PART 2

HYPOTHETICALS ON EVIDENCE

Presented to the

Criminal CLE

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HYPOTHETICAL 1

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 and was owing to a Columbian drug trafficker.

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. The plan 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. The calls included the following:

Jenkins: “Where is the Venezualan?”

Jenkins: “Give him the whole of the package”

Wilson replies: “No only half of it.”

Earlier conversations revealed that there had originally been an amount of 6 million dollars. In addition there had been earlier surveillance that observed Jenkins travel to the house at Paddington and hand to Francisco a full backpack

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

HYPOTHETICAL 2

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 the 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.

Prior to the trial Jones makes application for a separate trial.

1. What arguments would be available on this separate trial application?

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.

2. 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?

4. Just before the trial starts Mitchell says that he will not give any evidence at all. How might the prosecutor handle this? What ruling would you make?

AUTHORITIES

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

HYPOTHETICAL 3

James Smith is indicted for murder and prior to the trial gives notice to the Crown that he will present evidence in support of the partial defence of substantial impairment of mind.

At the same time a report from a psychiatrist was served. This report opined that the accused was suffering from schizophrenia at the time of the killing and that his capacity to assess the circumstances and to determine right from wrong was substantially impaired. In due course and prior to trial the Crown engaged a psychiatrist who expressed the view that the accused's capacities were not impaired in this way at the time of killing.

Both psychiatrists relied upon material apart from the interviews with the accused. This material included the following:

1. A history of the events leading up to and including the killing. The history was taken from the accused.
2. A personal history taken from the accused , including statements of feelings and sensations at times in the past and the present.
3. Hospital records of the accused both before and after the killing. The notes consisted of observations and assessments made of the accused during these times made by treating psychiatrists.

The accused had also given an electronically recorded interview a day after the killing in which he denied committing the crime. In the interview with the psychiatrist for the Defence he changed his story and admitted to doing the killing.

The Crown psychiatrist was called in the Crown case and most of the abovementioned material referred to by the psychiatrists was sought to be led in evidence.
The Defence called their psychiatrist as the only witness.

1. **Is the abovementioned material admissible?**

2. **If so, what could it be used to prove?**

3. **If admitted what direction, if any might be given to the jury?**

4. **What is the significance, if any, of the accused not giving evidence in this case?**

AUTHORITIES

R v Wilson **62 NSWLR 346**
Brian John Welsh **(1996) 90 A Crim R 364**
Azzopardi v The Queen **(2005) 205 CLR 50**

HYPOTHETICAL 4

An accused stands trial for the strangulation murder of his de facto wife. There is evidence that he had not been in contact with her for 1 year. She had moved to another address with a view to starting a new life in a place that the accused could not find. There is some mobile phone location evidence which put him in an area close to her new home on the day she was killed. There is also hearsay evidence of threats he had made against her in the presence of other people.

The deceased was found lying close to the kitchen table and crime scene examiners took a number of swabs from that location. The swabs were taken to the Division of Analytical Laboratories (DAL) and tested for DNA. One swab taken from the table was found to be a mixed sample of DNA containing DNA from 2 people. The major contributor revealed a profile consistent with the deceased and found to occur in fewer than 1 in 10 billion in the general population. The minor contributor revealed a profile consistent with the accused and occurring in fewer than 1 in 50 million in the general population. At the trial the Defence engaged an expert whose opinion was that the finding of the DAL expert was flawed. The Defence expert argued that the criteria for picking the minor profile had not been properly adhered to and that errors had been made in the interpretation of the graphs produced by the DNA lab. The DNA graphs, called EPGs, produce various peak heights at 10 different loci. The peak heights reflect the alleles of the 2 separate profiles at each locus and the determination of the minor profile depends upon a measurement of the percentage of the peak height imbalance at each locus. He relied upon 3 articles in scientific journals on interpretation of EPGs. In addition the Defence expert stated that the DAL did not have proper protocols in place for the interpretation of EPGs.

The DAL expert said that the articles did not support the opinion of the Defence expert. In addition there exists a previous case in which the Defence expert had claimed expertise in the interpretation of statistics, which another Court had rejected and ruled such evidence inadmissible.

Defence counsel objects to the admissibility of the DAL expert evidence and seeks a voir dire examination of the evidence.

1. **What are the principles that apply to such an application?**

2. **As the Defence, what material would you look for to support your case, where would you look and how would this instruct your cross examination of the DAL expert?**

3. **As the Crown, what material might be available to meet this attack and discuss some valid approaches to cross examination of the Defence expert?**

AUTHORITIES

Chamberlain v The Queen **(No 2) (1984) 153 CLR 521 at 598**
United States v Baller **519 Fed (2d) 463 (1975)**
Regina v Shamouil **(2006) 66 NSWLR 228 at 237**
Bropho v State of Western Australia **[2007] WADC 77**
R v Robert Black Farmer Unreported **NSW SCt Hall J 6th March 2008**

HYPOTHETICAL 5

Mr. Martin is indicted for the murder of his de facto wife. She was found by ambulance officers lying on a sofa in the flat shared by her with the accused. She had 30 separate sites of trauma to her body. She was taken to hospital and died shortly after from subdural bleeding.

The Crown case is that he delivered a severe beating to the deceased which included the injury to her head. The accused denied it, saying that they had taken a bad "eckie" the night before and she had a violent fit in the shower causing her to fall and sustain the injuries.

The Crown case is circumstantial, relying upon

(a) forensic evidence found in the flat, including a stick with his blood on it.

(b) the nature and extent of the injuries.

(c) evidence from another couple, with whom the deceased had spent the night, indicating that the accused had come at 5am and picked her up from their house.

There is additional evidence which the Crown seeks to call as follows:

i) friends and workmates of the deceased who saw bruising and other injuries on the face and body of the deceased for two years before her death.

ii) Evidence of statements made by the deceased as to how the injuries were inflicted upon her.

iii) Direct evidence of witnesses who saw the accused striking the deceased on previous occasions.

iv) evidence of statements made by the deceased that she feared the accused.

1) Would any or all of this evidence be admissible?

2) If so, on what basis?

AUTHORITIES

Wilson v The Queen (1970) 123 CLR 334
R v Serratorre (1999) 48 NSWLR 101
Conway v R (2000) 172 ALR 185
Lock (1997) 91 A Crim R 356 at 365
Gipp v R (1998) 194 CLR 106
R v Toki unreported NSW S Ct 25th October 2000 – Howie J

EXTRACTS FROM EVIDENCE ACT (NSW)

17 Competence and compellability: defendants in criminal proceedings

(1) This section applies only in a criminal proceeding.
(2) A defendant is not competent to give evidence as a witness for the prosecution.
(3) An associated defendant is not compellable to give evidence for or against a defendant in a criminal proceeding, unless the associated defendant is being tried separately from the defendant.
(4) If a witness is an associated defendant who is being tried jointly with the defendant in the proceeding, the court is to satisfy itself (if there is a jury, in the jury's absence) that the witness is aware of the effect of subsection (3).
Note. ***Associated defendant*** is defined in the Dictionary.

20 Comment on failure to give evidence

(1) This section applies only in a criminal proceeding for an indictable offence.
(2) The judge or any party (other than the prosecutor) may comment on a failure of the defendant to give evidence. However, unless the comment is made by another defendant in the proceeding, the comment must not suggest that the defendant failed to give evidence because the defendant was, or believed that he or she was, guilty of the offence concerned.
(3) The judge or any party (other than the prosecutor) may comment on a failure to give evidence by a person who, at the time of the failure, was:
(a) the defendant's spouse or de facto partner, or
(b) a parent or child of the defendant.
(4) However, unless the comment is made by another defendant in the proceeding, a comment of a kind referred to in subsection (3) must not suggest that the spouse, de facto partner, parent or child failed to give evidence because:
(a) the defendant was guilty of the offence concerned, or
(b) the spouse, de facto partner, parent or child believed that the defendant was guilty of the offence concerned.
(5) If:
(a) 2 or more persons are being tried together for an indictable offence, and
(b) comment is made by any of those persons on the failure of any of those persons or of the spouse or de facto partner, or a parent or child, of any of those persons to give evidence,
the judge may, in addition to commenting on the failure to give evidence, comment on any comment of a kind referred to in paragraph (b).

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.

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.

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.

165 Unreliable evidence

(1) This section applies to evidence of a kind that may be unreliable, including the following kinds of evidence:
(a) evidence in relation to which Part 3.2 (hearsay evidence) or 3.4 (admissions) applies,
(b) identification evidence,
(c) evidence the reliability of which may be affected by age, ill health (whether physical or mental), injury or the like,
(d) evidence given in a criminal proceeding by a witness, being a witness who might reasonably be supposed to have been criminally concerned in the events giving rise to the proceeding,
(e) evidence given in a criminal proceeding by a witness who is a prison informer,
(f) oral evidence of questioning by an investigating official of a defendant that is questioning recorded in writing that has not been signed, or otherwise acknowledged in writing, by the defendant,
(g) in a proceeding against the estate of a deceased person—evidence adduced by or on behalf of a person seeking relief in the proceeding that is evidence about a matter about which the deceased person could have given evidence if he or she were alive.
(2) If there is a jury and a party so requests, the judge is to:
(a) warn the jury that the evidence may be unreliable, and
(b) inform the jury of matters that may cause it to be unreliable, and
(c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.
(3) The judge need not comply with subsection (2) if there are good reasons for not doing so.
(4) It is not necessary that a particular form of words be used in giving the warning or information.
(5) This section does not affect any other power of the judge to give a warning to, or to inform, the jury.
(6) Subsection (2) does not permit a judge to warn or inform a jury in proceedings before it in which a child gives evidence that the reliability of the child's evidence may be affected by the age of the child. Any such warning or information may be given only in accordance with section 165A (2) and (3).
Note. The Commonwealth Act does not include subsection (6).