Chapter 11: Hearsay in criminal cases

Cases where a witness is unavailable

Page 328

Section 116(1)(a) will also operate to prevent s 116 being used where there is an overwhelming probability that the witness would rely on the privilege against self-incrimination and would decline to give evidence in the terms of the statement. See *R v Hayes* [2018] 1 Cr App R 134 (10), CA at [58]-[59]

Relevant person cannot be found even though such steps as are reasonably practicable to take to find him have been taken

Page 330

Where the judge concludes that the requirements of s 116(2)(d) are met, the statement is admissible and it is an error of approach to then consider as the 'next step', admissibility under s 114(1)(d). The next step is to consider the question of fairness and the application of s 78 of the Police and Criminal Evidence Act 1984. See *R v Kiziltan* [2018] 4 WLR 43, CA at [16].

Business and other documents

Section 117

Page 337

Where a statement contained in a document is an opinion, it does not meet the test for admissibility under s 117(1)(a), since oral evidence of opinion is inadmissible (unless it is an expert opinion): *R v Hayes* [2018] 1 Cr App R 134 (10), CA.

Admissibility in the interests of justice

Section 114(1)(d): inclusionary discretion

Pages 340-341

Where the identity of a witness is not known, it may be possible to use s 114(1)(d) if the witness is untraceable and in the circumstances in which the statement was

© Oxford University Press, 2019.

made, there is no realistic scope for questioning the credibility of the witness. In such a situation, there is no principled reason to treat the question of admissibility any differently from a case where the witness is known but after making his statement, cannot be found: *R v Brown* [2019] EWCA Crim 1143 at [34].

Examples of appropriate use of s 114(1)(d)

Page 344

In *R v Brown* [2019] EWCA Crim 1143A witness to a stabbing saw the assailant get into a car and then made a 999 call and read a registration number from the screen of a mobile phone of another witness present at the time who had recorded the registration number, but that witness was untraceable and unknown; the witness who made the 999 call could give evidence of the registration number.

See also *R v Randall* [2018] EWHC 1048 (Admin), an example of *inappropriate* use of s 114(1)(d). Where the complaint was present at court and willing to give evidence, the justices were wrong to admit her contentious statement on the basis that the accused had not identified which parts of her statement he disputed and had not otherwise engaged with the pre-trial process. Compare *R v Adams* [2008] 1 Cr App R 430 (35), CA, which provides some authority for using s 114(1)(d) where the accused has not engaged with the pre-trial process and the statement is *uncontentious*.

Other previous statements of witnesses

Section 120

Statements in rebuttal of allegations of fabrication

Page 347
Footnote 276
See now, the Crown Court Compendium (July 2019), Part 1, 14–9.

Statements consisting of a complaint about the alleged offence

Page 349
Footnote 288
See now the Crown Court Compendium (July 2019), Part 1, 14-9

© Oxford University Press, 2019.

Multiple hearsay

One of the statements admissible as business document, inconsistent statement, or other previous statement

Page 350
Footnote 290
In respect of an earlier statement being admissible under s 117, see the scenario posited in *R v Usayi* [2017] EWCA Crim 1394 at [35].

Admissibility in the interests of justice

Page 351
Erratum
Concerning *R v Walker* [2007] EWCA Crim 1698, last line of the paragraph, '… was multiple hearsay and **not** sufficiently reliable', delete '**not**' and insert, '**although would have been**…'.

Other safeguards

Stopping the case where the evidence is unconvincing

Discretion to exclude

General

Page 356
Footnote 314
Compare *R v Kiziltan* [2018] 4 WLR 43, CA, concerning a statement admissible under s 116(2)(d).

Rules of court

Page 358
In respect of the judge's ruling on admissibility, it is good practice for the judge to give a short ruling immediately after argument, and a more detailed ruling later in the trial. However, the detailed ruling should be given before speeches so that advocates can tailor their speeches to the ruling and, if appropriate make submissions on the proposed direction to the jury. See *R v Kiziltan* [2018] 4 WLR 43, CA at [24].

© Oxford University Press, 2019.

The direction to the jury

Pages 358-359

The direction to the jury on the dangers of relying on hearsay evidence has been described as 'one of the principal safeguards designed to protect a defendant against unfair prejudice.' (Per Lord Phillips in *R v Horncastle* [2010] 2 AC 373, SC at [38], cited in *R v Daley* [2017] EWCA Crim 1971 at [50]).

In *R v Daley* [2017] EWCA Crim 1971, it was held that an initial direction should be given before the hearsay evidence is heard, warning the jury of three limitations: (i) the lack of opportunity to observe the demeanour of the witness; (ii) that the statement is not made on oath; and (iii) the lack of opportunity to see the witness's statement tested on oath. The initial direction should be repeated in summing-up, where the judge should explain why the evidence was material to the issues they had to resolve (at [52] – 53]). See also the Crown Court Compendium (July 2019), Part 1, 14-, para 2.

In *R v Doyle* [2018] EWCA Crim 2198, the direction should have been given but failure to give it did not render the conviction unsafe. Compare *R v Kiziltan* [2018] 4 WLR 43, CA, where the direction was inadequate and the conviction *was* rendered unsafe.

Where the hearsay evidence also involves evidence of bad character, the direction needs to be tailored appropriately. See *R v Doyle* [2018] EWCA Crim 2198

Detailed guidance is provided in the Crown Court Compendium (July 2019), Part 1, 14-1. See, in particular, para 5(1)-(9).

© Oxford University Press, 2019.

OXFORD
UNIVERSITY PRESS