

## **IMPROPER QUESTIONING**

### **1. Intro**

- *The court may disallow improper questioning put to [W] during xxn or inform [W] not to answer the questions (**s 41(1)**)*

### **2. Definition**

*[P]'s questions are improper under [**s 41(3)([a/b/c/d])**] because they are:*

- a) misleading and confusing because...
- b) unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive because...
- c) put to [W] in a manner or tone that is belittling, insulting or otherwise inappropriate because...
- d) have no basis other than to stereotype on [W]'s [sex/race/culture/ethnicity/age/disability]

### **3. Analogue with cases/terms used**

- **Libke**
  - 'Tissue of lies'
  - Personal views/comments – 'I'm not buying it'
  - 'You're the historian here'
  - 'We've heard the great rhapsody'
  - 'Just another one of your inventions'
  - 'You thrash around and try to make up some explanation'
  - Cutting off answers before they're complete
    - Right to cross-examine does not extend to prevent witness from giving answers other than those which favour clients
  - Questions resting on controversial assumptions:
    - 'affirmative or negative answer may be almost equally damaging – perfectly honest witness may give a bad impression because he cannot answer directly but has to explain.'
  - Argumentative question
    - Should be avoided because [W] is an amateur and xxnr is a professional conductor of argument.
- **Picker**
  - It is improper to suggest in xxn that the accused's denying the complainant's allegation is equivalent to him calling them a liar
    - It is unfair and elicits prejudice against the appellant
  - It is impermissible to argue in xxn that because [accused]'s counsel had not questioned [complainant] about specified matters, the appellant was telling lies.

### **4. Objection**

- [Party] may object to a question put to a W on the ground that it is an improper question (**s 41(6)**)
- Duty is imposed on the court/judge to stop questions regardless of whether an objection is made S 41(7):
- Failure of the court to disallow the question will not affect admissibility of the answer (**s 41(8)**)

### **5. Vulnerable witness**

- *The court **must** disallow improper questioning put to [W] under **s 42(1)** because they will be a vulnerable witness because they are:*
  - are under 18 (**s 41(4)(a)**)
  - have a cognitive impairment (**s 41(1)(b)**)
  - are likely considered to be vulnerable under **s 41(4)(c)** due to

- i. Any relevant condition or characteristic of the witness of which the court is, or is made aware, including age, education, ethnic and cultural background, gender, language background and skills, level of maturity and understanding and personality; and
- ii. Any mental or physical disability of which the court is, or is made, aware and to which the witness is, or appears to be, subject; and
- iii. The context in which the question is put, including—
  - (A) Nature of the proceeding
  - (B) Nature of the offence to which the proceeding relates
  - (C) Relationship between [W] and [other party to the proceeding]

## **CHARACTER & CREDIBILITY**

### **CREDIBILITY EVIDENCE**

- *[relevant evidence] is credibility evidence because it is evidence which relates to the witness's credibility and*
  - is relevant only because it affects the assessment of the credibility of [W]; [or]
  - is relevant because it affects the assessment of credibility of [W] and for another purpose for which it is inadmissible.
- Credibility evidence is not admissible unless one of the exceptions in Part 3.7 applies (**s 102**)

### **CREDIBILITY**

- Credibility evidence about a witness is generally not admissible (**s 102**)
- However, xxn is an exception to the credibility rule if the evidence could substantially affect the assessment of the credibility of the witness (**s 103(1)**)
- Court will assess the following factors in whether it could substantially affect credibility (**s 103(2)**):
  - a) Whether evidence tends to prove that [W] knowingly or recklessly made a false representation when they were under obligation to tell the truth
  - b) The period of time that has elapsed since act/events to which the evidence relates were done/occurred.
- Adducing credibility evidence from another witness:
  - s 106(1): credibility rule does not apply to questions that are designed to show that a witness if in the cross examination of the witness:
  - the substance of the evidence was put to the witness; and
  - the witness denied, or did not admit or agree to, the substance of the evidence; and
  - the court gives leave to adduce the evidence – apply s 192

### **CHARACTER OF COMPLAINANT IN SEXUAL OFFENCE CASES**

*It is likely that the evidence of [xyz] will be impermissible under the Criminal Procedure Act (CPA) because it related to [complainant]'s sexual [reputation/dispositions/history]*

- [Complainant] cannot be questioned about her general reputation with respect to chastity – **s 341**
- [Complainant] can not be xxned, and court must not admit evidence, about their sexual activities – **s 342 CPA**

### **Sexual History evidence**

*[Evidence] is 'sexual history evidence' according to s 340 CPA because it relates to or tends to establish the fact that [complainant]*

- a) *was accustomed to engaging in sexual activities; or*
  - b) *had freely agreed to engage in sexual activity (other than that to which the charge relates) was [accused] or another person.*
- This evidence
    - is not admissible to support an inference that [complainant] is the type of person who is more likely to have consented to [sexual activity to which the charge relates] – **s 343 CPA**
    - is not substantially relevant to the facts in issue because it raises inferences as to [complainant]'s general disposition – **s 352(a) CPA**
    - is not a proper matter for xxn as to [complainant]'s credibility unless special circumstances show that it would be likely to materially impair confidence/reliability of [complainant's evidence) - **s 352(b) CPA**

- Exceptional circumstances – where may show general disposition but also be relevant to the fact that she consents ‘e.g. I’ll come over later and do this’ (***Bull v The Queen***)
- If extra time – refer to guiding principles in **s 388**
  - Including high incidence of sexual offences; sexual offences significantly underreported; offenders commonly known to victims

## **DELAY IN REPORTING**

### **Directions Regarding Delay**

Under the *Jury Direction Act (JDA)* there are certain rules on what can and cannot be said in court with relation to sexual offence cases and delays in reporting.

#### ***s 51 JDA***

- 1) TJ, P & D (or accused if unrepresented) must not say or suggest in any way that
  - a) Law regards complainants in sexual offence cases as unreliable class of witnesses
  - b) Complainants in sexual offence cases are an unreliable class of witness
  - c) Complainants who delay in making a complaint or do not make a complaint are, as a class, less credible or require more careful scrutiny
- 2) TJ must not say, or suggest in any way, that because the complainant delayed in making a complaint, or did not make a complaint –
  - a) It would be dangerous or unsafe to convict the accused; or
  - b) The complainant’s evidence should be scrutinised with great care

***S 52 JDA*** – TJ must give warnings if evidence is brought at trial regarding delay in making complaint/failure to make complaint - see p 89

### **Forensic Disadvantage**

- *Defence council may request that TJ direct jury of forensic disadvantage (FD)*
- *Under **s 39 JDA**, TJ may direct jury only if she is satisfied that the accused has experienced a significant FD*

*There must be more than mere delay, there must be a disadvantage connected with the consequence of the delay (PT)*

- e.g. ***Greenshill***
  - witness dead
  - unable to obtain medical evidence
  - unable to effectively explore or circumstances around accounts