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Dear Alistair,

Discussion Paper on Similar Fact Evidence and the *Moorov* Doctrine

This letter forms a response to the above Discussion Paper. I should say that I have found this paper very difficult to respond to. First, it seems to proceed on the assumption that it is necessarily correct to continue to distinguish between (a) evidence of bad character; (b) the *Moorov* and *Howden* rules on corroboration and (c) the admissibility of previous convictions and to apply separate rules in each area. This seems to me to replicate much that is wrong about the existing law and I am surprised that this approach is not itself the subject of consultation questions.

As the Discussion Paper notes (in referring to *DPP v Kilbourne* at para 6.4), corroborative evidence is simply relevant evidence. The suggestion by Lord Rodger in *DS v HM Advocate* (noted at para 7.43) that evidence of previous convictions can be relevant but not corroborative is surely, therefore, not correct. Much of the difficulty with our existing law arises from a failure to recognise this identity between questions of relevance and questions of corroboration. I doubt that sense can be made of this area of law by continuing to approach it in the piecemeal fashion which has so unsatisfactorily developed.

With those caveats in mind, I would answer the consultation questions as follows.

1. **Is the current law in relation to evidence of bad character, as set out in paragraphs 3.10-3.11, satisfactory?**

Given my initial comments, I express no opinion on this point.

2. **If not, what changes should be made?**

Consideration should be given to a unified approach to bad character evidence which seeks, as far as possible, to unify the areas of law canvassed in the Discussion Paper.

3. **Where the circumstances of a charge of which an accused person has been acquitted are sufficiently similar to those of a present charge that, had the two charges been contained in the same indictment, *Moorov* would have been available, it should be competent to lead evidence in relation to the earlier charge in order to contribute to the proof of the present charge (including, if necessary, by providing corroboration via the *Moorov* doctrine).**

Yes, but this question illustrates why thinking within the confines of *Moorov* is unsatisfactory. Such evidence may or may not be necessary in order to provide corroboration: the first issue is that it is relevant and it should therefore be admitted. The question of corroboration does not arise at the point when the Crown seeks to adduce evidence, as corroboration need not be established until the close of the Crown case.

4. **Where the circumstances of a charge of which an accused person has previously been convicted are sufficiently similar to those of a present charge that, had the two charges been contained in the same indictment, *Moorov* or *Howden* would have been available, should it be competent to lead evidence in relation to the earlier charge in order to contribute to the proof of the present charge (including, if necessary, by providing corroboration via the *Moorov* or *Howden* doctrine)?**

Yes, but my comments in response to question 3 apply. It does not seem to me to make sense to use a rule of sufficiency of evidence to determine admissibility – unless we recognise that it is not really a rule of sufficiency of evidence at all.

5. **If so, should any of the options outlined in the above paragraphs be excluded and, if so, why?**

Given the undesirability of creating separate sets of rules as the Discussion Paper envisages, I express no opinion on this point.

6. **Where an offence is alleged to have been committed outwith the jurisdiction of the Scottish courts, it should be competent to lead evidence of that offence where this is relevant to the proof of another offence which is competently charged. Where the similarities of time, character and circumstance are sufficiently strong, it should be competent to rely upon such evidence to provide corroboration via the *Moorov* or *Howden* principles.**

I agree.

7. Should the *Moorov* and *Howden* doctrines be set out in statutory form?

I doubt there would be any benefit to doing this other than as part of rather broader reform.

8. If so, what features should they incorporate?

Given my answer to question 7, I have no comments to make on this point.

9. Is the current statutory framework in relation to the admissibility of evidence as to previous convictions satisfactory?

I think that the Discussion Paper has demonstrated that it is not.

10. Does leading relevant evidence as to the previous bad conduct of the accused lead to the accused's being treated as "less equal" before the law?

I am not sure that this is a meaningful question; at any rate I do not feel able to answer it.

11. If so, should the jury be denied evidence as to the good conduct of the accused?

I see no reason why a special rule should be created to bar the admissibility of such evidence.

12. Would it be unfair to allow the admission of evidence of an accused person's relevant previous convictions in all circumstances?

and

13. If so, why?

This may pass over the rather more difficult question of when a previous conviction becomes "relevant" (a difficult question, and a rule generally excluding the admissibility of previous convictions means it can generally be avoided). Generally, I would have thought that such evidence should be excluded where its prejudicial effect exceeds its probative value.

14. Is there any logical reason why evidence of previous convictions should be treated as being relevant only to the credibility of the accused (as in *Leggate*), or should it be able to be used more generally, in relation to any of the crucial facts of the case?

No, there is no logical reason why these should be relevant to credibility only.

15. If relevant evidence as to previous convictions is to be admissible in relation to any of the crucial facts of a case, should its significance in relation to these facts be left to the jury?

Yes.

16. Should previous convictions be proved by requiring the rehearing of the evidence in the previous proceedings?

No, but the possibility of requiring the rehearing of evidence should not be excluded where necessary to establish relevant circumstances.

17. **If so:**
- (a) **how would such a system work in practice; and**
 - (b) **if it were impossible or impracticable to rehearse the evidence in the previous proceedings, should that bar the use of the previous conviction?**

In light of my answer to question 16, I have no comments to make here.

18. **Should the relevance of evidence of previous convictions be tested:**

- (a) **on the basis (as currently set out in section 275A of the 1995 Act) that evidence of (all) cognate offences will be treated as relevant;**
- (b) **by extrapolating the principles underlying the application of the *Moorov* doctrine;**
- (c) **by requiring the prosecutor to say for what purpose the evidence of those convictions is to be led; or**
- (d) **on some other basis (and, if so, what other basis)?**

(c) would seem to be procedurally helpful but cannot be said to amount to a test. (b) is the correct test in principle but illustrates why a unified approach to this area of law would be preferable.

19. **It should be made clear that evidence of previous convictions can never in itself amount to sufficient evidence to establish the guilt of the accused.**

Yes, but although this seems fairly clear at first sight it is not clear what it actually means as a rule. Previous convictions could never be the *only* Crown evidence (the crime itself would need to be proven). Is the point, therefore, that it would not be sufficient if the only evidence incriminating the accused were previous convictions? Is this meant to exclude the possibility of a sufficiency in a case which is circumstantial and other adminicles of circumstantial evidence only become incriminating when considered in conjunction with previous convictions?

20. **Should evidence of previous convictions be admitted only where there is otherwise sufficient evidence (leaving aside the requirement for corroboration) to establish that the accused committed the offence?**

No. I doubt that it is helpful to ask questions of sufficiency midway through the prosecution case. Moreover, this seems to assume that previous convictions could never be corroborative, which as the Discussion Paper notes earlier, seems wrong in principle.

21. **Could evidence of previous convictions be one of the circumstances in a prosecution based only upon circumstantial evidence?**

Yes.

22. **Should evidence of relevant previous convictions be admitted as a matter of course?**

I am not in fact certain what case is being made for this change: the issue pervades the Discussion Paper but does not seem to be (satisfactorily) tackled head on. I would want to have a clearer sense of the argument before endorsing it.

23. **If evidence of relevant previous convictions is to be admissible, should the trial judge be required to consider whether the probative value of such convictions exceeds their prejudicial effect?**

Yes.

24. **If question 23 is answered in the affirmative, then:**

(a) **is the "prejudicial effect" referred to an effect on the interests of the accused, or on the interests of the administration of justice; and**

(b) **what factors might inform such a consideration?**

The effect is one on the interests of the administration of justice, which includes the protection of the accused's interests. I doubt it would be helpful to set out relevant factors in a statutory test.

25. **There is no reason to suppose that a jury, properly directed, would not be able to accord a proper significance to evidence of relevant previous convictions.**

The section preceding this question notes that there is an absence of evidence of potential prejudice. This is largely correct. It then treats this as if it were evidence of the absence of potential prejudice. This is not correct. The empirical evidence cited at paras 7.125 and 7.127 seems irrelevant to the specific question of how a jury might respond to evidence of previous convictions.

26. **Are there any factors for or against the introduction of a rule permitting the leading of evidence as to previous convictions, other than those mentioned above, to which consultees would wish to draw our attention?**

No.

Yours sincerely,



James Chalmers