty if the challenged evidence proves or helps to prove the elements of the offence. But you must come to any finding of guilt by that process, not by assuming that because of his criminal record he must have committed the offence for which he is now on trial.**

The jury should be given a clear statement of the limited purpose of permitting evidence of previous convictions or bad character to be adduced by cross-examination under s 15(2)(c) (that is, to deny the defendant the benefit of a false claim as to good character, or to discredit him where he is in conflict with prosecution witnesses whose character he has attacked, but not, per se, as tending to his guilt of the offence charged.)<sup>3</sup> That is so whether counsel requests such a direction or not.<sup>4</sup>

2. Evidence directed to showing that the defendant is guilty of the offence charged.

**You have heard in this trial this evidence (identify evidence given by prosecution witnesses or defendant in cross-examination). It is relevant to the prosecution case in this way and this way only. It goes, if you accept it, to showing that [explain**

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<sup>2</sup> Section 15(2) *Evidence Act* 1977 deals with the asking of questions tending to show that a defendant is of bad character or has committed offences. The four circumstances in which a defendant may be cross-examined under s 15(2) are: where the defendant has sought to establish his own good character or has cast imputations on the character of prosecution witnesses; where the matter is probative of guilt of the offence charged; where the questions are directed to showing that another defendant is not guilty of the offence with which they have been charged; and where the defendant has given evidence against a co-defendant. In the first three instances, leave is required. It can be seen that the evidence in the second and third instances will be relevant to the issues in the case, and thus may also be the subject of questions put to witnesses other than the defendant, whereas in the first and fourth it may merely affect credibility.

<sup>3</sup> *Donnini v The Queen* (1972) 128 CLR 114.

<sup>4</sup> *BRS v The Queen* (1997) 191 CLR 275.

relevance]. **That is the specific purpose for which the prosecution has been allowed to lead the evidence and you must not use it for any other purpose. You may not seek to draw some inference from it that because the defendant has [been charged with or committed other offences or been said to have been involved in undesirable conduct, as the case may be] that he is therefore more likely to have committed the offence you are considering. In other words, it would be quite wrong for you to say, having heard that evidence, that the defendant is the sort of person likely to have committed the offence.**

**If you accept this evidence you may use it only to consider whether it assists the prosecution, in the way I have described, to prove its case against the defendant.**

Evidence may emerge on the prosecution case or through cross-examination of the defendant himself<sup>5</sup> which indicates that he has been charged with or convicted of other offences, or is otherwise adverse to his character. Such evidence is, of course, admissible if it is directly probative of the offence before the court.<sup>6</sup> In such an instance it is necessary to explain the relevance of the evidence while making it clear that no inference of disposition or propensity can be drawn.

3. Evidence directed to showing that a co-defendant is not guilty.
  - (a) Where evidence goes to show that co-defendant is not guilty of an offence with which the defendant is not charged -

**You have heard in this trial this evidence** (identify evidence given by witnesses or defendant in cross-examination). **[Mr X], counsel for [the co-defendant] has asked these questions and led this evidence to show that it was [the defendant] who committed the offence of ..... and not [the co-defendant]. It goes, if you accept it, to showing that [explain relevance].**

**You may use it in these ways only: It can be used, if accepted by you, as going to the proof of the prosecution case against [the co-defendant] on this charge, and also as detracting from the prosecution case against [the co-defendant].]**

- (b) Where evidence goes to show that co-defendant is not guilty of an offence with which both are charged:

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<sup>5</sup> With leave under s 15(2)(a) *Evidence Act*.

<sup>6</sup> See for example *R v Aston-Brien* [2000] QCA 211 in which the alleged provision of amphetamines immediately after a rape was described as “an integral part of the prosecution case”; *R v Ettles* (1997) 27 MVR 265 in which the defendant’s ingestion of cannabis was relevant to his manner of driving on a dangerous driving charge; *R v OGD* (No 2) (2000) 50 NSWLR 433 in which an admission of having done “these things” to the complainant (i.e. sexual assault) was made during the course of a similar assault on a witness; and *R v Grosser* (1999) 73 SASR 584 in which a history of the defendant’s prior arrest on fraud and firearms charges was relevant to charges of attempted murder arising out of a police siege of the defendant’s farmhouse. See also direction on Similar Facts.

**[A], counsel for [the co-defendant] cross-examined [the defendant]/led evidence from a number of witnesses to the following effect [set out evidence]. It goes, if you accept it, to showing that it was [the defendant] who committed the offence of ..... and not [the co-defendant] [explain relevance]. You must consider it for that purpose only; that is insofar as it concerns the case against [co-defendant]. It forms no part of the evidence against [defendant] on the charge of ..... It cannot advance the prosecution case against him in any way. In particular it is not permissible for you to say, if you were to accept that evidence, that because [defendant] may have committed that offence he is therefore likely to have committed the offence with which he has been charged. The evidence has no relevance to the charge against [defendant]. Its only relevance is to the charge against [co-defendant].**

Evidence may be adduced from witnesses or from a defendant in cross-examination<sup>7</sup> which is adverse to his character, but has a purpose in showing that a co-defendant is not guilty of an offence of which he has been charged. Such evidence must go to the issues, either in the Prosecution's case against the co-defendant or the co-defendant's defence; merely showing that the defendant was of bad character would not, of itself, advance the co-defendant.

There is a distinction to be drawn between the situation in which the defendant and co-defendant are both charged with the offence on which the co-defendant wishes to adduce the evidence; and that in which the co-defendant only is charged (as might occur for example, where there is a joint indictment involving a series of offences with a factual nexus but not all defendants are charged with every offence).

In the former situation it would seem to follow that the evidence would both tend to exculpate the co-defendant and inculpate the defendant of an offence with which he was charged and a direction in terms of 2 above should be given.

In the second case the evidence, while relevant to the issues against the co-defendant, could only be impermissible bad character evidence as against the defendant and the jury should be directed to consider it only in the co-defendant's case.

4. Where the defendant has given evidence against a co-defendant.

**[A], counsel for [co-defendant] cross-examined [defendant] as to [prior convictions/bad character]. His answers may be taken into account by you in assessing the credibility of the evidence [defendant] has given against [co-defendant] and considering whether you think he has been truthful in that regard. The evidence of his previous convictions/bad character may not be used by you however, to say that because he has admitted to having done such things in the**

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<sup>7</sup> The situation contemplated by s 15(2)(b) *Evidence Act*.

**past he is somehow more likely to be guilty of the crime with which he is charged. It would be wrong to proceed in that way.**

Cross-examination of the defendant attempting to show his commission of other offences or bad character is permissible<sup>8</sup> where a defendant gives evidence against a co-defendant. That situation arises where the defendant gives evidence which “supports the prosecution case against the co-defendant in a material respect or undermines the defence of the co-defendant”<sup>9</sup>. Cross-examination in this instance may be designed to show that the co-defendant is the perpetrator of the crime, in which case the considerations set out at 3 above will apply and a direction in whichever of the forms is appropriate should be given.

Alternatively the questioning may be designed to attack the credit of the defendant. In that event a direction in the terms above is suggested.

5. Where the defendant’s convictions are inadvertently raised in the course of the trial.

**You heard evidence that the defendant has in the past been convicted of an offence [or has been in custody]. That evidence is irrelevant. It would be unfair to speculate about it, and you must not use it in any way. I direct you that you should put it entirely out of your minds.**

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<sup>8</sup> By virtue of s 15(2)(d), without leave of the Court.

<sup>9</sup> *R v Crawford* [1997] 1 WLR 1329 at 1333, applying *Murdoch v Taylor* [1965] AC 574 at 592.