Is it Admissible?

Relevance

Evidence will only be admissible if it is determined as relevant (s56(1)). This concept is expressed in s 55 of the Evidence Act, as evidence that, if it were accepted, has the ability to rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding. Evidence that is not relevant is inadmissible (s56(2)). Therefore, the test of relevancy is whether there is a logical connection between the evidence in question and a fact in issue (Papakosmas, McHugh J)). The evidence can have different purposes, and may be relevant in more than one way (Papakosmas).

This task will be on the prosecution to successfully persuade to the judge that the various forms of evidence against the defendant are relevant to the [fact in issue], and will form part of the material to be considered in determining his case.

The [evidence] directly/indirectly relates to the [fact in issue]. Therefore, it can be reasonably deferred that the evidence provides a logical connection and should be made admissible under the Act pursuant to s 56.

Cases

The majority in Smith determined that the identification evidence was not relevant as the police were in no better position than the jury to make an assessment of whether the person in the photo was the accused or not. The evidence would not rationally affect the jury's decision. it should be up to the jury to answer whether the person was the accused. Thus it would be unfairly prejudicial causing the jury to think he was a criminal due to his prior dealings.

In Evans the evidentiary issue was whether the in court demonstrations were relevant.

- Gummow and Hayne JJ: said it was not relevant, as it couldn't have rationally affected the jury to see Evans dressed up in that way. There was nothing material for the Jury to compare to – at most dressing him up like that he would have *resembled* the person in the footage.
- Kirby: following the reasoning in Smith, stating that relevance is a broad threshold. He concluded that it was relevant, however excluded the evidence as it would be unfairly prejudicial, dangerous, and humiliating.
- Haydon (Crennan J agreeing): concluded that it was relevant as it only needed to support the conclusion of identity. Further he stated that is had small probative value, however was still relevant. Additionally, he said that if he dressed up, and he **didn't** resemble the robber, then it would be even more relevant.

Hearsay

Although the statement may be held as relevant, it is clear that the evidence will be subject to the exclusionary rule of hearsay (s59). The hearsay rule, pursuant to s 59 of the Act, defines hearsay as evidence of a previous representation made by a person with the intent to assert, or prove, the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation (s59(1)). The evidence is inadmissible, subject to it falling under an exception.

A previous representation is a representation that has been 'made otherwise than in the course of giving evidence in the proceeding...'(Dictionary part 1 definition of 'previous representation'). The definition for representation provides the types or ways representations can be made. This includes express or implied (oral or in writing), conduct, not intended to be communicated or seen by

another person or any sort of representation that is not communicated (Dictionary part 1 definition of 'representation').

The statement can thus be considered a previous representation, which was made by [maker].

Further, the court may have regard to the circumstances where the representation was made in determining whether it can be reasonably supposed that the person intended to assert a particular fact by the representation (s59(2A); Hannas).

- Test: The essence of the new statutory test is that intention is determined by what a person in the position of the maker of the representation can be reasonably supposed to have intended in the circumstances in which the representation was made.
- Unintended assertions are not caught by the rule in s59 (Waltons), and are admissible, subject to the discretions s135 and s136.
- Not all representations caught by the hearsay rule, only caught if using to prove something about the TRUTH of the representation; goes to state of mind of the maker: Subramanium

Through the objective test it can be reasonably asserted that [witness] was intending to assert the fact in issue, namely [fact in issue].

The s 60 exception to hearsay provides that if the evidence is admissible for a non-hearsay purpose, it may also be admissible for the hearsay purpose. The maker of the representation does not need personal knowledge (s60(2); Lee) However, this does not apply to evidence of an admission (s60(3)).

The declarant (not the maker i.e. person who told the maker) must have been competent pursuant to s13(1) at the time the statement was made (s61). Although competence is presumed(s61(3)), if it can be proven they were not competent, then there is no exception to the hearsay rule.
If it can be established that the hearsay was first hand, separated by one degree of separation, then it will be deemed an exception to the hearsay rule and is admissible (s62). However, the maker must have personal knowledge of the asserted fact (s62(1)), based on something they saw, heard, or otherwise perceived (s62(2)). As it has been established that [witness] is the maker of the representation, they had personal knowledge as they heard/saw [evidence] occurring (Vincent).

One such exception to the hearsay rule in criminal proceedings is in cases of first-hand hearsay, where the maker of the representation is available (s66(1)). The maker must be called to satisfy the hearsay exception (s66; Papakosmos). Unavailability of persons is defined in clause 4 part 2 of the dictionary. Thus as [witness] does not fit into (a)-(f), they are a maker available (clause 4(2)). The hearsay rule does not apply if when the representation was made, the occurrence of the asserted fact was 'fresh in the memory' of the maker (s66(2). In determining fresh in the memory the court looks to ; the nature of the event (s66(2A)(a)); the age and health of the person (s66(2A)(b)); and, the period of time between the occurrence and the asserted fact and the making of the representation (s66(2A)(c)).

- Papakosmos: Maker had personal knowledge, s 62 first hand, criminal proceedings, maker available, called, fresh in the memory = admissible for hearsay use. Three witnesses who DON'T have personal knowledge can give evidence for the hearsay use to prove that what she said to them about what happened to her was true
- Graham v The Queen: complained 6 years after offence, raped by her father, HC held not 'fresh in memory' – subsequently introduced 2A to include nature/severity of event
- Regina v XY: delay however complainant could recall other memories from same time which were independently verified as true and reliable