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*The tiny reference page numbers refer to the page numbers in the long note which can be purchased separately

*Use EITHER criminal OR civil in exams. They are not crossed-referenced.

opponent consent not to call or prosecutors believes the W testimony is untruthful or unreliable

- **YES** → identify the witness → go to Competence and compellability of the W STEP 1
- **NO** (failure to call) → inferences may only be drawn exceptionally and if the failure amounted to a breach of prosecutorial duty – **Dyers v R**;
 - Court's power to call W: ^{P13}
 - Trial judge cannot direct prosecutor to call a particular W except in exceptional circumstances – **Apostilides**
 - S26 EA provides power to allow a judge to call a W – **Milano**. However, **Sharp** held that the interpretation of s26 EA is too wide. Odgers argues that the Court's general power to control proceedings is sufficient to give the Court the power to call a witness by threat of judicial sanction of 'abuse of process' – s11(2) and potential of a mistrial.
 - Miscarriage of justice?
 - Prosecution not to call a W ground for setting aside conviction at trial → **miscarriage of justice** – **Apostilides**
 - Prosecution refuse to call on grounds of lack of reliability, evaluation of reliability must be based on identifiable factors and not assumed → (if assumed) **miscarriage of justice** → new trial – **Kneebone**
 - In the case of **expert evidence**, Prosecution should have called the witnesses but an miscarriage of justice was cured by a direction of the judge → **no miscarriage of justice** – **Velevski** ^{P16} (prosecution called 5 experts but end up only called 1 who support his case)

STEP 2: Witness – whether the defence has called a witness

- **YES** → identify the witness → competence and compellability of W
- **NO** (failure to call) → because of the onus of proof in criminal cases, D is not normally expected to call W nor to testify in person

Competence and compellability of the W

STEP 1: VD – s189(1)(c) → s189(4) (see above)

STEP 2: who is the W?

- A. **If the W is a child/ normal person:**
- a. S12(a) EA states that every person is competent to give evidence
 - b. S13-19 EA provide exceptions to that general proposition.
 - c. S13 includes a two-pronged competence test:
 - i. **Does the witness have the capacity to understand a question/give an answer that can be understood** – s13(1)
 - ii. **Does the competent witness have the capacity to understand that he/she is under an obligation to tell the truth**
 - d. burden is on the challenging party to prove on balance of probability that W is not competent [state the challenging party e.g. defence]
 - e. Whether the W complies the first test?
 - i. **YES** → capable to give **sworn evidence** → go to Competent witnesses are compellable – s 12(b)

1. Sworn evidence is the default position – **R v GW** ^{P18}
 2. There is no primacy given to sworn evidence under the Uniform Evidence Law as it is 'neutral in its treatment of the weight that may be accorded to evidence whether it is sworn or unsworn' – **R v GW**
 3. W must either take an oath, or make an affirmation, before giving evidence – s21(1) in accordance with form in Schedule 1 or in a similar form – s21(4)
 4. E.g. 'I swear (or the person taking the oath may promise) by Almighty God (or the person may name a god recognised by his or her religion) that the evidence I shall give will be the truth, the whole truth and nothing but the truth'
 5. Can have some assistance if children (vulnerable W): - CPA Part 6
 - a. (1) pre-recorded hearings (as an exception to the hearsay rule) for children and those with cognitive impairment (though statements may still be excluded).
 - b. (2) Closed-circuit television for children, though very restricted use where the accused is a child;
 - c. (3) A 'children's champion' to assist the court in conveying questions to child witnesses
 - d. (4) Warnings to be given by trial judge to jury that evidence given in this way does not have more or less weight
 - e. (5) Where D is legally unrepresented, the appointment of a person to perform the examination of a vulnerable witness as to offences which the section applies. The court is obligated to do so.
- ii. **NO** → W does not have the capacity to understand that he or she is under an obligation to give truthful evidence – s13(3)
1. see if W can comply the second test:
 2. **YES** → W could be permitted to give **unsworn evidence** – s13(4)
 - a. W who gives unsworn evidence will have neither taken an oath nor made an affirmation. That W may be cross-examined and may be subject to prosecution for perjury.
 - b. W can give unsworn evidence when: – s13(5)
 - c. The court tells the person that it is **important to tell the truth**; and – s13(5)(a)
 - d. The court tells the person that he or she should tell the court that he or she **does not know** or **cannot remember** about sth being asked; and – s13(5)(b)
 - e. The court tells the person that he or she may be asked questions that suggest certain statements are true or untrue and that he or she should agree with the statements that he or she believes are true and should feel no pressure to agree with statements that he or she believes are untrue – s13(5)(c)
 - f. Court needs to comply strictly with the terms of s13(5), otherwise the trial had not been conducted according to law – **SH** ^{P18}
 - g. W does not need to take an oath, or make an affirmation, before giving evidence – s21(2)

3. **NO** → state: s13(2) W is not competent to give evidence about that fact, but may be competent to give evidence about another fact

4. **Warnings re children's evidence** → P7, g

B. **If the W is the accused:**

a. **Accused is not a competent W for the prosecution** – s17(2)

b. **In the case of associated defendant:**

- i. Meaning: a person against whom a prosecution has been instituted, but not yet completed or terminated, for
 - (a) an offence that arose in relation to the same events as those in relation to which the offence for which the D is being prosecuted arose, or
 - (b) An offence that related to or is connected with the offence for which the D is being prosecuted
- ii. The associated D is not competent for the prosecution to give evidence against themselves – **Kirk**, or compellable to give evidence for or against another person with whom he or she is jointly tried – s17(3)
- iii. **To make the accused competent:** The prosecution would have to deal with the accused first by accepting a plea of guilt or by holding a separate trial to its conclusion – s17(3)

C. **If the W is a family member:** e.g. wives/husbands ; child/parent

- a. Under **Common Law**, a 'wife' did not include a 'de facto' wife. De facto partners always are competent and compellable to give evidence in criminal and civil cases – **R v Khan**, unless statute provides otherwise, e.g. s18 EA, which deals with a spouse and de facto spouse in the same way.
- b. Under **Uniform Evidence Act**, an accused's spouse/ family member is compellable **for the prosecution**, however, the judge has a discretion to exempt him or her from giving evidence – s18(2). A person (spouse, de facto spouse, parent or child) may make an objection – s18(4). The Judge is expected to balance the risk of harm to the W and / or the W's relationship with the accused against the importance of the W's evidence – s18(6).
- c. The discretion applies to the accused's spouse, de facto spouse, parent or child under ss18 and 19 EA.
- d. Court can **refuse objection** weighing specific factors in s18(7):
 - (a) the nature and gravity of the offence for which the D is being prosecuted,
 - (b) the substance and importance of any evidence that the person might give and the weight that is likely to be attached to it,
 - a. Are there direct/circumstantial evidence?
 - (c) whether any other evidence concerning the matters to which the evidence of the person would relate is reasonably available to the prosecutor,
 - (d) the nature of the relationship between the defendant and the person,
 - a. E.g. married
 - (e) whether, in giving the evidence, the person would have to disclose matter that was received by the person in confidence from the defendant.
- e. Section 18 EA **doesn't apply:**^{P22}
 - (i) to proceedings for an offence against or referred to in the following provisions of the Children and Young Persons (Care&Protection) Act 1998: ss 222, 223, 227, 228
 - (ii) if the person could be compelled to give evidence in proceedings under s 279 of the Criminal Procedure Act 1986 (NSW)^{P23}