Recent Evidence Case Law from the CCA and the High Court of Australia

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This paper outlines recent evidence case law from the Court of Criminal Appeal and the High Court of Australia. It considers common themes that have arisen in the last year and highlights a range of issues that have been considered in appellate criminal decisions. Given Justice Beazley will be presenting a paper on the important and recent developments in tendency and co-incidence evidence and, I assume, s. 137 (per *IMM v The Queen* [2016] HCA 14) following the differing approaches taken by the appellate Courts in *R v Shamouil* (2006) 66 NSWLR 228 (NSW), *Dupas v The Queen* (2012) 40 VR 182; 218 A Crim R 507 (Victoria) and *R v XY* (2013) 84 NSWLR 363 (NSW) , I have specifically omitted this subject from this summary. As the focus of this paper is on decisions in the last 12 months or so, it may be necessary from time to time to contextualise by reference to earlier cases to fully grasp the importance of some recent cases and where they fit in our current landscape.

Admissibility of hearsay evidence if maker is unavailable- Section 65 *Evidence Act*

Sio v R [2015] NSWCCA 42 and *Sio v The Queen* [2016] HCA 32

The appellant, Sio, was convicted of aggravated robbery in company, having previously been acquitted of the primary charge of murder. The Crown case was that Sio had driven the accomplice to the offence, Mr Filihia, to a brothel where Filihia entered the establishment with the intention of committing a robbery and where he stabbed the person Gaudry who subsequently died. Filihia fled the scene and was subsequently collected by Sio in his car. Filihia pleaded guilty to murder and agreed to give evidence for the prosecution at the trial of Mr Sio. The Crown case was one of constructive murder by way of a joint criminal enterprise to commit armed robbery with foresight by Sio of the possibility of a wounding by use of a knife. The Crown sought to rely on evidence that Filihia had made a representation to the police during an ERISP interview that a person who he identified as "Dan", later identified by identification parade to be Sio, was the person who had "put" him up to robbing the brothel, being the person who had also given him the knife, and driven him to (and from) the establishment. During the course of the investigation of the offence, Filihia was later found to have lied to police during his statement about the presence of a third person in the car used to drive him to and from the scene of the crime.

Filihia was called to give evidence in the trial against Sio, but refused to take an oath or affirmation or answer any questions relating to the matter, even after receiving advice as to the consequences of his silence and being cautioned that he risked punishment for contempt. Following these various attempts to have Filihia to give evidence, the Crown sought to tender the ERISP interviews and statements made by him concerning Sio's role in the offending. Objection was taken to the evidence on the basis of the evidence being hearsay by virtue of s. 59 of the *Evidence Act.*

The trial judge held that the recordings of police interviews with Mr Filihia were admissible as an exception to the hearsay rule pursuant to s. 65 of the *Evidence Act* on the basis that Filiiha was "not available to give evidence" as all reasonable steps had been taken by the Crown to compel the witness to give evidence. The trial judge also found that by the benefit of the deeming provision in s. 65(7) the representations were against the interest of the Sio, and so therefore satisfied s. 65(2)(d)(i). Significantly, the trial judge found that the statements made by Filihia concerning the role of Sio were reliable per s. 65(2)(d)(ii) on the basis of her assessment of his demeanour during the course of the ERISP interviews (in what appears to have been an assessment that he was apparently guileless, forthcoming, courteous and willing to answer

questions). Her Honour allowed the interviews into evidence over further objection per ss. 135 and 137, giving the jury a warning pursuant to s. 165 of the *Evidence Act* concerning its potential unreliability.[1] The issue (for the purposes of this paper) that arose was whether the trial judge erred in admitting the prior statement under s. 65(2)(d).

In ***Sio v R* [2015] NSWCCA 42,** Leeming JA noted the amendment to s. 65 (2)(d) following *R v Suteski* [2002] NSWCCA 509. This amendment sought to raise the threshold for section 65(2)(d).[2] *Suteski* raised essentially the same issues that came about in the appeal of ***Sio***: should s. 65(2) render statements made by a person who is complicit in an offence which are against his or her own interest prima facie admissible against the accused, even if he or she is unavailable? In the course of so finding, at [25]-[30], Leeming JA analysed the amended s. 65, noting the following matters arose from the text, structure and history of the provision:

1. the 2007 amendment to s. 65(2) was drafted specifically to impose an additional hurdle upon the prima facie admissibility of first hand hearsay evidence of a representation against interest whose maker is unavailable, and that an assessment of reliability is necessary;
2. The test as to reliability under s. 65(2)(d) (ii), "make it likely", is less onerous that the pre-existing test under s 65(2)(c) that "make it highly probable";
3. That the tests under s 65(2) (b)-(d) requires an assessment of the *circumstances* in which the representation was made with a view to assessing whether the *representation* is reliable;
4. Two circumstances that enhance reliability are contemporaneity (or near contemporaneity) and against interest, in that the circumstances set out in s. 65(2)(b) and (d) are examples of circumstances which are taken to increase reliability of a representation, they do not exhaust the matters to which regard might be had;
5. That there will be cases that even when s. 65(2) is satisfied, representations may nonetheless still be excluded under ss. 135 and 137, or alternatively, admitted but be subject to a warning and direction under s. 165 of the Act.

Significantly, Leeming J found (as per (3) above) that:

> The question posed by statute is not whether the actual statements made are themselves accurate or likely reliable, but whether the circumstances in which they were made are such that they are likely to be reliable. In order to address the statutory question, the Court examines the circumstances in which a statement is made, not the particular statement itself.

In so doing, the analysis did not include consideration of those parts of the statement that were clearly false: ie, as to the presence of a third person in the car, or the use of a false name to describe the person believed to be Sio. Leeming JA (with whom both Johnson and Schmidt JJ agreed) dismissed the ground of appeal in deference to the trial judge who, having seen and heard the evidence, was satisfied that the representation was made in *circumstances* that made it likely to be reliable.

In ***Sio v The Queen*** [2016] HCA 32, the High Court granted special leave in respect, inter alia, to the question as to whether the trial judge and the CCA erred in failing to exclude from the evidence Filihia's representation that Sio had given him the knife to stab the deceased. The High Court unanimously allowed the appeal and ordered a retrial. In their judgment French CJ, Bell, Gageler, Keane and Gordon JJ were (at [58]) critical of the approach taken by the trial judge and the CCA by taking

[1] The warnings to the jury pointed out that Filihia was criminally involved, had pleaded guilty to murder, "may have his own axe to grind" and was not subject to cross-examination.
[2] *Evidence Amendment Act* 2007 (NSW) amended s. 65(2)(d) to require the more stringent requirement that the representation to be both against the interests of the person who made it at the time it was made, and, that it be made in circumstances that make it likely that the representation is reliable.

a compendious approach to assessing reliability of the statement of co-offenders "whereby an *overall impression* was formed of the general reliability of the statements made by Mr Filihia." stating "[T]hat compendious approach does not conform to the requirements of the Act." The Court warned against making an "*impressionistic evaluation*" of all the evidence in assessing the reliability per s. 65(2)(d) and emphasised the special nature of the exception to the hearsay rule provided by the provision, stating (at [60]-[61]):

> It is no light thing to admit a hearsay statement inculpating an accused. Where s 65 is successfully invoked by the prosecution, the accused will have no opportunity to cross-examine the maker of the statement with a view the undermining the inculpatory assertion..had Mr Filihia pleaded not guilty, and he and Mr Sio been tried together, Mr Filihia's hearsay statements would not have been admissible in that trial against Mr Sio..because s 83 ..preserves the exclusionary operation of the hearsay rule in respect of evidence of an admission of a co-accused.
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> The serious consequences of the successful invocation of s 65(2)(d) emphasise the need for compliance with the conditions of admissibility prescribed by the section. The focus demanded by the language of s 65 is inconsistent with the impressionistic evaluation involved in the compendious approach adopted by the Court of Criminal Appeal. The language of the statute assumes the identification of each material fact to be proved by a hearsay statement tendered in reliance on s 65 and the application of the section to that statement, whereas the compendious approach applied by the trial judge and the CCA is not focused in that way.

The Court held that evidence by an accomplice was a class of evidence well recognised as being less than inherently reliable precisely due to its perceived risk of falsification (at [65]), and were a "classic example of a case where a 'plan of falsification' may be expected to be formed, given the obvious interest of one co-offender to shift blame ….[as] recognised by s 165(1)(d)". At [68] the Court held that the precise parts of the statements made by Filihia concerning who had given him the knife and who had "put him up to the robbery" were given in circumstances that were "plainly apt to minimise his culpability by maximising that of Mr Sio". Further, there was no point in trying to ascertain a defined set of examples of circumstances that assist a trial judge in concluding that a representation is unlikely to be reliable, stating at [71] "the true concern of the provision is with the identification of circumstances which of themselves warrant the conclusion that the representation is reliable notwithstanding its hearsay character." Focus ought be on the assessment of the circumstances in which the statement is made to establish its likely reliability "rather than a general assessment of whether or not it is likely that the representor is a reliable witness" (at [72]). The Court held at [73] that the circumstance of unreliability arose due the fact that Filihia was Sio's accomplice and that "nothing else in the objective circumstances in which the statement was made was apt to shift the balance in favour of a positive finding of likely reliability" the evidence ought not to have been admitted.

Sexual Assault: Admissibility of evidence relating to sexual experience –s 293 *Criminal Procedure Act*

GP v R [2016] NSWCCA 150; *Taleb v R* [2015] NSWCCA 105

Evidence relating to sexual experience has incited division in the courts regarding exclusion of evidence. In ***GP v R* [2016] NSWCCA 150**, the Crown case was that the offender engaged in two acts of sexual intercourse with MP, a child under the age of 10, being 3 or 4 years of age. The Crown case was that GP had digitally penetrated MP's vagina whilst babysitting her, and on a further occasion penetrated MP's vagina with his penis in her bedroom. MP disclosed this to family members about 6 years later and was reported to be distressed whilst doing so. The heart of the appeal was the refusal by the trial judge to allow the accused's counsel to cross examine MP about the contents of one of her complaints in which she made a complaint about her cousin (NP) in order to suggest to her that another family member and not the appellant had assaulted her, and thereby explain why the complainant was upset when reporting the allegations. The application was

refused on the basis that cross-examination of the complainant about prior sexual experience was precluded by s 293 of the *Criminal Procedure Act 1986* (NSW).

The issue that GP argued in his conviction appeal focused on whether evidence pertaining to MP's complaint concerning NP should have been admitted under section 293 of the *Criminal Procedure Act 1986* (NSW), as an exception to the rule, allowing for evidence of sexual experience or activity where relevant to "whether the presence of semen pregnancy, disease ***or injury*** is attributable to the sexual intercourse alleged to have been had by the accused person", per s 293(4)(c).

The applicant relied upon the passage in *R v Dimian* (1995) 83 A Crim R 358 at 367 where Hunt CJ at CL said:

> I reject the narrow interpretation for which the Crown contends. The section must, as I have already said, be construed broadly and in accordance with the purpose for which it was introduced. Reading par (c) in that way, and particularly taking into account the width to be given to the phrase 'attributable to ..injury", I am satisfied that the evidence was admissible pursuant to that paragraph and that leave to cross-examine should be granted.

The applicant further relied upon Simpson J's discussion of the provision in *JAD v R* [2012] NSWCCA 73 at [82]:

> On the appeal, the Crown fairly conceded that a psychological condition such as that suffered by the complainant comes within the term "disease or injury" for the purposes of s. 293(4)(c)(ii). The suffix to that subsection must, therefore, be considered – the evidence is admissible, provided that its probative value outweighs any distress, humiliation or embarrassment that the complainant might suffer as a result of its admission.

The Court comprising of Payne JA, McCallum and Wilson JJ found that s 293(4) (c) did not assist the applicant in the circumstances of this case as they were factually distinguishable: *JAD* on the basis that the "disease or injury" in that case was significant relating to hearing voices and suffering depression and suicidal ideation and could not be compared to evidence of a fleeting display of distress demonstrated by MP when she was telling her family members what had happened (at [35] and [45]). *Dimian* was distinguishable further as the evidence of 'injury' related to physical injury and related to the physically dishevelled state of the complainant in circumstances where there had been an earlier act of consensual sex prior to the act the subject of the charge (at [36]). The Court rejected that Hunt CJ at CL's reference in *Dimian* meant to introduce any prima facie "broad" approach to the construction of the exceptions to the rule contained in s. 293.[3] The Court asserted at [40]:

> Section 293 in its present form, clearly strikes a balance between competing interests being, on the one hand, the interest of preventing distressing and humiliating cross-examination of sexual assault victims about their prior sexual history and, on the other, the interest of permitting an accused person to cross-examine victims about defined aspects of their sexual history in the circumstances prescribed in the exceptions contained within s. 293.

The Court held at [44], that s. 293(4)(c) did not apply to the circumstances of this case and that "fear" and "anxiety"(in reference to the evidence that the complainant cried during the course of disclosing the assaults) did not fall within the description of "injury" within that provision, although conceded at [46], that a recognised psychological condition may.

Taleb v R [2015] NSWCCA 105 further involved a discussion of the provisions of s 293(4)(c) of the *Criminal Procedure Act 1986* (NSW) ('CPA') and a discussion of the various authorities. That case found that the exception provided by this provision related to sexual assault cases where intercourse was denied and not to those cases where consent was in issue

[3] It is noted that the version of the prohibition in *Dimina* was at the time, s 105 of the *Criminal Procedure Act* 1999, following from the s. 409B provision, and prior to the current provision in s. 293 of the *Criminal Procedure Act*.

(according to the words "sexual intercourse so alleged"). The case involved the application by the defence to cross examine the complainant about the presence of DNA on her undergarments, located on vaginal swabs, and of sexual banter contained within text messages suggestive of sexual conduct with another male to, in part, explain the presence of bruising to the thigh area said to be consistent with the allegation of sexual assault. VBy reference to the wording of s 293(4)(c)(i) however, because the accused conceded intercourse had taken place, but claimed it was consensual, the provision was not available to him. The lack of the ability to temporally link (beyond a period of 5 days) the presence of the DNA to the time of the allegation of the assault supported the trial judge's decision to disallow the questioning of the complainant in respect of other sexual activity.

DNA- issues of continuity, contamination and transference- section 137 *Evidence Act*

Ali [2015] NSWCCA 72

In *Ali* the CCA on a section 5F (3A) appeal under the *Criminal Appeal Act* 1912, found that the trial judge erred in excluding evidence of DNA certificates under s 137 of the *Evidence Act* on the basis their slight probative value was outweighed by the danger of unfair prejudice in that there was a distinct possibility of contamination and/or DNA transference (at [25]-[26]). The DNA of the accused had been found on the inside of the underwear of the complainant of sexual intercourse involving an allegation that the accused had touched her underwear whilst assaulting her. The accused was a neighbour of the complainant and she had seen him the day before. There was evidence that the item on which the DNA was located had also been touched by the mother of the complainant and mislabelled which led to issues going to the integrity of the continuity of the exhibit. Significantly, the Crown's position following the calling of expert evidence was that the location and presence of the DNA on the inside crotch area was evidence that it was possible the DNA had been deposited there by direct transfer, indirect transfer if a number of variables aligned, but it was more likely for an indirect transfer to have been on the outside of the clothing than the inside because such places were not generally in contact with surfaces or other places where DNA could be deposited or transferred (at [38]). In other words indirect transfer was argued to be *less likely* than direct transfer.

The CCA allowed an appeal finding that despite the issues concerning chain of possession, the possibility of contamination ought not to have resulted in the exclusion of the evidence as these were issues that could be explained to a jury and understood by them [48]. Hoeben CJ at CL, with whom Adams J and R A Hulme J agreed, said (at [48]) that the approach was not consistent with the findings of the Court in *R v Shamouil*, and that the court should not usurp the role of the jury. In reference to the judgment of Basten JA in *R v XY* [2013] NSWCCA 121 (with whom Simpson J and Hoeben CJ at CL agreed) the issues for consideration in assessing probative value is the *capability* of the evidence to rationally effect a fact in issue rather than a reference to the weight of the evidence (*XY* at [43]). The Court found that in this case the capacity of the DNA certificates to establish whether the respondent committed the offences charged, as distinct from the weight likely to be given to them, was substantial (at [50]) affording them significant probative value. That was balanced against any unfair prejudice, i.e. the likelihood the jury would give the evidence more weight than it deserved, that it might inflame the jury or divert them from their task. Such unfair prejudice was considered unlikely given the "relatively simple issues of continuity, contamination and the possibility of secondary transfer. The risk of such ought to have been dealt with by way of appropriate directions (at [51]). At [52] it was noted:

> The proposition that DNA evidence carries with it the backing of science is true of all DNA evidence. That does not make it unfair.

These comments concerning the significance juries may accord DNA evidence might be considered in light of comments made in other contexts: see the comments of the CCA in *R v Lisoff* [1999] NSWCCA 364 at [55] where the Court acknowledged that scientific evidence as a category was capable of being given "undue weight because of its very concreteness" (at [62]-[63]). Prejudice was said to include mis-estimation of the value of the evidence in *R v MM* [2014] NSWCCA 144 at [43] and *R v EM* [2003] NSWCCA 374 at [121].[4]

Voice identification evidence- admissibility-Section 137 *Evidence Act*

Miller v R [2015] NSWCCA 206

In *Miller v R* [2015] NSWCCA 206, Mr Miller was charged with dishonestly obtaining a financial advantage by deception, gaining $14,380,770 by way of a scheme whereby a male person pretending to be a solicitor used false instruments to raise a mortgage upon an office block that he did not know and had no authority to deal with. Many of the interactions between the perpetrator and his victims took place over the telephone. The Crown case relied, in part on voice identification evidence, being the identification by persons said to have spoken to the perpetrator of the fraud over the telephone. Investigators used a 20 second long recording of the accused speaking in a prior court case which was played to a witness together with recordings of seven other persons reading a transcript of the same words. Ten of the witnesses were played the eight recordings, seven of whom selected the accused's voice.

It was contended on appeal that the voice identification was inadmissible either on the basis that it was not relevant, per s. 55, or that it should have been excluded pursuant to s. 137 of the *Evidence Act 1995*. The Court held that the common law threshold requirement to admissibility that the voice have some distinctive feature, or that the witness had some familiarity with the voice,[5] no longer applied under the *Evidence Act,* the only precondition to the admissibility of voice identification evidence was the requirement in s 55(1) that it be relevant (at [55]),[6] and if so whether it survived any challenge to exclude it under s 135, 137 or 138. The Court derived assistance from cases of visual identification of accused persons from line up parades or photographs,[7] as demonstrating that the court must have regard to all relevant circumstances in making a determination under s. 137 including the conditions under which the recordings were made and the processes associated with the identification (at [60]).

[4] Comparison might also be made to those DNA cases where it is not possible to infer direct transfer was more likely than secondary transfer in circumstances where the location of the DNA, or the familial relationships, might explain its presence. In this case it is open to argue that the evidence of DNA may be no more than "neutral" in which case it is questionable whether the evidence can satisfy the test for relevance under s. 55 of the Act, as to whether it is capable of rationally affecting the probability of a fact in issue. Consideration of "intractably neutral" evidence was considered in *R v Ciantar* (2006)16 VR 26; 167 A Crim R 504 (at [40] and [72]) and *Penza v The Queen* [2013] NSWCCA 21 (who accepted the position of the Court in *R v Ciantar*, per Hoeben JA at [137]-[139]).

[5] *R v Smith* (1987) 7 NSWLR 444; *R v Brownlowe* (1987) 7 NSWLR 461.
[6] *R v Adler* [2000] NSWCCA 357; 116 A Crim R 38 at [13]-[14] per Smart AJ; Heydfon JA and Ireland AJ agreeing.
[7] *R v Johns* [1975] Crim LR 456 (accused only person in identification parade who wore a leather jacket. Court of Appeal held no unfairness as the witness based identification on what the accused looked like, rather than their clothing); *R v Block* [2000] NSWCCA 61 (excluded photographic identification procedure because the accused was the only person in the 12 photographs who had a goatee-style beard and the witness recalled that the offender having a similar beard); *Alexander v The Queen* (1981) 145 CLR 395 (precautions must be taken to ensure that no particular member of the identification group is the suspect).

Here it was clearly relevant as it went to the assessment of the probability that Mr Miller was the offender. After a detailed review of the evidence, the Court concluded that no unfair prejudice warranting exclusion of the evidence had been established. A general discussion about admissibility of such evidence may be found at [44]-[60], with consideration as to the circumstances of the recordings and their possible impact upon the fairness of the array of the sample voice recordings played to the witnesses, which included:

- Contrasting the voice recording taken from the accused speaking in court with the other constructed voice recording including consideration of "unnatural pauses"; clicks in the editing of the accused's recording (described as a 'disjointed cut and paste'); the presence of surrounding noise in the court room vs. no background noise; the faintness of the accused's voice given his distance from the microphone; the speed of the speaking; and consideration as to similarities between the voices;
- The delay between the conversation the subject of the charges and the voice identification procedure; and
- The medium by which the witnesses had initially heard the voice of the offender (namely the telephone).

In considering the test under s. 137 the Court formed the view that no unfair prejudice arose because weaknesses in the voice identification evidence, including sound quality and background noise, and delay were matters of weight to be examined under cross-examination and assessed by the jury having regard to the whole of the evidence [101], [106]-[107].The fact that some witnesses failed to identify the accused's voice was not found to give rise to unfair prejudice they were all matters for the jury: [107].

Opinion evidence vs. factual evidence- s 76 (1) *Evidence Act*

Haidari v R [2015] NSWCCA 126

A witness in the trial of the Haidari concerning offences of riot and affray at Villawood Detention Centre said that he was an officer at the detention centre and had seen the appellant amongst 10-12 others on the rooftop of the detention centre throwing rocks. He later said that he viewed ABC footage of the events (about 18 months later) and identified the accused amongst others from the footage. The evidence at trial was admitted and it was put to the officer that he was mistaken in his recognition of the appellant.

On appeal it was argued that the evidence was in truth opinion evidence relying on the position in *R v Drollett* [2005] NSWCCA 356, where an appeal against conviction was upheld where the trial judge allowed a witness to a gaol assault to identify the appellant from CCTV footage of the incident, where the footage did not represent what the witness himself observed of the incident – '*Here the primary evidence was the film footage. Mr Stephens' evidence was no more than an educated interpretation of what was depicted in the footage and was therefore opinion evidence."* It was argued that as opinion evidence it was inadmissible under s. 76(1) of the *Evidence Act*.

The CCA dismissed the appeal. The Court considered a number of cases where similar issues had arisen (at [54]):

(a) In *Smith v The Queen*, the police officers who purported to identify the accused person were not witnesses to the events portrayed in the photographs;
(b) *R v Marsh ,* the accused persons' sister did not witness the alleged offence, but her evidence of identification of her brother was admitted after application of the law stated in *Smith v The Queen*;
(c) In *R v Beattie* [2001] NSWCCA 502; 127 A Cri R 250, evidence of prison officers of photographic identification of the accused person, in circumstances where they had not observed the evidence in question, was held to have been wrongly admitted applying *Smith v The Queen*;

(d) In *Nguyen v R* [2007] NSWCCA 363; 180 A Crim R 267 at 272-277 [9]-[40], this Court (referring to *Smith v The Queen*; *R v Beattie, R v Marsh* and *R v Drollet*) upheld the decision of a trial Judge allowing police officers (who were not present at the scene of the events) to identify accused persons from CCTV footage taken at the time of the events.

Unlike other cases, the officer was present at the scene and had said he had seen the appellant.

The matter was distinguished from *Drollet* because in that case the witness had not claimed to have observed any part of the conduct forming the substance of the charge and was based solely on his observations of "extremely indistinct" footage of the incident (at [55]), whereas in this case the officer had observed the events as they occurred. His evidence was therefore properly considered as identification evidence, and found that his further evidence concerning what he saw from the ABC footage did not constitute opinion evidence (at [74]), but was rather factual evidence. The Court acknowledged that the distinction between fact and opinion is one of degree, referring to the "blurred boundary between fact and opinion" (at 76]).

Ad hoc Expert- Section 76 *Evidence Act*

Morgan [2016] NSWCCA 25

The issue of voice identification also arose in ***Morgan v R*** in which the Crown sought to rely upon evidence of identification of the appellant's voice derived from a listening device that, together with a tracking device had been installed in the stolen BMW, pursuant to a warrant. The car had been used for multiple break ins the subject of the charges. In order to establish that the appellant was one of the voices recorded from the listening devices it relied on the opinion evidence of one of the investigating police officers. The Crown relied on the officer as an ad hoc expert having listened to the recordings of the conversation contained within the car on multiple occasions and comparing it with recorded telephone calls made by the appellant to his wife whilst he was in custody for the purposes of familiarising himself with the appellant's voice. He said that he paid particular attention to pitch, tone, speed and accent of the participants within the car and was able to describe the appellant's voice as a "deep male voice, throaty, stentorian and gravely…[with an] accent he associated with Australian Aboriginal males". No objection was taken at trial to the description of the officer as an ad hoc expert[8]. Instead on appeal the objection was taken to the evidence on the basis of s. 76 impermissible opinion evidence not excluded by s. 79 (where based on specialised knowledge). The CCA declined to make a ruling as to the admissibility of the evidence on the basis that the point had not been taken below (per Rule 4) and on the basis that the Appellant had accepted the admission of the evidence at trial. However, the Court noted that question as to the admissibility of ad hoc expertise remained undecided by the High Court and had not been ruled on in *Honeysett v The Queen* [2014] HCA 29 253 CLR 122 expressly.

Warnings and directions

Test and directions for unsworn evidence- s 13 *Evidence Act*

The Queen v GW [2016] HCA 6

[8] This point was not taken on appeal as trial counsel accepted that the witness could give evidence of similarity between the voices recorded on the two sets of tapes when being compared: an acceptance that was in conflict with *Morgan v R* [2011] NSWCCA 257; 215 A Crim R 33.

In ***The Queen v GW*** [2016] HCA 6, the Court determined that the *Evidence Act 2011 (ACT)*[9] is neutral in its treatment of the weight that may be accorded to evidence whether it is sworn or unsworn.

The appellant, GW, was convicted of committing an act of indecency in the presence of his daughter, 'R'. At the time of the offence R was five years old. R gave evidence at a pre-trial hearing before a single judge of the Supreme Court of Canberra. It was R's competence to give sworn evidence that became a point in issue. Under s. 13 (3) of the *Evidence Act* a person is not competent to give *sworn* evidence if the person does not have the capacity to understand that, in giving evidence, the person is under the obligation to give truthful evidence. Section 13 (4) of the *Evidence Act* provides that a person who is competent to give evidence, but not sworn evidence, may give unsworn evidence provided that the court issues specific directions regarding the importance of telling the truth and other matters (per ss (5)). In this case, the pre-trial judge during a pre-trial hearing determined that R's evidence should be received unsworn and the recording of it tendered at trial. The ground of appeal to the Court of Appeal of the Supreme Court of the ACT was that the trial judge had erred in failing to direct the jury that R's evidence was unsworn because R did not comprehend the obligation to tell the truth. The Court of appeal upheld this ground holding that the trial judge was required to instruct the jury as to the difference between sworn and unsworn evidence and to take it into account when assessing its reliability.

The High Court, per French CJ, Bell, Gageler, Keane and Nettle JJ, held that there was no requirement under either the *Evidence Act* 2011 (ACT) or the common law to warn the jury of the need for caution in accepting R's evidence. Nor was there a requirement to direct the jury to take into account the differences between sworn and unsworn evidence in assessing the reliability of R's evidence.

Additionally, the High Court held that the trial judge was not required to direct the jury as the defence counsel sought. The fact that R did not give sworn evidence was not material to the jury's assessment of whether her evidence was reliable or not. It was concluded by the majority at [56]-[57]:

> The Evidence Act does not treat unsworn evidence as of a kind that may be unreliable. Had a direction been requested under s. 165(2), there was no requirement to warn the jury that R's evidence may be unreliable because it was unsworn. Nor was there a requirement under the common law to warn the jury of the need for caution in accepting R's evidence and in assessing the weight to be given to it because it was unsworn. Nor was there a requirement under common law, falling short of a warning of that kind, to direct the jury to take into account the differences between sworn and unsworn evidence in assessing the reliability of R's evidence.
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> It is possible that different considerations would apply where a witness other than a young child is capable of giving evidence about a fact but incapable of giving sworn evidence because the witness does not have the capacity to understand that, in giving evidence about the fact, he or she would be under an obligation to give truthful evidence. Depending of the circumstance, it might prove necessary or desirable to give some further form of direction. But for the present, that need not be decided.

[9] S. 13 of the *Evidence Act* 2011 (ACT) is identical in form to s. 13 of the *Evidence Act* 1995 NSW.

More on drug codes: Admissibility of expert evidence by detective concerning use of code words in illicit drug trade and eavesdropping - s 90 *Evidence Act*

Czako v R [2015] NSWCCA 202

Two issues concerning the admissibility of evidence arose from this case which concerned the prosecution of Czako for one count of participation in a criminal group contrary to s. 93T(1) of the *Crimes Act* 1900 (NSW) and one count of money laundering. The Crown case was that the applicant participated in a criminal group that was involved in the sale of substantial quantities of heroin and cocaine.

The Crown relied upon evidence concerning things alleged to have been said by the accused in Hungarian to a co-accused during the course of the execution of a search warrant. The things said were overheard by one of the searching police officer who spoke (but was not NAATI accredited) in the Hungarian language. During the search the accused was asked to speak in English, but was nonetheless overheard by the police officer to say to the co-accused in Hungarian the words (amongst others) "they are not going to find the thing I told you about earlier" and later "I told you to throw that away before". The evidence was subject to an objection on the basis of s. 90 of the *Evidence Act* on the ground that having regard to the circumstances in which the admission was made it would be unfair to the accused to use the evidence. One of the bases of the objection was that the officer had been intentionally placed at the search as an eavesdropper, a matter which was not conceded by the witness, although it was acknowledged his presence was not a co-incidence (at [79]). The Court rejected the submission that the evidence supported the intentional placing of the officer in the scene as an eavesdropper on the basis that the officer was only in the presence of the accused occasionally during his duties as searching officer (at [82]). It is unclear what the Court's position may have been if it could have been inferred that he was so intentionally placed.

Secondly, the evidence was objected to because the accused had not been given any opportunity to adopt (or contest) the officer's notes as to the remarks said to have been overheard. The Court agreed with the ruling of the trial judge that the evidence was not unfair as the accused had been cautioned, was not a detained person, and was not obliged to speak to, or in the presence of, police ([83]-[84]).

A further ground of appeal arose following the admission of opinion evidence given by a police officer with extensive experience in the illicit drug trade who had given evidence in respect of evidence of telephone intercepted calls and the language contained therein.

The officer's evidence was general in respect of the use of coded language and veiled speech and the use of slang, and specific in terms of language contained within the intercepts that he considered was consistent with his experience of the choice of codes used. The applicant argued that the expert had impermissibly strayed into asserting his opinion as fact.

The Court, at [116], held that the evidence of the officer was properly admitted as opinion evidence in respect of veiled and coded speech generally, rather than the use of a particular word as code for a drug-related word.

Importantly, the Court corrected the trial judge's reference to the police officer as an "ad hoc" expert that being a term used to describe a witness who gives an opinion based on expertise acquired for the very purpose of the proceedings in which the evidence is to be given so called voice identification expertise. Care ought be taken to the admission of such evidence: *Nasrallah v R* [2015] NSWCCA 188. This was an error reported to arise from earlier cases such as *Chen v R* [2011] NSWCCA 145. The important matter is that the opinion evidence must be restricted to their expertise, and not trespass

into the role of the jury: caution must be exercised when considering expressions of opinion close to the ultimate issue: *Keller v R* [2006] NSWCCA 204 at [28].[10] If the officer's opinion had founded on material no different from the material available to the jury from its own observation, his opinion could not rationally affect the jury's assessment of the relevant fact and would be irrelevant (per *Smith v R* [2001] HCA 50; 206 CLR 650 at [11]). Because the officer's evidence was not confined to the analysis of the evidence to be considered by the jury but to matters that went to his extensive experience it was properly admissible. In this way the case further supports the direction of the CCA in *Chen, Keller* and *Nguyen*, that such experts are to give evidence of their opinion in terms of the *consistency* of language involved in drug trading, and not their opinion that a person is *in fact* talking about drugs.[11]

Hearsay evidence: admissibility "over objection" and Section 59 *Evidence Act*

Perish, Perish & Lawton [2016] NSWCCA 89

The appellants Anthony Perish, Andrew Perish and Matthew Lawton were convicted for conspiracy to murder of Falconer. Falconer was abducted whilst on work release from gaol. The Crown case was that at the direction of Anthony Perish, three men (including Witness E) impersonated police officers, purported to arrest Falconer and subdued him with chloroform before placing him in a metal box and driving him to Anthony Perish's residence where both Anthony Perish and Lawton were waiting. There was conflicting evidence as to what occurred after arriving at Anthony Perish's residence. Witness E recalled that Falconer was still alive when they reached Anthony Perish's residence, and Anthony Perish later assaulted and killed him. Alternatively, Anthony Perish's account, was that the intention was to question Falconer and return him to prison. However, when he opened the box, Falconer was already dead. At trial Witness E refused to confirm evidence he had provided in a recorded interview. A transcript of the interview was admitted into evidence. However, Witness E had given differing accounts to different people. *Another witness, Witness C, gave evidence at trial that Witness E told him Anthony Perish had said it didn't matter that Falconer died before he got to Perish's residence because 'that's how he would have ended up anyway'*. No objection was made to this evidence (no doubt because this was a critical issue in its defence).

A ground of appeal was based upon the contended wrongful admission of second hand hearsay evidence. The Court comprising Bathurst CJ, Hoeben CJ at CL, Bellew J dismissed the appeal finding that the wording of s. 59 "is not admissible" ought be interpreted as meaning not admissible if objected to, and not as if it meant "shall not be adduced" (per [268]). The Court noted (further at [268]) that the context of Parliament drafting the legislation in contemplation of adversarial proceedings "in which generally it is counsel's responsibility to present their client's case and to object to such evidence as they think it in the interests of their client." At [270] the Court made reference to the joint judgment of Gleeson CJ and Hayne J in *Dhanhoa v R* [2003] HCA 40; 217 CLR 1 at [20] where it was noted that "counsel for an accused person may have any one or a number of reasons for not objecting. A trial judge ordinarily will not know why no objection is taken and may have no right to enquire". As no objection was taken, the evidence was admissible.

[10] In *Keller v R* and *Nguyen v R* (2007) 173 A Crim R 557 the opinion was objectionable because it was based not on specialised knowledge but rather on the subsequently established facts that drugs were discovered.
[11] See *Chen* at [75] and [78].