

Chapter 5: Hearsay

Question One

Margaret stumbled across a teenage youth lying on a park path. He had what appeared were serious wounds. The youth muttered that two boys had come along and knifed him. He then slipped into unconsciousness. Next to him was a badge with the initials NG. The wounded boy was Jake, a cycle courier from a local fast food store. He died the next day. Police set up a murder inquiry. Their local research revealed the existence of a group called the Nasty Gang. Members include Gerry and Abe who were arrested. The prosecution case is that the Nasty Gang was engaged in a dispute with the couriers from the food store. It is alleged the Gang planned and carried out the stabbing of Jake to gain status. Gary and Abe were subsequently charged with the murder of Jake and plead not guilty. They claim they were at a Quad Bike Repair Workshop at the time of the stabbing. They have been unable to find anyone who will confirm that they were there and want to adduce the computerised attendance record where they said they had entered their names. Police have possession of a text message from Gerry to Abe the day before the stabbing of Jake which stated 'Need that knife for the job'.

Advise on evidence arising from the above facts.

Answer guidance

The question asks you to consider various pieces of hearsay evidence and you will need to cite the relevant sections of the Criminal Justice Act 2003. In relation to Jake's statement consider first hand oral hearsay, admissible under s116 since there is a reason (death) for not calling J. Alternatively it is *res gestae*, see *R v Andrews* [1987] AC 281. If Margaret gives a statement to police it becomes multiple hearsay, so consider whether s117(2)(a) applies and note the implications of *Maher v DPP* [2006] 170JP 441. The inclusionary discretion in section 114(1) Criminal Justice Act may also be considered. The defence will argue that it fulfils the definition in CJA s115(2) as hearsay. In relation to the text message refer to the different interpretations in *R v Bucknor* [2010] EWCA Crim 1152 and *R v Twist* [2011] 2 Cr App R 17 and consider if it is an admissible implied assertion. The badge is real evidence not hearsay since the initials NG, even if taken to be an assertion, are an implied assertion and so non hearsay. Consider s117 in relation to the computerised attendance record. Reference to *R v Horncastle* [2010] 2AC 373 should also be made if hearsay is sole or main evidence.

Question Two

How far in your view does the current law on hearsay evidence in criminal trials protect the rights of the defendant?

Answer guidance

The essay should set the context for the 2003 reform of the hearsay rule particularly the increased concern for victims' interest. Some question whether this undermines defendants' rights. Refer to the importance of cross examination or the right to confrontation and the values enshrined in Article 6. The essay should define differences between the public interest and the defendant's interest since although both must care about due process, arguably the former demonstrate greater concern for crime control and might therefore be more pro-prosecutorial. Arguments to suggest the law is overly pro-prosecutorial, i.e. does not protect the defendant fairly include: i) hearsay applies to both defence and prosecution but arguably used more by prosecution, eg police statements; ii) in the light of *R v Horncastle* [2009] UKSC 14, a defendant can be convicted by hearsay alone; iii) the Grand Chamber in *Al-Khawaja and Tahery v UK* [2012] 54 EHRR 23 was in part critical of the approach of the English courts and held that the courts must exercise full scrutiny where a conviction is based solely or primarily on hearsay; iv) the law is uncertain in its application, particularly in relation to implied assertions. On the other hand, arguments to suggest the law is fair to defendants include: i) there are a number of safeguards in the statute, eg s114 inclusionary discretion and exclusionary discretion under ss125(1) and 126(1); ii) the defence may potentially adduce third party confessions which would be of assistance to the suspect as for example in *R v Finch* [2007] 1WLR 1645; iii) the English courts have applied the sole and decisive rule with care, see for example *R v Harvey* [2014] EWCA Crim 54. The essay should draw on academic comment.