Chapter 9: Hearsay Evidence

This chapter considers hearsay evidence as it applies in criminal cases, and provides some examples. Hearsay evidence is one of the most difficult areas of law for practitioners. It has been described as an 'oral or written statement of a person who is not produced in court, conveyed to the court either by a witness, or by the instrumentality of a document'.[1] If evidence is not given on oath by the person who can best attest to a fact then it is generally referred to as hearsay evidence and may not be admissible. It was described at the beginning of the twentieth century in the following way:

> If a person appears in court, and himself on oath deposes to a certain fact, this evidence is at first hand; but if a witness appears and deposes that a person told him a certain fact, or if a writing by some person stating a fact is produced, this is only at second hand, and is hearsay evidence.[2]

This description adequately describes hearsay evidence as it is understood at common law. The numbers of exceptions to the inadmissibility of hearsay evidence have gradually grown and, in many instances, legislation has incorporated these exceptions and added to them.

Hearsay Rule

When considering hearsay evidence reference is often made to the hearsay rule that is also called the rule against hearsay. The hearsay rule is simply that hearsay evidence is not admissible in a court of law. When reference is made to exceptions to the hearsay rule this means that there have been decisions made by courts or introduced by statute that allow particular types of hearsay evidence to be admitted in court.

The reason for the hearsay rule is succinctly stated by the court in *Lee v The Queen*:

> The common law of evidence has long focused upon the quality of the evidence that is given at trial and has required that the evidence that is given at trial is given orally, not least so that it might be subject to cross-examination. That is why the exclusionary rules of the common law have been concerned with the quality of the evidence tendered - by prohibiting hearsay, by permitting the giving of opinions about matters requiring expertise by experts only, by the "best evidence rule" and so on. And the concern of the common law is not limited to the quality of evidence, it is a concern about the manner of trial. One very important reason why the common law set its face against hearsay evidence was because otherwise the party against whom the evidence was led could not cross-examine the maker of the statement. Confrontation and the opportunity for cross-

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1 Powell on Evidence, 7th ed., 132.

2 Indermaur & Thwaites, *Principles of The Common Law*, Stevens & Haynes, London, 1904, 483.

> examination is of central significance to the common law adversarial system of trial [3]

The hearsay rule involves consideration of evidence that is sought to be led about something said or done out of court. The evidence sought to be led about something said or done out of court is a 'previous representation'. If it is intended to be led to prove the existence of a fact that the person who made the representation intended to assert by it, then it may not be admissible unless it falls within one of the exceptions to the hearsay rule.

One of the leading cases on hearsay is *Subramaniam v Public Prosecutor* where hearsay evidence was admitted not for the purpose of assisting with determining the truth of what was said in the statement, but simply to prove that it was made.[4] The Privy Council said in this case:

> Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.[5]

In each case where hearsay evidence is sought to be adduced to show 'the fact that [the statement] was made' needs to be evaluated as to its admissibility on the grounds of relevance and its probative value versus its prejudicial effect. In circumstances where hearsay evidence is sought to be led, even on the basis described in *Subramaniam's case*, the prosecution should identify the relevance and probative value of the evidence.

The hearsay rule has been modified over time and the courts have suggested that it is not an inflexible rule. In the Australian case of *Walton v The Queen* Mason CJ stated:

> The hearsay rule should not be applied inflexibly. When the dangers which the rule seeks to prevent are not present or are negligible in the circumstances of a given case there is no basis for a strict application of the rule. Equally, where in the view of the trial judge those dangers are outweighed by other aspects of the case lending reliability and probative value to the impugned evidence, the judge should not then exclude the evidence by a rigid and technical application of the rule against hearsay.[6]

Whilst not an inflexible rule it is one that still requires careful consideration before it is breached.

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3 [1998] HCA 60, 32.
4 [1956] 1 WLR 965, 970.
5 Ibid.
6 [1989] HCA 9; (1989) 166 CLR 283,293.

Example of an Approach to Hearsay Evidence

It is not unusual in a criminal case for evidence to either inadvertently or deliberately be sought to be led from a witness who is attempting to give an account of what another person said about an incident. For example, witness A says to a police officer:

> 'I saw B come out of the house and as he ran by he said to me "C just shot D"'.

Such evidence is inadmissible hearsay and objection should be taken if an attempt is made to lead such evidence. Care needs to be taken when reading the statements of witnesses to ensure that inadmissible hearsay does not inadvertently find its way into evidence. The appropriate way of giving the above evidence is:

> 'I saw B come out of the house and as he ran by he said something to me'.

The witness statement provided to the police should be couched in the above terms. The police officer taking the statement should advise the witness not to make reference to what B said C said about shooting D. Furthermore, the practitioner conducting the hearing should in conference advise the witness that such evidence is inadmissible hearsay.

The appropriate way of leading evidence about what B alleges he saw or heard is to call B as a witness. His evidence would then not be hearsay and would be admissible. Each case depends on its facts and thought needs to be given to whether or not an exception may be available, or some flexibility applied to its application.

Res Gestae Exception

A common law exception to the rule is the *res gestae* exception. An acceptable definition of *res gestae* is: '[t]hings so close in time or space to the matter being proved as to be inseparable from it'.[7] In *Walton v The Queen* Wilson, Dawson and Toohey JJ stated:

> An assertion may be admitted to prove the facts asserted if it is part of the res gestae, but it is then an exception to the rule against hearsay: see Adelaide Chemical and Fertilizer Co. Ltd. v. Carlyle [1940] HCA 44; (1940) 64 CLR 514. The justification for that exception is now said to lie in the spontaneity or contemporaneity of assertions forming part of the res gestae which tends to exclude the possibility of concoction or distortion: Ratten, at pp 389-390; Reg. v. Andrews (1987) AC 281, at pp 300-301. See also Adelaide Chemical and Fertilizer Co. Ltd. v. Carlyle, at p 531. Of course, the discussion in Ratten and Andrews was in the context of the res gestae rule. The unlikelihood of concoction or distortion is not sufficient of itself to render a hearsay statement admissible: see Vocisano v. Vocisano [1974] HCA 14; (1974) 130 CLR 267, at p 273. But if sometimes there is an element of hearsay in evidence which is led of

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7 Butterworths Australian Legal Dictionary.

> statements made by a person other than a witness for the purpose of founding an inference concerning that person's state of mind, the justification for disregarding that element of hearsay may be thought to be of a similar kind. Such statements will rarely be purely assertive. Ordinarily they are reactive and are uttered in a context which makes their reliability the more probable. On the other hand, if a statement by a person about his state of mind is a bare assertion not amounting also to conduct from which a relevant inference can be drawn, then it ought to be excluded as hearsay.[8]

Evidence Act and Exceptions

In summary the exceptions to the hearsay rule as expressed in the *Evidence Act* are:

- admissions (subject to certain protections for an accused see Part14 *Evidence Act*);
- maker of the statement is unavailable (section 118);
- evidence of a right or custom (section 119);
- business documents (section 120);
- tags, labels and writing placed in the course of business (section 121);
- telecommunication (section 122);
- statements about state of health or mind (section 123);
- personal history (section 124);
- public and general rights (section 125);
- adduced in interlocutory proceedings about source (section 126);
- evidence relevant for a non-hearsay purpose (section 127);
- opinion evidence (section 128, 129);
- expert opinion (section 130);
- opinion of handwriting (section 131);
- expert reports (section 133);
- evidence of good character in civil proceedings (section 134); and
- evidence of bad character in civil proceedings (section 135).

The *Evidence Act* Part 9 commencing at section 117 to 135 covers hearsay evidence and the exceptions to it. Section 117 incorporates the hearsay rule. It states:

> **117.** A hearsay statement is not admissible except as provided by this Act or other law.

Section 118 allows for evidence to be admitted where the witness is unavailable or if calling the maker of the statement would cause undue expense or delay. The proviso attached to this section is the general proposition, defined somewhat in subsections (4), (5) and (6), that the statement must be made in circumstances where there is reasonable assurance that the statement is reliable. This requirement would require

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8 *Walton v R* [1989] HCA 9 at [25]; (1989) 166 CLR 283.

careful evaluation in each case and its probative value would still need to outweigh its prejudicial effect.

Section 118 states:

> **118.** (1) A hearsay statement is admissible in any proceeding if –
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> (a) the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and
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> (b) either –
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> (i) the maker of the statement is unavailable as a witness; or
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> (ii) in any case where the court considers that undue expense and delay would be caused if the maker of the statement were required to be a witness.

Section 118(2) provides some additional protection by requiring notice to be given by the party intending to call hearsay evidence. It states:

> **118.** (2) In a criminal proceeding, no hearsay statement may be offered in evidence unless:
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> (a) the party proposing to offer the statement has given reasonable notice of the intention to rely on the statement*;* or
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> (b) another party has waived the requirement for notice; or
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> (c) the court dispenses with the requirement for notice in the interest of justice.

Where a party is seeking to adduce hearsay evidence pursuant to s 118 then reasonable notice needs to be given in writing to the other party of the intention to adduce the evidence. Effectively, s 118(2) requires notice to be given of an intention to lead evidence of 'first hand hearsay' where the maker of the representation is not going to be called as a witness. It is designed to allow the party receiving the notice to make inquiries about the evidence and to obtain available evidence to modify or rebut the hearsay evidence.

Section 118(3) relates to the accused and states:

> **118.** (3) If an accused in a criminal proceeding does not give evidence, the accused may not offer his or her hearsay statement as evidence in the proceeding.

This subsection, presumably, stops an accused from tending his own record of interview with the police or from calling witnesses to give evidence of

what the accused said, unless the accused gives evidence. Nothing in this subsection would affect the giving of a dock statement by the accused.

Section 118(4), (5) and (6) state:

> **118.** (4) In this section, 'circumstances', in relation to the statement by a person who is not a witness, includes –
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> (a) the nature of the statement; and
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> (b) the contents of the statement; and
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> (c) the circumstances that relate to the making of the statement; and
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> (d) the circumstances that relate to the truthfulness of the person; and
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> (e) any circumstances that relate to the accuracy of the observation of the person.
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> (5) For the purposes of this section, a person is unavailable as a witness in a proceeding if the person –
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> (a) is dead; or
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> (b) is outside Solomon Islands and it is not reasonably practicable for him or her to be a witness; or
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> (c) is unfit to be a witness because of age or physical or mental condition; or
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> (d) cannot with reasonable diligence be identified or found; or
>
> (e) is not compellable to give evidence.
>
> (6) Subsection (1) does not apply to a person whose statement is sought to be offered in evidence by a party who has caused the person to be unavailable in order to prevent the person from attending or giving evidence.

Section 119 allows an exception to the hearsay rule relevant to general custom or right. It states:

> **119.** (1) When the court has to form an opinion as to the existence of any general custom or right, evidence may be given of general reputation with reference to such custom or right among persons who would be likely to know of its existence.
>
> (2) Where in any proceeding a question arises as to the existence of any right or custom evidence may be given of –

(a) any transaction by which the right or custom in question was created, modified, recognised, asserted or denied or which was inconsistent with its existence;

(b) particular instances in which the right or custom was claimed, recognised, or asserted, or in which its exercise was disputed, asserted, or departed from.

(3) The hearsay rule does not apply to a previous representation about the existence or non-existence, or the content, of the traditional laws and customs of a Solomon Islander tribal group.

(4) The opinion rule does not apply to evidence of an opinion expressed by a member of a tribal group about the existence or non-existence, or the content, of the traditional laws and customs of the group.

Section 120 provides for exceptions to the hearsay rule where business records are involved. It states:

120. (1) This section applies to a document that –

(a) either –

(i) is or forms part of the records belonging to or kept by a person, body or organisation in the course of, or for the purposes of, a business; or

(ii) at any time, was or formed part of such a record; and

(b) contains a previous representation made or recorded in the document in the course of, or for the purposes of, the business.

(2) The hearsay rule does not apply to the document (so far as it contains the representation) if the representation was made –

(a) by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact; or

(b) on the basis of information directly or indirectly supplied by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact.

(3) Subsection (2) does not apply if the representation –

(a) was prepared or obtained for the purpose of conducting, or for or in contemplation of or in connection with, a proceeding in Solomon Islands or another country; or

(b) was made in connection with an investigation relating or leading to a criminal proceeding.

(4) The hearsay rule does not apply to evidence that tends to prove that there is no record kept, in accordance with a system, or the occurrence of an event, if –

(a) the occurrence of the event of a particular kind is in question; and

(b) in the course of a business, the system has been followed of making and keeping a record of the occurrence of all events of that kind.

(5) For the purposes of this section, a person is taken to have had personal knowledge of a fact if the person's knowledge of the fact was or might reasonably be supposed to have been based on what the person saw, heard or otherwise perceived (other than a previous representation made by a person about the fact).

Section 121 deals with an exception to the hearsay rule relating to tags and writing. It states:

121. (1) The hearsay rule does not apply to a tag or label attached to, or writing placed on, an object (including a document) if the tag or label or writing may reasonably be supposed to have been so attached or placed –

(a) in the course of a business; and

(b) for the purpose of describing or stating the identity, nature, ownership, destination, origin or weight of the object, or of the contents (if any) of the object.

Section 122 provides for an exception to the hearsay rule for telecommunications. It states:

122. (1) The hearsay rule does not apply to a representation contained in a document recording a message that has been transmitted by electronic mail or by a fax, telegram, letter gram or telex so far as the representation is a representation as to –

(a) the identity of the person from whom or on whose behalf the message was sent; or

(b) the date on which or the time at which the message was sent; or

(c) the message's destination or the identity of the person to whom the message was addressed.

(2) Before relying on evidence of such a representation, the court must take into account the possibility of such a representation being false, whether deliberately or not.

Section 123 allows for an exception where a contemporaneous representation is made about health, feelings, sensations, intention or state of mind. The principle being that the representation is more likely to be truthful because it is contemporaneous.

> **123.** The hearsay rule does not apply to evidence of a representation made by a person that was a contemporaneous representation about the person's health, feelings, sensations, intention, knowledge or state of mind.

Section 124 deals with an exception regarding personal history. It states:

> **124.** (1) The hearsay rule does not apply to evidence of reputation concerning –
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> (a) whether a person was, at a particular time or at any time, a married person; or
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> (b) whether a man and a woman cohabitating at a particular time were married to each other at that time; or
>
> (c) a person's age; or
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> (d) family history or a family relationship; or (e) tribal affiliation of a person.
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> (2) In a criminal proceeding, subsection (1) does not apply to evidence adduced by an accused unless –
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> (a) it tends to contradict evidence of a kind referred to in subsection (1) that has been admitted; or
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> (b) an accused has given reasonable notice in writing to each other party of the accused's intention to adduce the evidence.
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> (3) In a criminal proceeding, subsection (1) does not apply to evidence adduced by the prosecutor unless it tends to contradict evidence of a kind referred to in subsection (1) that has been admitted.

Second 125 concerns an exception for a public or general right. It states:

> **125.** (1) The hearsay rule does not apply to evidence of reputation concerning the existence, nature or extent of a public or general right.
>
> (2) In a criminal proceeding, subsection (1) does not apply to evidence adduced by the prosecutor unless it tends to contradict evidence of a kind referred to in section (1) that has been admitted.

Section 126 deals with an exception for interlocutory proceedings. It states:

> **126.** In an interlocutory proceeding, the hearsay rule does not apply to evidence if the party who adduces it also adduces evidence of its source.

Section 127 does not follow the common law. It is a significant change from the position taken by the court in *Subramaniam v Public Prosecutor* where hearsay evidence could only be admitted for a non hearsay purpose, that is, it could not be admitted to prove the truth of what was being said.[9] This section is taken from s 60 of the *Australian Evidence Act 1995*, and it allows for hearsay evidence to be admitted to prove the existence of a fact. It states:

> **127.** The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of the fact intended to be asserted by the representation.

If the evidence is admitted, the Australian cases indicate that it can be used to prove:

- representations because they formed part of conversations making an agreement for sale;[10]
- evidence of a prior consistent statement;[11]
- evidence of prior inconsistent statement;[12]
- evidence of the basis of an expert's opinion.[13]

For example, an expert's report dealing with the accused's medical status usually contains a history given by the accused, which the expert relies upon to form an opinion. Section 127 allows that history to be taken into account as a true history. At the time of writing there are no Solomon Islands cases that consider section 127.

Sections 128, 129, 130 and 131 allow for an exception to the hearsay rule for opinion evidence. They state:

> **128.** A statement of an opinion is not admissible in a proceeding, except as provided by this Act.
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> **129.** A witness may state an opinion in evidence in a proceeding if that opinion is necessary to enable the witness to communicate, or the fact-finder to understand, what the witness saw, heard or otherwise perceived.

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9 [1956] 1 WLR 965, 970.
10 *R v Macraild* (unreported NSWCCA, Sully, Dunford, Simpson JJ, 18 December 1977).
11 *R v Sing-Bal* (1997) 92 A Crim R 397.
12 *Lee v The Queen* [1998] HCA 60; (1998) 195 CLR 594, 601, 603-604.
13 R v Welsh (1996) 90 A Crim R 364.

130. (1) An opinion by an expert that is part of expert evidence offered in a proceeding is admissible if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding.

(2) An opinion by an expert is not inadmissible simply because it is about

(a) an ultimate issue to be determined in a proceeding; or

(b) a matter of common knowledge.

(3) Subject to subsection (4), if an opinion by an expert is based on a fact that is outside the general body of knowledge that makes up the expertise of the expert, the opinion may be relied on by the fact-finder only if that fact is or will be proved or judicially noticed in the proceeding.

(4) If expert evidence that includes an opinion about the sanity of a person also includes a statement that the person made to the expert about the state of mind of the person, then

(a) the statement of the person is admissible to establish the facts on which the expert's opinion is based; and

(b) neither the hearsay rule nor the prior inconsistent statements rule applies to evidence of the statement made by the person.

131. (1) Where the court has to form an opinion as to the person by whom any document was written or signed, any person acquainted with the handwriting of the person by whom such document is alleged to have been written or signed may give evidence that in his or her opinion it was or was not written or signed by that person.

(2) A person shall be deemed to be acquainted with the handwriting of another person, when–

(a) he has seen that person write; or

(b) he or she has received documents purporting to be written by that other person in reply to documents written by himself or herself or by his or her direction and addressed to that other person; or

(c) in the ordinary course of business documents purporting to contain that other person's handwriting have habitually come under his or her notice.

Some Case Examples

In *Lee v The Queen* the appellant was convicted of 'when armed with a pistol intent to assault and rob'.[14] A witness gave evidence to the police that the appellant had spoken to him shortly after the attempted robbery and said, *inter alia*:

> 'I haven't got it, leave me alone, cause I'm running because I fired two shots.' I said, 'what do you mean you fired two shots.' He said, 'I did a job and the other guy was with me bailed out.'[15]

At trial the witness who heard the admission was called to give evidence by the prosecution but did not give the above evidence. The prosecution sought and was granted leave after a lengthy *voir dire*, for the witness to be cross-examined in front of the jury about the statement he made to the police which was in documentary form. The written statement by the witness was tendered in evidence. The High Court found that:

> Taken as a whole, . . .the charge to the jury would have been understood as an instruction that if the jury were satisfied that the appellant said these words to [the witness], they were a confession by the appellant to the crime with which he was charged.[16]

Effectively, the acceptance by the jury of the confession to the witness may have resulted in the jury accepting a prior inconsistent statement as proof of the existence of a fact (confession) as represented by the words allegedly said by the appellant to the witness. The court considered the effect of section 60 of the Australian *Evidence Act 1995* which is the same as section 127:

> The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of the fact intended to be asserted by the representation.

The court held that the evidence of the witness about what the appellant said 'was not evidence of the truth of that confession. It should not have been received at the trial of the appellant, as it was, as evidence establishing that the appellant had committed the offence.'[17] The High Court found this way, at least in part, because it was not first-hand hearsay. In reaching this conclusion the court evaluated the evidence in the following way:

> The nature of what Mr Calin [the witness] said in his statements to the police was such that evidence of those statements was evidence both of representations made by Mr Calin to the police (about what Mr Calin had seen and heard) and of representations made to Mr Calin by the appellant (about what the appellant had done). By virtue of s59 the evidence was not admissible to prove the existence either of the facts which Mr Calin

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14 [1998] HCA 60 at [32].
15 Ibid.
16 Ibid [12].
17 Ibid [30].

> intended to assert to the police or of the facts which the appellant intended to assert to Mr Calin. Section 60 operated only upon the former representations; it had nothing to say to the representations made by the appellant to Mr Calin. It was only the representations made by Mr Calin to the police that were relevant for a purpose referred to in s 60: the purpose being to prove that Mr Calin had made a prior inconsistent statement and that his credibility was thus affected. The hearsay rule was rendered inapplicable to Mr Calin's representations, but not to the representations allegedly made by the appellant. And, of course, the representations allegedly made by the appellant were not admissible under the confession exceptions to the hearsay rule created by s81 because the evidence of these confessional statements was not first hand.
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> To put the matter another way, s 60 does not convert evidence of what was said, out of court, into evidence of some fact that the person speaking out of court did not intend to assert. And yet that is what was done here. Evidence by a police officer that Mr Calin had said, out of court, that the appellant had said that he had done a job was treated as evidence that the appellant in fact had done a job - a fact which Mr Calin had never intended to assert. (Of course, it would be different if Mr Calin had said in evidence in court that the appellant had said he had done a job. Then the representation made out of court would be the appellant's, not Mr Calin's.)[18]

Prior inconsistent statements are often used in trials to undermine the credibility of a witness. The court took the view that the trial judge should have rejected those parts of the witness' statement which were admitted as evidence of the truth of the confession. This was the preferred approach of the court, the alternative being that the trial judge 'give clear directions to the jury about the very limited use to which they could be put'.[19]

Hearsay evidence can be particularly damaging where it arises in a trial involving co-accused. In *Bannon v The Queen*[20] the appellant was tried jointly with a co-accused for the murder of two people. The victims had been stabbed to death and the Crown had no evidence other than what each accused had said.

The Crown alleged that either the co-accused acted together or that one or the other aided and abetted the principal actor. Co-accused Calder gave no evidence at the trial but evidence was available that she had said at various times the following:

1. [T]hat's what you get when you kick knives out of people's hands.
2. Oh fuck I don't know, I think I've killed these cunts.
3. You don't understand, I just can't go to a doctor. I could have killed these couple of people tonight in a knife fight.

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18 Ibid [28]-[29].
19 Ibid [41].
20 [1995] HCA 27; (1995) 185 CLR 1.

> 4. You just don't understand, you know too much already, these people are dogs...I could have killed two people but it does not matter, it is not a worry, prison means nothing to me.[21]

The appellant Bannon contended that words of the kind quoted above should have been admissible in his case for the purpose of showing the truth of the representations made, with the inference being open that the co-accused was the sole murderer.

The comments of Deane J in *Bannon's case* highlight the difficulties faced in a co-accused trial where hearsay evidence is an issue. He stated, *inter alia*, that:

> The joint criminal trial of two persons charged either on the basis that both were jointly involved in criminal conduct or on the basis that one or other of them is alone guilty of the charged criminal offence has long been rightly seen as representing one of the most difficult facets of the administration of criminal justice. At the heart of the difficulties which are likely to be inherent in such a joint trial, there lies the likelihood that some evidence which is led against one or other of the accused will be prejudicial to the other accused but inadmissible in his or her trial. Ordinarily, the trial judge must endeavour to meet that circumstance with clear directions to the effect that the particular evidence is not evidence in the trial of the other accused and that the jury would be acting unlawfully, and doing a grave injustice to the other accused, if they took into account against him or her. In such circumstances, the accused is subjected to the risk of illegitimate prejudice and is likely to be placed in a forensic dilemma involving the need to choose between reliance on the efficacy of judicial directions and increasing the risk of emphasising the prejudicial material by seeking to counter it. Nonetheless, an intelligent juror can be expected to perceive the fairness of the approach that material, such as an ex-curial statement made in the absence of the other accused and not susceptible of being tested by cross-examination on behalf of that accused, should not be treated as evidence against him or her. The same cannot, however, be said of circumstances where, on a joint trial, the Crown leads evidence against one accused but, on the ground that it is not led or admissible against the other accused, seeks to preclude the other accused from relying upon it to support his or her denial of guilt. Indeed, particularly in the context of the criminal standard of proof, one can envisage circumstances in which an ordinary juror would be conscious of strong considerations of fairness and common sense militating against a strict observance of a trial judge's direction to the effect that the other accused was not entitled to rely on such evidence for the reason that it was not evidence in his or her trial.[22]

In the appellant's case an exception to the hearsay rule was not made because the evidence was not probative of his innocence, was insufficiently reliable and counsel at trial had failed to seek a redirection from the trial judge on the use of the co-accused evidence. Practitioners should be aware

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[21] Ibid [30].
[22] Ibid [13].

that each case should be evaluated on its facts and that the hearsay rule is not inflexible as highlighted by Mason CJ in *Walton v The Queen*[23].

There is also the possibility of hearsay being admitted where an accused participated in a conspiracy.[24] This exception does not seem to have been applied in the Solomon Islands.

The next chapter deals with competence and compellability.

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23 [1989] HCA 9; (1989) 166 CLR 283,293.

24 See *R v Chai* (1992) 27 NSWLR 153; *R v Masters* (1992) 26 NSWLR 450.