

CONTENTS

| | |
|--|----|
| Background notes..... | 3 |
| Adducing Evidence..... | 4 |
| Competence..... | 4 |
| Compellability..... | 4 |
| Witness Examination Process..... | 5 |
| Documents and other evidence..... | 8 |
| Relevance..... | 10 |
| Hearsay..... | 11 |
| Non-hearsay purpose..... | 11 |
| First-hand hearsay exceptions..... | 11 |
| Non-first hand Hearsay Exceptions..... | 12 |
| Admissions..... | 13 |
| Opinions..... | 16 |
| Tendency and Coincidence..... | 3 |
| Tendency Rule..... | 3 |
| Coincidence Rule..... | 4 |
| Credibility and Character..... | 6 |
| Character Evidence..... | 6 |
| Credibility Evidence..... | 7 |
| Identification..... | 4 |
| Exclusions..... | 7 |
| Unfair Prejudice..... | 7 |
| Public Policy..... | 8 |
| General discretion..... | 9 |
| Warnings..... | 10 |

ADMISSIONS

The hearsay and opinion rules do not apply to evidence of an admission (s 81(1)), or to evidence of a previous representation that contextualises the admission (s 81(2)).

DEFINITION

A previous representation (expressed, implied or inferred) that is made by a party to a proceeding, and is adverse to that person's interest in the outcome of the proceeding.

SILENCE AS ADMISSION

An unfavourable inference cannot be drawn from a party's failure to answer questions or respond to representations made by an investigating official (s 89(1)), unless the failure or refusal to answer a particular question is a fact in issue (s 89(3)).

LIES AS ADMISSION

A defendant's lie might 'in limited circumstances amount to conduct which is inconsistent with innocence, and amount therefore to an implied admission of guilt', 'on the basis that the truth would implicate the accused in the offence with which he is charged' (*Edwards v The Queen*).

GENERAL RULES

- To form an exception to the hearsay rule, the evidence must be **first-hand**:
 - given by a person who saw, heard or otherwise perceived the admission being made (s 82(a)); or
 - a document in which the admission is made (s 82(b)).
- The court may find that a particular person made the admission if it is **reasonably open** to find that he or she made the admission (s 88).
- An admission's **truth** is disregarded for its admissibility, unless it is raised by the defendant (s 189(3)).
- s 81 does not prevent the application of the hearsay rule or opinion rule to evidence of an admission in relation to the case of a **third party**, unless the third party consents (s 83).
- An admission by **another person** is considered an admission by a party if (s 87(1)):
 - (a) the person had authority to make representations for the party; or
 - (b) the person is an employee of party making a statement about matter within scope of employment; or
 - (c) representation made by person in furtherance of a common purpose (legal/illegal) with party.

COMPLIANCE WITH RECORDING REQUIREMENTS

Admissions are only admissible if they are tape-recorded, or recorded in writing as soon as possible where tape-recording was not reasonably practicable (*Crimes Act* s 23V(1)).

An unsigned document is not admissible as proof of an admission (s 86). 'Document' does not include audio, video tape or transcript of audio tape (s 86(4)). The interviewing officer may still give oral first-hand hearsay evidence of the interview. The judge may give a warning about the unreliability of this evidence (s 165(1)(f)).

INFLUENCE OF VIOLENT CONDUCT (S 84)

Evidence of an admission is inadmissible if the making of the admission was influenced by violent, oppressive, inhuman or degrading conduct (towards the maker or someone else) or threat of such conduct (s 84(1)).

- There must be a 'reasonable possibility' that the admission was influenced by such conduct (*Habib*).
- It is sufficient that oppressive conduct was *one of* multiple factors that led to the 'absence of true voluntariness in admissions' (*Ye Zhang*)

CIRCUMSTANCES ADVERSELY AFFECTED THE TRUTH OF THE ADMISSIONS (S 85)

Where an admission is made by the defendant (s 85(1)):

- (a) to, or in the presence of, an investigating official,
- (b) as a result of an act of someone else who was, and who the defendant knew or reasonably believed to be, capable of influencing the decision whether the prosecution should be brought or should be continued,

this evidence is inadmissible unless the circumstances in which the admission was made make it unlikely that the truth of the admission was adversely affected (s 85(2)).

The court must take into account (s 85(3)):

- (a) any relevant conditions or characteristics of the defendant, including age, personality and education and any mental, intellectual or physical disability; and
- (b) if the admission was made in response to questioning—
 - (i) the nature of the questions and the way in which they were put; and
 - (ii) the nature of any threat, promise or other inducement made to the person questioned.

If a question legitimately arises, the prosecution bears the onus to prove on balance of probabilities that the circumstances did not adversely affect the truth of the admission (s 142(1), *Esposito*).

PUBLIC POLICY (S 138)

Evidence that is obtained improperly or illegally must be excluded unless the desirability of admitting the evidence outweighs the undesirability of admitting it (s 138(1)).

- Onus to prove impropriety or illegality lies on the accused/defence (*Coulstock*).
- 'mere doubts about the [conduct's] desirability or appropriateness' are not sufficient, must be a degree of unlawfulness that is 'quite inconsistent with' standards expected of police (*Robinson v Woolworths*)
- Evidence is taken to have been obtained improperly if the questioner (s 138(2)):
 - (a) acted in a way that 'was likely to **impair substantially** the ability of the person being questioned to respond rationally to the questioning';
 - (b) made a **false statement** to compel an admission.
- Unless another law applies, evidence is taken to have been obtained improperly if (s 139):
 - (1) the person is arrested and questioned **without a caution**.
 - (2) the person is not arrested, but questioned **without a caution**.

NB: Caution must be in an understandable language for the person, in writing if hearing-impaired (s 139(3)).

DESIRABILITY

The court must take into account (s 138(3)):

- (a) probative value of the evidence;
- (b) importance of the evidence;
- (c) nature and gravity of the offence; (*the graver the offence, the more likely evidence to be admitted*)
- (d) gravity of the impropriety or contravention;
- (e) whether the impropriety or contravention was deliberate or reckless;
- (f) whether the impropriety or contravention was inconsistent with ICCPR; and
- (g) whether any other proceedings are likely to be taken in relation to the impropriety or contravention;
- (h) the difficulty (if any) of obtaining the evidence without the impropriety or contravention.

Consider general policy concerns and the undesirability of setting a poor precedent for police behaviour.

UNFAIRNESS (S 90)

The court has discretion to exclude evidence of an admission if the circumstances in which the admission was made would make it unfair to a defendant to admit that evidence (s 90). It is necessary to consider the 'nature and effects of the police infringement of the defendant's rights' (*Foster*).

- '... the discretion given by s 90 will be engaged only as a final or "safety net" provision' (*Em v R*).
- **Unfairness in *Foster* (also s 138)**: unlawful arrest and detention by the police, refusal to release the defendant unless he signed a confession, refusal to let his mother visit him, no chance of corroboration.

COVERTLY RECORDED CONVERSATIONS

Covert police operations/recording of conversations are not inherently unfair or improper (*Em v R*). There must be an infringement of the accused's right to choose whether or not to speak to the police, by looking to all the circumstances (*Swaffield*).

- *Em v The Queen*: Police gave half the standard caution; suspect incorrectly believed that because the conversation was not being recorded it could not be used as evidence. Evidence was held admissible: police simply took advantage of 'a species of ignorance or stupidity', no impropriety (Kirby J in dissent).
- *R v Swaffield; Pavic v The Queen*
 - An arson case against Swaffield was dropped for lack of evidence. Two years later, police posed as someone who wanted to buy illegal drugs and obtained inculpatory admissions.
 - Pavic, suspected of murder, made no statements during police interview. Later, police wired one of Pavic's friends – Clancy – and used him to obtain inculpatory admissions from Pavic.
 - **Held**: Look at the accused's freedom to choose to speak to the police and the extent to which that freedom has been impugned. If the freedom has been impugned, court has discretion to exclude evidence. Relevant to consider if accused had previously refused to speak to the police.

POLICE INFORMER/AGENT

The use of an informer is not inherently unfair or improper (*R v DRF*). But if the informer is acting as an agent of the state at the time of the admission and *elicited* the statement from the accused, the accused's right to silence has been infringed and the court has discretion to exclude the evidence (*R v Simmons*).

- **Agent of the state**: The informer is a state agent if the exchange would not have taken place in the form and manner that it did but for police intervention (*R v Pavitt, R v DRF*).
- **Elicited the admission**: consider whether conversation was the 'functional equivalent of an interrogation', or the informer exploited special characteristics and weaknesses of the accused or their relationship (*R v Simmons*). Consider also the instructions police gave to the informer.
 - No violation if the suspect speaks by his or her own volition and takes the risk of being reported – if the 'conversation is one that might easily have occurred without police intervention' (*R v DRF*).