

Evidence of Children and Persons with Impaired Mental Functioning in Certain Cases

<i>SH v R [2012] NSWCCA 79</i>	
Facts	-A child was to give unsworn evidence in a criminal trial
Issue	-Does the Court have discretion to refuse to allow a child to give unsworn evidence?
Held	-No
Rationale	-Despite the use of the word 'may' in the fact, there is no discretionary power to refuse to allow a child to give unsworn evidence if the court is satisfied as to the child's capacity to understand a question and give a comprehensible answer
KLP	-The court does not have discretion to refuse a witness to give unsworn evidence

<i>R v GW [2016] HCA 6</i>	
Facts	-A child was a key witness in her father's trial on a charge of committing an act of indecency -There was no dispute as to the competence of the child to give evidence -However in the pre-trial hearing, the judge ruled that she was not competent to give sworn evidence, instead allowing her to give unsworn evidence -The defence sought the trial judge to direct the jury that the child's evidence was unsworn because the child did not comprehend the obligation to tell the truth; The judge refused
Issue	-Does unsworn evidence bear a different weight to sworn evidence?
Held	-It does not bear a different weight
Rationale	-Where the presumption of competence to give sworn evidence is displaced, it is up to the court and the trier of fact to assess the reliability of that evidence -Sworn evidence does not bolster its reliability -The Act does not treat unsworn evidence as potentially unreliable -In this case, there was no need to direct the jury to take differences between sworn and unsworn evidence
KLP	-The Act is neutral in its treatment of the weight that may be accorded to evidence whether it is sworn or unsworn

<i>R v Khan (unreported, NSWSC, Hidden J, 22 November 1995)</i>	
Facts	-Khan was charged with murdering his friend -The prosecution alleged that Khan caught his wife in bed with his friend, and killed him by stabbing him with a kitchen knife -The prosecution argued that the killing was an act of revenge, and the defence argued the killing was a loss of self-control to engage a defence, reducing the charge to manslaughter -Mrs Khan initially gave a statement to the police, but then later refused to give evidence, claiming the police forced her to sign the statement, which she had not read
Issue	-Was she a compellable prosecution witness
Held	-She should not be compelled
Rationale	<u>Hidden J:</u> -The gravity of the crime, and the importance of Mrs Khan's evidence is not in doubt -The weight of her evidence is a different matter -The evidence coming from Mrs Khan's statement may be reasonably available to the prosecution from other sources available -Mrs Khan had been married to Mr Khan for 10 years, they shared children, and despite the circumstances, their marriage endured -Mrs Khan's giving of evidence would likely cause harm to their relationship and this outweighs the desirability in her giving evidence
KLP	-The importance of protecting personal relationships must be weighed against the interests of justice in the case at hand -If it would likely cause significant harm to the relationship, and evidence can be obtained elsewhere, it is likely that the witness will not be compelled

Reviving Memory

<i>R v Da Silva [1990] 1 WLR 31</i>	
Facts	<ul style="list-style-type: none"> -Michael Da Silva was charged with one count of robbery -After pleading not guilty, he was found guilty by a jury and convicted -The prosecution alleged that Da Silva along with two others entered a hotel (one acted as look out) and threatened the hotel owner at knife point, taking \$8,500 -This was based on the fact that they found the money and a dagger in his bedroom, as well as on evidence that he was involved in planning the robbery -He also allegedly confessed to a fellow prisoner, Michael Collina -The prosecution called Collina to give evidence regarding the confession -Collina was giving evidence at trial to take place in late October 1987 and had not re-read his statement before he got into the witness box -Once in the witness box, he said that he could not remember the conversation, but remembered making a statement to police about it -The trial judge allowed him to re-read his statement
Issue	-Was Collina able to re-read his witness statement?
Held	-He was able to re-read his statement, given the circumstances
Rationale	<p><u>Stuart-Smith LJ:</u> <i>Matter of fact and degree:</i></p> <ul style="list-style-type: none"> -In the case of a statement that is not contemporaneous, a witness may refresh his memory by looking at the statement before he goes into the witness box but not thereafter -It is a question of fact and degree in each case as to whether a statement was made contemporaneously with the facts/events it records -What must be avoided is a witness reading his statement when he has no real recollection -The court is concerned to see that the truth emerges so that justice can be done -Oral evidence becomes more a test of memory than of truthfulness if witnesses are not allowed to refer to notes made closer to the time of the events to check their recollection
KLP	<ul style="list-style-type: none"> -Witnesses can refresh their memory with a statement made near to the time of events in question provided the judge is satisfied that: <ul style="list-style-type: none"> -The witness cannot now remember the details of the events due to the time lapse -The witness made a statement much nearer the time of the events and the contents of the statement represents their recollection -They had not read the statement before entering the witness box -They wished to have an opportunity to re-read the statement before they continued -A witness cannot generally re-read their statement from the witness box

<i>Dodds v R (2009) 194 A Crim R 408</i>	
Facts	<ul style="list-style-type: none"> -The appellant was convicted of conspiring to commit an armed bank robbery -He was not identified by the police as being present when the motor vehicles were intercepted on the way to the bank, but there was other evidence to connect him -It was submitted that the officer's statements should not have been admitted, because his statements were not made at the time of or soon after the event to which they referred
Issue	-Were the officer's statements admissible?
Held	-The statement was admissible
Rationale	<p><u>McClellan CJ (Simpson and Harrison JJ agreeing):</u></p> <ul style="list-style-type: none"> -The officer's statement was made when he was reviewing relevant material, including the application for the telephone warrants, his own notes and information contained in the police computer database -The statement was made about matters that were contemporaneous
KLP	-Statements which are contemporaneous will be admissible for review for the purposes of reviving memory

The Rule Against Hearsay

<i>Subramaniam v Public Prosecutor [1956] 1 WLR 965</i>	
Facts	<ul style="list-style-type: none"> -Subramaniam was charged with possessing ammunition to assist a terrorist -Subramaniam was captured by security forces operating against terrorists -He was found wearing a belt containing 20 rounds of ammunition -He argued the defence of duress on the basis that he had been captured by terrorists and forced to carry the ammunition (they had threatened to kill him) -When called to give evidence in his own defence, Subramaniam wanted to give evidence of what the terrorists had said to him when threatening him -The trial judge ruled such evidence inadmissible on the basis that it was hearsay
Issue	-Was the evidence admissible?
Held	-It was admissible for a non-hearsay purpose
Rationale	<p><u>Mr DaSilva, Lord Radcliffe and Lord Tucker:</u></p> <ul style="list-style-type: none"> -It is hearsay and inadmissible when the object is to establish the truth of what is contained in the statement -It is not hearsay and is admissible when the object is to establish the fact that the statement was made, but not the truth of it -The fact that a statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or some other person -In this case statements could have been made by the terrorists – whether true or not, if Subramaniam had believed them, they may have reasonably induced his behaviour -The evidence of the statements could have been evidence of duress
KLP	<ul style="list-style-type: none"> -Articulated the rule against hearsay -Noted that it is admissible when used to establish the fact the statement was made, but not the truth of it, in order to reasonably explain the state of mind of the witness

<i>Ratten v R [1972] AC 378</i>	
Facts	<ul style="list-style-type: none"> -Mr Ratten had been having an affair and shot and killed Mrs Ratten -Mr Ratten (an experienced firearms user) claimed it was accidental (while cleaning his gun) -To rebut the accident defence, the prosecution called a telephonist from the local exchange to give evidence that: <ul style="list-style-type: none"> -A call from the Ratten house was made -A reply was 'get me the police please' from a hysterical and sobbing woman -The prosecution alleged it was Mrs Ratten's voice
Issue	-Was the evidence admissible?
Held	-It was admissible; it was not hearsay
Rationale	<p><u>Lord Wilberforce:</u></p> <ul style="list-style-type: none"> -Ratten argued that the evidence was admitted as evidence of an assertion by Mrs Ratten that she was being attacked by Mr Ratten (impliedly) and therefore it was hearsay evidence -Words spoken are facts just like other human actions -Just because evidence of a witness includes evidence as to words spoken by another person, it does not mean it is inadmissible -Hearsay only arises when the words spoken are relied on testimonially -In this case the evidence of the phone call was factually relevant to rebut the defence -The evidence showed: <ul style="list-style-type: none"> -A call was made from the Ratten household by a woman only minutes before the fatal shooting which could only have been Mrs Ratten -That at this time she was in a state of emotion/fear
KLP	<ul style="list-style-type: none"> -If the speaking of words is a relevant fact, a witness may give evidence that they were spoken -Hearsay only arises when the words spoken are relied on testimonially

Tendency and Coincidence

<i>Makin v A.-G. for N.S.W. [1894] AC 57</i>	
Facts	<ul style="list-style-type: none"> -The Makin's were charged with murdering infant child who they were fostering -On 9 November, police found the body of a male child, aged between 2 and 9 weeks, buried in the backyard of their home address -At trial, the prosecution adduced evidence in support of the charge: <ul style="list-style-type: none"> -Police found the remains of three other infants when they dug up the child's remains, and the remains of eight other babies buried in the yards of other residences where the accused had lived -The defence argued that this evidence should not have been admitted
Issue	-Should the evidence have been admitted?
Held	-The evidence should not have been admitted
Rationale	<u>Lord Herschell:</u> <ul style="list-style-type: none"> -The prosecution cannot adduce evidence tending to show that the accused had been guilty of criminal acts other than those covered by the indictment for the purpose of showing the accused is a person likely from his criminal conduct or character to have committed the offence -The mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury -It may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence -In the circumstances of this case, the evidence that: -In this case the other evidence was deemed not relevant
KLP	<ul style="list-style-type: none"> -Tendency and coincidence evidence is generally not admissible -It may be admissible if it goes to a fact in issue

<i>D.P.P. v Boardman [1975] AC 421</i>	
Facts	<ul style="list-style-type: none"> -Boardman was charged with offences involving three of his pupils -The prosecution's case detailed several sexual offences or attempts at sexual offences -The trial judge pointed out that it was a common feature, that the prosecution evidence involved criminal behaviour 'of a particular, unusual kind' in that in each case: <ul style="list-style-type: none"> -Boardman was a grown man -He was attempting to induce sexual acts with an adolescent boy -The adolescent was to play the active, and Boardman the passive -The trial judge said it was open to find the boys' evidence corroborated each other -Boardman appealed arguing that the mutual corroboration direction was incorrect
Issue	-Was the evidence admissible?
Held	-It was admissible
Rationale	<u>Lord Morris of Borth-y-Gest:</u> <ul style="list-style-type: none"> -The prosecution cannot adduce evidence which tends to show that an accused person has been guilty of criminal acts other than those with which he is charged for -But there may be cases where the interests of justice will permit a jury, to consider the evidence of another fact against the current set of facts -This is only if between the two sets of facts, there is a close or strikingly similar situation -Also at issue was whether it was against all the probabilities that the boys, unless they had collaborated, would tell stories having considerable features of similarity
KLP	-To be admissible as a similar incidence, evidence must be of facts of 'striking similarity'

<i>The Queen v Dennis Bauer (a pseudonym) [2018] HCA 40</i>	
Facts	<ul style="list-style-type: none"> -The respondent was charged with 18 sexual offences committed over 11 years -The complainant, "RC", was his foster child, placed in his care from two years of age, and was between five and 15 years of age when the charged acts occurred
Issue	<ul style="list-style-type: none"> -Is there a requirement to exclude evidence where there was a risk of contamination, concoction or collusion? -When should a complainant's evidence of uncharged sexual acts be admissible?
Held	-There is not a requirement to exclude evidence where there is risk of contamination
Rationale	<p><u>Contamination:</u></p> <ul style="list-style-type: none"> -Provided the evidence is rationally capable of acceptance, the possibility of contamination, concoction or collusion falls to be assessed by the jury as part of the ordinary process <p><u>Tendency:</u></p> <ul style="list-style-type: none"> -A complainant's evidence of an accused's uncharged acts may be admissible as tendency evidence in proof of sexual offences which the accused is alleged to have committed against that complainant <i>whether or not the uncharged acts have about them some special feature</i> of the kind mentioned in IMM v The Queen, or exhibit a special, particular or unusual feature of the kind described in Hughes v The Queen <p><u>Trying Cases Together:</u></p> <ul style="list-style-type: none"> -In such cases where an accused is charged with a number of counts of generally similar sexual offences against a single complainant and the counts are joined and tried together, evidence of each charged act is admissible as circumstantial evidence -Evidence that an accused has committed one sexual offence in conjunction with evidence of another sexual offence against the same complainant suggests that the accused has a sexual interest in or sexual attraction to the complainant and a tendency to act upon it
KLP	<ul style="list-style-type: none"> -Under the Act, the common law rule of exclusion has no application -Affirmed IMM v R and Hughes v R

Incidents in the one Transaction v Tendency

<i>O'Leary v The King (1946) 73 CLR 566</i>	
Facts	<ul style="list-style-type: none"> -Charles O'Leary was charged with murdering Walter Ballard and found guilty -On 6 July 1946 they had a drunken orgy with other workers -Ballard returned to his cubicle at midnight, which was a short distance from O'Leary's -In the early hours, Ballard was found in his cubicle severely beaten and burnt -He had been struck in the head multiple times, had kerosene poured on him, and set alight -The prosecution's case was circumstantial: <ul style="list-style-type: none"> -Shortly before discovery of Ballard, O'Leary was seen with a bottle -O'Leary's jumper was found near Ballard's cubicle -During the drunken orgy at various times, O'Leary assaulted other employees, sometimes with unprovoked blows to the head -Ballard was on person who O'Leary directed the blows at
Issue	-Was the evidence admissible?
Held	-It was admissible for other reasons
Rationale	<p><u>Latham CJ:</u></p> <ul style="list-style-type: none"> -Similar fact evidence: crime is of a special character – specific features showing it was committed by someone with certain abnormal characteristics -But in this case the crime charged is simply one of savage violence -But the evidence of the other assaults was admissible for another reason – to show the probability that he would attack another man in a fit of drunken fury -All the assaults were incidents of a drunken orgy on the same day and acted as evidence that the accused had been drinking and actually attacked other workers without cause -Such evidence puts the act of attacking Ballard in a setting which makes it possible for the jury to obtain a real appreciation of the events of the day and the night
KLP	-Evidence inadmissible for tendency reasons may be admissible for other reasons

Statements Made in the Presence of the Accused

<i>Barca v R (1975) 133 CLR 82</i>	
Facts	<ul style="list-style-type: none"> -Barca was charged with murdering Petula, the husband of Barca's sister -Their customs required 'a sign of honour' to be left upon the body of the murdered man -Petula was subsequently found dead with two bullets fired into his head -Prosecution alleged it was Barca who killed him -Barca's counsel put forward the hypothesis that it was Barca's father -During a police interview, the Barca denied that his sister gave him a rifle 15 years ago -He also denied the police's suggestion that no one saw Petula after Barca said he left him... 'No I have nothing to say about that. I left him in the station, that's it'
Issue	-Was the denial admissible?
Held	-The denial was not admissible
Rationale	<p><u>Gibbs, Stephen and Mason JJ:</u></p> <ul style="list-style-type: none"> -The statement is only evidence against him of the truth of the matter asserted if he has some way admitted the truth -If he denies the truth of a statement when it is made (and there is nothing in his conduct/demeanour which suggests otherwise he acknowledged the truth of it) it is accepted practice to exclude the statement altogether -In this case, Barca denied the statement that his sister gave him a rifle -There was no evidence that by his demeanour or conduct he accepted its truth -Barca's response did not amount to admission of the truth of what Police stated to him
KLP	-A statement to which an accused responds by giving a bare denial is not admissible

Conduct as an Implied Admission: Evidence of Consciousness of Guilt

<i>Woon v R (1964) 109 CLR 529</i>	
Facts	<ul style="list-style-type: none"> -Woon was charged with breaking, entering and stealing from a bank -The offence was conceded, but all four men denied that they were in any way involved -Woon did not give any evidence, and none of the other men at trial implicated Woon -The prosecution led direct evidence which implicated Woon in the offence charged -The case against Woon depended entirely on answers he gave in two interrogations conducted by the police -First interrogation: <ul style="list-style-type: none"> -Woon said Stuart was a friend but he had never heard of Radcliffe and Shirreff -Woon admitted to having \$8k in a safety deposit box (would not say how he got it) -Woon would not admit to whether he had or had not sent a telegram to Radcliffe -Second interrogation: <ul style="list-style-type: none"> -Woon now admits sending the telegram to Radcliffe and knowing him -Woon still admits to having the money in the safety deposit box -Woon does not deny and does not admit the robbery -The trial judge admitted the evidence of interrogations -Jury was warned that there was no evidence of 'express, explicit or direct admission' -Jury was told to consider whether Woon's answers suggested he was conscious of guilt
Issue	-Were the directions appropriate?
Held	-They were appropriate
Rationale	<p><u>Kitto J:</u></p> <ul style="list-style-type: none"> -An accused may accept any of the particular facts put to him; There may be by words, actions, etc. that are an unintended manifestation of agreement with the statement -Those reactions may have evidential value because they show, when considered in light of the circumstances, that he had a consciousness of guilt -Woon was within his rights to say nothing and no adverse inference would be drawn -Answers Woon gave might reveal a consciousness on the part of Woon
KLP	-A denial can be construed as evidence of consciousness of guilt and therefore an admission if the denial is in circumstances what suggest it to be a lie