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NOTES

EVIDENCE—REBUTTING EVIDENCE OF GOOD CHARACTER OF ACCUSED BY PROOF OF PRIOR MISCONDUCT

It is not unusual in the trial of a criminal case for the defendant to offer evidence of his good character. It is, therefore, a matter of some importance to the prosecution, as well as to the defense, when a decision of the Supreme Court seems to enlarge considerably the scope of rebuttal by the Commonwealth of the defendant's evidence of his good character. Such was the rather startling decision in *Commonwealth v. Harvie*, 345 Pa. 516.

The defendant was indicted on a charge of "operating a motor vehicle while under the influence of intoxicating liquor." He pleaded "not guilty" and went to trial. A witness testified that the defendant's reputation for sobriety was good. On cross-examination the witness was asked if he had not heard of a former similar charge against the defendant and of his being tried on that charge. The objection to this question was over-ruled and the witness answered that he had

not so heard. The Commonwealth then offered in evidence, over objection, the record of the Court of Quarter Sessions of Allegheny County, wherein it appeared that the defendant had been indicted and tried in 1940 upon a similar charge and the jury had returned a verdict of "not guilty but pay the costs." The jury returned a verdict of guilty and the defendant was sentenced. Upon appeal to the Superior Court, 148 Pa. Super. Ct. 607, the judgment was affirmed in a *per curiam* opinion which simply stated that "the six judges who heard the argument in this case being equally divided in opinion, the judgment is affirmed."

An appeal to the Supreme Court was allowed. The opinion of this Court was short and on the principal question involved, without citing any authority or precedent, made the amazing statement that "it is well settled that when a defendant puts his character (i. e. his general reputation) in issue, as did the defendant here, it may be shown by the records of a court that he had been convicted of a crime. Since the record establishes the fact, no collateral issue is raised."

It is respectfully submitted that such a rule is not "well settled." If anything is well settled, it is a wholly contrary principle. In *Henry on Pennsylvania Trial Evidence* (3rd Ed.) p. 170, it is said: "The established method of proving character is by showing the general reputation of the person . . . in respect to the particular characteristic or trait which is the subject matter of investigation. The same rule applies to evidence offered in rebuttal of evidence of good character."

In 22 C. J. S. p. 1077, it is said: "It appears settled by the weight of authority that on direct examination evidence of particular and specific acts of good or bad conduct is not admissible to prove good or bad character, but the evidence must be limited to proof of general character or reputation." On page 1079 appears the following: "It is generally held by the courts that the state may not attack the character of an accused by eliciting testimony referring to specific criminal acts on his part; so it is not permissible for the state to rebut evidence of good character by inquiring whether accused had been charged with, or convicted of, crime."

To the same effect is the statement in 1 *Wharton on Criminal Evidence* (11th Ed.) pp. 467-468: "When a defendant has voluntarily put his character in issue, it is neither competent or relevant to the issue to admit in rebuttal, on the part of the prosecution, evidence of independent facts, or acts of misconduct. The rebutting testimony should relate to bad reputation."

With the foregoing Professor Wigmore fully agrees. In 1 *Wigmore on Evidence* (3rd Ed.) pp. 642-643, he says: "If a defendant in a criminal case chooses to offer his good character (for the appropriate trait) as an argument that he probably did not commit the offense charged, the prosecution may by counter-evidence dispute the existence in him of the good character thus alleged;

and it has also been seen that the fact thus to be proved or disproved is the real disposition or character, of which reputation or anything else is merely evidence. The question thus arises how the character is to be proved or disproved. It has been noted that there are three conceivable ways of evidencing it: (1) reputation of the community. . . .; (2) personal knowledge or opinion of those who know the defendant (which the author on page 142 of volume 7 states is universally and rigorously excluded); (3) particular acts of misconduct exhibiting the particular trait involved. This last sort of evidence is now to be considered. The law here declares a general and absolute rule of exclusion. It is forbidden, in showing that the defendant has not the good character which he affirms, to resort to particular acts of misconduct by him."

The decisions of the appellate courts in Pennsylvania are replete with statements to the same effect and an exhaustive search has disclosed no precedent for the statement made in the principal case. In *Snyder v. Commonwealth*, 85 Pa. 519, 522, it is said that where an accused has shown his good character, it "can be impeached only by evidence of general reputation, and not by evidence of particular acts of misconduct." The syllabus in *Commonwealth v. Jones*, 280 Pa. 368, states "In a criminal case it is reversible error for the trial judge to permit proof of a specific offense on a prior occasion to rebut evidence of good character." It will be observed that this is completely contrary to the statement in the particular case.

In *Commonwealth v. Thomas*, 282 Pa. 20, 22, appears the following: "The issue raised by the testimony offered by appellant was not her character generally but her reputation for peacefulness. To meet evidence that her reputation in this respect was good, it would have been competent for the Commonwealth to show it was otherwise; this, however, could not be done by testimony that she was guilty of a particular crime." To the same effect is *Commonwealth v. Becker*, 326 Pa. 105, 114, where the court said: "If the witnesses had been called in rebuttal (of evidence of good character), they would have been offered to establish bad reputation, which, like good reputation, cannot be proved by evidence of particular acts." In *Commonwealth v. Jones*, 341 Pa. 541, 550, it is said: "It is true that questions pertaining to specific offenses cannot be asked character witnesses as rebuttal of evidence of good character."

Two recent decisions of the Superior Court announce the same principle. "It is well established that neither the possession of a good reputation nor the lack of it can be shown by proof of specific acts": *Commonwealth v. Flynn*, 137 Pa. Super Ct. 458, 461. The court thereupon stated that it was improper "to rebut the testimony of good reputation by showing that the defendant had committed another distinct crime." "Specific acts of misconduct are unquestionably inadmissible in criminal actions to prove a general bad reputation": *Commonwealth v. Lyons*, 142 Pa. Super. Ct. 54, 57.

With such an array of contrary authority, it seems impossible to rationalize the statement of the Supreme Court in the principal case. Was it intended to change the pre-existing law as herein set forth? This cannot be so, because the court stated that the rule announced by it was already "well settled." Such language does not indicate change. Or was it the court's intention to modify the former rule and permit proof of prior misconduct to rebut evidence of good character only in cases where the prior misconduct could be established by the record of conviction of a crime, for the reason, as stated by the court, that "since the record establishes the fact, no collateral issue could be raised."

Professor Wigmore points out in his treatise on Evidence (vol. 1, p. 650, 3rd Ed.) the inadequacy of any such reason for departing from the rule that prior misconduct cannot be shown to rebut evidence of good character. He states that there are several reasons for the rule excluding such evidence: (1) the over-strong tendency to believe the defendant guilty of the present charge merely because he is a person likely to do such acts; (2) the tendency to condemn, not because he is believed guilty of the present charge, but because he has perhaps escaped all or adequate punishment for past misconduct; (3) the unfairness to the defendant in attacking one who is necessarily unprepared to demonstrate that the attacking evidence of prior acts of misconduct has been fabricated; and (4) the confusion of new issues.

He then points out that while the last reason could be obviated by excluding extrinsic testimony of prior misconduct, and allowing proof thereof only by a record of prior conviction, nevertheless, the elimination in this way of the fourth reason would not justify a different rule because the first three reasons are the vital ones.

Another point should be considered. In the principal case the defendant offered evidence of his good reputation for sobriety. This was in full accord with the rule that a defendant in a criminal case can offer evidence of his good reputation for the particular characteristic or trait which is involved in the charge made against him: *Commonwealth v. Colandro*, 231 Pa. 343, 355; *Commonwealth v. Wisewesser*, 124 Pa. Super. Ct. 251, 262. The prosecution should not be allowed and under existing law is not allowed, to rebut by showing bad reputation for any other trait of character. In *Commonwealth v. Thomas*, 282 Pa. 20, the defendant offered evidence of good reputation for peacefulness and the court said it would be improper and irrelevant to show in rebuttal that she was unchaste.

This limitation on rebuttal would be removed if the language in the principal case is applied literally. In the principal case the defendant put in issue his reputation for sobriety. If this can be rebutted by offering the record of a conviction for a crime, which means any crime, then the prosecution in the principal case, to rebut evidence of good reputation for sobriety, could have shown con-

victions of crimes which involved such traits as dishonesty, unchastity and others which were not involved in the charge for which the defendant was on trial. It is extremely doubtful if the Supreme Court intended to go so far.

It may be that the court's intention was merely to apply the well settled rule that where an accused testifies as a witness, the prosecution, in rebuttal and to attack the defendant's credibility as a witness, may show the records of his previous convictions of felony or misdemeanors *crimen falsi*, but not for any crime as the language used would indicate. But this is far different from using former convictions to rebut evidence of good character. It is confidently expected that the court will, as soon as opportunity permits, repudiate the statement made in the principal case. This the court can easily do, for it can characterize its statement as *obiter dictum*, for the reason that the prosecution did not offer the record of a conviction to rebut evidence of good character, but offered only a verdict in the former case of "not guilty but pay the costs." This the court properly held to be inadmissible, as it would be under the rule stated by the many authorities cited herein. It is respectfully submitted that the rule so stated is still the only safe and logical rule to follow in Pennsylvania, notwithstanding the unfortunate statement in the principal case.

FRED S. REESE