



ANU LAW STUDENTS' SOCIETY

LAWS2207 Evidence Semester 2, 2010

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LAWS2207 Evidence – Sem 2, 2010

QB: 24.5/30

NB: Marker did not make any comments/ticks throughout exam paper.

QB1: 5/5 marks

1. Faye: AFP officer

Relevant for establishing prosecution's case of uncovering scam: s 55, 56.

2. She had convo with man, met her at C address

This is hearsay – prior representation by man identified as Don, not offered for truth of intended assertion: s 59.

Insufficient to be ID evidence – no assertion that it was D – just man named Don: Dictionary.

3. Don nodded and said as much as you want

Admission by D as previous rep (including conduct) by D that is adverse to interest as suggests many items for sale in garage, thus admission: *Dict* and hearsay and opinion rule do not apply: s 81(1) as F perceived the rep: s 82(2)(a).

Exclusion?

But possible that unfairly obtained due to under compensation would be unfair to use: s 90 but in *Toflau* – adm. made in undercover investigation not unfair to use – probs admissible as not sufficiently “unfair” to D: s90.

S 85 not arising as “investigating official” doesn't include police officer in covert operations: *Dictionary*.

4. Told Don come back later

Not for hearsay purpose: s 59.

5. Went behind garage etc

Relevant to FII of whether D used false docs – as established he has them in his possession.

6. What looked like hundreds

Opinion but lay opinion s 78(a) based on what she saw – necessary to obtain understanding s 78(b) of what she perceived.

S138 Improperly Obtained Exclusion

Possible exclusion if unavailability is outweighed by undesirability.

Mandatory factors: s 138(3). However high desirability as it has high PV: s 138(3)(a) and is important: s138(3)(b) being undercover doesn't infringe laws probably not excluded under s 138.

B2 – 4 /5 marks

“Appeared to be under influence”

s 78 lay opinion thus s 76 not arise.

Uncertain of relevance – not related to FII, thus irrelevant and inadmissible: s 56(2), 66, unless relevant to exclusion: s 57

“Shit I should have smelled a cop”

Admission by D as prior rep adverse to interests: *Dictionary* thus hearsay rule won't apply: s 81(1), s82(a), but as made to police officer only admit if circumstances make unlikely truth affected: s85(2) – consider influence of drugs affecting truth: as “condition”: s 85(3)(a). Also improperly obtained as questioning with no caution: s 139(1) – exclusion s 138. Or unfair to use against D: s 90.

“Look don't have anything”

Relevant to FII of whether D possessed bats and why: s 55. Admission by D – could be adverse by creating later PIS or consciousness of guilt.

∴ hearsay doesn't apply.

Again s 85(2) – prosec must satisfy reliability not affected – possibly affected by drugs or alcohol.

B3 – 4/5 marks

H brought Bradman bat, answered advert

Relevant to establishing FII of whether someone accepted as genuine and whether gan obtained (purchase) as per s 347: s 55, 56.

Tendency? S 97.

Hadley's identification – “similar to D”

This is ID evidence as it's H's assertion that person who sold bat (offence) resembles D:

Dictionary, thus Pt 3.9 applies. It is visual ID evidence based on what H saw, thus s114 applies: *Dictionary* s114(1). Caution needed: s 116.

Will only be admissible if not reasonable to hold ID parade: s 114(2)(b). Deemed unreasonable if D refused to take part unless lawyer was present and it would not reasonably be practical for such lawyer to be present: s 114(5), s 114(2) does not exclude evidence.

However, evidence has low PV due to time elapsed – 2 months prior to arrest – thus low reliability of evidence. Further, D now has “darker hair” – not a very definite ID – so low PV which is outweighed by danger of unfair prejudice (disproportionate weight to dodgy evidence) to D, so must be excluded: s 137.

B4 – 4/5 marks

Ida inspected cricket bats seized

Relevant to context for her opinion below.

NB these not necessarily same bats as seized from D's place – thus reduces PV – possibly misleading/confusing: s 135(b), discretion to exclude.

“Not genuine Bradman era bats”

Relevant to whether docs were false: FII. Opinion so not admissible as proof of opinions as fact: s 76. More than lay opinion: s 78.

S79

I may have specialised knowledge on bats based on her “long time” experience of cricket-loving, thus if opinion is wholly/substantially based on such knowledge – s 76 won’t apply: s79(1).

Issue re: whether she had “specialised knowledge” would need to be on Bradman bats. However, she has stated assumptions/factual substratum for her conclusion: *Makita* and ad hoc experience is OK: *R v Cassar* – so if she could establish specialised knowledge in bats (more facts needed) would be OK as opinion.

Tested writing

Some relevance – to establish if false. S 76 not admissible to prove opinion.

S79 (see above). Here her knowledge is in forensic chemical analysis based on training and experience with AFP – a clearly identified aspect of field: *Makita*. Opinion is based on such knowledge and she has stated how conclusions reached/factual substratum: *Makita* thus probably admissible under s79(1) exception.

Exclusion?

Possible exclusion as PV (ability to affect assessment of FII – whether “false”) limited by inability to establish that bats were D’s bats. Risk of misleading jury: s 135(b) thus discretion to exclude, if the risk of being misleading substantially outweighs the low PV.

B5 – 3.5/5marks

Don busy working/unemployed

Arguably not relevant FII if not relevant – inadmissible: s 56(2).

He would never engage in illegal activities

This is character evidence as it is about D to prove good character in general (“illegal”) and specific respect (selling fake memos) thus hearsay/opinion credibility rules don’t apply: s110(1)

Relevant to whether he committed offence: s55.

Prior convictions for car theft – D’s denial

Prosec adduced maybe as tendency relevant to FII of whether D would not meet high s97(1)(b) SPV and s101 “substantially outweighs” prejudice test as not directly on point but highly prejudicial.

Only credibility evidence relevant to D’s cred – as inadmissible for tendency: s 101A(b): Pt 3.7 applies – cred evidence is not admissible: s 102.

s103

But s102 won’t apply if on cross and if could substantially affect assessment of D’s credibility: s103(1). Given the dishonest conduct of selling stolen parts, probably pass s103 test – must consider time elapsed: s103(2)(b). Need leave under s104(2).

Should leave be given?

S106 to rebut denial as in cross (see above) substance put to D and denied: s 106(1)(a). No leave needed to adduce evidence of convictions: s 104(2)(b). Only admissible for fact of conviction: s 91.

B6 – 3/5 marks

This evidence is relevant to FII of whether D was knowingly in possession of false bats (docs) but also to credibility. Inadmissible re FII because it is hearsay: s 59 maker available whether fresh in memory: s 66.

Credibility evidence: s 101A(b) and cred rule excludes: s102.

S108

However cred rule doesn't apply to evidence as it is of prior consistent statement (same as D's prior statement that bat's not his) and prosecution will suggest statement fabricated: s 108(3)(b) by stating it is "make believe" in closing address.

Thus defence can adduce evidence of PCS even if not from D: *Leung*, so OK.

Now admitted, can also be used for hearsay purpose (to prove that D was only storing for friends).