

Topic 4: Hearsay (use of evidence) & Exceptions

Non-examinable content

- 1) Implied assertions
- 2) Statement made by deceased declarants
- 3) All statutory exceptions for documents: ss 45, 52, 53, 46-51, 59b, 34, 34CA
- 4) Authentication

Answer Outline

- 1) The [evidence] is relevant because it tends to prove/disprove [explain material fact in issue]
- 2) Being an OOCS in the form of a [doc/verbal statement], the admission of the evidence has the potential to offend the hearsay rule, that excludes the admission of OOCS for the purposes of proving the truth of the facts asserted in the statement (whether oral or written).
- 3) Brief assessment of the value of the evidence – the evidence is highly probative and very favourable towards P/D's case given that it proves/disproves [explain].
- 4) There does not/does appear to be an original use of the evidence (i.e. relevant in the fact that the statement was made/res gestae/state of mind) that would avoid the scope of the exclusionary hearsay rule and so the [evidence] is prima facie admissible/inadmissible.
- 5) However, there may be an exception to the hearsay rule.

Roadmap

1: Hearsay v OOCS

- 1) An **out of court statement** is a **TYPE** of evidence, it is **NOT** automatically hearsay.
- 2) **Hearsay** is a **NOT** a type of evidence, it is a **USE** of evidence.
- 3) Admissibility of an OOCS depends on the **USE, PURPOSE and RELVANCE** of that evidence.
- 4) Admission depends on the **OOCS** having **relevance other than the truth of the facts asserted within it.**
- 5) Original use is NOT a hearsay exception. Original use means OOCS is not being used to prove truth of statement. Hearsay exception, on the other hand, allows OOCS to be used to prove truth of statement.

2: The Rule

- 1) Evidence of a statement made to a W by a person who is not himself called as a W **may or may not** be hearsay. It is **hearsay** when the **object of the evidence is to establish the truth of what is contained in the statement** (inadmissible). It is **NOT hearsay** when it is tendered to establish, NOT

the truth of the statement, but that the statement was made (admissible): *Subramaniam v The Public Prosecutor*

- 1) **Remember**, hearsay is a type of **USE** of evidence – an out of court statement (OOCs) that is tendered in order to **prove the truth of what the statement**: *Subramaniam*

3: What is the OOCs?

- 2) Oral
 - a) W in court, re-telling what they, or someone else said outside of court.
- 3) Written
 - a) **Note**: any document tendered at court is hearsay because it was prepared OOC (subject to exceptions).
 - b) Receipts, newspapers, forensic reports, airline tickets, wills, suicide notes etc.
- 4) Implied conduct (not examinable)

4A: How is it Relevant?

- 5) Original or hearsay use?

4B: Original Use (NOT hearsay and NOT a hearsay exception)

- 6) Relevance does NOT depend on establishing the truth of any fact asserted in the statement. Relevance exists simply in the fact that the statement was made.
 - a) For **documents**: relevance does not depend on establishing the truth of any fact asserted in the document.
- 7) Used to prove:
 - a) the fact a statement was made e.g. threats, defamation: *Subramaniam*
 - b) state of mind (especially knowledge, intention, belief): *Bull, Walton, Kamleh, Andrews*
 - i) See notes on *Walton* below.
 - c) *res gestae* (original use): **part of the event**, non-testimonial: *Fragomeli*
 - i) **Remember, *res gestae* is also a hearsay exception as well** – hearsay exception = not part of the event but directly before or after.
 - ii) See notes on *Fragomeli* below.
 - iii) Needs to be **spontaneous** NOT narrative.
- 8) Prima facie admissible for non-hearsay purpose.

4C: Hearsay use (Inadmissible unless an exception applies)

- a) Evidence is offered to prove **the truth of what was said**.
 - i) For **documents** relevance depends on establishing the truth of any fact asserted in a statement in the document – e.g. notes on observations of a crime scene.

- b) Infringes hearsay rules as it requires jury to accept what the declarant has conveyed as true – trier of fact cannot draw its own inferences and must rely on the observational W:
Subramaniam
- c) Prima facie inadmissible subject to exceptions.

5: Exceptions to the hearsay use of evidence

- 1) If admitted as a hearsay exception, then OOCs can be used to show proof of the statement that was made.
- 1) Remember, hearsay use is **different to original use** – which is non-hearsay. Original use = OOCs not being tendered to prove truth of statement.

5.1 Admissions

- 9) Admission by party against their interests (**only applies in criminal cases**)
 - a) If X admits to a crime they committed jointly with Y, statement is only admissible against X, not Y.
 - b) **Remember:** silence gives NO adverse inference, due to D's right to silence: *Petty v R*
- 10) Before/after event; express/implied words; conduct
- 11) *Bannon v R*: an informal admission, by words or conduct, made by a party or those in privity with party is admissible against the party for truth of contents.
- 12) No third-party confessions unless joint criminal enterprise (JCE): *Bannon*
- 13) Includes self-serving statements: *Spense; Demasi*
- 14) Vicarious admissions
 - a) Admissions admissible only against party making it BUT admissible against another party if they had authority to make admission on the party's behalf.
 - b) Employees and managers
 - i) Admission of employee/manager with authority can bind employer: *Pomery v Rural Hotels*
 - ii) Manager will generally have authority to bind enterprise: *Pomery*.
 - c) Joint criminal enterprise
 - i) Admissions in statements made in furtherance of joint criminal enterprise may be used as evidence against all persons involved if existence of joint criminal enterprise is established: *R v Blake*
 - ii) On void dire
 - (1) Adduce reasonable evidence that statements were made in furtherance of joint criminal enterprise: *Ahern v R*

- (a) Once conspiracy established, can use statements to establish nature of D's participation and scope of conspiracy.

5.2 Res Gestae (contemporaneous statements)

- 1) Test: **NOT** whether statement was **part of the event** – **NOT contemporaneous** (that would be original use res gestae) BUT whether it was made in conditions (**approximate** but not necessarily in **exact contemporaneity**) of involvement or **pressure of events** as to exclude the possibility of concoction or distortion: *Ratten*
- 15) Assertions made in conditions of **approximate but not exact contemporaneity** under the continuing pressure or involvement of events: *Ratten*
 - a) Needs to be a level of intensity and pressure in the lead up to, or just after, the incident.
 - b) **Close and intimate connection** between the OOCs and the incident.
- 16) There must be evidence of **contemporaneity**, beyond statement itself: *Benz*
- 17) Must actually relate to the event exerting pressure: *R v Plevac*
- 18) **Does NOT include:**
 - a) a narrative statement where the speaker is disengaged
- 19) **May include:**
 - a) statements made immediately before event
 - i) E.g. in *Ratten*, drama leading up to the event assumed such intensity and pressure that the statement reflected what was unfolding.
 - b) A narrative statement that is spontaneous
- 20) **Factors to consider (R v Andrews)**
 - a) Instinctive reaction to event with no opportunity for reflection
 - b) Made in circumstances so unusual, startling or dramatic as to dominate thoughts of the V.
 - c) An instinctive, reaction to the events where there is no chance for reasoned reflection.
 - d) Made in conditions of approximate but not exact contemporaneity.
 - e) Whether event still dominating mind
 - f) Close and intimate connection.
 - g) No independent motive for concoction
 - i) Malice
 - ii) Drunkenness
 - iii) Circumstances that made identification more difficult.
 - iv) Possibility of human error, ordinary fallibility of human memory/recollection – **goes towards weight not admissibility.**

21) **Examples**

- a) *Ratten*: frantic calls by V to police made spontaneously under overwhelming pressure of events (see case notes below)
- b) *Andrews*: W's statement identifying D minutes after D stabbed V was of such a nature that it excluded the possibility of malice giving rise to concoction or fabrication.

5.3 Statements made identifying a party to a phone call

22) Key case = *Pollitt* (see notes below)

- a) Statement must be (from *Pollitt*):
 - i) spontaneous/reactive (less likely to be constructed)
 - ii) as to identity only
 - iii) likely to have a high degree of reliability (i.e. no reason to suspect false name being used)
 - (1) it is not acceptable where used in the course of criminal conspiracy (unlikely to be reliable – false ID).
 - iv) if W recognises caller's voice, can give ID evidence without needing to rely on caller's assertion of ID.

5.4 Statement in business/public document/record

23) Not examinable

5.5 Particular proceedings or persons

24) Victims of sexual offences

- a) Section 34LA(1) provides that in proceedings in which a person is charged with a sexual offence, a statement not made in oral evidence in the proceedings (an OOCS) is admissible as evidence of any matter stated if:
 - i) oral evidence given in the proceedings by the person who made the OOCS would be admissible as evidence of that matter; and
 - ii) the person who made the OOCS is identified to the court's satisfaction; and
 - iii) each of the conditions specified in subsection (2) is satisfied [see legislation]
- b) See notes under Topic 8 for more detail on s 34LA.