sexually assaulted and then stabbed 49 times while walking her dog on a public common.

- Colin, an unemployed man, was known to walk his dog on the same common.
- A criminal psychologist profiled the killer and determined Colin fitted the profile.
- Police decide to 'catch' Colin by using a police women to pose as a friend of a former lover in a lonely hearts column.
- Police woman communicates with Colin over a period of five months, trying to elicit information about his romantic interests, suggesting sexual and violent fantasies, including the sexual assault and murder of Rachel.
- These communications are taped. Colin does not admit to the murder, but the prosecution believes there is enough evidence to infer that he killed Rachel.
- SHOULD THIS EVIDENCE BE ADMITTED UNDER THE EVIDENCE ACT?

Stage 1: Voir dire
- Collin's lawyer is challenging the tape evidence
- Was getting excluded in VD. They were making submission

Collin's lawyer:

- Defence
  - Issue: <u>Whether the taped communications was obtained because of impropriety/ illegal under Australian law? S138</u>
  - Improper/ illegal
  - The impropriety here is entrapment (taping him with his consent)
  - Surveillance normally need a warrant -- we don't know if there is a warrant here
  - Any taping without warrant is a breach of law --> illegality
  - If you don't have a warrant, you have to be consensual, D needs awareness of being taped, not here --> violation
  - Go to magistrate to get a warrant. It has to be satisfied with balance of probability.
  - Issue: relevance of the communications being evidence. Is it relevant? What are the influences are?
    - We don't know what has been said. May be some relevant statement that jury would infer there is guilty knowledge.
  - Violation of privileged against self-incrimination
    - Procuring of the statement: He does not know he has been taped, he doesn't know she is a police. Deliberating prompting him.
  - There is at least impropriety here

Prosecution need to make a submission re admissibility:
- Prosecution need to establish 'Desirability of admitting the evidence outweighs the undesirability of admitting the evidence having regard to the way the evidence was obtained' on balance of probability
- Factors: s138(3)

- Issue: should the court admit this tape notwithstanding with impropriety.

- It is a very serious case. It is a murder case.
- Court should be more inclined to admit the evidence on the basis of seriousness
- Not only murder, it is also aggravated sexual assault (stabbing as well), it is done in a public place
- Affect the reputation of the accused, the sanction should be much higher. So need to be so much careful
- Probative value of the evidence: s183(3)
  - Meaning: Relevance?
  - the evidence need to be taken at its highest (court cannot question its reliability in detail, so

if there is a reasonable possibility that the statement made by Collin show knowledge of the fact, where it is not directly probative, the statement is not from the police officer but the suspect, and that information is not mention in newspaper/ online, he has no pecuniary knowledge, then it is enough to be probative value - IMM v The Queen)
    - We don't know much here, we don't know the details, we don't know what exactly what was said.
    - He used to walk there, he would be familiar with the area. Some part of the common that he would know detail. That's not on newspaper/internet that he would know
    - Does that mean he has familiarity with Collin? NO. but it has probative value. Take it at the highest
- Evidence of the murder itself - Crime scene investigation
    - Some forensic. No DNA. We only have a profile. We have some bad character evidence. He is a type of person. He has the opportunity to commit the crime. Highly circumstantial
    - Circumstantial evidence
        - Nothing link to him directly
        - all it shows is that he had the opportunity to commit the crime - no direct evidence. No other evidence.
        - All infer
        - It is important part of the narrative. Without it the case collapses.
    - To what extent there is a nexus with him actually killing her or sexually assaulting her?
        - Having a fantasy does not mean guilty knowledge
        - It is just prejudicial. Giving to much freedom to the tribunal fact to infer and to fill in the gaps. Highly prejudicial and not very relevant
    - Is this a great violation?
        - Violation of his right
        - it is deliberate, entrapment, procuring statements, and even then we don't get an explicit admission.

In conclusion:

- Judge would admit/not admit

- The trial judge in real case admit the evidence. On appeal, the judge exclude the evidence. It was one of the worst examples of entrapment that they have come across (In the UK).

6. Admissibility of evidence – hearsay

Monday, 1 July 2019 8:07 pm

6.1 The hearsay rule - EA ss 59, 60, 136

- Definition of Hearsay:
  - 'a statement other than one made by a person giving oral evidence in the proceedings is in admissible as evidence of any fact stated' (Cross on Evidence)
  - S59(1) EA: previous representation made by a person is inadmissible to prove the existence of a fact that it can reasonable supposed that the person intended to assert

- Elements:
  - A previous representations
  - Made by a person
  - Containing what can reasonably be supposed to be an intended assertion of fact
  - The representation must be adduced to prove the actual existence of the fact (or the truth of the facts asserted)
  - All 4 must be established for the statement to be caught by hear say
  - Most important is point 4

- Key terms:
  - 1) 'representation' - see Dictionary. Ver y comprehensive and inclusive . Incorporates:
    - Express or implied representations
      - Influence from conduct; does not have to be verbal;
    - Representations inferred from conduct
    - Representations not intended to be seen or communicated
    - NB. Broad definition fo representation does not mean all implied assertions can be caught by the hearsay rule; see below
  - 2) 'previous representation' - also defined in the Dictionary = 'a representation made otherwise than in the course of giving evidence in the proceedings in which evidence of the representation is sought to be adduced.'
    - Representations made in previous court proceedings, therefore, would be caught
    - Includes previous statements made by the witness who is testifying in court where they are being adduced to prove the facts they assert rather than to support or impeach credibility (though see s60(1) providing an exception)
    - Also covers statements made in interlocutory phase of the same proceedings
    - Doesn't include statements made on affidavit in relation to current proceedings
  - 3) 'made by a person'

- Excludes representations made by machines (e.g. cameras at traffic lights) or animals (e.g. dogs barking at time of a murder)
- But would apply If a person yelled 'he just went through a red light' or 'murder'
- Human-machine composite statements: lab experiments - computer print outs admissible to prove results, but technicians would have to be called to testify as to origin of the date (cf ***R v Wood***)

- 4) 'to prove the existences of a fact' - what is this evidence being introduced to prove?
  - Not all uses of a previous representation are for a 'hearsay purpose'. If not, we call this original evidence'
  - ***Subramaniam v Public Prosecutor*** [1956] 1 WLR 965 (KOP [7.30])
    - D found in possession of live ammunition.= death penalty offence in Malaya. Defence under the penal code if 'compelled to do the offence by threats'. D adduced evidence he'd been forced to wear the ammunition belts under threats. Trial court prevented D from adducing evidence of what terrorists had said on grounds of hearsay
    - Held: PC - Not hearsay because not a hearsay purpose. D adducing evidence of the threats, not as evidence that the terrorists would kill D, but that he believed they would. Evidence of his state of mind was circumstantially relevant to his defence of duress per minas. A statement is only hearsay of it's being adduced to prove the truth of the facts it asserts, not the mere fact they were made
    - If it is being introduced to prove a state of mind, it's not a fact - therefore not hearsay. What you believe to be true doesn't make it true.
    - Rules:
      - The evidence is hearsay and inadmissible when the object of evidence is to establish the truth of what is contained in the statement.
      - The evidence is not hearsay and it is admissible when it is proposed to establish by evidence, not the truth of the statement but the fact that it was made (relevant?)
    - Here, the evidence was relied upon not to prove the truth of what the terrorists were saying, but that there was something said which caused the defendant to fear them and to follow their instructions:
    - "The evidence of the appellant, such as it was, suggested generally that he was in fear, that he planned to escape, and that he had no alternative but to do as the terrorists asked him to do."
- 5) reasonably be supposed that the person intended to assert'
  - Prior to 2008, the section required a subjective intention to communicate a fact. No longer necessary - the test is now objective looking at the cirs and context in which it was made. Subjective intention will be evidence of intention, but section no longer limited to only those facts. Can include facts' necessarily assumed'

recorder bought by W.

136 General discretion to limit use of evidence

The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might:

(a) be unfairly prejudicial to a party, or

(b) be misleading or confusing.

NON-HEARSAY S66A

66A Exception: contemporaneous statements about a person's health etc

The hearsay rule does not apply to evidence of a previous representation made by a person if the representation was a contemporaneous representation about the person's health, feelings, sensations, intention, knowledge or state of mind.

- Reflects a well-known exception at CL: evidence introduce to prove a state of mind, where relevant, is not hearsay. So in a murder trial, evidence D had told the deceased 'I hate you', can be introduced as evidence of motive which is relevant to mens rea
- Not sure about its scope

SECTION 60(1)

- Hearsay rule doesn't apply to evidence admitted for a non-hearsay purpose - meaning tribunal of fact are permitted to treat the evidence as evidence of the facts it asserts
- So previous consistent statements or previous inconsistent statement, though admitted on grounds of credibility, can also be used to prove the facts they assert

60 Exception: evidence relevant for a non-hearsay purpose

(1) The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of an asserted fact.

(2) This section applies whether or not the person who made the representation had personal knowledge of the asserted fact (within the meaning of section 62 (2)).

Note : Subsection (2) was inserted as a response to the decision of the High Court of Australia in *Lee v The Queen(1998)* 195 CLR 594 .

(3) However, this section does not apply in a criminal proceeding to evidence of an admission.

The admission might still be admissible under section 81 as an exception to the hearsay rule if it is "first-hand" hearsay: see section 82.

- Also factual basis for an expert's opinion is admissible to explain how the expert came to his opinion. So a doctor's opinion as to a particular patient can refer to that patient's medical history, and the medical history would be evidence of how the doctor came to his opinion. It would not be initially admissible to prove the events states in the medical history. But s60(1) permits the medical history to be used to prove the truth of the facts stated
- Rationale for exception: difficult, if not impossible, for tribunal of fact to distinguish acceptable an dnon-acceptable uses for the evidence.