

HYPOTHETICALS ON EVIDENCE

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Presenter: Christopher Maxwell QC

HYPOTHETICAL 1

Davies and Spencer returned to their apartment after midnight to find three other men, Molloy, Jones and Mitchell in the house. Immediately thereafter a violent confrontation between the men occurred. A neighbour called police who arrived very promptly.

Davies subsequently gave a formal statement to police where he said that he had never seen these men before and when he and Spencer came into the room they were attacked by all of them. Davies was punched to the face and his jaw was broken. He said that Spencer, who was apparently a person of great physical strength managed to overcome the 3 men. They also sustained substantial bruising to their faces.

Spencer gave a short statement to the first officer on the scene which was written in a summary form in the initial police report. He agreed to go into the police station the next day to give a more detailed statement to investigating police the day after, but never attended to do so.

The account given by Spencer was that the 3 men were known to Davies and Molloy had been given a key to the apartment. They were waiting for Davies to return and after this an argument took place between Davies and Molloy in which Davies threatened to kill Molloy. Then followed a fight in which Davies was punched a number of times by Molloy, Jones and Mitchell and that Spencer had come to Davies' assistance.

Molloy and Mitchell were interviewed by police by way of ERISP saying that Jones had told them that Davies had invited him to come to the flat in order to discuss a business proposition. **Molloy**, in addition said that he was frightened of Jones who he believed was a very violent man. He, Jones had a key which he used to open the flat and that they were simply waiting for Davies to return. Shortly after his return Davies became very upset and commenced to attack them. They had been surprised and had responded simply in order to defend themselves and leave the premises.

Jones was interviewed by ERISP and said that the 3 of them had broken in to the flat in order to steal drugs that they believed were there. He said that Molloy was the ring leader, that they were terrified of him and the reason he had been part of it was that Molloy had threatened to kill his daughter if he did not agree.

After committal the defendant **Mitchell** approached the police with a view to making an induced statement by way of ERISP. This was accepted and he said that the 3 had broken into the apartment, they were caught out and that they had violently assaulted Davies in an attempt to escape.

He was then offered and accepted a plea to assault occasioning actual bodily and agreed to give evidence in accordance with his ERISP.

The Crown filed an indictment against Molloy and Jones for aggravated break and enter.

At trial Davies gave evidence in accordance with his police statement, but Spencer could not be located after extensive inquiries by police. Davies had given evidence that Spencer had left his apartment that night owing him a large amount of money and he had never seen him again.

1. Are the contents of the initial police report containing the statement of Spencer admissible evidence in the trial? If so, who should lead this evidence?

The Crown also had a statement from **Johnson**, who said that he had worked together with Molloy, who had given to him another account. Molloy told Johnson that he had heard that Davies had a substantial amount of cash hidden in the apartment and he had gone there that night with Jones and Mitchell to steal it. Jones had some expertise in breaking locks and had gained entry in this fashion. He told Johnson that they had been surprised by the return of Davies and had fought with both in an attempt to get away.

2. The Crown gives notice that it intends to call Johnson to give this evidence. Is it admissible and if so, against whom?

3. Just before the trial starts Mitchell says that he will not give any evidence at all. How might the prosecutor handle this?

AUTHORITIES

***Elms, David John* [2004] NSWCCA 467
R v Suteski (2002) 56 NSWLR 182**

HYPOTHETICAL 2

Mr Ronald Charles was indicted for trial on two counts, one of supplying a large commercial quantity of heroin and the other supplying cocaine. The case against him was based largely on telephone intercepts.

The conversations appeared to use some kind of code and a police witness, Sergeant Davies analysed those conversations and will be called to give evidence about the meaning of certain words used in the relevant conversations. In his proof of evidence he says that expressions such as “old man”, “a big old man”, “a table”, “a bottle, a big bottle” referred to a 350 gram block of heroin and a “young man” or a “kid” referred to an ounce of heroin. In a conversation where the applicant referred to two little kids, he expresses the opinion that the conversation was about ounces of heroin.

He says also that prior to giving his interpretation of these words he had become aware of the fact that the accused had made this admission and that a co-accused had been arrested the day after, these conversations in possession of cocaine and heroin. He says that his interpretation on the meaning of these words was not based solely on the argot of drug dealing, but in part was based on a process of deduction from these subsequently established facts.

1. As defence counsel what will you do in relation to this evidence?

Another police witness Sgt Glen looked at the intercepts and gave a statement that in his opinion the words “*noses.....the sweet stuff....the sweet bloke*” all referred to cocaine.

As defence counsel you challenge this evidence and a voir dire examination is commenced. Here is an extract of some of the evidence:

Q. Is there a dictionary type document that you have relied upon which confirms that certain expressions are commonly meant to mean certain thing?

A. Can I say it in two parts.

Q. Please?

A. There is a document, yes as I referred to yesterday. That document didn't confirm anything for me. That document can be used as a guide or indicator and as an expert or as a person who purports to be an expert, I rely on what I see in that call to make a call. I certainly wouldn't allow someone else's opinion to be transposed into my opinion.

Q. So are you, are have you in preparing your statement relied upon a document which is said to indicate words that commonly mean something, or have you done this completely of your own independent experience?

A. I have utilised a document to assist me, but I have not in any way relied upon it. This is based wholly on my experience and knowledge

Q. The commonly accepted opinion in the police document on occasions you were at odds with it, you didn't agree?

A. The opinion – the document also allows for the person who purports that opinion to be, I may or may not agree with that person's opinion. It's not – it doesn't mean it's the position of the entire police force. It's the – that entry relates to the opinion of one person.”¹

Q. But you have on occasions used just common sense deduction that it's so unrealistic that what is being spoken about that the actual words mean what is being spoken about so unrealistic that that is correct you are able to draw the conclusion then it must not be what they're talking about so they must be talking about drugs?

A. Yes, I agree that I've used that logic. However, when I say they must be talking about drugs I base that on my other experience. I think there are a number of passages in my statement where it's so unrealistic they're talking about something other than what they mean and then I've used other logic and experience to come to the conclusion that it's drugs and take for example 30 noses, very unrealistic a man having 30 noses in two days, it's not possible. However, instead of saying that's just not right, it must be drugs I've used the word “noses” to combine with it to then say 30 something of drugs.”²

2. What arguments would you make on the admissibility of this evidence?

There is also evidence of a statement made to Sergeant Brown, the accused's custody manager after his arrest. After giving an ERISP in which he denied committing the offences Sgt Brown said “*As these are serious offences I will be refusing you bail. I will however get you before a magistrate this afternoon. What happens from there is a decision of the magistrate. Do*

¹ VD Transcript 9/11/06 p138.30.

² VD Transcript 9/11/06 p 263.55.

you understand that? The accused said “ Yes. I don’t know why I got involved in selling drugs. My girlfriend will leave me and my life is a mess.”

3. Is this evidence admissible against the accused?

AUTHORITIES

Keller v R [2006] NSWCCA 204

Nguyen v R 173 A Crim R 557

Chen v R [2011] NSWCCA 145

Tran v R NSWCCA

Bryant v R [2011] NSWCCA 26

HYPOTHETICAL 3

Late one evening in the Sydney suburb of Paddington neighbours heard very loud banging and voices raised in a terrace house. The Police were called and attended to find the front door ajar. They entered and found in the living room an open suitcase which contained \$A3 million. There was only one occupant of the house, who was a Venezuelan national called Francisco who said he was visiting Sydney and this was money he had obtained from a real estate transaction.

A report on Eagle Eye was made and the AFP became immediately aware that the state police had inadvertently stumbled into one of their current investigations. This investigation was in relation to the importation of cocaine from Columbia. The money was thought to be the proceeds of that importation.

The AFP had been running telephone intercepts on the phones of 2 men called Jenkins and Wilson. These calls were between each other and their principal in Columbia and concerned the importation of the drugs and how the payment was to be effected. Essentially it was that a third person would take the money back to Columbia. Francisco had arrived in Australia 2 days before from Venezuela and was staying at the premises in Paddington.

There were 25 telephone calls that had been made between these 2 and the principal prior to the arrival of Francisco.

Francisco was charged under Section 400.3(1) of the Criminal Code (Cth) with dealing with money, being the proceeds of crime and that he knew it.

Jenkins and Wilson were not located, but in any event, it could not be shown that they had any contact with the money.

The Crown sought to lead all of the abovementioned telephone conversations in the trial against Francisco. It should be noted that the Crown did not and

could not argue that Jenkins and Wilson were part of any joint criminal enterprise in relation to this offence.

**1. Would the telephone conversations be admissible against Francisco?
What provisions (if any) of the Evidence Act would apply?**

Authorities.

Li, Wing Cheong v R [2010] NSWCCA 40
Papakosmas V The Queen (1999) 1996 CLR 297 at 312
Walton v The Queen (1988-89) CLR 283 at 288

EXTRACTS FROM EVIDENCE ACT (NSW)

38 Unfavourable witnesses

- (1) A party who called a witness may, with the leave of the court, question the witness, as though the party were cross-examining the witness, about:
 - (a) evidence given by the witness that is unfavourable to the party, or
 - (b) a matter of which the witness may reasonably be supposed to have knowledge and about which it appears to the court the witness is not, in examination in chief, making a genuine attempt to give evidence, or
 - (c) whether the witness has, at any time, made a prior inconsistent statement.
- (2) Questioning a witness under this section is taken to be cross-examination for the purposes of this Act (other than section 39).
- (3) The party questioning the witness under this section may, with the leave of the court, question the witness about matters relevant only to the witness's credibility.

Note. The rules about admissibility of evidence relevant only to credibility are set out in Part 3.7.
- (4) Questioning under this section is to take place before the other parties cross-examine the witness, unless the court otherwise directs.
- (5) If the court so directs, the order in which the parties question the witness is to be as the court directs.
- (6) Without limiting the matters that the court may take into account in determining whether to give leave or a direction under this section, it is to take into account:
 - (a) whether the party gave notice at the earliest opportunity of his or her intention to seek leave, and
 - (b) the matters on which, and the extent to which, the witness has been, or is likely to be, questioned by another party.
- (7) A party is subject to the same liability to be cross-examined under this section as any other witness if:
 - (a) a proceeding is being conducted in the name of the party by or on behalf of an insurer or other person, and
 - (b) the party is a witness in the proceeding.

59 The hearsay rule—exclusion of hearsay evidence

- (1) Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation.
- (2) Such a fact is in this Part referred to as an **asserted fact**.
- (2A) For the purposes of determining under subsection (1) whether it can reasonably be supposed that the person intended to assert a particular fact by the representation, the court may have regard to the circumstances in which the representation was made.

Note. Subsection (2A) was inserted as a response to the decision of the Supreme Court of NSW in *R v Hannes* (2000) 158 FLR 359.

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.
Note. 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.

62 Restriction to “first-hand” hearsay

- (1) A reference in this Division (other than in subsection (2)) to a previous representation is a reference to a previous representation that was made by a person who had personal knowledge of an asserted fact.
- (2) A person has personal knowledge of the asserted fact if his or her knowledge of the fact was, or might reasonably be supposed to have been, based on something that the person saw, heard or otherwise perceived, other than a previous representation made by another person about the fact.
- (3) For the purposes of section 66A, a person has personal knowledge of the asserted fact if it is a fact about the person’s health, feelings, sensations, intention, knowledge or state of mind at the time the representation referred to in that section was made.

65 Exception: criminal proceedings if maker not available

- (1) This section applies in a criminal proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.
- (2) The hearsay rule does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if the representation:
 - (a) was made under a duty to make that representation or to make representations of that kind, or
 - (b) was made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication, or
 - (c) was made in circumstances that make it highly probable that the representation is reliable, or
 - (d) was:
 - (i) against the interests of the person who made it at the time it was made, and
 - (ii) made in circumstances that make it likely that the representation is reliable.
Note. Section 67 imposes notice requirements relating to this subsection.
- (3) The hearsay rule does not apply to evidence of a previous representation made in the course of giving evidence in an Australian or overseas proceeding if, in that proceeding, the defendant in the proceeding to which this section is being applied:
 - (a) cross-examined the person who made the representation about it, or

- (b) had a reasonable opportunity to cross-examine the person who made the representation about it.
- Note.** Section 67 imposes notice requirements relating to this subsection.
- (4) If there is more than one defendant in the criminal proceeding, evidence of a previous representation that:
- (a) is given in an Australian or overseas proceeding, and
 - (b) is admitted into evidence in the criminal proceeding because of subsection (3), cannot be used against a defendant who did not cross-examine, and did not have a reasonable opportunity to cross-examine, the person about the representation.
- (5) For the purposes of subsections (3) and (4), a defendant is taken to have had a reasonable opportunity to cross-examine a person if the defendant was not present at a time when the cross-examination of a person might have been conducted but:
- (a) could reasonably have been present at that time, and
 - (b) if present could have cross-examined the person.
- (6) Evidence of the making of a representation to which subsection (3) applies may be adduced by producing a transcript, or a recording, of the representation that is authenticated by:
- (a) the person to whom, or the court or other body to which, the representation was made, or
 - (b) if applicable, the registrar or other proper officer of the court or other body to which the representation was made, or
 - (c) the person or body responsible for producing the transcript or recording.
- (7) Without limiting subsection (2) (d), a representation is taken for the purposes of that subsection to be against the interests of the person who made it if it tends:
- (a) to damage the person's reputation, or
 - (b) to show that the person has committed an offence for which the person has not been convicted, or
 - (c) to show that the person is liable in an action for damages.
- (8) The hearsay rule does not apply to:
- (a) evidence of a previous representation adduced by a defendant if the evidence is given by a person who saw, heard or otherwise perceived the representation being made, or
 - (b) a document tendered as evidence by a defendant so far as it contains a previous representation, or another representation to which it is reasonably necessary to refer in order to understand the representation.
- Note.** Section 67 imposes notice requirements relating to this subsection.
- (9) If evidence of a previous representation about a matter has been adduced by a defendant and has been admitted, the hearsay rule does not apply to evidence of another representation about the matter that:
- (a) is adduced by another party, and
 - (b) is given by a person who saw, heard or otherwise perceived the other representation being made.
- Note.** Clause 4 of Part 2 of the Dictionary is about the availability of persons.

66 Exception: criminal proceedings if maker available

- (1) This section applies in a criminal proceeding if a person who made a previous representation is available to give evidence about an asserted fact.
- (2) If that person has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by:
 - (a) that person, or

- (b) a person who saw, heard or otherwise perceived the representation being made, if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.
- (2A) In determining whether the occurrence of the asserted fact was fresh in the memory of a person, the court may take into account all matters that it considers are relevant to the question, including:
 - (a) the nature of the event concerned, and
 - (b) the age and health of the person, and
 - (c) the period of time between the occurrence of the asserted fact and the making of the representation.

Note. Subsection (2A) was inserted as a response to the decision of the High Court of Australia in *Graham v The Queen* (1998) 195 CLR 606.

- (3) If a representation was made for the purpose of indicating the evidence that the person who made it would be able to give in an Australian or overseas proceeding, subsection (2) does not apply to evidence adduced by the prosecutor of the representation unless the representation concerns the identity of a person, place or thing.
- (4) A document containing a representation to which subsection (2) applies must not be tendered before the conclusion of the examination in chief of the person who made the representation, unless the court gives leave.

Note. Clause 4 of Part 2 of the Dictionary is about the availability of persons.

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.

79 Exception: opinions based on specialised knowledge

- (1) If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.
- (2) To avoid doubt, and without limiting subsection (1):
 - (a) a reference in that subsection to specialised knowledge includes a reference to specialised knowledge of child development and child behaviour (including specialised knowledge of the impact of sexual abuse on children and their development and behaviour during and following the abuse), and
 - (b) a reference in that subsection to an opinion of a person includes, if the person has specialised knowledge of the kind referred to in paragraph (a), a reference to an opinion relating to either or both of the following:
 - (i) the development and behaviour of children generally,
 - (ii) the development and behaviour of children who have been victims of sexual offences, or offences similar to sexual offences.

85 Criminal proceedings: reliability of admissions by defendants

- (1) This section applies only in a criminal proceeding and only to evidence of an admission made by a defendant:
 - (a) to, or in the presence of, an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence, or
 - (b) as a result of an act of another person who was, and who the defendant knew or reasonably believed to be, capable of influencing the decision whether a prosecution of the defendant should be brought or should be continued.

Note. Subsection (1) was inserted as a response to the decision of the High Court of Australia in *Kelly v The Queen* (2004) 218 CLR 216.
- (2) Evidence of the admission is not admissible unless the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected.
- (3) Without limiting the matters that the court may take into account for the purposes of subsection (2), it is to take into account:
 - (a) any relevant condition or characteristic of the person who made the admission, including age, personality and education and any mental, intellectual or physical disability to which the person is or appears to be subject, and
 - (b) if the admission was made in response to questioning:
 - (i) the nature of the questions and the manner in which they were put, and
 - (ii) the nature of any threat, promise or other inducement made to the person questioned.

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101A Credibility evidence

Credibility evidence, in relation to a witness or other person, is evidence relevant to the credibility of the witness or person that:

- (a) is relevant only because it affects the assessment of the credibility of the witness or person, or
- (b) is relevant:
 - (i) because it affects the assessment of the credibility of the witness or person, and
 - (ii) for some other purpose for which it is not admissible, or cannot be used, because of a provision of Parts 3.2 to 3.6.

Notes.

102 The credibility rule

Credibility evidence about a witness is not admissible.

Notes.

¹ Specific exceptions to the credibility rule are as follows:

- evidence adduced in cross-examination (sections 103 and 104)
- evidence in rebuttal of denials (section 106)
- evidence to re-establish credibility (section 108)
- evidence of persons with specialised knowledge (section 108C)
- character of accused persons (section 110)

Other provisions of this Act, or of other laws, may operate as further exceptions.

² Sections 108A and 108B deal with the admission of credibility evidence about a person who has made a previous representation but is not a witness.

103 Exception: cross-examination as to credibility

- (1) The credibility rule does not apply to evidence adduced in cross-examination of a witness if the evidence could substantially affect the assessment of the credibility of the witness.
- (2) Without limiting the matters to which the court may have regard for the purposes of subsection (1), it is to have regard to:
 - (a) whether the evidence tends to prove that the witness knowingly or recklessly made a false representation when the witness was under an obligation to tell the truth, and
 - (b) the period that has elapsed since the acts or events to which the evidence relates were done or occurred.

106 Exception: rebutting denials by other evidence

- (1) The credibility rule does not apply to evidence that is relevant to a witness's credibility and that is adduced otherwise than from the witness if:
 - (a) in cross-examination of the witness:
 - (i) the substance of the evidence was put to the witness, and
 - (ii) the witness denied, or did not admit or agree to, the substance of the evidence, and
 - (b) the court gives leave to adduce the evidence.
- (2) Leave under subsection (1) (b) is not required if the evidence tends to prove that the witness:
 - (a) is biased or has a motive for being untruthful, or
 - (b) has been convicted of an offence, including an offence against the law of a foreign country, or
 - (c) has made a prior inconsistent statement, or
 - (d) is, or was, unable to be aware of matters to which his or her evidence relates, or
 - (e) has knowingly or recklessly made a false representation while under an obligation, imposed by or under an Australian law or a law of a foreign country, to tell the truth.

108A Admissibility of evidence of credibility of person who has made a previous representation

- (1) If:
 - (a) evidence of a previous representation has been admitted in a proceeding, and
 - (b) the person who made the representation has not been called, and will not be called, to give evidence in the proceeding, credibility evidence about the person who made the representation is not admissible unless the evidence could substantially affect the assessment of the person's credibility.
- (2) Without limiting the matters to which the court may have regard for the purposes of subsection (1), it is to have regard to:
 - (a) whether the evidence tends to prove that the person who made the representation knowingly or recklessly made a false representation when the person was under an obligation to tell the truth, and

- (b) the period that elapsed between the doing of the acts or the occurrence of the events to which the representation related and the making of the representation.

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135 General discretion to exclude evidence

The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:

- (a) be unfairly prejudicial to a party, or
- (b) be misleading or confusing, or
- (c) cause or result in undue waste of time.

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.

137 Exclusion of prejudicial evidence in criminal proceedings

In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.

Criminal Procedure Act 1986 No 209

Current version for 1 July 2011 to date (accessed 9 September 2011 at 14:29)

[Chapter 6](#) [Part 2](#) [Section 281](#)

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281 Admissions by suspects

- (1) This section applies to an admission:
 - (a) that was made by an accused person who, at the time when the admission was made, was or could reasonably have been suspected by an investigating official of having committed an offence, and
 - (b) that was made in the course of official questioning, and
 - (c) that relates to an indictable offence, other than an indictable offence that can be dealt with summarily without the consent of the accused person.
- (2) Evidence of an admission to which this section applies is not admissible unless:
 - (a) there is available to the court:
 - (i) a tape recording made by an investigating official of the interview in the course of which the admission was made, or
 - (ii) if the prosecution establishes that there was a reasonable excuse as to why a tape recording referred to in subparagraph (i) could not be made, a tape recording of an interview with the person who made the admission, being an interview about the making and terms of the admission in the course of which the person states that he or she made an admission in those terms, or

- (b) the prosecution establishes that there was a reasonable excuse as to why a tape recording referred to in paragraph (a) could not be made.
- (3) The hearsay rule and the opinion rule (within the meaning of the *Evidence Act 1995*) do not prevent a tape recording from being admitted and used in proceedings before the court as mentioned in subsection (2).
- (4) In this section:

investigating official means:

- (a) a police officer (other than a police officer who is engaged in covert investigations under the orders of a superior), or
- (b) a person appointed by or under an Act (other than a person who is engaged in covert investigations under the orders of a superior) whose functions include functions in respect of the prevention or investigation of offences prescribed by the regulations.

official questioning means questioning by an investigating official in connection with the investigation of the commission or possible commission of an offence.

reasonable excuse includes:

- (a) a mechanical failure, or
- (b) the refusal of a person being questioned to have the questioning electronically recorded, or
- (c) the lack of availability of recording equipment within a period in which it would be reasonable to detain the person being questioned.

tape recording includes:

- (a) audio recording, or
- (b) video recording, or
- (c) a video recording accompanied by a separately but contemporaneously recorded audio recording.