

L-5

Evidence 2

Criminal Lit

Abbreviations

AR – Actus Reus

MR – Mens Rea

ABH – Actual Bodily Harm

GBH – Grievous Bodily Harm

D – Defendant

Co-D – Co-Defendant

PC – Police Constable

PS – Police Station

PACE – Police Powers And Criminal Evidence Act 1984

CJPOA – Criminal Justice And Public Order Act 1994

CJA – Criminal Justice Act 2003

CDA – Crime and Disorder Act 1998

YJCEA – Youth Justice and Criminal Evidence Act 1999

WS – Witness Statement

W - witness

Evidence 2

Hearsay

General Rule

Admission Rules

Character Evidence



1. HEARSAY

Hearsay

Statement not made in oral evidence in the proceedings

- 1) Statement out of court; and
- 2) Trying to prove the truth:

BUT NOT: **Implied assertions** – [*Kearley*] statement which is not intended by maker to explicitly assert a fact, but which does so by implication e.g. a kid picks up the phone and says: “daddy”.

The facts of the case were simple enough. The appellant's flat was raided and he was arrested for possession of prohibited drugs when the police found drugs in his flat. When he was taken to the police station, the police remained in his flat for several hours, during which time a number of telephone calls were intercepted in which the callers asked to speak to the appellant and asked for drugs. A number of persons also called at the flat asking for the appellant and asking for drugs. The appellant was then charged with possession of a prohibited drug and with possession with intent to supply the drug to others. The appellant denied the latter charge and at his trial the prosecution proposed to call the police officers who had intercepted the telephone calls and had received the callers at the flat to give evidence of the calls and visits and what had been said on these occasions. Despite defence objections that this evidence was **hearsay**, the evidence was admitted and the appellant was convicted on the basis of it. It is not clear why conviction should have followed so easily from the evidence of the calls because the prosecution had to prove that the appellant intended to supply the small amount of drugs that were found in a rabbit hutch in his home and not merely an intention to deal in drugs generally.

of Salmond J in *Davidson v Quirke* [1923] NZLR 1.

'... [A] logically relevant method of proving that the occupier of premises used them on a certain day for the purpose of betting by telephone is to prove that on that day a large number of persons communicated with those premises by telephone for the purpose of making bets there.'

Is hearsay admissible in evidence ?

Rule against hearsay

Procedure : Application with the court / Notice to Introduce Hearsay Evidence or Application to Exclude Hearsay Evidence (reasons to exclude substantially outweigh admissibility)

Unnecessary Hearsay – waste of time [s.126(1) CJA] relevant to no case to answer e.g. multiple hearsay, no details of the actual witness, there is other evidence more reliable, given otherwise than orally, circumstances in which it was obtained

Unconvincing Hearsay – case based wholly or partly on hearsay, which is unconvincing, that considering its importance to the case against the defendant, his conviction of the offence **would be unsafe**. [s.125 CJA]

'That means looking at its strengths and weaknesses, at the tools available to the jury for testing it, and at its importance to the case as a whole.' [Galbraith] e.g. an untested hearsay statement; previous inconsistent statements

Criminal Justice Act 2003, s. 114

(1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if—

- (a) any provision of this chapter or any other statutory provision makes it admissible,
- (b) any rule of law preserved by section 118 makes it admissible,
- (c) all parties to the proceedings agree to it being admissible, or
- (d) the court is satisfied that it is in the interests of justice for it to be admissible.

Evidence is **Unjust**: [TEST]: *in the interest of justice* [114(1)(d) CJA 2003]

- 1) How much probative value the statement has or how valuable it is for the understanding of other evidence
- 2) Other evidence and how important in the context
- 3) Circumstances - it was made
- 4) Reliability of the maker
- 5) Whether oral evidence can be given
- 6) Difficulty of challenging
- 7) Extent of the prejudice

Agreement between the parties
[s.114(1)c CJA]

5 ways to be admit
hearsay, subject to the
court's discretion

Admission of
business docs
[s.117 CJA]

Unavailable
witness
[s.116CJA]

Multiple hearsay:

1. Either

- a. Admission of business and other docs [s.117 CJA]
- b. Inconsistent statement [s.119 CJA]
- c. Other previous statements [s.120 CJA]

2. All agreed;

3. Court's discretion under s.121 CJA higher standard than under s.114

Preserved common law categories of admissibility [s.118 CJA]

1. Public information: scientific works, dictionaries, maps, public registers, evidence relating to a person's age or date or place of birth

2. Reputation as to character or family tradition: evidence of a person's reputation, preserved only so far as it allows the court to treat such evidence as proving the matter concerned, existence of a marriage, identity of any person or thing

3. Res gestae: a spontaneous response to stimuli and generally considered to be credible pieces of evidence e.g. the statement of a person, as witness to a crime, so emotionally overwhelmed by an event there is no possible way for distortion or concoction of the utterance.

4. Confessions and Admissions by agents of a defendant

Common enterprise: a statement made by a party to a common enterprise is admissible against another party to the enterprise as evidence of any matter stated.

5. Expert evidence: any rule of law under which in criminal proceedings an expert witness may draw on the body of expertise relevant to his field.

Admissibility of documents s.117 CJA

– only if prepared for pending or contemplated proceedings or the investigation or multiply hearsay

1. The evidence would be admissible if was oral;

2. Either:

2.1 Was received in the course of business/profession and the supplier of the evidence had personal knowledge of the matter or reasonably supposed to;
or

2.2 Was prepared for the purpose of the pending criminal proceeding

3. Then either:

3.1 Any of the conditions from 116 above applies; or

3.2 The person cannot reasonably be expected to have personal recollection of the matter (length of time);

+ goes together with s.120 CJA previous inconsistent statements

4. + Should be admitted in the interests of justice s.114(1)(d)

Unavailable witness [s.116 CJA] TEST

1. The evidence would be admissible if was oral

2. Identity is known

3. One of the circumstances applies [good reason]:

➤ **Dead**

➤ **Physically or mentally ill** – unable

➤ **Outside of the UK:** [*R v Castillo*] take into account: importance of the evidence; expense and inconvenience; seriousness of the offence; whether can be by video; extend of the prejudice not to cross-examine

➤ **Cannot be found** – but reasonable steps taken

➤ **Fear for life** + court gives leave or if a **child**: does not need to have rational basis, court will take into account content, prejudice regarding not challenging, other relevant circumstances

BUT Not Caused in order to prevent the evidence being given

4. + Should be admitted in the interests of justice s.114(1)(d)

Examples:

1. W gives WS about a crime + she is ill and cannot attend court [prepared for the purpose s.117 + illness s.116]
2. W gives oral statement to PC / PC makes notes about / W cannot be found [in the course of profession + W had personal knowledge of the facts s.117]
3. W (accountant) asked to prepare accounts for police investigation / in a while case goes to court, so [W does not remember the content + would be unreasonable to remember s.117]

2. CHARACTER EVIDENCE

Good Character

Non-Defendant – inadmissible

Defendant – admissible as to creditability and propensity (Court will give Vye directions to the jury as to significance of a good character)

BUT Where a defendant is of bad character, a judge has a discretion whether to give a good character direction.

Types:

Absolute good character - no previous convictions or cautions: entitled to both the credibility and propensity

Effective good character - has previous convictions or cautions recorded which are old, minor and have no relevance to the charge: It is for the judge to decide by assessing all the circumstances of the offence(s) and the offender

Previous convictions/cautions adduced under CJA 2003, s 101 by the defence - no entitlement to either limb of the good character direction, but subject to the judge's discretion, as what fairness dictates.

May be challenged
by Defence
"Application to
Exclude D's bad
Character"

Bad Character

Non-Defendant – s.100 CJA

1. All parties agreed
2. Important explanatory evidence:
 - a. Without which it is impossible to understand other evidence; and
 - b. The understanding is substantial for understanding the case as a whole

3. **Probative value is substantial** [factors]:

- Nature and number of the events
- When
- Nature and extend of the similarities and dissimilarities

+ **Substantial importance** [*R vs. Brewster and Cromwell*] whether a *fair-minded tribunal would regard it as affecting the worth of the witness evidence*

Defendant – 101 CJA

- A. All parties agreed
- B. Adduced by D himself or given in answer to Qs
- C. Important explanatory evidence:
 1. Without which it is impossible or difficult properly to understand other evidences; and
 2. The understanding is substantial for understanding the case as a whole
- D. **Important matter between D and prosecution**
- E. **Important value between D and Co-D**: accuse each other
- F. **To correct false impression given by D** (whether or not: given by D; or before / after the proceedings started; by words or conduct)
- G. **D attacked another person's character**

Gate d (matter between prosecution and defendant)

Admit

- a) **Propensity to commit an offence:**
offence of the same description or category (kind); and significant factual similarity with previous
- (b) **Untruthful:**
I. **Lie offences** (fraud, false representation, perjury), offences of dishonesty (theft) will not generally show a propensity to be untruthful [Hanson]; or
II. **Pleaded not guilty but was convicted:** telling lies, not just entering the plea [Campbell]

Exclude

- (a) **Convictions do not demonstrate relevant propensity:**
- **One conviction is unlikely to show a propensity;**
 - **In case of an offence of the same kind:**
 - factual circumstances of the convictions are different;
 - It is unjust to rely on them, because the time has elapsed; and
 - does the propensity make it more likely that the defendant is guilty;
 - **Does it show untruthfulness?**
- (b) **Persuade the court to exercise its power under s 101(3)**
- **The conviction will be more prejudicial than probative,** as defendant will be convicted on the basis of his previous convictions alone;
 - **Will support the prosecution case that is otherwise weak**
 - **Are the previous convictions spent:**
 - absolute discharge – 6 months;
 - conditional discharge – 1 year;
 - fine/community order – 5 years;
 - custodial sentence up to 6 months – 7 years;
 - custodial sentence up to 30 months – 10 years ; and
 - over – cannot be spent.

Gate g (attacking bad character by Defendant):

When he is interviewed, in defence statement, cross-examination, adducing evidence, that: other 3d party e.g. witness, victim, co-defendant

- (a) **Committed an offence**
(b) **Behaved or was disposed to behave in reprehensive way**
(c) **Challenge admissibility**

(a) Test for admitting was not satisfied:

- Merely accused the witness of fabricating a story
- Attack was made during the interview – *can the record be excluded because of the breach of PACE or Code of Conduct by the police?*

(b) Persuade the court to exercise its power under s 101(3)

Evidence

1. **Hearsay: Legal Guidance: The Crown Prosecution Service**
http://www.cps.gov.uk/legal/h_to_k/hearsay/
2. **ss 100-106, 114-121, 125, 126 CJA**
3. **Legal Practice Companion: Evidence at trial or LPC Handbook**
4. **Criminal Litigation Practice and Procedure, Deborah Sharpley (CLP): "Evidence" / Hearsay Evidence; Character Evidence**
5. **Criminal Litigation, Martin Hannibal and Lisa Mountford: "Proving the Case - The Rules of Criminal Evidence" / Hearsay evidence; Character evidence and the accused as a witness at trial**