EVIDENCE IN REBUTTAL IN CRIMINAL CASES

The question as to whether the prosecution or for that matter the defence be allowed to adduce rebutting evidence after either has closed its case (in the case of the prosecution during or after the evidence and speeches for the defence have been completed) is not an easy one since it is an exception to the general idea that a party should not be allowed to call further evidence once its case is closed. Thus it may be mentioned in passing that in civil cases the discretion of a judge to admit rebutting evidence called by a party is not wide ranging but exercised with safeguards in mind as shown by *Bigsby* v. *Dickinson*,[1] a decision of the Court of Appeal, where the overriding consideration was whether the plaintiff who applied to adduce rebutting evidence was taken by surprise and *Beevis* v. *Dawson*[2] where Singleton L.J. indicated that the guiding lights were the element of surprise, the interests of justice, the interests of the parties and the point of view of the court. *Beevis* v. *Dawson,* it may be observed, dealt specially with the law pertaining to libel but their Lordships also on this question referred to a few authorities dealing with matters other than libel.

In *Osman bin Ali* v. *Public Prosecutor,* Wee C.J. delivering the judgment of the Singapore Court of Criminal Appeal said:[3]

> It is clear law that, apart from statute, the trial court has a discretion whether evidence, not having been tendered as part of the prosecution case, ought to be given as rebutting evidence. There is also ample authority that a trial court is necessarily in a far better position to exercise this judicial discretion with much more ample means of knowledge as to whether the evidence can be fairly admitted or not than an appellate court. There is also abundant authority that an appellate court would not interfere with the exercise of that discretion unless the exercise of the discretion has resulted in injustice to the accused. It has been so far as we are aware, the practice of the High Court to allow the prosecution to call medical evidence in rebuttal where an accused person adduces evidence in support of a defence of diminished responsibility. A similar practice, so far as we are aware, prevails in England. In so far as non-medical evidence is concerned the principle that ought to be applied is whether or not the rebuttal evidence, if admitted, would operate unfairly against the accused and where it has been admitted the test is, as stated above, whether the accused has suffered an injustice.

No authorities were cited in the judgment.

As this is a statement of a Court of Criminal Appeal (comprising three experienced judges) on an important matter of recurring concern, it will no doubt have repercussions on the administration of justice and

1. (1876) 4 Ch. D. 24.
2. [1956] 3 All E.R. 837, C.A.
3. [1972] 2 M.L.J. 178, C.C.A. at p. 181.

it behoves us to consider its applicability in the light of certain decisions. Three questions may be asked as regards the abovementioned pronouncement of the Criminal Court of Appeal:

1. What is the nature and extent of the discretion in regard to evidence in rebuttal ?
2. When can an appellate court interfere with the exercise of such discretion ?
3. Is there any special position or practice as regards medical evidence in rebuttal concerning the defence of diminished responsibility ?

The Nature and Extent of the Discretion

In *R.* v. *Owen*[4] Lord Goddard C.J. in explaining the nature of the discretion, contrasted the previous position with the current law. The previous law according to Lord Goddard is contained in the "usually cited" case of *R.* v. *Frost* where Tindal C.J. said:[5]

> There can be no doubt about the general rule, that where the Crown begins a case (as it is with an ordinary plaintiff), they bring forward their evidence, and cannot afterwards support their case by calling fresh witnesses, because there may be evidence in the defence to contradict it. But if any matter arises *ex improviso* which the Crown could not forsee, supposing it to be entirely new matter, which they may be able to answer only by contradictory evidence, they may give evidence in reply.

In stating the current law Lord Goddard C.J. explained that unlike the period when Tindal C.J. laid down the safeguard in all its strictness, the modern criminal law now allows accused persons to give evidence on their own behalf. Thus under such circumstances the judge had a discretion :[6]

> ...to admit evidence for the prosecution after the case for the defence has been closed where it becomes *necessary* to rebut matters which have been raised *for the first time* by the defence.... It must be a matter for the discretion of the judge which should be applied with caution....

It would appear that, in civil cases, since a defendant has always been entitled to give evidence on his behalf, the strictness of the safeguard propounded by Tindal C.J. remains in its pristine state. Conversely, one might be tempted to comment that the rule laid down by Tindal C.J. should therefore continue to govern in criminal cases now that the position is the same. However, in *R.* v. *Harris,*[7] Avory J. delivering the judgment of the Court of Appeal differentiated between civil and criminal cases with reference to the power of a judge himself to call rebutting evidence and stated:[8]

4. [1952] 1 All E.R. 1040, C.C.A.
5. (1840) 9 C. & P. 129 at p. 159; 173 E.R. 771 at p. 784. Note that the same quotation cited in *R.* v. *Harris* [1927] 2 K.B. 587, C.C.A. and *R.* v. *Liddle* (1929) 21 Cr. App. Rep. 3 is not worded with exact similarity.
6. At p. 1042. Emphasis added.
7. [1927] 2 K.B. 587, C.A.
8. *Ibid*., at p. 594. See also *Yianni* v. *Yianni* [1966] 1 All E.R. 231 on the same point.

> ...it was clearly laid down in the Court of Appeal in *Re Enoch and Zaretsky, Bock and Co. Ltd.*[9] that in a civil suit a judge has no power to call a witness not called by either side unless with the consent of both parties. It also appears to be clearly established that the rule does not apply at a criminal trial, where the liberty of the subject is at stake, and where the sole object of the proceedings is to make certain that justice is strictly done between the Crown and the accused.

Probably this rationale explains the divergence between many of the modern cases and *R.* v. *Frost* where it could be said their Lordships in the modern cases were on balance and — subject to safeguards — more concerned with the truth rather than the procedural safeguard. As Lord Goddard C.J. said in *R.* v. *Flynn:*[10]

> As one had to observe before now, criminal trials are not a game. The object of a criminal trial is to acquit the innocent and convict the guilty.

The above observation of mine, nonetheless, must be qualified by the realization that the modern cases, *e.g. R.* v. *Owen,* which deviate from *R.* v. *Frost* actually do not materially diverge from the pronouncement of Tindal C.J. as I will seek to show.

An example as to a defence being raised for the first time was the case of *David Flynn*, where *R.* v. *Owen* was cited. This was the "familiar defence of alibi". It was deployed at the last moment, *i.e.* at the trial and only when the prisoner was making his defence; he also called a witness to support his alibi. The prosecution was allowed to call rebutting evidence so as to show that the witness was in fact giving false evidence. The rationale as explained by Lord Goddard, C.J. on appeal (with Gorman and Pearson JJ.) was that the prosecution did not know what the alibi was going to be, and moreover as "the object of a criminal trial is to acquit the innocent and convict the guilty" the rebutting evidence was rightly admitted. However, His Lordship also cautioned that if the alibi had been set up *earlier* the prosecution would have known about it and therefore would be in a position to test it by calling relevant evidence in chief and the presiding judge would then be correct in refusing an application to admit rebutting evidence.

R. v. *Liddle*[11] was also a case of alibi but Lord Hewart C.J., sitting together with Avory and MacKinnon JJ., adhered to the principle laid down by Tindal C.J. in *R.* v. *Frost* and in doing so held that as alibi was "the commonest of all defences; there is nothing *ex improviso* about such a defence as that." It was also held that the rebutting evidence had caused injustice to the accused, such evidence being used to rebut the supposedly sudden evidence of alibi. The conviction was quashed. One must point out that the accused in *R.* v. *Liddle* in fact gave evidence on his own behalf (unlike *R.* v. *Frost*). So, comparing *R.* v. *Liddle* with *R. v. Owen,* it would appear that the position of law is not really so "clear" as observed by Wee C.J. in *Osman bin Ali* v. *P.P.,* for Lord Hewart C.J. aligned his view with that of Tindal C.J. and did not distinguish between the previous and the current law as later explained by Lord Goddard, C.J. in *R.* v. *Owen.*

9. [1910] 1 K.B. 327.
10. (1958) 42 Cr. App. Rep. 15.
11. (1928) 21 Cr. App. Rep. 3.

It is appropriate to add that prior to *R.* v. *Liddle*, Avory J., sitting with Sankey and Aalter JJ. in *R.* v. *Sullivan*,[12] held that rebutting evidence adduced after the prisoner had given evidence was admissible as the prisoner had set up the defence of alibi for "the first time". Avory J. relied on *R.* v. *Crippen*[13] which was also relied upon by Lord Goddard in *R.* v. *Owen* as modifying Tindal C.J.'s pronouncement in *R.* v. *Frost.*

In *R.* v. *Crippen*, Darling J., sitting with Channel and Pickford JJ., in his judgment criticised the rule laid down by Tindal C.J. The test laid down by Darling J. was whether rebutting evidence "could or ought to have been given before the prosecution closed their case".[14] This is very close to the view of Lord Goddard in *R.* v. *Flynn.* It would appear that Avory J. changed his view five years later in *R.* v. *Harris* [15] where he adopted Tindal C.J.'s rule; and judging from the notes of the; exchanges between Avory J. and Fulton for the Crown in *R.* v. *Liddle*, he continued to adhere to his new opinion.

Indeed the different emphasis of different Courts and the state of the authorities have probably moved the editors of *Halsbury's Laws of England*,[16] one of the principal contributors to which is the former Humphreys J., to make the following statement of law with an attendant qualification:

> 776. *Rebutting evidence.* After the witnesses for the defence have given their testimony, the evidence is closed, and the court will not allow fresh evidence to be given, but if any matter arises unexpectedly in the evidence called by the defence, such a matter may be answered by rebutting evidence on behalf of the prosecution.

The learned editors themselves suggest that this is based on the view of Tindal C.J. for they cite *inter alia R.* v. *Frost* and then significantly they add: "but see *R.* v. *Owen*" obviously by way of differentiation. In view of this, it is desirable to examine further authorities.

In *R.* v. *Rice and Others,*[17] Winn J., sitting with Salmon and Ashworth JJ., mentioned in passing the question of controlling the admission of evidence in rebuttal (this question did not arise on appeal), but as the contents of a police statement had been introduced after the prosecution's case by way of cross-examination of one of the accused persons who made the statement, Winn J. was moved to explain as follows:[18]

12. [1923] 1 K.B. 47.

13. [1911] 1 K.B. 149, C.C.A.

14. (1911) 103 L.T. 705 at p. 706; 22 Cox C.C. 289 at p. 291. This wording is not found in the Law Reports report or in the other collateral reports.

15. [1927] 2 K.B. 587. C.C.A.

16. 3rd ed., Vol. 10, p. 422. See also *R.* v. *Dovan* (1972) 56 Cr. App. Rep. 429, at 436.

17. (1963) 47 Cr. App. Rep. 79.

18. At p. 85.

> There is a general principle of practice, the court thinks, though no rule of law, requiring that all evidentiary matter that the prosecution intend to rely upon as probative of the guilt of an accused person, or of the guilt of any one of a number of co-accused persons, should be adduced before the close of the prosecution case if it be then available. Whether or not evidence subsequently for the first time available to the prosecution should be introduced at any later stage is a matter to be determined by the trial judge in his discretion, exercised, subject to certain limits imposed by authorities which need not for the present purpose be examined, in such a way and subject to such safeguards as seems to him best suited to achieve justice between the Crown and the defendants, and between defendants.

It could be observed that this rule of practice, in view of the limits and safeguards imposed by authorities on the discretion of the judge, has in effect the force of law albeit applied in a flexible manner. The theme of evidence for the prosecution being available for "the first time" or the defence being raised for "the first time" recurs in *R.* v. *Sullivan, R.* v. *Owen, R.* v. *Flynn* and *R.* v. *Levy and Tait.*[19] The recurrence seems to suggest that one of the elements in the exercise of this limited discretion is whether the prosecution is being taken by surprise and thereby finds it "necessary" to introduce rebutting evidence.

The Court (Winn L.J., Widgery L.J. and Lawton J.) had occasion again to consider evidence in rebuttal in *R.* v. *James Milliken*[20] and approved what Lord Goddard C.J. said in *R.* v. *Owen* on the question of a judge having a discretion in such matters. It considered what it said in *R.* v. *Rice* with reference to the phrase "for the first time available to the prosecution" but described such ruling in the circumstances *(i.e.* in view of that phrase) as a "somewhat different ruling" from its present decision in *R.* v. *Milliken.*

In *R.* v. *Milliken*, the evidence in rebuttal introduced by the prosecution was as to alleged fabrication or framing up by the police amounting to an alibi. However, it is sufficiently clear from the report that as this evidence of framing up by the police was introduced by the defence for the first time, it was evidence of a "wholly unanticipated" nature thereby rendering evidence in rebuttal by the prosecution admissible. The real difference between *R.* v. *Milliken* and *R.* v. *Rice* was in fact more realistically adumbrated by Winn L.J. when he said that, unlike *R.* v. *Rice,* the evidence in rebuttal in *R.* v. *Milliken* was not probative of the guilt of the defendant. His Lordship, whilst pointing out that the exercise of the judge's discretion must depend on the circumstances of the case, threw more light on the operation of the guidelines previously laid down by him in *R.* v. *Rice:*

> Generally speaking, particularly since the Criminal Justice Act, 1967 came in force, an alibi is to be anticipated; but this was a case where the alibi defence was wholly unanticipated.... Whether the evidence sought to be introduced in rebuttal is itself evidence probative of the guilt of the defendant and where *it is reasonably forseeable* by the prosecution that some gap in

19. (1966) 50 Cr. App. Rep. 198.

20. (1969) 53 Cr. App. Rep. 330.

> the proof of guilt needs to be filed by evidence called by the prosecution then, generally speaking, the Court is likely to rule against the closing of any such gap by rebuttal evidence....[21]

So it is submitted that whether it be evidence which is raised for first time by the defence or available to the prosecution for the first time, it is the notion of reasonable foreseeability which is the common touchstone of these cases. Viewed from this angle there is little difference between *R.* v. *Owen* and *R.* v. *Frost:* the test encompasses something which arises unexpectedly. The difference is really one of subtle emphasis and indeed in *R.* v. *Owen,* Lord Goddard C.J. merely described Tindal C.J.'s rule as being "probably in wider language than would be used at the present day". The somewhat piecemeal circumscribing of this "wider language" has been fraught with some difficulty as has been seen and those who have studied the cases must be forgiven for being sometimes rather perplexed over what Winn L.J. in *R.* v. *Milliken* described rather unsympathetically as an "unnecessarily thorny topic".

This "thorny" aspect of reasonable foreseeability is best illustrated by the conflicting cases over the question of alibi. We have had Lord Hewart C.J.'s reference to an alibi defence in *R.* v. *Liddle* as being the commonest of defences and therefore being reasonably forseeable. On the other hand, in *R.* v. *Flynn* and *R.* v. *Milliken*, the courts encountered the problem of differentiating between alibi itself as a defence and the nature of the alibi in the particular case on hand. It is established that a prisoner is not obliged to reveal his defence (e.g. alibi) before the trial. Thus, in *R.* v. *Hoare*,[22] the defence of alibi was apparently put up only at the trial although it is not certain from the report whether it was at an early stage *(e.g.* in the cross-examination of prosecution witnesses) or only when the appellant was giving evidence. The conviction was quashed because the trial judge made strong comments on the failure of the accused to reveal his alibi until his trial and did not pay sufficient attention to the fact that an accused is entitled to rest on his silence. The case would appear to suggest that, if an accused person reveals his alibi only when he begins his evidence after the defence has been called as he is entitled to do so, then, on the authority of *R.* v. *Flynn* and *R.* v. *Milliken* and bearing in mind the safeguards therein, it is likely that rebutting evidence will be allowed. This is tantamount to saying that as a matter of practical prudence the prisoner would be advised to reveal the alibi defence at an early stage — *e.g.* soon after the accused is charged but before the trial. The difficulty as to whether weight may be attached to a prisoner's failure to provide an early explanation is revealed in the following words of Lord Parker C.J. in *R.* v. *Hoare:*[23]

> This matter has come before the court on a great number of occasions; it is unnecessary to go through all the cases, many of which, if my recollection is right, cannot be completely reconciled the one with the other.

21. *Ibid.*, at p. 333. Emphasis added.

22. (1966) 50 Cr. App. Rep. 166.

23. *Ibid.*, at p. 169.

Counsels' dilemma therefore in a practical sense is compounded by the need to caution early silence in certain cases and on the other hand the anxiety that rebutting evidence will probably be allowed as a result. Whatever it be, the greater emphasis placed by the courts on the search for truth and justice will provide solace to those who are still perplexed by the somewhat fragmentary development of the law on this aspect.

R. v. *Milliken*, although it appears to be the latest authority on the matter, ought also to be read together with *R.* v. *Levy and Tait*,[24] which was in fact cited in *R.* v. *Mittiken.* In *R.* v. *Levy and Tait* the Court of Criminal Appeal (the L.C.J., Marshall and James JJ.) was faced with the question as to whether the evidence of a police officer (called by the prosecution) was clearly relevant: if it was so, then the prosecution could have anticipated the nature of the defence of alibi of the prisoners which was disclosed for the first time and therefore rebutting evidence on the part of the prosecution should not be allowed. However, in the circumstances the Court held that the evidence of the police officer was merely marginally relevant to the prosecution and as such rebutting evidence should be allowed. James J. delivering the judgment of the Court said:[25]

> It is quite clear and long established that the judge has a discretion with regard to the admission of evidence in rebuttal; the field in which that discretion can be exercised is limited by the principle that evidence which is clearly relevant — not marginally, minimally or doubtfully relevant, but clearly relevant — to the issues and within the possession of the Crown should be adduced by the prosecution as part of the prosecution's case, and such evidence cannot properly be admitted after evidence for the defence.

It would appear therefore that what is clearly relevant and is within the possession of the Crown is reasonably forseeable and thus should have been within the contemplation of the prosecution. Indeed this appears to be the interpretation of *R.* v. *Levy and Tait* by Winn L.J. in *R.* v. *Mulliken* where he explained the *ratio* in the former case as follows:

> . . .this Court had ruled that only where the prosecution *could not anticipate* that certain relevant evidence would be given was it right to allow evidence in rebuttal. The meaning of the word 'relevant' is extremely important.

It will be seen that *R.* v. *Crippen* was also along the same line. So for that matter — but with a slight difference in emphasis — was *R.* v. *Frost.* What is reasonably forseeable or within reasonable anticipation may be ascertained by asking oneself whether the rebutting evidence was available to the prosecution at the outset or whether the defence was raised for the first time and furthermore whether the evidence was clearly relevant; but it is submitted that the references to "the first time" are only guides and the test must still be that of reasonable forseeability. If the evidence is within the possession of the Crown and it was not reasonably forseeable, rebutting evidence will be allowed.

24. (1966) 50 Cr. App. Rep. 198.

25. *Ibid*., at p. 202.

On a consideration of these authorities the difference as to emphasis between *R.* v. *Owen* and *R.* v. *Frost* would appear to lie in the fact that whereas in *R. v. Frost* the matter which it was sought to rebut was "*entirely* new matter", in many of the modern cases *e.g. R.* v. *Flynn* and *R. v. Milliken* and *R. v. Levy and Tait*, this consideration was not a necessary condition. Furthermore in these modern cases the "discretion" of the judge, albeit subject to limits and safeguards, was stressed. Be that as it may, whether the matter be "entirely new matter"[26] or not (and these words do not appear in the alternative report), if the discretion is to be exercised according to the test of reasonable forseeability the only real difference that remains is that the discretion of the judge will be respected but only if exercised according to the safeguards, which may appear to be a reincarnation of *R.* v. *Frost.*

In laying down these safeguards and limits the common law courts have understandably proceeded by the time-honoured method of empirical reasoning stretching over a series of cases based on arguments on the facts of each case with general guide-lines or principles being laid down from time to time. As Lord Devlin said in the Privy Council case of *Jayasena* v. *The Queen*:[27]

> The common law is shaped as much by the way in which it is practised as by judicial dicta. The common law is malleable to an extent that a code is not.

Much, of course, would depend on the good sense and sense of fairness of the judge, this being one of the golden threads in English criminal law. The manner in which this sense of fairness is applied would possibly vary in emphasis according to the epoch. Thus as regards the reception or rejection of hearsay evidence, Lord Pearce in *Myers* v. *Director of Public Prosecutions*[28] traced the varying fortunes of the hearsay rule from the sixteenth century onwards. It may be argued that in the constant struggle between the rather opposite inclinations of seeking truth and justice on the one hand and on the other hand of holding the procedural and evidential scales evenly and impartially between the prosecution and the defence, judicial policy will take note of the conditions in society *e.g.* the crime wave in modern societies. Both inclinations are motivated by a sense of justice and fair play but apparently the modern tendency in many cases — *e.g.* as found in the observations of Lord Goddard C.J. in *R.* v. *Flynn* with regard to criminal law not being a "game" — is to prefer the inclination of Lord Goddard in *R.* v. *Owen* and *R.* v. *Flynn.* A balance nonetheless has been struck in both *R.* v. *Frost* and *R. v. Owen* with exceptions and safeguards in mind, for English judges are not minded to swing from one end of the pendulum to the other, the difference in emphasis but not in principle between *R.* v. *Owen* and *R.* v. *Frost* being already explained.

Thus, in the pursuit of truth and justice in *R.* v. *Sullivan, R.* v. *Harris* and *R.* v. *Liddle* (following *R.* v. *Harris*), it was held that a judge *himself* was entitled to call rebutting evidence after the close of

26. These words do not appear in all the reports of *R.* v. *Frots.* See fn. 5, above.

27. [1970] 2 W.L.R. 448 P.C., at p. 453.

28. [1965] A.C. 1001 H.L., at p. 1037.

the defence, the varying emphasis of *R.* v. *Sullivan* on the one hand and *R.* v. *Harris* and *R.* v. *Liddle* on the other hand having previously been dealt with in this article. The principle applicable is the same as when the prosecution calls rebutting evidence, but in *R.* v. *Tregear*[29] (Davies L.J., Fenton Atkinson and Canntley JJ.) it was held that so long as the judge sought "to ascertain the truth" *and* did not seek to supplement the case for the prosecution in calling a winess, the limitations placed on the discretion of the judge by viture of the general rule in *R.* v. *Frost* (followed in *R.* v. *Harris)* did not apply. *R.* v. *Tregear* was explained in *R.* v. *Cleghorn*[30] (Lord Parker, C.J. Diplock L.J. and Ashworth J.) as having been decided on the "special circumstances of that case", and the Court in *R.* v. *Cleghorn* in quashing the conviction ruled that the "general rule of practice" in *R.* v. *Frost* and followed in *R.* v. *Harris* should apply. The "special circumstances" in *R.* v. *Tregear* were that the defence had invited the prosecution to call two witnesses; the prosecution refused (which it was entitled to do); and the defence called one the other being called by the judge after the close of the case for the defence at the request of the defence. What emerges in addition from these two cases is that the vigour of the general rule or practice in *R.* v. *Frost* is still undimmed in so far as some appeal judges are concerned.[31]

In view of *R.* v. *Cleghorn* and *R.* v. *Tragear* it is probable that the principle in the head-note to *R.* v. *McKenna*[32] (Goddard L.C.J., Hilbery and Byrne JJ.) is open to review as being too wide. In *R.* v. *McKenna* Lord Goddard following *R.* v. *Sullivan* ruled as follows:

> ...A judge *in the circumstances* in which the learned Commissioner acted *in this case,* has complete discretion whether a witness shall be recalled, and this court will not interfere with the exercise of his discretion unless it appears that thereby any injustice has resulted.[33]

If this statement is meant to be a general principle of law or practice, then it should be pointed out that as has been seen, Avory J. who delivered the judgment in *R.* v. *Sullivan* later changed his view in *R.* v. *Harris* and *R.* v. *Liddle* both of which followed *R.* v. *Frost.* Then there are also the other cases already mentioned, namely, *R.* v. *Milliken*, *R.* v. *Levy and Tait* and *R.* v. *Rice* which reiterate the limits on the judicial discretion.

Perhaps the Singapore Court of Criminal Appeal in *Osman bin Ali* v. P.P. had *R.* v. *McKenna* in mind when Wee C.J. made the pronouncement already quoted. Besides the above-mentioned observations, it is

29. [1967] 1 All E.R. 989, C.A.
30. [1967] 1 All E.R. 996, C.A.
31. See also *R.* v. *McMahon* (1933) 34 Cr. App. Rep. 95, which followed the rule of practice in *R.* v. *Frost.*
32. (1956) 40 Cr. App. Rep. 65. The head note reads: "*A* judge has complete discretion whether a witness who has given evidence shall be recalled after the prosecution have closed their case and a submission that there is no case to go to the jury has been made by the defence. The Court of Criminal Appeal will not interfere with the exercise of such discretion unless it appears that thereby an injustice has resulted."
33. *Ibid.*, at p. 66 *(per* Byrne J. delivering the judgment of the court). Emphasis added.

fair to note that Lord Goddard C.J., a wise and experienced judge, was careful to emphasize the fact that the special circumstances of the case warranted allowing the judge complete discretion. The special circumstances in *R.* v. *McKenna* were that the trial judge called rebutting evidence (on a "highly technical" point) when in the view of the Court of Criminal Appeal there was no need to do so. Furthermore the material fact which was in issue was peculiarly within the knowledge of the accused himself so he had no right to complain about the exercise of the discretion when the trial judge recalled a witness after Counsel for the prisoner had submitted that there was no case to answer. The headnote in *R.* v. *McKenna,* which ignores the Court's qualifying remarks as to the particular circumstances of the case, is therefore too wide.

Interference by Appellate Court

It has been seen that in *R.* v. *Liddle*, the conviction was quashed on the grounds that the exercise of the discretion had caused "injustice". This, however, is not the only ground on which a Court of Appeal may interfere with the discretion of the trial judge. In *R.* v. *Levy and Tait* the Court of Criminal Appeal dismissed the appeal against conviction because in the words of James J. :[34]

> Th e judge...was entitled to exercise his discretion. He did so and there is nothing to suggest that he did so in any way that was wrong.

R. v. *Milliken*[35] is also a direct authority to the same effect, and in *R.* v. *Flynn*[36] Lord Goddard was impliedly of the same view.

As regards the general position, Devlin J. delivering the judgment of the Court of Criminal Appeal (Lord Parker, C.J. with Devlin, Donovan, McNair and Hinchcliffe JJ.) in *R.* v. *Cook*[37] in connection with the discretion of a trial judge to allow questions by the prosecution as to a prisoner's previous convictions, the prisoner having cast imputations on the character of a prosecution witness, said:[38]

> It is well settled that this court will not interfere with the exercise of a discretion by the judge below unless he has erred in principle or there is no material on which he could properly have arrived at his decision.

Devlin J. was evidently speaking not only of the discretion of the judge in the particular issue but as to a discretion of a trial judge in criminal matters generally. Furthermore, the Court held that as the trial judge did not exercise his discretion it was open to the appellate court to do so and held in this case that the trial judge should not have allowed such questions.

It is the writer's opinion therefore that the discretion is exercised in a wrong manner if the court fails to apply or wrongly applies the principles enunciated in the authorities. *A fortiori,* when there is no

34. (1966) 50 Cr. App. Rep. 198 at p. 204.
35. (1969) 53 Cr. App. Rep. 330 at p. 335.
36. (1958) 42 Cr. App. Rep. 15 at p. 19.
37. (1959) 43 Cr. App. Rep. 138.
38. At p. 147.

material basis to found the exercise of such discretion. Presumably — as in *R. v. Cook* — even if disputed and discretionary evidence is admitted, it does not necessarily follow that the discretion has been judicially exercised for to exercise the discretion one must be aware of the principles guiding the discretion.

In view of the rather numerous and somewhat varied comments on the nature of the discretion in regard to rebutting evidence, it is now appropriate for the House of Lords or the Privy Council to gather from the varied observations and to lay down certain general principles so that courts may conveniently apply these principles without having to thread their way through the thorny thickets of this often hotly disputed evidence. As Lord Reid said in the House of Lords in *Commissioners of Customs and Excise v. Harz and Another* (with reference to the formula regarding the admissibility of confessions as set out in text books), "The common law, however, should proceed by the rational development of principles and not by the elaboration of rules and formulae".[39] In view of the rather numerous rulings and observations and the controversial nature of rebutting evidence there is a danger that the human mind may seize on one or other of these observations in law as being a sort of formula in the absence of a leading and all-embracing authority by the House of Lords or the Privy Council.

On one question, however, it would appear that trial judges do not possess a discretion in the matter and that is when the prosecution seeks to admit evidence in rebuttal by way of further evidence after the summing up to the jury has been completed, the leading authority being *R. v. Owen.*[40] In explaining the difference Lord Goddard C.J. stated[41] that once the summing up had been given, proof by the prosecution had been adduced and therefore it would be "too late" to prolong the matter further — the danger was that the defence then might call further evidence. This same danger of allowing rebutting evidence was referred to by Lord Hewart C.J. in *R. v. Liddle*[42] and by Avory J. in *R.* v. *Harris*[43] and in *R.* v. *Browne*[44] (Lord Caldecote C.J., Asquith and Cassels JJ.). This danger would also apply — albeit with less force — where Counsel have already made their closing speeches before the summing up; but the authorities have laid down that in such cases the judge has a discretion to admit evidence in rebuttal. It would appear therefore that this again is an indication of a compromise or balance being struck between the quest for truth and holding the procedural and evidential scales even. A limit, however, at some stage has to be imposed and in *R. v. Owen, Regina,* v. *Gearing*[45] (Lord Parker,

39. [1967] 1 All E.R. 177 at p. 184.

40. [1952] 1 All E.R. 1040, C.C.A.

41. *Ibid.,* at p. 1043.

42. (1929) 21 Cr.App. Rep. 3, at p. 13.

43. [1927] 2 K.B. 587, at p. 595.

44. (1943) 29 Cr. App. Rep. 106. Approved in *R. v. Dovan* (see fn. 16, above).

45. [1968] 1 W.L.R. 344, C.C.A. (thus reported although decided in 1965).

C.J. Ashworth and Widgery JJ.) and *Regina* v. *Lawrence*[46] (Diplock L.J. Phillimore and Blain JJ. following *Regina* v. *Gearing*) the prohibition against admitting further evidence after the summing up, was indeed laid down as a "very strict rule of procedure". In all three cases the convictions were quashed, although it must be said that the Court would have upheld the conviction if the proviso to section 4 of the Criminal Appeal Act, 1907 (as amended by Criminal Appeal Act, 1966 (c. 13) s. 4(1)) had availed the prosecution in *Regina v. Lawrence.* At the same time in *Regina* v. *Gearing* (which was applied in *Regina* v. *Lawrence)* the Court of Appeal categorically relied on the following "very strict rule" (which it said "must be adhered to") laid down in *Regina* v. *Wilson* (Lord Goddard C.J. Hilbery and Donovan JJ.) :[47]

> The principle that, once the summing up is concluded, no further evidence ought to be given, must be maintained in every case...and if further evidence is allowed at that stage, even on a matter which appears to the Court of Criminal Appeal irrelevant, the conviction *will* be quashed.

Thus there appear to be two variations of the theme — one, the purist view that the strict rule must be adhered to in all its pristine strength and the other that he proviso to section 4 (as to whether there was a substantial miscarriage of justice) would dilute the principle in *R.* v. *Wilson. R.* v. *Nixon*[48] (Davies L.J. Boskill and Cusack JJ.) is an example of the latter view. In that case the jury were allowed to examine the car after the summing up and it was held in the circumstances that although there was an irregularity and a breach of the rule there was no miscarriage of justice, the Court of Criminal Appeal applying the said proviso.

It is realized that the amended proviso regarding the existence or absence of a substantial miscarriage of justice became law only in 1966, *i.e.* after *R.* v. *Wilson* and *R.* v. *Gearing* had been decided. It could be argued with force, however, that the said proviso, if at all it dilutes the purity of the strict rule, can be allowed to do so only in exceptional circumstances. Thus in *R.* v. *Lawrence* which was decided *after* the proviso, the Court held that it "must apply the rule laid down in *R.* v. *Gearing* and quash this conviction." Indeed the pre-1966 proviso (considered in *R.* v. *Browne)* also applied the test of "substantial miscarriage of justice". Seen in this light, *R. v. Nixon* (also decided after the proviso) was so decided because of the exceptional circumstances of the case and indeed the Court held that *R.* v. *Nixon* was "entirely different" from *R.* v. *Lawrence.* Not only did defence Counsel expressly invite the jury to witness further evidence, that further evidence was also merely in the nature of the jury inspecting the car there being no doubt as to the previous identification of the car. It is pertinent further to mention that in *R.* v. *Nixon* the Court was aware of the rule in *R. v. Gearing* and described it as being "normally... a very strict rule".

46. [1968] 1 W.L.R. 341, C.A.

47. (1957) 41 Cr. App. Rep. 226 (see headnote thereof). Emphasis added.

48. [1968] 1 W.L.R. 577, C.A. In *R.* v. *Dovan* (1972) 56 Cr. App. Rep. 429, the Court of Criminal Appeal held that further evidence might be admitted on grounds of "justice" notwithstanding that it was not strictly of a rebutting character, but such cases must be *rare.*

For the avoidance of doubt it must be mentioned that although the cases of *R.* v. *Gearing, R.* v. *Lawrence* and *R. v. Nixon* were not decided on the basis of rebutting evidence[49] but on the question as to whether further evidence could be admitted after the summing up to the jury, these cases are of close relevance to the question of admitting rebutting evidence after the defence has closed its case for they deal with the same objection — that once proof has been given the case should not be allowed to "wander on indefinitely".[50] Thus a definite link between these two aspects of the law of evidence was established when the Court in *R.* v. *Nixon* cited and distinguished the case of *R.* v. *Sanderson*[51] which in turn considered and distinguished *R.* v. *Owen* which last case in fact dealt with the question of further evidence and also rebutting evidence. And *R.* v. *Owen* was followed in *R.* v. *Wilson* (followed in *R.* v. *Gearing)* where in the second case Lord Goddard C.J. held that although the case against the accused was a clear one there being no difficulty in convicting, the breach of the rule in *R.* v. *Owen* "was more important that the result of this particular case".[52] In *R.* v. *Sanderson* the Court of Appeal (Lord Goddard C.J. Lynskey and Pearson JJ.) allowed a defence witness (who arrived very late) to adduce evidence after the summing up on the grounds that whereas in *R.* v. *Owen* it was decided that such application by the prosecution should be refused, in *R.* v. *Sanderson* the application was made by the defence although it is fair to mention that the Court of Appeal described it as a "rather unusual course". This distinction between the prosecution and defence, it can be said, is consistent with the line of thinking of the other authorities which deal with rebutting evidence by the prosecution. One explanation of this distinction is that when the prosecution has closed its case, the defence can be said to be continuing albeit procedurally at an end; and thus the prosecution should not be allowed to call rebutting evidence after the summing up. On the other hand, it could be argued that once the defence is called it is in a way adducing evidence in rebuttal of the prosecution's case; hence any further evidence by the defence after summing up is in the nature also of rebutting evidence. How many bites (one or two) of the cherry would that be?!

So it appears on a review of the cases that so long as there is no substantial miscarriage of justice, *i-e.* where the facts of the case are exceptional, a trial judge in practical effect would still have a discretion to admit further evidence called for by the jury or the defence after the summing up provided it is subsequently held on appeal that he admitted such evidence without a substantial miscarriage being caused. One can only pause to admire the creative resilience of English common law judges as exemplified by *R.* v. *McKenna, R. v. Tregear* and *R.* v.

49. Compare paragraphs 776 with 789 of *Halsbury's Laws of England,* 3rd ed. Cumulative Supplement to Vol. 10, 1972.

50. *Per* Hewart C.J. in *R.* v. *Liddlo.* In *R.* v. *Owen, R.* v. *Gearing* and *R.* v. *Lawrence,* the jury asked for further evidence.

51. [1953] 1 All E.R. 485, C.A.

52. See also *Halsbury's Laws op. cit.* paragraph 778, and *Webb* v. *Leadbetter* [1966] 2 All E.R. 114 Q.B.D. where rebutting evidence was distinguished as an exception to further evidence being called after the defence was closed.

Nixon. What would happen if the prosecution applied to call rebutting evidence after the summing up *in the event of exceptional or special circumstances* awaits further judicial exposition for *R.* v. *Sanderson* (citing *R.* v. *Owen*) only laid down a *general* prohibition against such application being made.

What would happen where there is no jury as in the case of Singapore where jury trials have been abolished? The idea behind cases such as *R.* v. *Gearing* is that once the summing up is over the prosecution have already made up their minds with finality and the jury should be left in a state of mind undisturbed by further evidential intrusions for the prosecution already have had their opportunity of proving the case throughout. In the case of a trial without jury it could be submitted that as the judge is both judge and jury the final stage when the mind comes to rest after hovering over the evidence is when the speeches have closed subject to judgment being reserved. However, the authorities (*R.* v. *Sullivan* and *R.* v. *Liddle*) have established that a judge may himself call rebutting evidence at this stage: perhaps the answer lies in the argument that whereas the jury are susceptible to irrational vacillations consequent on rebutting evidence being called after the summing up, a judge on the other hand views the evidence with judicial detachment aided by judicial experience and training. This is based on the assumption that (in non-jury cases) a trial judge remains as judicial and impartial as where there is a jury, this being perhaps a moot point in controversial cases for one of the reasons for having a jury is to further ensure that the trial judge will not give way to his sympathies. Perhaps it would not be inappropriate for the writer to express his opinion that in the light of the authorities cited in this article, in non-jury cases a trial judge ought not to call rebutting evidence after the close of the speeches [53] unless the evidence was not reasonably forseeable by the prosecution and in the interests of truth and justice such course of action is warranted by the special circumstances of the case. In other words, he ought not to supplement the case for the prosecution.

Medical Evidence concerning Diminished Responsibility

The tenor of all these cases show that there is no special position as regards non-medical evidence. On the question of medical evidence there are three cases to the knowledge of the writer where medical evidence in rebuttal was adduced by the prosecution, the defence having called medical evidence on the question of diminished responsibility: *Rose* v. *R.*[54] where the provisions in the Bahama Islands were the same as the provisions in the English Homicide Act, 1957; *R.* v. *Jennion*[55] and *R.* v. *Bathurst.*[56] The Singapore law on diminished responsibility is the same as that in England.

53. In England the defence has the last word and in Singapore and Malaysia the prosecution.

54. [1961] 1 All E.R. 859, P.C., at p. 862-A.

55. [1962] 1 All E.R. 689, C.C.A., at p. 691-A.

56. [1968] 1 All E.R. 1175 C.A., at p. 1176-F.

In all these cases the question as to the discretion of the judge in admitting rebutting evidence did not arise and therefore was not argued on appeal or in the trial court. One must bear in mind, nonetheless, that as the burden of proof is on the accused in cases where diminished responsibility is raised as a defence, it is expected that the defence having called medical evidence in support of such evidence, the prosecution should be allowed to call medical evidence in rebuttal. Thus in *R.* v. *Jennion* Edmund Davies J. said:[57]

> But the Crown, as was its entitlement, and indeed its duty, called rebutting evilence on this issue.

The case of *R.* v. *Barthurst* makes it abundantly clear that such burden lies on the accused "by laying a foundation of fact on which the experts can give their opinion".[58] This special position therefore should not be confused with the usual position where the burden is on the prosecution. Failure to distinguish between these two situations could well confuse the position of law. Where the burden is on the prosecution it is clear that the evidence in rebuttal by the prosecution is not necessarily a matter of fact assumption.

The close juxtaposition of these two situations in the statement of law laid down in *Osman bin Ali* v. *Public Prosecutor*[59] without a cautionary distinction is therefore rather unfortunate notwithstanding the last sentence "In so far as non-medical evidence is concerned... ." The distinction, with great respect to Wee C.J., is not between medical and non-medical evidence — it is between two different situations involving the burden of proof as explained. It therefore follows that once this distinction is borne in mind, in cases where the burden of proof is on the prosecution, the general safeguards laid down in the cases cited in this article would apply irrespective of whether the evidence is medical or non-medical.[59] One could therefore usefully refer to the case of *R.* v. *Day*[60] where rebutting evidence, *i.e.* the evidence of a handwriting expert, was called by the prosecution in a forgery case after the close of the defence at the suggestion of the trial judge. The defence objected to the admission of rebutting evidence relying on the principle in *R.* v. *Frost.* The Court (Lord Hewart C.J. Hilbery and Hallet JJ.) agreed, citing, besides *R. v. Frost, R. v. McMahon, R.* v. *Harris* and *R.* v. *Liddle* and quashed the conviction, Hilbery J. observing that the admission of rebutting evidence was designed to remedy an "obvious deficiency in the prosecution's case by way of "supplementary evidence". In *R.* v. *Russel,*[61] Marshall J. described doctors as "expert" neutral witnesses"; that was a case where diminished responsibility was raised by the defence. It is uncertain whether the limitations in *R.* v. *Frost* (or *R. v. Owen*) would apply where the defence seeks to call rebutting evidence

57. [1962] 1 All E.R. 689, at p. 691.

58. [1968] 1 All E.R. 1175, at p. 1177.

59. [1972] 2 M.L.J. 178, at p. 181 (quoted at p. 11, above).

59. See *R.* v. *Browne* where rebutting medical evidence was called by the trial judge. This case supports my criticism.

60. [1940] 1 All E.R. 402, C.C.A.

61. [1963] 3 All E.R. 603 at p. 605.

in cases where the burden of proof is on the defence. The writer's view is that the limitations which apply to the prosecution should also apply to the defence. An analogy would be hearsay evidence where in *Sparks* v. *The Queen,*[62] Lord Morris delivering the judgment of the Privy Council held that the hearsay rule applied to both the Crown and the defence notwithstanding that it was helpful to the defence.

R. v. Russel was a peculiar but relevant case in the context of this article in that it was the prosecution which in fact proposed to raise the defence of insanity, *i.e.* guilty but insane within the McNaughten rules which as we know from *Rose* v. *R.* is to be differentiated from the defence of diminished responsibility. The prosecution called medical evidence during the prosecution's case not to establish that the prisoner was insane but to establish that the accused was admitted into the mental hospital. The defence made use of this medical evidence by way of cross-examination to establish diminished responsibility rather than go on insanity; in the latter case it would amount to an acquital which would not entitle the accused to an appeal. The issue arose as to whether, the cross-examination by the defence having raised the defence of diminished responsibility, the prosecution should be allowed to call evidence in rebuttal, *R.* v. *Harris* being relied on by the defence by way of objection. The prosecution's answer was that it did not propose to call evidence in rebuttal but that the *ex improviso* exception would have applied if not for the interim discussion initiated by the trial judge as to the law. Marshall J. held that as it was a matter of doubt he would decide in favour of the defence and ruled against further medical evidence being given presumably by the prosecution (as the defence subsequently called medical evidence). The prisoner was convicted of manslaughter. This case can be explained on the ground that as the prosecution had raised the issue of insanity and not the defence it was for the prosecution to call medical evidence supporting such contention and then for the defence to call medical evidence establishing diminished responsibility instead of insanity. Any attempt therefore on the part of the prosecution to call rebutting evidence as to insanity as opposed to diminished responsibility could be met by way of objection either on the principle in *R.* v. *Frost* or *R.* v. *Owen.*

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62. [1964] A.C. 964.

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