

EXCLUDING EVIDENCE UNDER SECTION 137 OF THE EVIDENCE ACT, 1995

"Like other sections of the *Evidence Act*, s.137 calls upon a judge to compare essentially incommensurable considerations: probative value on the one hand and unfair prejudice on the other. As Justice Scalia once put it, this is like asking "***whether a particular line is longer than a particular rock is heavy***" (*Bendix Autolite Corporation v Midwesco Enterprises Inc* 486 US 888 (1988) at 897). Nevertheless this is a task that judges are often called upon to perform."

Source: (**R v Shamouil** [2006] NSWCCA 112 per Spigelman CJ at [71] -emphasis mine)

1. "Is the line longer than the rock is heavy?" – Not an inconsequential question

The Evidence Act, 1995 has been in force in NSW for a period approaching 18 years.

Put in terms as bald as Justice Scalia's formulation, the "comparative exercise" which section 137 requires of the judge might seem to a non-lawyer to have much in common with the question "**How many angels can dance on the head of a pin?**"

The authors of Wikipedia suggest that in modern usage the question

"...serves as a metaphor for wasting time debating topics of no practical value or questions whose answers hold no intellectual consequence".

To the non-lawyer the judicial debate concerning the proper application of section 137 might appear to be mysterious, obscure, obtuse and arcane. It has extended for most of the time that the Act has been in force.

However, whilst much of that debate could fairly be described in such terms, the practical results of it are important for criminal lawyers and their clients and the resolution of the "comparative exercise" in "the particular case" has very real practical consequences.

Section 137 is often the very last port of call for the lawyer or Accused person seeking to secure a fair trial and despite the fact that in my opinion the cases are extremely difficult to reconcile it is incumbent on all of us to endeavour to "waste a little time" coming to grips with how the section has been judicially interpreted.

2. A little bit of history – The birth of the *Christie* Discretion

In 1914 the House of Lords dealt with an appeal in **R v Christie**¹. Christie had been convicted of an indecent assault on a boy.

At the trial the boy's mother stated in evidence that, as she and her son came up to the respondent shortly after the act complained of, the little boy said in the respondent's hearing "That is the man", and described what the respondent did to him, and that the respondent replied "I am innocent".²

For his 20th century legal representatives at the trial, Mr Christie's words created a problem which is not unfamiliar to criminal lawyers in the 21st century.

In this century it is not uncommon for an accused person to say or do something amounting to a denial or involving words or actions more ambiguous than that, the evidence of which, the prosecution later contends is somehow probative of guilt of the offence charged.

In the decision, the House of Lords, expounded upon a common law "rule of practice", which governed the circumstances when statements of the Accused that did not amount to unambiguous admissions (as well as the statements of others made in his or her presence), ought to be excluded on the basis that they had limited

¹ [1914] AC 545

² at 545

probative value but created a risk of prejudice that might be difficult for the trial judge to overcome in directions to the jury.

3. A bit more history – The *Christie* discretion potentially applies to "any" evidence

In subsequent cases the *Christie* discretion, as it became known, applied to evidence much broader in compass than merely to evidence of statements made by or in the presence of an Accused.³

Thus in **R v Carusi**⁴, Hunt CJ at CL described the discretion in terms

"whereby the trial judge may exclude any evidence where its prejudice to the accused outweighs its probative value"

4. Judicial concern that the exercise of the *Christie* discretion usurps the role of the jury

The leading judgments in **R v Christie** were perhaps those delivered by Lord Moulton and Lord Reading. I have not extracted those in this paper but it is important to note that those judgments demonstrate that even at that early stage, the exercise of the *Christie* discretion was impacted upon by three sometimes distinct but sometimes related matters, namely:

1. The Court's view of the probative value of the evidence objected to;
2. The Court's view of the potential for unfair prejudice to the Accused of admission of the evidence; and
3. The degree to which any unfair prejudice could be ameliorated by directions to the jury.

Where the discretion was exercised in favour of an Accused, its exercise could always be criticised (rightly or wrongly) on the basis that the trial judge was usurping the role of the jury.

As a consequence (and although I have not assembled the empirical evidence to support the assertion) I would suggest that the Courts were generally reluctant to exercise the discretion and it was invoked much more frequently by defence counsel than it was exercised by courts in favour of the Accused.

³ See for example, the discussion in **Dupas v the Queen** [2012] VSCA 328, (2012) 218 A Crim R 507 where the Court reviewed authorities where the discretion was exercised or considered in relation to:

- Identification evidence [79-92]
- Confessions and admissions [116-123]
- Accomplice evidence [124]
- Expert evidence [125-132]
- Propensity, similar facts, tendency and coincidence evidence [133-138]
- Complaint evidence [138]

⁴ (1997) 92 A Crim R 52 at 55 (emphasis added)

A similar reluctance to exclude evidence pursuant to s.137 is evident in the cases.

5. The provisions of the Act

Prior to the enactment of the Evidence Act, the Australian Law Reform Commission proposed that the *Christie* discretion be retained in its conventional form.⁵ There has been some debate about whether the legislature achieved that intention but I will not directly address that debate in the course of this discussion.

Section 137 provides:

"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/accused]"

"Criminal proceeding" is defined in the dictionary to mean:

"a prosecution for an offence and includes –

- (a) a proceeding for the committal of a person for trial or sentence for an offence; and**
- (b) a proceeding relating to bail- but does not include a prosecution for an offence that is a prescribed taxation offence within the meaning of Part III of the *Taxation Administration Act 1953* of the Commonwealth"**

The words "probative value" are defined in the dictionary as follows:

"Probative value of evidence means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue"

Judicial interpretations of the dictionary definition of "probative value" often refer to section 55 so I repeat it in part:

"55 Relevant evidence

- (1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.**
- (2)"**

The Act does not define the term "unfair prejudice".

Another portion of the Act which has become relevant in recent times is the dictionary definition of "credibility". It is defined as follows:

"credibility of a witness means the credibility of any part or all of the evidence of the witness, and includes the witness's ability to observe or remember facts and events about which the witness has given, is giving or is to give evidence"

⁵ ALRC 26, vol 1, para 957

6. Uncontroversial propositions concerning section 137

6.1. Section 137 is a mandatory provision which involves a weighing exercise analogous to a discretionary judgment

The presence of the word "must" in the section indicates that it is a mandatory provision. The court "must" refuse to admit the evidence if its probative value is outweighed by the danger of unfair prejudice to the Accused.

In **R v Blick**⁶, Sheller JA at [19-20] noted that the task set by s.137 is analogous to the exercise of a judicial discretion:

"... a trial judge's estimate of how the probative value should be weighed against the danger of unfair prejudice will be one of opinion based on a variety of circumstances, the evidence, the particulars of the case and the judge's own trial experience. In that sense, the result can be described as analogous to a discretionary judgment: see Heydon, *A Guide to the Evidence Acts* (2nd ed, 1997), par 3.725

Even so, and with due respect, there seems to me to be a risk of error if a judge proceeds on the basis that he or she is being asked to exercise a discretion about whether or not otherwise admissible evidence should be rejected because of unfair prejudice to the defendant. The correct approach is to perform the weighing exercise mandated. If the probative value of the evidence adduced by the prosecutor is outweighed by the danger of unfair prejudice to the defendant, there is no residual discretion. The evidence must be rejected."

6.2. Unfair prejudice means more than that the evidence damages the accused's case

Evidence is not unfairly prejudicial to a defendant merely because it makes it more likely that the defendant will be convicted.⁷

One explanation of the concept of "unfair prejudice" is that which appeared in the Australian Law Reform Commission report which explained in relation to s.135(a):

"By risk of unfair prejudice is meant the danger that the fact-finder may use the evidence to make a decision on an improper, perhaps emotional basis, ie on a basis logically unconnected with the issues in the case. Thus evidence that appeals to the fact-finder's sympathies, arouses a sense of horror, provokes an instinct to punish, or triggers other mainsprings of human action may cause the fact-finder to base his decision on something other than the established propositions in the case. Similarly, on hearing the evidence the fact-finder may be satisfied with a lower degree of probability than would otherwise be required."⁸

⁶ [2000] NSWCCA 61, (2000) 111 A Crim R 326

⁷ Odgers in Uniform Evidence Law (Loose leaf edition) at [1.3.14780] cites Mc Hugh J in **Papakosmas v The Queen** (1999) 196 CLR 297; 73 ALJR 1274 at [91] and 98; **Festa v The Queen** (2001) 208 CLR 593 per Gleeson CJ (at [22]), Mc Hugh J (at [51]); **R v GK** (2001) 53 NSWLR 317; 125 A Crim R 315; [2001] NSWCCA 413 at [39] per Mason P as authority for this proposition.

⁸ ALRC 26, vol 1, para 644

A similar explanation contained in the same report was as follows:

"There is some uncertainty over the meaning of "prejudice". But, clearly, it does not mean simply damage to the accused's case. It means damage to the accused's case in some unacceptable way, by provoking some irrational, emotional response, or giving the evidence more weight than it should have." ⁹

These explanations of the concept have found favour with the judiciary and in **R v Lisoff**¹⁰ at [52] the Court quoted the last of those passages with approval.

Similarly in the decision **R v Yates**¹¹ the Court at [252] explained unfair prejudice in the following terms:

"On the other side of the comparison is "unfair prejudice", or the danger thereof arising from the evidence. All evidence incriminatory of an accused which has probative value, necessarily causes prejudice, but this is not the prejudice of which sections 135 to 137 (or for that matter s 192) speak. Prejudice argues for exclusion only if there is a *real risk* of danger of it being unfair: *R v Lisoff* [1999] NSWCCA 364. This may arise in a variety of ways, a typical example being where it may lead a jury to adopt an illegitimate form of reasoning, or to give the evidence undue weight. However, insofar as any prejudice flows from the legitimate use of evidence it provides no ground for the exercise of the duty or discretion arising under sections 135-137".

Although these explanations of unfair prejudice are uncontroversial they must constantly be borne in mind and, if arguing for exclusion under s.137, care must be taken to identify the "real risk" and characterise it in terms such as those set out above.

7. A controversial area – Reliability and Credibility

7.1. How is probative value assessed? – the "narrow construction" v the "broad construction"

In performing the exercise mandated by s.137, there have been divergent views as to how a Court ought to go about assessing probative value.

Smith and Odgers¹² characterised these divergent views in terms of two contrasting positions, the "narrow construction" and the "broad construction".

According to them, the "narrow construction" of s.137 requires the Court to assess the probative value of disputed evidence without regard to issues of its credibility or its reliability. Adopting the "narrow construction" a court assumes the evidence will be accepted by the tribunal of fact and takes no account of its credibility or reliability in assessing its probative value.

⁹ ALRC 26, vol 1, para 957

¹⁰ [1999] NSWCCA 364

¹¹ [2002] NSWCCA 520

¹² Tim Smith and Stephen Odgers, "Determining 'probative value' for the purposes of section 137 in the Uniform Evidence Law" (2010) 34 Crim LJ 292 at 293

By contrast the "broad construction" holds that the Court is free, within limits, to assess the credibility and/or reliability of the evidence in assessing its probative value and is not bound to assume its acceptance in making that assessment.

They noted that

"The High Court is yet to rule on this issue, although Gaudron J and Mc Hugh J have, at different times, expressed views which have been regarded as being on different sides of the debate"¹³

This is a reference to dicta of Mc Hugh J in **Papakosmas v The Queen** ¹⁴ where His Honour stated:

"Probative value is defined in the Dictionary of the Act as being 'the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue'. That assessment, of course, would necessarily involve considerations of reliability"

That was contrasted with the comments of Gaudron J in her dissenting judgment in **Adam v The Queen** ¹⁵

"The dictionary to the Act defines 'probative value' to mean 'the extent to which the evidence could rationally affect the probability of the existence of a fact in issue'. That definition echoes the substance of s 55(1) of the Act which provides that 'evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding'. It is to be noted that the dictionary definition differs from s 55 in that it is not predicated on the assumption that the evidence will be accepted.

The omission from the dictionary definition of "probative value" of the assumption that the evidence will be accepted is, in my opinion, of no significance. As a practical matter, evidence can rationally affect the assessment of the probability of a fact in issue only if it is accepted. Accordingly, the assumption that it will be accepted must be read into the dictionary definition"

7.2. NSW Court of Criminal Appeal adopts the "narrow construction"

In the NSW Court of Criminal Appeal, a line of authority has favoured the "narrow construction"¹⁶.

An early case in that line authority was **R v Carusi** ¹⁷.

One of the issues in the appeal was whether identification evidence ought to have been excluded upon the basis of the *Christie* discretion. The appeal was ultimately allowed upon the basis that the jury's verdict was unsafe and unsatisfactory.

¹³ at p.293

¹⁴ (1999) 196 CLR 297 at [86]; 73 ALJR 1274

¹⁵ (2001) 207 CLR 96 at [59]-[60]

¹⁶ Although in **R v Shamouil** [2006] NSWCCA 112; (2006) 66 NSWLR 228, Spigelman CJ characterised it as "the restrictive approach" at [60]

¹⁷ (1997) 92 A Crim R 52

Before reaching that result, Hunt CJ at CL (Newman J and Ireland J agreeing) rejected the submission that the evidence ought to have been excluded upon the basis of the *Christie* discretion. In the process of dealing with that issue His Honour observed:

"The power of the trial judge to exclude evidence in accordance with the *Christie* discretion does not permit the judge, in assessing what its probative value is, to determine whether the jury should or should not accept the evidence of the witness upon which the Crown case depends. The trial judge can only exclude the evidence of such a witness where, taken at its highest, its probative value is outweighed by its prejudicial effect; whereas this Court may use its supervisory powers to set aside a verdict where, the issue having been left to the jury, this Court is satisfied – on the whole of the evidence – that the jury ought nevertheless have had a reasonable doubt" ¹⁸

Those observations have been influential in subsequent consideration of the operation of s.137 by the NSW CCA.

In **R v Singh-Bal**¹⁹ Hunt CJ at CL after referring to **R v Carusi** specifically adopted the phrase he had previously used in the context of the *Christie* discretion "taken at its highest" when he said in relation to s.137,

"The trial judge can exclude the evidence only where, taken at its highest, its probative value is outweighed by its prejudicial effect"²⁰

Similarly the Court (constituted by Wood CJ at CL, Hulme J and Buddin J) in **R v Yates**²¹ again adopted that phrase.

Whilst a decision in keeping with this theme, the decision of **R v Cook**²² might have at first appeared to leave some role for a court's assessment of reliability and credibility when assessing its probative value. The Court ultimately found that the trial judge erred in admitting evidence of flight on the basis that its prejudicial effect was unfair and outweighed its probative value when regard was had to the evidence which the Accused gave on the voir dire as to his reasons for flight. That evidence

"not only disclosed previous criminal offences, it disclosed criminal offences with a disturbingly close relationship to the offence with which he was charged." ²³

Simpson J (with Ipp JA and Adams J agreeing) delivered the judgment and at [43] she said:

"....I am satisfied that it is not the role of a trial judge in NSW, under the Evidence Act, to make a finding of fact about the actual reasons for flight where such evidence is given on behalf of the Crown. That remains the province of the jury. The role of the judge in NSW, at least post- 1995, is merely to determine the relative probative value against the danger of unfair prejudice that might result. In saying this, I do not mean to lay down a blanket rule that, in considering evidence on a voir dire in which the issue is the admissibility of evidence having regard to s 137, there is never any room for findings

¹⁸ at 66

¹⁹ (1997) 92 A Crim R 397

²⁰ at 403

²¹ [2002] NSWCCA 520 at [255]-[256]

²² [2004] NSWCCA 52

²³ at [48]

concerning credibility. There will be occasions when an assessment of the credibility of evidence will be inextricably entwined with the balancing process. That means that particular caution must be exercised to ensure that the balancing exercise is not confused with the assessment of credibility, a task committed to the jury. There may, for example, be occasions on which the accused's response is so preposterous as to give rise to the conclusion that it could be accepted by no reasonable jury. The credibility exercise, in those circumstances, is to determine whether the evidence given by (or on behalf of) the accused is capable of belief by the jury. If it is, then its prejudicial effect must be considered. If it is not, then the balancing exercise may well result in an answer favourable to the Crown. That is essentially because any prejudice arising to an accused from putting a preposterous explanation to the jury would not be unfair prejudice."

In that same year, the case of **R v Rahme**²⁴ considered the meaning of the term "probative value" in s.105 of the Criminal Procedure Act, 1986 as it was then drafted. It was agreed by all members of the Court that the term had the same meaning as in the Evidence Act.

James J (with whom Sully J agreed), relying on Gaudron J's comments in **Adam v The Queen** and also referring to Hunt CJ's expression "taken at its highest"²⁵, concluded that the trial judge had erred in taking into account, when assessing the probative value of evidence, that he himself had found the evidence

"unconvincing, odd and lacking much connection with reality and that he himself considered that the evidence was inconsistent with other evidence which had been admitted."²⁶

By contrast Hulme J in his dissenting judgment took the view that the trial judge did not so err.

After quoting Gaudron J's comments in **Adam v The Queen** His Honour indicated that he had difficulty accepting that the dictionary definition of "probative value" has to be read on the assumption that the evidence will be accepted. His Honour went on to say:

[221] By virtue of the words used in the definition, any consideration under the Evidence Act of the probative value of evidence requires an assessment of "the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue". Take for example the evidence of a witness of generally bad credibility who had said on a number of occasions that he did not see an event occur but who, at the time of trial is disposed to give evidence to the effect that he did see the particular event. It does not seem to me that a judge, asked to exercise his discretion under s. 135 should be obliged to proceed on the basis that the proposed evidence would be accepted. Why could he not say that, given the earlier contrary assertions, the evidence could not, rationally affect the probability of the existence of any fact in issue?

[222] The need to consider the "extent" in the context of "rationally affect" to my mind argues for an assessment of the credibility of the author and the likelihood of the evidence being accepted. That is not to deny that operation must be given to the word "could" in the expression "could rationally affect".

²⁴ [2004] NSWCCA 233

²⁵ From R v Carusi

²⁶ at [205]

When a judge is required to consider the probative value of evidence, the test is not simply whether the judge believes it.

[223] Many of the occasions contemplated by the Evidence Act as to requiring an assessment of probative value also point in the direction of requiring, or at least permitting, an assessment of the credibility or reliability of the evidence under consideration. These include comparison with "any prejudicial effect it (the evidence) may have on the defendant"—s 101, "the danger (the evidence) might be unfairly prejudicial... misleading or confusing, or cause or result in undue waste of time"—s 135, and "the danger of unfair prejudice" – s 137. It strikes me that a far more useful comparison with these matters can be made if a comprehensive assessment of the value of the evidence under consideration can be made, rather than an assessment circumscribed by a prohibition on considering the credibility or reliability of the author of the evidence.

8. R v Shamouil – Controversy resolved, or was it?

The line of sometimes conflicting NSW authority (referred to above) culminated in the decision **R v Shamouil**²⁷.

After tracing the NSW CCA decisions from **R v Carusi** onwards; and also noting the competing approaches of Gaudron J and Mc Hugh J; Spigelman CJ (with Simpson J and Adams J agreeing) said:

"60 The preponderant body of authority in this Court is in favour of a restrictive approach to the circumstances in which issues of reliability and credibility are to be taken into account in determining the probative value of evidence for purposes of determining questions of admissibility. There is no reason to change that approach.

61 In my opinion, the critical word in this regard is the word *could* in the definition of probative value as set out above, namely, 'the extent to which the evidence could rationally affect the assessment ...'. The focus on *capability* draws attention to what it is *open* for the tribunal of fact to conclude. It does not direct attention to what a tribunal of fact is *likely* to conclude. Evidence has 'probative value', as defined, if it is capable of supporting a verdict of guilty.

62 This conclusion is reinforced by the test that evidence must 'rationally affect' the assessment. As Gaudron J emphasised in *Adam*, a 'test' of 'rationality' also directs attention to capability rather than weight.

63 There will be circumstances as envisaged by Simpson J in *R v Cook*, where issue of credibility or reliability are such that it is possible for a court to determine that it would not be open to the jury to conclude that the evidence could rationally affect the assessment of the probability of the existence of the fact in issue. In that limited sense Mc Hugh J's observations in *Papakosmas* that 'considerations of reliability are necessarily involved' have application.

64 To adopt any other approach would be to usurp for a trial judge critical aspects of the traditional role of a jury...".

On one reading, upon the approach in **R v Shamouil** issues of credibility and reliability play no role in the assessment of probative value except where it can be said that those issues are such that it would not be open to a jury to conclude that the evidence could rationally affect the assessment of the probability of the existence.

²⁷ [2006] NSWCCA 112; (2006) 66 NSWLR 228

Odgers²⁸ notes that the difficulty with this analysis is that in the limited circumstances where the court allows issues of credibility and reliability to play a part in the assessment of probative value, the evidence would not be relevant and would be inadmissible under s.56(2) with the effect that s. 137 would have no application.

Regardless of this, the problem with the **Shamouil** approach for the defence lawyer is that arguably probative value will generally be assessed without regard to *extent to which* the evidence is *capable* of bearing on the fact in issue. This in my view, has the effect of weighting the scales in favour of the prosecution before the comparative exercise begins. If the particular frailties of the evidence are ignored in assessing probative value, the practical result (although he/she bears no onus) is that the Accused must necessarily demonstrate a greater risk of unfair prejudice for the comparative exercise to move the scale in favour of exclusion.

9. Subsequent NSW CCA decisions apply R v Shamouil

9.1 R v Mundine

Perhaps an illustration of the last point is the decision in **R v Mundine**²⁹. In that case, Simpson J (Mc Lellan CJ at CL and Grove J agreeing) applied **R v Shamouil**.

On Her Honour's analysis, the trial judge's conclusion that identification evidence did not have strong probative value, took into account the implied statutory recognition of the potential weaknesses in identification evidence spelled out in s.165 of the Evidence Act.

At [37] Her Honour said:

"In my opinion, in taking this approach to the assessment of the probative value of the evidence his Honour fell into the error referred to in *Shamouil*. He took into account the reliability of the evidence, and the credibility or reliability of the witnesses through whom, it was proposed, the evidence would be given. As was pointed out in *Shamouil* ([64]-[65]) this trespassed upon the function of the jury."

When considering the danger of "unfair prejudice", her Honour did acknowledge at [44] that considerations of credibility and reliability could be weighed into the assessment. However, in her Honour's analysis, the danger of prejudice was "very low indeed" [at 49] as compared to probative value which was "very high indeed". Accordingly the evidence ought to have been admitted.

9.2 R v Sood

R v Shamouil was also applied in an earlier case **R v Sood**³⁰. In that case the Crown contended that the respondent had disposed of some receipt books and receipts by placing them in a bin. It submitted that this conduct displayed a "consciousness of guilt". The respondent denied disposing of the items but her counsel submitted that if the jury rejected that denial, a reasonable alternate innocent hypothesis for her conduct was that she sought to dispose of the material to conceal her exposure to an allegation of tax fraud.

²⁸ Odgers *Uniform Evidence Law* (Loose leaf edition) [1.3.14760]

²⁹ [2008] NSWCCA 55; (2008) 182 A Crim R 302

³⁰ [2007] NSWCCA 214

Latham J (Ipp JA and Fullerton J agreeing) applied **R v Shamouil** but went further and held at [27]:

"Section 137 requires the assessment of the probative value of evidence to be adduced by the prosecution, that is, the probative value of that evidence in the Crown case, unqualified by competing constructions or inadequacies that might be advanced by the defendant or contrary evidence that might be led in the defendant's case"

In a later part of the same judgment her Honour also said, referring to **R v Cook** at [36] said:

"...The critical passages of Simpson J's judgment, set out below in bold type, confirm that her Honour determined that findings of fact, including questions of credibility and reliability (and therefore weight), from the evidence on the voir dire play no part in the assessment of the probative value of evidence sought to be admitted in the Crown case. The credibility and reliability of any explanation proffered by the accused, in order to explain flight or other conduct suggestive of a consciousness of guilt, may however play a role in the balancing exercise, that is, in determining whether unfair prejudice arises out of the nature of the explanation."

And finally, in reference to the assessment of probative value, at [40] Her Honour said:

"...it was no part of the trial judge's function... to have regard to competing explanations for the respondent's conduct, other than that upon which the Crown relied, even assuming that an alternative explanation was given by the respondent on the voir dire."

9.3 DSJ v the Queen; NS v The Queen

Odgers³¹ cites **DSJ v The Queen; NS v The Queen**³² as authority for the proposition that **R v Sood** is no longer good law. **DSJ** involved an issue of the test of "significant probative value" in s. 98(1)(b).

Contrary to what had been held in **R v Sood** it was conceded (and the Court accepted) that when assessing probative value, a court may have regard to any alternative explanation to that advanced by the prosecution if it arises on the evidence³³. Bathurst CJ said at [10]:

"However, as Whealy JA has pointed out (at [78]-[81]), the trial judge in forming a view as to whether the evidence has significant probative value must consider by reference to the evidence itself or other evidence adduced or to be adduced by the party tendering it, whether there is a real possibility of an alternate explanation inconsistent with (in this case) the guilt of the party against whom it is tendered."

At [78] Whealy JA said:

"...the trial judge must ask whether the possibility of such an alternative explanation substantially alters his (or her) view as to the significant capacity

³¹ Odgers, Uniform Evidence Law (Loose leaf edition) [1.3.14760]

³² [2012] NSWCCA 9; (2012) 215 A Crim R 349

³³ Bathurst CJ at [10]; Whealy JA at [78]

of the Crown evidence, if accepted, to establish the fact in issue. Does the alternative possibility, in the Judge's view, rob the evidence of its otherwise cogent capacity to prove the Crown case? If it does not, the trial judge may safely conclude that the evidence has significant probative value.

However, it was again emphasised by reference to **R v Shamouil** that a court should not

"engage in a fact finding exercise involving an assessment of the reliability and credibility of the evidence"³⁴

10. Victorian Court of Appeal concludes R v Shamouil is manifestly wrong and should not be followed

In **Dupas v The Queen**³⁵ in a joint judgment the Victorian Court of Appeal concluded that **R v Shamouil** was manifestly wrong and should not be followed.

At [63] the Court said:

"... We are compelled to the conclusion that we should depart from the reasoning and conclusion in *Shamouil* as error can be demonstrated with a degree of clarity by the application of the correct legal analysis. Our conclusions are as follows:

- (a) The common law did require the trial judge, in assessing probative value, to evaluate the weight that the jury could rationally attach to the evidence. The contrary conclusion was inconsistent with a continuous line of High Court authority.
- (b) The legislative intention, as disclosed by the language of s 137 and its context, is that the task under s 137 is the same as that at common law.
- (c) The trial judge undertaking the balancing task is only obliged to assume that the jury will accept the evidence to be truthful but it is not required to make an assumption that its reliability will be accepted. The phrase "taken at its highest" is more appropriately used in considering a no case submission, when the judge must accept that the jury may find the evidence credible and reliable.
- (d) In order to determine the capacity of the evidence rationally to affect the determination of a fact in issue, the judge is required to make some assessment of the weight that the jury could, acting reasonably, give to that evidence. Where it is contended that the quality or frailties of the evidence would result in the jury attaching more weight to the evidence than it deserved, the trial judge is obliged to assess the extent of the risk. That does not require the trial judge to anticipate the weight that the jury *would* or *will* attach to it. The judge is obliged to assess what probative value the jury could assign to the evidence, against which must be balanced the risk that the jury will give the evidence disproportionate weight.
- (e) So to construe s 137 accords with the language of the statute and its context. To construe it otherwise does not.
- (f) Such a construction does not involve any enlargement of the powers of a trial judge or any encroachment upon the traditional jury function.

³⁴ per Bathurst CJ at [8], Allsop P and Mc Callum J agreeing

³⁵ [2012] VSCA 328; (2012) 218 A Crim R 507

It is interesting to note that the course of reasoning of both the Victorian Court (in **R v Dupas**) and the NSW Court (in **R v Shamouil**) assume that s 137 was intended to be a statutory formulation of the *Christie* discretion which involved no alteration of the relationship which existed at common law between the role of the judge and the role of the jury.³⁶ However the Victorian Court suggested that the analysis in **R v Shamouil** was founded on a misapprehension of the role of the judge under the common law.³⁷

Whereas the Court in **R v Shamouil** at [49] found that the *Christie* discretion did not involve considerations of reliability, the Victorian Court very convincingly pointed to many instances where courts in fact had done so, including in a portion of the judgment of Hunt CJ in **R v Carusi** which had not been referred to in **R v Shamouil**³⁸

Thus, from roughly the same starting point, the Victorian Court reached a very different conclusion.

The Victorian approach would obviously facilitate a more frequent application of the section in favour of the Accused but it has limits and does not entitle a judge to substitute his/her view of what the evidence proves for that of the jury. He/she is only entitled to assess what probative value the jury *could* assign to the evidence and then factor that into the weighing exercise.

10.1 What is "credibility"? What is "reliability"?

It can be observed from the NSW cases that the concepts of "credibility" and "reliability" are most often used interchangeably suggesting that they mean the same thing. The term "weight" is also sometimes used as connoting degrees of "credibility" and "reliability"

The Victorian approach in **R v Dupas** does not assume that credibility and reliability are interchangeable. On the Victorian approach the judge is obliged to assume the jury will accept the evidence to be truthful. The Court was at pains to distinguish credibility which in its view was synonymous with truthfulness with the concept of reliability.³⁹ It would appear that in the Court's view "unreliable evidence" is evidence that has a quality such that

"there is something other than truthfulness that may bring its probative value into question"⁴⁰

At [205] the Court referred to comments of Simpson J in **R v Mundine** to the effect that whilst questions of the "weight" of the evidence do not come into play in assessing probative value they can play a role in assessing unfair prejudice. At [206] it continued:

"This approach admits of no circumstances where it would be necessary for the trial judge to evaluate the weight that could reasonably be attached to the

³⁶ See **Dupas** at [65] and **Shamouil** at [65]

³⁷ at [68]

³⁸ See **Dupas** at [97] where the court quoted what it described as the "first passage" in Hunt CJ's judgment in **R v Carusi** at 55-56 with emphasis added by the Court to emphasise the ways in which issues of reliability came into account in the exercise of the discretion.

³⁹ See the discussion from [191]-[198]

⁴⁰ At [191]

evidence when assessing probative value but raises the possibility of it being done in assessing unfair prejudice. Such a methodology would, in our respectful opinion, be fundamentally flawed in cases where the risk of unfair prejudice was the risk that unreliable evidence would be given disproportionately high probative value. The difficulty is as follows. Since the judge must ignore the unreliability in assessing probative value and since – ex hypothesi – the jury is likely to give the evidence more weight than it deserves, the prejudice will equal, but never exceed, the probative value so as to favour exclusion. That is why the trial judge's task in evaluating probative value must always commence with assessing the weight that the jury could reasonably assign to that evidence. The weight which the evidence could reasonably be given necessarily bears on the question of the extent to which the evidence could rationally affect the jury's assessment of the probability of the existence of the fact in issue."

In my view the Victorian Court's approach has much to recommend it. It does much to preserve the traditional roles of the judge and the jury. It leaves to the jury matters which juries have long been regarded as specially qualified to do, namely assess the honesty of the witnesses. However, in the area of potentially "unreliable" evidence (one example of which is identification evidence) it is recognised that juries do not have the same expertise or experience as Judges in recognising the factors that can cause evidence to be unreliable. But the power of judges to take potentially unreliable evidence away from the jury is still circumscribed on the Victorian Court's approach and would be exercised infrequently. Where the "unreliability" can be dealt with by directions it would still be admitted.

However, whilst in my view that is so, Odgers has suggested that the assumption that the evidence is "truthful" is problematic. He notes the statutory definition of "probative value" does not draw a distinction between "truthfulness" and "reliability" and suggests there is

"no principled basis for such a distinction, bearing in mind that the degree of risk of untruthfulness is one of many factors which bear on the assessment of reliability"⁴¹

11. R v Shamouil is still the law in NSW – R v XY

Following the Victorian decision, a NSW Court of Criminal Appeal bench of five was constituted to decide **R v XY**⁴²

11.1 Factual summary

The Accused had been secretly recorded speaking to the complainant many years after the events alleged in the trial. From the content of the conversations, various possible inferences were put forward by the Crown including that when speaking to the complainant, he knew to whom he was speaking and that he admitted to having a sexual relationship with the complainant when she was aged 10. It was accepted that alternative inferences were also available including that he did not know to whom he was talking and that he had made admissions to having had sexual relations with some other young female who was in high school.

⁴¹ Odgers, Uniform Evidence Law (Loose leaf edition) [1.3.14760]

⁴² [2013] NSWCCA 121

11.2 Issues

The case was a Crown s 5F(3A) appeal against a ruling where the trial judge had rejected evidence pursuant to ss. 90 and 137. There were at least three issues to be decided, namely:

1. The jurisdictional question, i.e. did the trial judge's ruling "substantially weaken the Crown case"?
2. Should the evidence have been excluded pursuant to s.90?; and
3. Should the evidence have been excluded pursuant to s.137?

On the jurisdictional question, a majority, Basten JA, Hoeben CJ at CL, and Simpson J found that the ruling had "substantially weakened" the Crown case⁴³ while Price J found the crown had not discharged the onus of establishing its case had been substantially weakened⁴⁴ and Blanch J did not decide the issue.

On the s.90 issue, the same majority Basten JA, Hoeben CJ at CL, Simpson J held that the trial judge was in error in excluding the evidence pursuant to s.90⁴⁵ while Blanch J and Price J did not decide the issue.

On the s.137 issue, a different majority, Hoeben CJ at CL, Blanch J and Price J held that the trial judge had correctly rejected the evidence pursuant to s.137⁴⁶ while Basten JA and Simpson J found that evidence was not rendered inadmissible by s.137.⁴⁷

11.3 R v Shamouil is still the law

Despite the views expressed in **R v Dupas** it is clear that a majority also regarded **R v Shamouil** as good law which should continue to be applied.

Basten JA at [65] expressly considered the issue and found no compelling reason to depart from the "general approach" accepted in **R v Shamouil**.

Hoeben CJ at CL at [87] expressly agreed that the Courts of NSW should follow **R v Shamouil**.

Simpson J indicated that having given careful consideration to the reasoning of the Victorian Court of Appeal she adhered to the views she had expressed in **R v Cook** and **R v Mundine** and her concurrence with those of Spigelman CJ in **R v Shamouil**.

Blanch J, while acknowledging at [194] that the

"courts in this state have been guided by the judgment of Spigelman CJ in Regina v Shamouil"

made no direct statement on the issue. But neither did he say anything which could be interpreted as rejecting continuing relevance of the decision.

⁴³ Basten JA at [81], Hoeben CJ at CL at [84], Simpson J at [132-3]

⁴⁴ at [222]

⁴⁵ Basten JA at [77], Hoeben CJ at CL at [85], Simpson J at [157]

⁴⁶ Hoeben CJ at CL at [92], Blanch J at [208], Price J at [223]

⁴⁷ Basten JA at [73], Simpson J at [178]

Price J at [224] indicated that upon his analysis it was unnecessary to consider the conflict in approaches between the two Courts but at [225] indicated that in his opinion

"the approach taken in *Dupas* does much to avoid evidence being before a jury which in reality (rather than being taken at its highest in favour of the Crown) has little probative value and is outweighed by the danger of unfair prejudice to the accused."

11.4 The judgment of Basten JA

The judgment of Basten JA is a very interesting if dense read. His Honour was also perhaps the only Judge to attempt to identify the precise conflict between the two approaches.

It is very difficult to do his Honour's judgment justice by simply repeating a few quotes. However, his Honour concluded at [51] that it is **"by no means clear"** that there is **"a significant difference between the *Dupas* principles and *Shamouil*, read in full"**.

Referring to [60] in **R v *Shamouil*** where Spigelman CJ had spoken of the

"restrictive approach to the circumstances in which issues of reliability and credibility are to be taken into account in determining probative value"

his Honour made 5 points in relation to that statement. They will not be repeated here but need to be read to understand the judgment. In expounding the fifth point His Honour referred to a passage from ***Festa v The Queen***⁴⁸ and [74] in **R v *Shamouil***. His Honour then continued at [48]-[49] to say:

48 Two factors are apparent from these passages. First, in carrying out the "weighing" exercise, it would be necessary for the trial judge to consider where the prosecution evidence fell on a scale of probative value ranging from strong to weak. Secondly, the unreliability of the evidence was a factor to be weighed on the other side of the scale, together with the likely effectiveness of warnings about the nature of such unreliability. In effect, *Shamouil* requires careful attention to the language of the statute and the exercises required to be undertaken: the judgment must be read as a whole. The prosecution is entitled to have its evidence assessed according to its capacity to support the prosecution case, which is not to say that the reliability of the evidence may not be a factor, at least in some cases, in applying the test provided in s.137.

49. The discussion of *Shamouil* in *Dupas* (2012) tended to extract and address the early passages (as to removing credibility and reliability from the assessment of probative value), as if they denied the need to assess probative value for the purpose of the weighing exercise. That Spigelman CJ undertook this task is not in doubt; what he did not do was determine whether the jury would reject the retraction (the credibility issue): at [78]. It may be noted that the term "credibility" has both a common meaning and a statutory meaning. Its common meaning (or one such meaning) is whether the witness is to be believed. That is often distinguished from the question whether the evidence, objectively considered, is plausible. Thus, plausibility may well affect an assessment of credibility, but will leave open a conclusion that the witness genuinely believes that he or she is telling the truth but the evidence is objectively implausible. The statutory definition of "credibility", on the other

⁴⁸ [2001] HCA 72; 208 CLR 593 (per Mc Hugh J at [51])

hand, when applied to a witness, includes "the witness' ability to observed or remember facts and events", the subject of the evidence. This latter element would often be defined as "reliability", which suggests that in the statements in *Shamouil*, "credibility" was used in some more limited sense.

Under the heading "**Application of principles – s 137**" His Honour went on to say at [66] – [67]:

"66 The importance of *Shamouil* lies not in the precise language used (the judgment is not to be treated as a statute) but in the general principle it articulates. The operation of that principle may vary depending upon the circumstances of the case. In broad terms, the principle has three elements:

- (1) In determining inadmissibility under s 137, the judge should assess the evidence proffered by the prosecution on the basis of its capacity to advance the prosecution case;**
- (2) It follows from (1) that the judge should deal with the evidence on the basis of any inference or direct support for a fact in issue which would be available to a reasonable jury considering the proffered evidence, without speculating as to whether the jury would in fact accept the evidence and give it particular weight;**
- (3) It also follows from (1) that judge should not make his or her own findings as to whether or not to accept the inference or give the evidence particular weight.**

67 This principle does not produce uniformity of approach in all cases. The "weighing" exercise required if s 137 is engaged not only involves incommensurates, but elements that may interrelate in a variety of ways. For example in the present case there are a number of possible inferences to be drawn from the recorded conversations..."

His Honour then went on to detail the inferences upon which the prosecution relied and noted other available inferences. His Honour's analysis then considered the effect of these competing inferences on "unfair prejudice" and at [72] said:

"72 The jury could readily be directed as to the alternative inferences. If they drew the inference favourable to the prosecution, there would be no risk of unfair prejudice. However, it would be necessary to direct the jury that, if they preferred the view that the accused was referring to a sexual liaison with another girl, then in high school, no possible inference could be drawn as to whether or not the complainant's allegations were true. The suggestion that the jury could not or would not understand and apply such a direction should not be entertained. Any risk of unfair prejudice on this account was fanciful and should be rejected. Accordingly there was no basis to exercise the exclusionary rule in s 137."

It appears, on His Honour's approach, that whilst issues of "credibility" and "reliability" generally do not factor into the assessment of probative value (and did not in this case) such issues (used in a more limited sense as connoting "plausibility") might on occasion be relevant to assessing the capacity of the evidence to advance the Crown case when alternative inferences exist and can be said to significantly undermine that capacity.

Even if I am wrong in that interpretation, it is clear that His Honour's approach does continue to leave room for such issues to play a role in determining the risk that such issues will give rise to unfair prejudice.

11.5 Judgment of Hoeben CJ

On the question of whether issues of "reliability, credibility or weight" could be taken into account in assessing probative value, Hoeben CJ specifically adopted Basten JA's comments at [66]-[67] set out above.

However, unlike Basten JA, in implicitly taking such matters into account on the other side of the balancing exercise (unfair prejudice), His Honour found that the alternative inferences which were inconsistent with the prosecution case were objectively plausible and carried a

"significant risk that the jury would give the evidence more weight than it deserves and that the content of the evidence might 'inflamm[e] the jury or divert the jurors from their task' (*Festa v R* [2001] HCA 72; 208 CLR 593 at [51] (McHugh J))."⁴⁹

His Honour also found that the risk was such that it could not be adequately met by a direction from the trial judge and accordingly was correctly rejected.⁵⁰

11.6 Judgment of Simpson J

Simpson J took a different approach and as noted above continued to adhere to her views expressed in **R v Cook, R v Mundine** and her concurrence with Spigelman CJ in **R v Shamouil** to the effect that questions of credibility, reliability and weight play no part in assessing probative value.

At [163] she noted that a judge is necessarily asked to embark upon the s.137 exercise at a time before the evidence is complete. As such the "actual probative value" to be assigned to evidence is ordinarily not able to be determined by the trial judge and what the judge undertakes is a "predictive and evaluative exercise". For Her Honour:

"The prediction is of what use the jury *could* rationally make of the evidence, in the context of the trial evidence in its complete form. The evaluation is of the importance or significance of the evidence in the same context."⁵¹

Her Honour would also conduct that evaluation on the basis that the evidence will be accepted as accurate.⁵²

Her Honour also noted at [168]-[170]

168 The terms "credibility", "reliability" and "weight" have largely been used as though interchangeable. Although it is possible to discern differences in what is imported by these terms, I will, for present purposes, proceed on the basis that they convey essentially the same concept.

⁴⁹ at [90]

⁵⁰ at [91]

⁵¹ at [167]

⁵² See [163]

169 Determination of the credibility of evidence will often depend upon the assessment of the witness who gives the evidence. Determination of reliability will often depend upon some analysis of the circumstances surrounding the coming into existence of the evidence.

170 Determination of the weight to be given to any item of evidence will depend, not only on where that evidence fits in the overall mosaic of the evidence in the trial, but, in many cases, upon an assessment of a witness after cross-examination. It may also depend upon an assessment of the evidence of one witness against the evidence of another (or others). That is not something that can readily be undertaken at a pre-trial or interlocutory stage.

Given these limitations, Her Honour then went on to reject the **R v Dupas** suggestion that some assessment of weight can be undertaken.⁵³ For Her Honour,

"To embark upon a partial assessment of weight could, in my opinion, be potentially productive of real injustice. No boundaries with respect to the extent to which the weight of the evidence is to be explored are discernible in any of the provisions that call for evaluation of probative value"⁵⁴

11.7 Judgment of Blanch J

Blanch J adopted yet another approach. In his judgment he first repeated the telephone conversations in their entirety and identified the potential prejudice. For his Honour,

"193 In the instant case, in the emotionally charged atmosphere of a child sexual assault trial, evidence disclosing the respondent's promiscuity and interest in high school girls would create a highly significant and unfair prejudice to the respondent. It introduces a real danger of the jury using tendency reasoning to arrive at a verdict".

In assessing the probative value of the evidence His Honour firstly noted that

"...in the present case the evidence sought to be tendered does not give rise to any question of credibility or reliability. The evidence is known and can be evaluated"⁵⁵

His Honour then referred to the comments of Bathurst CJ and Whealy JA referred to above in **DSJ v R; NS v R**⁵⁶ to the effect that alternative explanations may be such as to "rob the evidence of its otherwise cogent capacity".

His Honour then indicated in his view that the contention by the Crown that comments made by the respondent amounted to a confession "is open to question". He went on to identify some matters that the trial judge had taken into account.

His Honour continued

207 Those matters are all relevant for the judge to consider when assessing the capacity of the evidence to establish the fact in issue. What must be done then

⁵³ Her Honour was referring to [63](d) in **R v Dupas**

⁵⁴ at [171]

⁵⁵ at [198]

⁵⁶ That is, Bathurst CJ at [10] and Whealy JA at [78]

is to weigh that capacity against the unfair prejudice. In this case when I do that I find the capacity of the evidence to prove guilt is compromised because of the competing inferences open when interpreting the conversations and the unfair prejudice is highly significant. It is evidence that may inflame the jury or divert the jurors from their task. Furthermore, such prejudice could not be corrected by directions to the jury and it outweighs the probative value of the evidence.

11.8 Judgment of Price J

As noted above Price J was alone in finding that the Crown had not discharged the onus of establishing that its case had been substantially weakened. Strictly speaking his comments as to s.137 would therefore be obiter.

However, His Honour agreed with Blanch J's identification at [185], [186], and [193] of the unfair prejudice. To his mind it was unnecessary to consider questions of competing explanations as the evidence viewed at its highest was weak, substantially outweighed by the danger of prejudice and could not be corrected by jury directions such that s.137 mandated rejection of the evidence.

His Honour continued at [224]-[225] as follows:

224 Whilst upon my analysis, it is unnecessary to consider the conflict in the approaches to be taken to s 137 Evidence Act since the decision in *Dupas v The Queen* [2012] VSCA 328, it seems to me that enabling the trial judge to consider questions of credibility, reliability or weight when s 137 is invoked, is likely to enhance the fundamental principle that an accused is to receive a fair trial. Although Simpson J at [163], [170]-[171] refers to the practical difficulties that may arise by adopting such an approach, it is not uncommon for a witness to be cross-examined during a *voir dire* and an assessment can be made by the trial judge of the actual probative value of the evidence. More often than not, the probative value of evidence may be assessed from the witness statements without the necessity of calling witnesses.

225 In my opinion, the approach taken in *Dupas* does much to avoid evidence being before a jury which in reality (rather than being taken at its highest in favour of the Crown) has little probative value and is outweighed by the danger of unfair prejudice to the accused."

14. Where to from here?

When I started work on this paper I hoped that I could: write something short; which could briefly encompass the approach that the Courts have adopted in applying s 137; so as to assist others to invoke the section in appropriate cases.

Unfortunately I have failed to do so on at least two of those counts.

Better lawyers than myself may be able to reconcile the apparently conflicting decisions but that end has escaped me. To me the "correct" construction of s 137 is something which is only a little bit clearer than mud.

One day the High Court is likely to have more to say on the proper construction of s 137. In doing so it might accept the *Shamouil* approach or it might follow the

Dupas approach. It might of course apply a completely different approach to the problem. Whichever approach the Court takes, we will hopefully be wiser for it.

In the meantime, in NSW, criminal lawyers have to assume that considerations of reliability, credibility and weight have little or no role to play in the assessment of probative value but can be taken into account when assessing the risk of unfair prejudice.

I use the qualification "little or no role", to acknowledge that it does appear that where evidence that the Crown proposes to lead does not unambiguously point to guilt, an alternate explanation or explanations for the evidence (which is/are real and plausible) might be used to "rob the evidence of its otherwise cogent capacity" to prove guilt when the court comes to assess probative value. The precise circumstances when this will or will not happen are in my view anything but clear.

As the law stands at present I can only offer a couple of hints for those who seek s 137 exclusion.

They are:

1. Clearly formulate in your own mind what the nature of the unfair prejudice is.
2. Consider whether alternate possibilities are available on the evidence and if not try to place such possibilities before the trial judge.
3. If such possibilities can be put before the court be prepared to argue that they have the effect of undermining the "capacity" of the evidence to be used for the purpose the crown contends.
4. Also be prepared for that argument to fail and to argue that the underlying unreliability of the evidence is the cause of or aggravates the already existing prejudice.

However, most of all be aware that judges are reluctant to usurp the jury and somehow be prepared to answer the question which the Court will inevitably pose "Why isn't this a matter for the jury?"

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11 December, 2013