

Ch 12: Hearsay in criminal cases

The meaning of hearsay in the Criminal Justice Act 2003

‘Statements’ and ‘matters stated’

A ‘statement’

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A statement includes an e-fit picture: *R v Thomasson* [2021] EWCA Crim 114 at [40] - [45].

Admissibility in the interests of justice

Section 114(1)(d): inclusionary discretion

Section 114(2): factors which must be considered

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The wording of this subsection – ‘In deciding whether a statement ... [*should be*] admitted...’ - does not mean that s 114(1)(d) operates only prospectively, so that the decision to admit evidence under s 114(1)(d) must be taken before the evidence is introduced: *R v Nguyen* [2020] 1 WLR 3084, CA, at [42], [58] – [59] and [66]; and *R v Y* [2008] 1 WLR 1683, CA, at [60].

Section 114(1)(d) and third party confessions

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In *R v Nguyen* [2020] 2 Cr App R 286 (19), CA, a co-accused made a confession which included statements that incriminated the accused but he did not repeat the incriminating statements when he gave evidence at trial. The statements were properly admitted as evidence of matters stated against the accused under s 114(1)(d).

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

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See also *R v Muldoon* [2021] EWCA Crim 381 (hostile witnesses); and *R v Nguyen* [2020] 2 Cr App R 286 (19), CA (confession of a co-accused).

Previous inconsistent statements

Section 119(1)

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It would appear that s 119(1) operates only against the person making the statement: *R v Nguyen* [2020] 2 Cr App R 286 (19), CA.

Other previous statements of witnesses

Section 120

Statements consisting of a complaint about the alleged offence

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It would appear that the conditions of s 120 (4) and (7) do not need to be met where the defence request that the evidence is not treated as a complaint for tactical reasons, for example, in order to allow the evidence to be used to point out inconsistencies and support a suggestion of fabrication: *R v KH* [2020] EWCA Crim 1363. Where the evidence is clearly a complaint but the conditions of s 120(4) and (7) are not met, it may be still admissible under s 120(2) to rebut a suggestion that oral evidence has been fabricated: *Ibid*; see also the decision of the Northern Ireland Court of Appeal in *R v RH* [2018] NICA 28 at [29] and [31].

Other safeguards

Stopping the case where the evidence is unconvincing

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In *R v RT* [2021] 1 Cr App R 282 (14), CA, at [29] it was said that a judge's decision whether evidence is 'unconvincing' requires '... an assessment of the relevant potentially reliable evidence as a whole.' The judge applied the 'potentially safely reliable' test which applies to the admissibility of hearsay evidence generally, whatever section is being considered.

Rules of the court

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In *R v Smith* [2020] 4 WLR 128, CA, at [50]–[51], it was stated that the rules are not decorative and the prosecution’s obligation to serve notice is not waived by defence silence. Cf *R v Turner* [2020] EWCA Crim 1241 at [58]– [59], concerning hearsay evidence of surveillance where the court appeared to consider that the defence’s failure to object was tacit agreement.

Failure to adhere to the rules may render a conviction unsafe, as in a case where the failure has led to unfairly prejudicial evidence being admitted and directions are insufficient to allay the prejudice. In *R v Smith* [2020] 4 WLR 128, CA, a conviction was rendered unsafe where highly complex and very prejudicial evidence went before the jury without notice. Had the rules been adhered to, the judge would have heard properly articulated arguments and it is very likely that he would have excluded the evidence. (See [52], [55] and [57].)

Written statements under s 9 of the Criminal Justice Act 1967

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The wording of s 9 (see the text) means that the statement does not represent conclusive proof of matters stated and the tribunal of fact may accept or reject what is said in the statement, in the same way that it might accept or reject the oral evidence of a witness. See *R v Drummond* [2020] EWCA Crim 267 at [56] and [58].

Adrian Keane and Paul McKeown, The Modern Law of Evidence, 13th Edition

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