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ADVERSE INFERENCES AND FAILURES TO 'COME UP TO PROOF'

Abstract

Can an adverse inference be drawn against a witness when their evidence does not 'come up to proof' with the opening address of counsel? Currently, there is an apparent conflict between appellate decisions of the Supreme Court of South Australia on this issue. On one approach, an opening address is not evidence and any discrepancy is not a proven inconsistency. On another, the process of drawing the adverse inference is a 'traditional and well known process'. After examining the conflict between the decisions, this article explores the principles underlying the admission and treatment of prior inconsistent statements and argues that to allow an inference to be drawn in such circumstances would fail to give effect to the longstanding principles of fairness to witnesses which also support accuracy in fact-finding. It is argued that the preferable approach is to ensure any inconsistency must be proven in line with the common law and statutory preconditions before an inference adverse to a witness may be drawn.

I Introduction

A witness fails to 'come up to proof'.[1] Counsel, in opening, outlined in terms that the witness's evidence would include four key details. The witness's evidence only contained two. The failure means that certain facts cannot be established in the evidence. Opposing counsel, in cross-examination, determined not to explore the difference in the witness's evidence from their sworn statements, disclosed prior to trial. It comes time to prepare for addresses, and the trial judge is asked — can the witness's failure to come up to proof, in addition to meaning that facts cannot be established in the evidence, be the subject of a direction that the tribunal of fact draw an inference adverse to that witness's credibility and reliability, on the basis of the discrepancy between the opening address and the witness's

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1 The expression 'failing to come up to proof' is an informal way of saying that a witness has failed to testify in accordance with their written statement(s): *Oxford Reference* (online at 11 August 2023) 'proof' (defs 1–2).

evidence? On one view,[2] this would be contrary to basic principle and would elevate the status of the opening address to evidence in the trial. On another, it is a 'traditional and well known process'.[3] This article explores the discrepancy between these two views, including by reference to the laws governing the admission of evidence of prior inconsistent statements and the so-called rule in *Browne v Dunn*.[4] Ultimately, it is argued that, any 'inconsistency' must be established in the evidence before a tribunal of fact can draw an inference adverse to that witness. To proceed otherwise would be to invite speculation and be contrary to fundamental precepts of fairness to witnesses enshrined in the laws of evidence.

II The Conflict

The case of *R v A, GP* ('*A, GP*')[5] was an appeal against convictions for sex offences against a child, heard in 2012 in the Court of Criminal Appeal of the Supreme Court of South Australia. One ground of appeal alleged that the trial judge sitting alone had erred in finding the appellant guilty of the third alleged occasion of abuse. Underpinning the ground of appeal was an argument that the discrepancy which had arisen at trial between the prosecutor's opening address as to what the complainant's evidence would be on the relevant count in the information, and the evidence that the complainant gave, meant there was an inconsistency in the complainant's account. This argument was given short shrift by Vanstone J (with whom Nyland J and David J agreed), who remarked that the appellant's submission

> misunderstands the nature of an opening address. It is not evidence and in particular it is not evidence that witnesses have previously made statements in accordance with what counsel foreshadows will be their evidence. There might well have been an inconsistency to be explored. However it was not explored. Again, the appellant is bound by the conduct of his trial counsel. Again, counsel might have taken a forensic decision not to cross-examine, since the conduct described in evidence was arguably less serious than the allegation outlined by the prosecutor.[6]

The next year in the same Court, a differently constituted bench appeared to endorse the opposite view. In *R v MAS* ('*MAS*'),[7] also a case dealing with sexual offending against a child, the topic of a discrepancy between a prosecutor's opening address and a complainant's evidence came up. This time, it was in the context of a consideration of the sufficiency of the trial judge's directions to the jury in assessing the complainant's credibility and reliability and the inconsistencies in her evidence. It is of note that there was extensive cross-examination of the complainant in that

2 *R v A, GP* (2012) 113 SASR 146 ('*A, GP*').

3 *R v MAS* (2013) 118 SASR 160, 183 [91] ('*MAS*').

4 (1894) 6 R 67.

5 *A, GP* (n 2).

6 Ibid 150 [29] (Vanstone J, Nyland J agreeing at 147 [1], David J agreeing at 151 [32]).

7 *MAS* (n 3).

matter which established the complainant had made a number of prior inconsistent statements.[8] However, the Court observed that the discrepancy between the prosecutor's opening address and the witness's evidence was capable of bearing on the credit of the complainant, in particular in being used as an 'inconsistency': '[t]he use of a demonstrated inconsistency between the prosecutor's opening and a witness' testimony to test the credit of that witness is a traditional and well known process'.[9]

While the authorities cited by the Court in *MAS* are considered in detail below, what is immediately apparent is the *potential* conflict between the two judgments.[10] The first question that emerges is whether or not what is being considered is evidence of an inconsistency — and, if so, whether the laws of evidence governing the admission and use of evidence of prior inconsistent statements apply.

III Prior Inconsistent Statements and Fairness to Witnesses

The laws of evidence governing prior inconsistent statements can be traced to *The Queen's Case*.[11] While there has been an understandable degree of modification since that decision in the 19th century, the substance of the decision is reflected in statutory form in South Australia in ss 28–9 of the *Evidence Act 1929* (SA). These provisions and interstate analogues[12] reflect the substance of ss 4–5 of the *Criminal Procedure Act 1865*.[13]

As was noted by Doyle J (with whom Kourakis CJ agreed) in *R v Trabolsi*,[14] the provisions exist to ensure that the statements are relevant to the facts in issue, are inconsistent with evidence the witness has given, and that the witness is given 'a fair opportunity to admit or deny the previous statement'.[15] These rules ensure that the scope of attacks on the credit of witnesses is confined, to avoid the principal litigation becoming bogged down with collateral attacks on credit. Similarly, it ensures that the fact finder who must apply the burden and standard of proof does so only against the background of the facts in issue in the case itself.

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8 Ibid 168 [37].

9 Ibid 183 [91].

10 The matter is not resolved — see, eg, *R v Munn* [2021] SADC 97 where Kimber DCJ observed that the judgment in *MAS* 'is consistent' with allowing a discrepancy between an address and the evidence of a witness being used as a prior inconsistent statement: at [36]. See also: *R v Smith* [2023] SADC 108, [77]–[100]; *R v JH* [2023] SADC 163, [228]–[232].

11 *The Queen's Case* (1820) 2 Brod & Bing 284; 129 ER 976.

12 *Evidence Act 1977* (Qld) ss 18–19; *Evidence Act 1906* (WA) ss 21–2. See also: *Evidence Act 2011* (ACT) s 43; *Evidence Act 1995* (NSW) s 43; *Evidence (National Uniform Legislation) Act 2011* (NT) s 43; *Evidence Act 2001* (Tas) s 43; *Evidence Act 2008* (Vic) s 43.

13 *Criminal Procedure Act 1865*, 28 & 29 Vict, c 18, ss 4–5.

14 (2018) 131 SASR 297.

15 Ibid 330 [157]–[159] (Doyle J, Kourakis CJ agreeing at 299 [1]).

Another aspect of the rules governing the admission of prior inconsistent statements is the underlying aim to strive for accuracy in fact-finding. Rather than allowing one party to impugn the credit of a witness without putting any inconsistencies to them, the rules have developed to ensure that cross-examination of witnesses on prior inconsistencies is done in a way that promotes transparency.

The witness must be taken to the prior statement and be given an opportunity to acknowledge it, and, importantly as regards fairness, an opportunity to explain any inconsistency between the prior statement and the evidence they have given in the trial. In this way, tribunals of fact are able to assess the witness when they are confronted with any inconsistency, and also able to assess the veracity of any explanation given. As former Justice of the Supreme Court of South Australia WAN Wells states, in relation to ss 28–9 of the *Evidence Act 1929* (SA), the provisions and the principles underlying them

> cover the field; they are not merely enabling. Accordingly, if you wish to tender, or to elicit, proof of a prior inconsistent statement, you must lay the proper foundation for such proof strictly in accordance with the procedure and order prescribed. It is mandatory under each section that a witness may be contradicted only where the prior inconsistent statement is 'relative to the subject matter of the cause': in other words, the testimonial effect of the prior statement must be relevant to the issues; the section does not authorise contradiction where that testimonial effect merely would affect the witness's veracity upon a collateral matter. It is also mandatory that, before a witness may be contradicted, he must be given a fair opportunity to say whether he made the statement; what is a fair opportunity is prescribed appropriately by each section.[16]

Moreover, the assessment of the witness by the tribunal of fact is done with reference to only the evidence admitted at the trial. This would include the evidence of any prior inconsistency (and any potential explanation for that inconsistency) given by the witness. This prevents counsel, and tribunals of fact, from impugning the credit of witnesses on the basis of material other than the evidence in the trial. It is also designed to ensure that tribunals of fact do not speculate on potential explanations for inconsistency (whether nefarious or benign). In that sense, while the conflict raised above relates to the evidence of complainants, it can also be of central importance when assessing evidence given by an accused person in a criminal trial. The principles relating to this, and analogy with the rules relating to prior inconsistent statements, were recently considered by the High Court in *Hofer v The Queen* ('*Hofer*').[17]

IV The Rule in *Browne v Dunn* and Fairness to Witnesses

It is a rule of practice in Australian trials that counsel cross-examining a witness from an opposing party, who intends to submit the witness's evidence ought not

16 WAN Wells, *Evidence and Advocacy* (Butterworths, 1988) 178–9.

17 (2021) 274 CLR 351 ('*Hofer*').

to be accepted, should put the propositions that are to be relied upon to impugn the witness's testimony for the witness's comment or explanation.[18] This rule of practice is commonly referred to as the rule in *Browne v Dunn*. The High Court recently observed that, in the criminal context, '[a]s a general rule, defence counsel should put to witnesses for the Crown for comment any matter of significance which is inconsistent with or contradicts the witness's account and which will be relied upon by the defence'.[19]

The rule has been held to apply in criminal practice.[20] The rule, simple to state, is more complex when considered in application to the conduct of a trial. This is particularly so in the context of a criminal defence case, and the tension that can arise between the desire for fairness underpinning the rule and the burden of proof that rests on the prosecution.

This complexity, and the tension, were the subject of consideration and comment by King CJ in *R v Manunta*.[21] There, considering the potential application of the rule to the cross-examination of an accused, where propositions had not been put to prosecution witnesses consistently with the evidence then given by the accused person, King CJ observed that the assumption that there was only a single reason that the propositions were not put by defence counsel and the inference from counsel's omission that the defendant's evidence 'was an untrue embellishment', was 'a process of reasoning … fraught with peril and [which] should therefore be used only with much caution and circumspection'.[22]

In similar circumstances before the High Court in *Hofer*, Kiefel CJ, Keane and Gleeson JJ outlined that where cross-examination to the above effect has occurred, a direction from the trial judge was required:

> It was necessary that the trial judge put the omissions in perspective, discount any assumption as to why they occurred by reference to other possibilities and warn the jury about drawing any inference on the basis of a mere assumption. Absent such directions there was a real chance that the jury may have assumed that the reason for the omission was that the appellant had changed or more recently made up his story.[23]

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18 Ibid 360–1 [26]–[28] (Kiefel CJ, Keane and Gleeson JJ); *Browne v Dunn* (n 4) 70–1 (Lord Herschell LC), 76–7 (Lord Halsbury); *MWJ v The Queen* (2005) 222 ALR 436, 448 [38] (Gummow, Kirby and Callinan JJ) ('*MWJ*').

19 *Hofer* (n 17) 361 [28].

20 *MWJ* (n 18) 440–1 [18] (Gleeson CJ and Heydon J), discussing *R v Manunta* (1989) 54 SASR 17, 23 (King CJ) ('*Manunta*').

21 *Manunta* (n 20).

22 Ibid 23.

23 *Hofer* (n 17) 366–7 [47] (citations omitted).

In *MWJ v The Queen* ('*MWJ*'),[24] Gummow, Kirby and Callinan JJ made a number of observations about the impact of the rule in practice:

> One corollary of the rule is that judges should in general abstain from making adverse findings about parties and witnesses in respect of whom there has been non-compliance with it. A further corollary of the rule is that not only will cross-examination of a witness who can speak to the conduct usually constitute sufficient notice, but also, that any witness whose conduct is to be impugned, should be given an opportunity in the cross-examination to deal with the imputation intended to be made against him or her. An offer to tender a witness for further cross-examination will however, in many cases suffice to meet, or blunt a complaint of surprise or prejudice resulting from a failure to put a matter in earlier cross-examination.[25]

The judgment went on to observe that, in the context of prosecution witnesses, 'subject to the obligation of the prosecution not to split its case', the recall of the relevant witness to allow the matters to be put to them, in compliance with the rule, was the course 'that should be able to be adopted on most occasions without injustice'.[26]

The rule, perhaps unsurprisingly given its age, has been subject to various criticism. Given the different adversarial contest that underpins civil litigation, it has been the subject of rather different scrutiny in the context of its continuing usefulness or applicability in civil proceedings.[27] Despite the differing considerations that attend the rule in civil proceedings, an observation made by Justice Sackar is apposite to its application in both civil and criminal proceedings. That is, where issues are joined and a tribunal of fact called upon to assess witnesses, those witnesses are entitled to an opportunity to 'tell their side of the story'.[28]

That the rule in *Browne v Dunn* exists, in part, due to considerations of fairness aligns it with the principles governing the admission and use of evidence of prior inconsistent statements of witnesses discussed above. Each body of law reflects a desire to ensure that tribunals of fact only approach the assessment of the credibility and reliability of witnesses in line with rules that ensure that witnesses are afforded a fair opportunity to comment on lines of attack that may be mounted on their evidence — and, to the extent possible and with an eye to confining the issues in any given trial, an opportunity to explain any aspects which might otherwise damage their accounts.

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24 *MWJ* (n 18).

25 Ibid 448 [39].

26 Ibid 448–9 [40].

27 See, eg, Justice John Sackar, 'The Rule in Browne v Dunn: Essential or Anachronistic' (Speech, University of Oxford, 16 Jan 2019) <https://supremecourt.nsw.gov.au/documents/Publications/Speeches/2019-Speeches/Sackar_20190116.pdf>.

28 Ibid 35.

Having considered the principles applicable to prior inconsistent statements and the rule in *Browne v Dunn*, it is convenient to turn to what the Court in *MAS* described as the 'traditional and well known process'[29] of drawing an inference adverse to a witness's credit due to a discrepancy between an address of counsel and a witness's evidence.

V 'Traditional and Well Known Process'

As outlined above, the Court in *MAS* observed that the drawing of an inference adverse to a witness's credit based on a discrepancy between counsel's opening and the witness's evidence was a 'traditional and well known process'.[30] Various authorities are cited for the proposition.[31]

When those authorities are considered, it can be observed that none clearly articulate that it is a rule of evidence that a tribunal of fact can draw an inference adverse to a witness on a basis of a discrepancy between an address of counsel and sworn evidence. None grapple with the potential conflict such an approach might give rise to with the rules governing the admission of prior inconsistent statements.

The primary authority the Court refers to, *Davis v The Queen* ('*Davis*'),[32] involved a consideration of the adequacy of directions given to a jury about inconsistencies in circumstances where the complainant's evidence was at odds with the prosecutor's opening and statements given to a doctor and the police (which the judgment outlines were also explored in the evidence). There, Prior J (Doyle CJ agreeing) held that in the circumstances of that case, the effect of the proven inconsistencies in the complainant's evidence and the two directed acquittals required directions that did more than just reiterate submissions of counsel.[33] It is significant that Prior J's assessment of the directions as to inconsistency in the evidence was closely related to a separate ground of appeal impugning the trial judge's directions on intoxication, which was separately upheld.[34] To that extent, *Davis* does not hold that discrepancies between

29 *MAS* (n 3) 183 [91].

30 Ibid.

31 Ibid 183 [91]–[92], citing: *Walker v Kraft* (Supreme Court of South Australia, O'Loughlin J, 19 March 1987); *G v The Queen* (Supreme Court of South Australia, Cox, Olsson and Mullighan JJ, 4 April 1995); *Davis v The Queen* (1995) 183 LSJS 186 ('*Davis*'); *R v Carter* (Supreme Court of South Australia, Lander J, 18 April 1997) ('*Carter*'); *Wheeler v The Queen* (Court of Criminal Appeal of Western Australia, Franklyn, Walsh and Ipp JJ, 20 April 1998) ('*Wheeler*'); *Huynh v The Queen* [1999] WASCA 45 ('*Huynh*'); *Jaensch v The Queen* [2000] WASCA 212 ('*Jaensch*'); *R v M* [2001] QCA 458; *Dyers v The Queen* (2002) 210 CLR 285, 310 (Kirby J) ('*Dyers*'); *R v ND* [2004] 2 Qd R 307; *Rowney v The Queen* (2007) 168 A Crim R 579 ('*Rowney*'); *DPJB v Western Australia* [2010] WASCA 12 ('*DPJB*').

32 *Davis* (n 31).

33 Ibid 190–2 (Prior J, Doyle CJ agreeing at 192).

34 Ibid 189–90.

a prosecutor's opening and a witness's evidence, in the absence of a foundation elsewhere in the evidence, can be used to draw inferences adverse to that witness.[35]

Other authorities considered by the Court in *MAS*[36] include analyses of inconsistencies (with some references to discrepancies between a prosecutor's opening and the evidence of a witness) in numerous contexts, from reasons for verdict,[37] to considerations of grounds of appeal alleging inconsistent or unreasonable verdicts.[38] The majority fall into the latter category. This means that any discussion of the evidence has to be seen in its proper context. The comments made in a number of those authorities are in the context of the appellate court undertaking their own independent review as they must pursuant to *M v The Queen*,[39] rather than analysing the principles applicable to evidence of prior inconsistent statements.

More problematic is the fact that some of the other authorities make clear that any reference to a discrepancy does not have the effect of elevating an address of counsel to the status of evidence. Instead, they make clear that the tribunal of fact is only to consider a witness's evidence as it was properly admitted; none speak of a 'traditional' or 'well known process' which would allow an inference adverse to that witness to be drawn in the absence of proof of an inconsistency in line with the rules of evidence. One such example can be found in observations from one of the authorities cited in *MAS*, *Huynh v The Queen* ('*Huynh*'):[40]

> However, I am not sure that there is any rule of law or practice that prevents the Crown from putting to the jury a case for conviction that is somewhat different from that alluded to in the opening address. Each case has to be assessed on its merits and it would depend on the nature and materiality of the departure. *It is a truism that the case which the jury has to consider is that which is established by the evidence, not by the opening. To take an example, it cannot be the case that because a Crown witness has not 'come up to proof' the prosecution must fail because what remains differs from the way it was put in opening.* Of course, a departure from the opening may be the subject of comment at the appropriate time. There will also be occasions on which the trial judge is obliged to hold the Crown to the case it said in opening that it intended to advance. … Much will depend on the materiality of the departure and the effect it would have on the ability of the accused to put his or her defence squarely to the jury.[41]

35 Ibid 190–2.

36 *MAS* (n 3) 183 [92] n 52.

37 *Carter* (n 31).

38 See, eg: *G v The Queen* (n 31); *Wheeler* (n 31); *Huynh* (n 31); *Jaensch* (n 31); *Dyers* (n 31); *R v ND* (n 31); *Rowney* (n 31); *DPJB* (n 31).

39 (1994) 181 CLR 487, 492 (Mason CJ, Deane, Dawson and Toohey JJ), 525 (McHugh J).

40 *Huynh* (n 31).

41 Ibid [30] (Owen J) (emphasis added).

The difficulties attending the approach in *MAS* are apparent. It should also be noted that, given that the comment in *MAS* was made in respect of a ground of appeal that was considering the sufficiency of directions given by the trial judge in that particular case, it can be considered properly as obiter dictum.[42] Further, it is of note that the descriptor 'demonstrated' is deployed by the Court.[43] One way in which to reconcile the comments with ss 28–9 of the *Evidence Act 1929* (SA) would be to understand the comment as only referable to inconsistencies which are proven (or put another way, 'demonstrated') in the evidence before the tribunal of fact in line with those provisions. This reading may also mean that the judgment may not conflict with the comments of Vanstone J in *A, GP*.[44] However, this is difficult to reconcile with the comment made in the preceding paragraph in *MAS*, that 'there was here stark evidence that D had failed to give any evidence of a serious and specific allegation'.[45] Without further examining the basis for the assertion that an absence of evidence was 'stark evidence',[46] it may be observed that, notwithstanding its status as obiter, it leaves trial courts and counsel in a difficult position.

VI Consequences: An Inference Adverse, Drawn Without Notice?

Tribunals of fact determine disputes at trial on the basis of the evidence admitted before them in accordance with the rules of evidence. The emphasis on in-person testimonial evidence that had long underpinned our system of adversarial litigation may have begun to shift. For example, such a shift is apparent through ss 12AB and 13BA of the *Evidence Act 1929* (SA) and surrounding amendments relating to vulnerable witnesses which may be contrasted with the 'testimonial emphasis' underpinning many rules of evidence.[47] Despite this shift, the emphasis on affording fairness to witnesses as part of an effort to ensure there is accuracy in fact-finding has not. To that extent, one may question whether the drawing of an inference adverse to a witness on the basis of a discrepancy between an opening address and that witness's evidence is in accordance with principle.

Further, it should be observed that in the criminal context, a 'failure to come up to proof' often has the result that an accused person is acquitted on certain charges. To that extent, the benefit to the accused is immediate. Further, that benefit is an obvious justification for any counsel for an accused person making a forensic decision not to explore any inconsistency in cross-examination (in accordance with any relevant statutory provisions governing that process). The most obvious risk of

42 *MAS* (n 3) [10], [28]–[30], [91], [107]–[109].

43 Ibid 183 [91].

44 See above n 6 and accompanying text.

45 *MAS* (n 3) 183 [90].

46 Ibid.

47 Andrew Ligertwood and Gary Edmond, *Australian Evidence: A Principled Approach to the Common Law and the Uniform Acts* (LexisNexis Butterworths, 5th ed, 2010) 575 [7.1].

such a course is that a complainant's memory may be refreshed and the prospect of acquittal, which may have been guaranteed to the extent that there was no evidence admitted in relation to certain charges, may vanish and be replaced with a cogent, coherent account of the witness in cross-examination and re-examination as to why the evidence was not given in chief. Moreover, to the extent that inconsistencies are in fact proven in line with the applicable rules, there is nothing stopping counsel then incorporating the fact that the proven inconsistencies are highlighted or exacerbated when considered against the allegations that were contained in an opening address. So much was contemplated in the authorities cited in *MAS*, including the observation in *Huynh* that departures from an opening address may be subject to 'comment at the appropriate time'.[48] To that extent, any discrepancy remains relevant — but it does not undermine or otherwise adversely impact the justification for and operation of the rules of evidence governing the admission of prior inconsistent statements.

The alternative seems difficult to reconcile with the rules of fairness as to witnesses that underpin the law governing the admission and use of prior inconsistent statements and the rule in *Browne v Dunn*. On one view, *MAS* would permit an accused to not only obtain the benefit of any directed acquittals as a result of a failure to come up to proof, that may be in no way the complainant's fault, but then compound that benefit by inviting a fact-finder to draw an inference adverse to that complainant's credit without having to abide by the rules established to allow fairness to witnesses that would otherwise apply.

VII Conclusion

The conflict between the judgments in *A, GP* and *MAS* potentially puts trial courts in difficulty. To the extent there is a discrepancy between counsel's opening and a witness's evidence, at least in South Australia, it currently appears that the position of a fact-finder in assessing that discrepancy is unclear. As recent decisions in the District Court of South Australia demonstrate,[49] the issue remains unresolved. The examination of the judgment in *MAS*, and the authorities which it cites for what it describes as a 'traditional and well known process',[50] was undertaken to demonstrate that there does not appear to be a general principle that an inference adverse to a witness's credit may be drawn against a witness when they fail to 'come up to proof'. Instead, in accordance with the common law and ss 28–9 of the *Evidence Act 1929* (SA), any prior inconsistent statement must be proven in line with the established laws of evidence. It is contended that such a view best gives effect to the principles of fairness to witnesses and accuracy in fact-finding.

48 *Huynh* (n 31) [30] (Owen J).

49 See above n 10.

50 *MAS* (n 3) 183 [91].