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## COURT OF APPEAL CRIMINAL DIVISION (ENGLAND)

# *R v BISHOP*

**Stephenson LJ, MacKenna and O'Connor JJ**

**20, 21 May, 13 June 1974**

**[1975] QB 274; [1974] 3 WLR 308; [1974] 2 All ER 1206; 59 Cr App R 246**

**EVIDENCE – IMPUTATIONS ON CHARACTER OF PROSECUTION WITNESS – DEFENDANT CLAIMED THAT WITNESS HAD HAD HOMOSEXUAL RELATIONS WITH THE DEFENDANT – WITNESS DENIED SUCH AN IMPUTATION – LEAVE GRANTED TO SHOW DEFENDANT'S PRIOR CONVICTIONS – DEFENDANT CONVICTED – WHETHER COURT IN ERROR IN REJECTING THE OBJECTION TO LEAD EVIDENCE OF DEFENDANT'S PRIOR CONVICTIONS.**

The defendant was tried on a charge involving theft from a bedroom. In evidence he explained the presence of his fingerprints in the room by saying that he had had a homosexual relationship with a prosecution witness, which the witness had denied. The prosecution sought leave to ask the defendant questions tending to show that he had been convicted of offences other than that charged because the nature and conduct of the defence was such as to involve imputations on the character of the witness for the prosecution within section 1(f)(ii) of the *Criminal Evidence Act* 1898. [Ed note: This section is on all pars with Victorian *Crimes Act* 1958. Section 399 proviso e(ii)).] The defendant objected on the grounds that, in view of section 1(1) of the *Sexual Offences Act* 1967, an allegation that a man was a homosexual or practised homosexuality was not an imputation on his character within section 1(f)(ii) of the Act of 1898, and in any event the allegation had been made for the purpose of explaining the defendant's presence in the room and not for that of discrediting the testimony of the prosecution witness. The objection was rejected, questions about the defendant's previous convictions were asked, and he was convicted. He appealed on the ground that his objections to the evidence of his previous convictions had been wrongly rejected. On the appeal—

**HELD: Appeal dismissed. The character of a witness was impugned by an allegation of homosexual conduct made against him and an imputation of homosexual immorality against a witness might reflect on his reliability, generally or in the witness box; that a defendant who made such an attack but disclaimed the intention to discredit the testimony of the witness nevertheless was still subject to the risk of cross-examination as to his own record and that accordingly the defendant's allegations brought him within section 1(f)(ii) of the Act of 1898, and his objections to the evidence of his previous convictions had been rightly rejected.**

***R v Knuller (Publishing, Printing and Promotions) Ltd* (1973) AC 435, HL (E); and**
***R v Selvey* (1970) AC 304, HL (E) applied;**
***R v Preston* (1909) 1 KB 568 CCA, doubted.**

**STEPHENSON LJ read the judgment of the Court:** In our opinion, the judge rightly rejected the submission and this appeal fails. B. submitted that in these progressive (or permissive) days it was no longer an imputation on a man's character to say of him that he was a homosexual or that he practised homosexuality. Since 1967, when section 1 of the *Sexual Offences Act* 1967 became law it was no longer an offence to commit a homosexual act with another man of full age in private. No reasonable person would now think the worse of a man who committed such acts; he might not wish to associate with him but he would not condemn him. We think that this argument goes too far and that the gap between what is declared by Parliament to be illegal and punishable and what the common man or woman still regards as immoral or wrong is not wide enough to support it.

We respectfully agree with the opinion of Lord Reid in *R v Knuller (Publishing, Printing and Promotions) Ltd* (1973) AC 435, 457 that 'there is a material difference between merely exempting certain conduct from criminal penalties and making it lawful in the full sense' and with him we read the Act of 1967 as saying that even though homosexual acts between consenting adults in private may be corrupting, if people choose to corrupt themselves in this way, that is their affair and the law will not interfere.

If Mr Price were to sue the defendant in respect of his allegation if repeated outside a court of law,

we venture to think that a submission that the words were incapable of a defamatory meaning would be bound to fail and a jury would generally be likely to find them defamatory. Most men would be anxious to keep from a jury in any case the knowledge that they practiced such acts and many would be debarred from going to the police to charge another with any offence if they thought that he might defend himself by making such an allegation, whether baseless or not. If this is still true, we are not behind the times in holding that Mr Price's character was clearly impugned by the allegation of homosexual conduct made against him by the defendant.

Then it is contended that even if the allegation reflects upon his character, it does not reflect upon his integrity, his honesty or his reliability so that he is thereby rendered less likely to be a truthful witness, or if in fact it has that effect it was not made with that intention. This contention, particularly the second part of it, is based upon older authorities, particularly the well known judgment given by Channell J in *R v Preston* (1909) 1 KB 568, where, of section 1(f)(ii), he said, at p575:

> " ... if the defence is so conducted, or the nature of the defence is such, as to involve the proposition that the jury ought not to believe the prosecutor or one of the witnesses for the prosecution upon the ground that his conduct – not his evidence in the case, but his conduct outside the evidence given by him – makes him an unreliable witness, then the jury ought also to know the character of the prisoner who either gives that evidence or makes that charge, and it then becomes admissible to cross-examine the prisoner as to his antecedents and character with the view of showing that he has such a bad character that the jury ought not to rely upon his evidence. That is the general nature of the enactment and the general principle underlying it."

And the court went on to hold at p576:

> 'The statement in the present case was a mere unconsidered remark made by the prisoner without giving any serious attention to it, and in our opinion it does not come within section 1(f)(ii) of the Act as being an imputation made upon the character of a witness for the prosecution for the purpose of discrediting his testimony.'

Mr Bate says that the defendant's allegation against Mr Price was made not for the purpose of discrediting his testimony but for the purpose of explaining his presence in Mr Price's room.

We do not consider that this argument can succeed against the plain words of section 1(f)(ii) given their natural and ordinary meaning. If we give them that meaning, as we are now required to do by the House of Lords in *Selvey's case* (see for instance what Viscount Dilhorne said (1970) AC 304, 339), they cannot be restricted in the way suggested by the words of the judgment which we have just quoted. Though we agree that the general nature of the Act and the general principle underlying it are as there stated we do not accept the submission that an imputation of homosexual immorality against a witness may not reflect upon his reliability — generally or in the witness box; nor do we accept the submission that a defendant can attack the character of a witness without risk of the jury's learning that his own character is bad by disclaiming any intention to discredit the witness's testimony. Such a construction of the section would enable many guilty men to resort to variations of 'the Portsmouth defence' with success by unfairly keeping the jury in ignorance of their true character and would fly in the face of the decision in *Selvey's case* to strip the plain words of section 1(f)(ii) of the gloss put upon them in earlier cases.

Mr Bate referred us to numerous earlier authorities, but with no disrespect to him we do not find it necessary or helpful to refer to them because, as Mr Worsley for the Crown pointed out, many of them are difficult to reconcile and were given on the construction of the Statute strained in the defendant's favour through a failure to appreciate that the trial judge had a discretion: *R v Cook* (1959) 2 QB 340 approved in *Selvey's case*.

Once it is conceded, as Mr Bate rightly conceded, that an imputation on character covers charges of faults or vices, whether reputed or real, which are not criminal offences it is difficult to restrict the statutory exception of section 1(f)(ii) in any such way as has been suggested on behalf of the defendant.