

EVIDENCE

Topic 1: Discretions, Leave and Relevance

Factor	Exam Script	Personal Notes
Discretion – 136	<p>Under section 136, the trial judge may use its discretion to limit use of previous representation for non-hearsay use if it would be unfairly prejudicial to admit the evidence for its hearsay use eg.</p> <ul style="list-style-type: none"> - Eg. the party could not cross-examine who made the representation (Jango) - Eg. expert based opinion on assumptions not assertions (Roach v Page) 	
General Discretion – s 135	<p>Due to issues such as [insert facts eg. health], the assertions made by X may be excluded under the discretion in section 135. This would require that the probative force of the evidence be substantially outweighed by the evidence being unfairly prejudicial (as defined in Pfennig).</p> <p>While the term ‘fairness’ is not defined, it is likely to encompass the reliability of [the admission].</p> <p>[Insert evidence] may be considered prejudicial in the sense that it sheds more ‘heat than light’. There may be a high risk that the evidence will not be scrutinised with sufficient care. Therefore, arguably, such concerns could be addressed by the trial judge addressing judicial direction.</p> <p>On balance, the relatively low probative value of the evidence is arguably substantially outweighed by the prejudicial effect and therefore should be excluded under section 135.</p>	<p>The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:</p> <ul style="list-style-type: none"> (a) be unfairly prejudicial to a party; or (b) be misleading or confusing; or (c) cause or result in undue waste of time.
Relevance	<p>[Insert evidence] is highly relevant to P’s case as it directly bears on the fact in issue specifically that [insert what the evidence could link to] (section 55).</p> <p>Circumstantial Evidence: X’s evidence is likely circumstantial evidence (indirect evidence) which suggests a motive (eg) for [insert facts].</p> <p>Therefore, X’s evidence constitutes an indispensable link (motive and opportunity) which must be proven (Sheppard) in order for D to be found guilty. Therefore, X’s evidence is relevant.</p>	<p>When discussing whether evidence is hearsay, consider whether that evidence is likely to be relevant to prove a particular fact in issue of the case. Identify what the particular fact in issue is, for example, to identify a particular witness, or to prove that someone had done something/ or been engaged in some act.</p>

	<p>Generally, when should someone give evidence?</p> <p>The court may require X to give evidence if the evidence does not tend to prove that X committed an offence and the interests of justice require her to give evidence. Consider Lodhi factors</p>	
Unfairness discretion section 90	<p>General Point: The general point is that is the covertly recorded admissions during the undercover operation did not involve threats, coercion or oppressive conduct, then the recorded admissions are generally admissible. However, deception alone does not render a confession inadmissible (Hadara v the Queen). The question is whether the confession was made voluntarily and without improper pressure. If the accused spoke freely and believed he was speaking to [insert facts], it is unlikely that the Court will find unfairness warranting exclusion.</p> <p>Even if the trial judge concluded that the admission was sufficiently reliable for the purposes of section 85, the defence may ask that it be excluded in the exercise of the fairness discretion under section 90 (only applicable in criminal proceedings)</p> <p>The question is whether, given the circumstances in which the admission was made, it would be unfair to use it against D. (Pavic; Swaffield).</p> <ul style="list-style-type: none"> - Unfairness as its reliability is impacted to such an extent that it would be unfair to use it against D - Must confirm that the circumstances are such as to be unlikely to adversely affect the truth of the admission <p>Analogising to Pavic, an undercover officer was engaged and had recorded the conversation with the accused. In this case, the recording was admitted. The Court held that while the recording was covert, the accused had not been misled or coerced and the context did not override the fairness of admitting the evidence.</p> <p>Consider analogising/ distinguishing from Tofilau; Marks; Hill; Clarke: the undercover police made the accused believe that they, in their capacity of their undercover identities had the power to influence corrupt officials in the favour of the accused. The police officers posed as members of a criminal gang offering money, protection or assistance in exchange for cooperation. The confessions were made outside formal police interviews, often in social settings, with the accused believing they</p>	<p>Discretion to exclude admissions</p> <p>In a criminal proceeding, the court may refuse to admit evidence of an admission, or refuse to admit the evidence to prove a particular fact, if</p> <ul style="list-style-type: none"> (a) The evidence is adduced by the prosecution; and (b) Having regard to the circumstances in which the admission was made, it would be unfair to an accused to use the evidence

	<p>were speaking to powerful underworld figures. On these facts, it was held that the police are able to use tricks to gain information during an investigation, provided that they do not go against a statute (i.e. be illegal). The undercover operations did not involve threats, inducement or overbore the will or improper coercion. The accused spoke voluntarily, believing that they were speaking to criminals and not police.</p>	
<p>Circumstantial/ Indirect Evidence</p>	<p>Circumstantial Evidence: requires further inference- can be highly powerful eg. seeing someone run with blood all over them/ suicide note</p> <p>Plomp v R</p> <ul style="list-style-type: none"> • Facts: P was charged with murdering his wife. The prosecution must prove that P killed his wife with the requisite intention • Direct Evidence: dead body of wife washed up on the beach • Circumstantial Evidence: she was drowned; water in lungs suggests that she was alive when she was in the water. She went surfing with her husband. They knew the beach well and the surf was calm. She was a strong swimmer and the water was waist deep • Plomp stated that there was a strong undertone and he tried to grab her but her cozy strap ripped. This evidence did not suggest that it was possible for her to have drowned in those circumstances • Circumstantial Evidence: he had an affair with another woman, hold the mistress his wife can dead and he was a widow. He told his children that they were going to have a new mum. This adds up to a motive for Plomp to kill his wife. <p>Principle/ Held: circumstantial evidence can be compelling. Where competing inferences arise in a case, it is for the jury to determine whether the inference of guilt arises, and if so whether it completely overcomes all other inferences so as to leave no reasonable doubt in their minds. Hence, where there is a high probability that the occurrence of those circumstances would be accompanied by the existence of that fact-in-issue that the contrary cannot reasonably be supposed. If the jury considers that there is any reasonable explanation of those circumstances which is consistent with the innocence of the accused, they must find them not guilty.</p>	<p>As long as the evidence as a whole, suggests beyond reasonable doubt that the accused had committed the crime that they have been charged with, then both direct and indirect evidence can be tendered in as evidence</p>