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Citation: Stockdale, Michael and Clough, Joanne (2013) Confessions and the Criminal Justice Act 2003. *The Journal of Criminal Law*, 77 (3). pp. 231-254. ISSN 0022-0183

Published by: Vathek Publishing

URL: <http://dx.doi.org/10.1350/jcla.2013.77.3.842>
<<http://dx.doi.org/10.1350/jcla.2013.77.3.842>>

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CONFESSIONS AND THE CRIMINAL JUSTICE ACT 2003

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Abstract

The admissibility of hearsay evidence in criminal proceedings in England and Wales is now governed by provisions of the Criminal Justice Act 2003, a result of Law Commission reform proposals. The Law Commission's Report left several issues concerning the admissibility of confessions in the context of its proposed hearsay regime unclear, some of which have not yet been clarified by the post 2003 Act jurisprudence. In particular, whilst the authorities have established that confessions made by third parties may be admissible in exceptional circumstances, the courts have not yet engaged with s.128(2) of the 2003 Act which limits the extent to which confessions made by defendants may be admissible under the 2003 Act's provisions. Moreover, whilst the Court of Appeal has recognised both that certain confessions may exist outside the 2003 Act's statutory framework and that the admissibility of such a confession for the prosecution when made by a defendant is governed by s.76 of the Police and Criminal Evidence Act 1984, other issues concerning the admissibility of such confessions have not yet been resolved.

Introduction

The Law Commission's report, *Evidence in Criminal Proceedings: Hearsay and Related Topics*¹, the recommendations in which form the basis of the hearsay regime introduced by Chapter 2 of Part 11 of the Criminal Justice Act 2003, does not deal at length with the subject of confessions. The Law Commission largely intended to preserve the rules and provisions that had previously governed the admissibility of confessions, only intending to modify the pre-existing regime by making express statutory provision concerning admission of a defendant's confession as evidence for a co-defendant and by permitting the admission of confessions made by third parties. The purpose of this article is to consider both the extent to which the Law Commission's recommendations concerning the admissibility of confessions in criminal proceedings under its new hearsay regime have been

reflected by the approach of the criminal courts in applying the hearsay provisions of the 2003 Act and whether there are any lacunae in the relationship between the provisions of the Police and Criminal Evidence Act 1984 which govern the admissibility of confessions made by defendants and the hearsay provisions of the 2003 Act which the courts have yet to fill.

The Law Commission's Recommendations

The Law Commission proposed that admissions and confessions would fall within one of three categories of automatically admissible hearsay evidence², the rationale for the automatic admissibility of confessions being: "...the general assumption that what a person says against his or her own interests is likely to be true".³ Admissibility would, however, be "subject to the existing statutory safeguards."⁴ Thus, the Law Commission, having initially proposed in its consultation paper that,

"... confessions should continue to be admissible against their makers, subject to section 76 of PACE and the discretions at common law and under section 78(1) of PACE to exclude prosecution evidence"⁵,

finally recommended, in line with this original proposal, that: "...the current law be preserved in respect of admissions, confessions, mixed statements, and evidence of reaction."⁶

So far as those circumstances in which a co-defendant wishes to adduce evidence of the defendant's confession are concerned⁷, the Law Commission recommended the enactment of s.76A of the Police and Criminal Evidence Act 1984 on the basis that:

"...the admissibility of a confession by one co-accused at the instance of another should be governed by provisions similar to section 76 of PACE, but taking into account the standard of proof applicable to a defendant."⁸

In relation to the operation of this provision, the Law Commission indicated that:

Where a confession is admitted against one accused on behalf of a co-accused, the fact-finders may consider the admission as exonerating the defendant who did not make it, but may not take it as evidence against the defendant who made it. A hearsay admission is still evidence only against the person who made it, and a jury must be warned accordingly. A number of our respondents thought it extremely important that this principle be retained, and we agree.⁹

The first sentence of this quotation demonstrates that the Law Commission envisaged that where a confession made by a defendant is admitted for a co-defendant under s.76A the confession would not be evidence against its maker. Thus, Durston's reading of the Law Commission's proposals was that:

“...the Law Commission was adamant that, where a confession was admitted on behalf of a co-accused, but not the Crown, the tribunal of fact should only consider the admission as exonerating the co-defendant and not as evidence against its maker.”¹⁰

The second and third sentences of the above quotation from the Law Commission's Report indicate that the Law Commission intended to preserve “...the universal rule which excludes out of court admissions being used to provide evidence against a co-accused, whether indicted jointly or separately...”.¹¹ Whilst these sentences appear under the heading “Confessions and co-defendants”, they suggest that the Law Commission's intention was to preserve this rule as a rule that applied to confessions in general, whether adduced by a co-defendant or by the Crown. As is demonstrated immediately below, however, it seems that the Law Commission did not intend the operation of this rule to preclude the possibility that a confession made by a third party to criminal proceedings could be admitted against its maker under the provisions of the 2003 Act. Thus, whilst the position is not clear, it may be that the Law Commission envisaged that confessions admitted under the provisions of the 1984 Act would not be admissible against persons other than their makers but intended that confessions could potentially be admissible against persons other than their makers under the provisions of the 2003 Act.

So far as confessions made by persons who are not defendants in the proceedings (i.e. confessions made by third parties) are concerned, the Law Commission recognised that the existing position was that “A confession by someone who is not a defendant in the proceedings is inadmissible hearsay, following *Blastland*...”.¹² The Law Commission intended, however, that such a confession could be admissible under the provision that now exists in the guise of s.116 of the 2003 Act if the witness was dead, too ill to attend, could not be found, was outside the U.K. or was in fear or, otherwise could be admissible in the interests of justice under the “safety-valve” inclusionary discretion which now exists in the form of s.114(1)(d) of the 2003 Act.¹³ The Law Commission's concerns related to

“the exclusion of confessions which are relevant. What should not arise is the situation where, because it is known that someone else has confessed, it is feared that a conviction is unsafe, but evidence of that confession could not be admitted at the trial.”

Thus, one of the Law Commission's examples of the potential admissibility of hearsay evidence under its safety-valve inclusionary discretion was as follows:

"D is charged with assault. X, who is not charged, admits to a friend that he, X, committed the assault. D and X are similar in appearance. X's confession is inadmissible hearsay unless the safety-valve is used."¹⁴

Reliance on a confession made by a third party for such a purpose is not inconsistent with the general preservation of the rule that confessions are only admissible against their makers. The following example from the part of Law Commission's Report relating to hostile witnesses, which relates to the provision that now exists as s.119 of the 2003 Act, suggests, however, that the Law Commission did intend that a confessions made by a third party could potentially be admitted against persons other than its maker under the provisions of the 2003 Act:

"...suppose that W has already pleaded guilty and is now a witness for the prosecution. W has been deemed hostile and claims that he did not make the confession attributed to him in which he implicated D. That confession is admissible against D, as if W were a testifying co-accused."¹⁵

Moreover, so far as the admission of hearsay evidence under its safety-valve inclusionary discretion is concerned, the Law Commission made clear that its intention was that its proposed safety-valve be available both to the prosecution and to the defence.¹⁶ Nothing in the Law Commission's Report should be taken to suggest that the Law Commission intended to render confessions made by third parties routinely admissible against persons other than their makers, however. Rather, the Law Commission envisaged that its proposed "safety-valve" inclusionary discretion "would only be used exceptionally".¹⁷

The admissibility of confessions made by third parties to criminal proceedings under the hearsay provisions of the Criminal Justice Act 2003

Both ss.76 and 76A of the Police and Criminal Evidence Act 1984, which govern the admissibility of confessions made by defendants in criminal proceedings, apply to "a confession made by an accused person". Consequently, ss.76 and 76A neither apply to confessions made by persons who have never been charged in the proceedings nor to confessions made by persons who have been but are no longer charged in the proceedings (for example, because they have pleaded guilty or have been

convicted).¹⁸ In other words, ss.76 and 76A do not apply to confessions made by third parties to criminal proceedings. Similarly, s.128(2) of the Criminal Justice Act 2003, which limits the extent to which confessions may be admissible under the hearsay provisions of the 2003 Act, does not apply to confessions made by third parties to criminal proceedings because s.128(2) only applies to “a confession made by a defendant”.

As was seen above, the Law Commission envisaged that confessions made by third parties to criminal proceedings could potentially be admissible under hearsay exceptions created by its proposed reforms. In *R v Y*¹⁹ the Court of Appeal held that a confession made by a person who had previously pleaded guilty to the murder with which the accused was charged and which implicated the accused was potentially admissible for the Crown under s.114(1)(d) of the 2003 Act, under which the court may admit hearsay evidence if its admission is in the interests of justice. Their Lordships held that s.114(1)(d) is not subordinate to s.114(1)(b). Rather, their Lordships held that s.114(1)(b) (via s.118) preserves certain common law rules of admissibility (including, via s.118(5), rules relating to the admissibility of confessions) but does not preserve rules of inadmissibility (such as the common law rule that a confession is only admissible against its maker). In reaching this decision, the Court of Appeal²⁰ recognised that the Law Commission had envisaged that a confession made by a third party could be admitted under its proposed “safety valve”, which now exists in the guise of s.114(1)(d). Thus, their Lordships held that s.114(1)(d) “prevailed over” the common law rule that a confession is only admissible against its maker.²¹

The Court of Appeal in *R v Y* made clear that whilst confessions made by third parties were potentially admissible under s.114(1)(d), “It does not of course follow that hearsay in, or associated with, third party confessions should routinely be allowed to be admitted under section 114(1)(d)...”.²² In particular, their Lordships recognised that when the court is reaching a judgment as to the admissibility of such evidence under s.114(1)(d) and s.114(2)²³ (which directs the court to consider a variety of specific factors when it is considering the admissibility of hearsay evidence under s.114(1)(d) plus any other relevant factors), two relevant factors will be “the fact that the hearsay in question is an accusation against the defendant, rather than an admission against interest” and “the fact that it is the Crown which seeks to adduce it”.²⁴ In relation to the former factor, their Lordships recognised that whilst a person will not normally confess to a crime that the person did not commit, a person may well have a motive to make a false allegation against another.²⁵ As regards the latter factor, their Lordships indicated that: “It does not necessarily follow that the interests of justice will point in the same direction upon an application by the Crown as they might upon an application made by a defendant”.²⁶ Thus, their Lordships indicated that:

Since the burden of proving the case is upon the Crown and to the high criminal standard, very considerable care will need to be taken in any case in which the Crown seeks to rely upon an out-of-court statement as supplying it with a case against the defendant when otherwise it would have none.

Fundamentally, their Lordships indicated that:

the existence of section 114(1)(d) does not make police interviews routinely admissible in the case of persons other than the interviewee, and...the reasons why they are ordinarily not admissible except in the case of the interviewee are likely to continue to mean that in the great majority of cases it will not be in the interests of justice to admit them in the case of any other person.²⁷

Thus, whilst s.114(1)(d) prevails over the common law rule that that a confession is only admissible against its maker, the reasons why confessions are not normally admissible against persons other than their maker continue to be of major significance when the court is considering whether it is in the interests of justice to admit a confession as evidence against a person other than its maker.

With regard to those circumstances in which the third party who made a confession is available to testify but is reluctant to do so, the Court of Appeal in *R v Y* indicated²⁸ that:

...before reaching the conclusion that it is in the interests of justice to admit a hearsay statement, the Judge must very carefully consider the alternatives. The alternatives may well include the bringing of an available, but reluctant, witness to court.

Similarly, in *R v Finch*²⁹ (in which the Court of Appeal held that the judge had properly declined to admit in evidence for the accused a confession³⁰ made by a former co-defendant who had pleaded guilty on the basis that the witness was available to give evidence and it was not in the interests of justice to admit his hearsay evidence under s.114(1)(d)) the Court of Appeal indicated that:

Whatever might be the situation if an erstwhile co-accused were to be unavailable or had demonstrably good reason not to give evidence, it will, as it seems to us, often not be in the interests of justice for evidence which the giver is not prepared to have tested to be put untested before the jury.

In particular, their Lordships in *Finch* recognised that if the witness had been called and proved adverse to the party calling him, his previous inconsistent statements could have been admitted under s.119 of the 2003 Act, under which hearsay evidence of a witness' previous consistent statements may be admissible. Thus, *Finch* demonstrates that it will be exceptional for a confession

made by a third party who is available to testify to be admitted under s.114(1)(d) of the 2003 Act and that this will be so even where it is a defendant rather than the prosecution who wishes to adduce such evidence. *Finch* also demonstrates that (as the Law Commission had envisaged) a confession made by a third party may be admissible under provisions of the 2003 Act other than s.114(1)(d), such as s.119 or (relying on the reference in *Finch* to “an erstwhile co-accused” who is “unavailable”) s.116.³¹ Equally, in *R v Marsh*³², the Court of Appeal upheld the judge’s decision not to admit a confession made by a third party in evidence for the accused, their Lordships recognising that had the witness been called there might have been potential to admit his hearsay evidence under s.119 of the 2003 Act if his testimony in court had been inconsistent with it. Finally, *R v Lamb*³³ demonstrates that in circumstances in which the interests of justice demand the admission of a confession made by a former co-defendant as defence evidence for another co-defendant and the confession also implicates a third co-defendant the jury should be warned³⁴ “that the other defendant had not had an opportunity to cross-examine [the witness] and that the evidence lacked the force of evidence given by a witness.”

It is suggested that when the court is considering the admissibility of a confession made by a third party under the hearsay provisions of the 2003 Act, the Court should adopt the approach advocated by the Court of Appeal in *R v Riat*³⁵ with regard to the making of admissibility decisions under the 2003 Act’s hearsay provisions. Thus, when determining whether such hearsay evidence is admissible, the court should consider: whether the evidence is admissible under a specific statutory gateway such as s.116; whether there is material that can be adduced under s.124³⁶ to help the court to test or assess the hearsay evidence; whether the specific interests of justice test imposed by s.116(4)³⁷ is applicable; if no other gateway is applicable, whether the evidence should be admitted in the interests of justice under s.114(1)(d); whether the court should exclude the evidence in the exercise of its exclusionary discretion³⁸; and whether, once the evidence has been admitted, the trial should subsequently be stopped under s.125.³⁹ There is no reference in *Riat* to the potential for admitting hearsay evidence under s.119 of the 2003 Act, but this is not surprising since the Court of Appeal in *Riat* was concerned with the problems associated with admitting the hearsay evidence of an absent witness whereas when hearsay evidence is admitted under s.119 it will be the inconsistent statements of a witness who has been called and is, thus, available for cross-examination. The existence of s.119 must, however, be indirectly relevant in the context of the *Riat* process since, as has already been seen, the possibility of calling the third party whose confession implicates the accused and, where appropriate, relying upon the confession as evidence of the matters stated under s.119 is a matter that may be of relevance when the court is making an admissibility decision under s.114(1)(d).

Examination of the authorities concerning the admissibility of confessions made by third parties confirms that the approach of the Court of Appeal in those cases both equates with the Law Commission's intention that confessions made by third parties may potentially be admissible under the hearsay exceptions created by the 2003 Act and with the Law Commission's intention that recourse would only be had to its "safety valve" inclusionary discretion in exceptional circumstances. A matter that was not considered in any of these cases (because the existence of the concept of the "non-hearsay confession" had not yet been recognised by the courts) is whether a non-hearsay confession made by a third party is admissible in criminal proceedings as evidence against persons other than its maker. Whether this is so is considered in the final section of this article.

The admissibility of confessions made by defendants under the hearsay provisions of the Criminal Justice Act 2003

Since it came into force, the admissibility for the prosecution of confessions made by defendants has been governed by s.76 of the Police and Criminal Evidence Act 1984, admissibility also being subject to the exercise of the court's exclusionary discretion under s.78 of the 1984 Act and to the exercise of the common law exclusionary discretion.⁴⁰ The admissibility of confessions made by defendants as evidence for co-defendants is now governed by s.76A of the 1984 Act, which was inserted into the 1984 Act by s.128(1) of the Criminal Justice Act 2003.

As was seen above, the Law Commission intended that under its proposed statutory hearsay regime, confessions made by defendants would fall within an "automatic admissibility" category of hearsay evidence, admissibility being subject to the operation of ss.76 and 78 of the 1984 Act and the exercise of the court's common law exclusionary discretion or, if the evidence was tendered by a co-defendant, to the operation of s.76A of the 1984 Act. Confessions are patently dealt with by two provisions of the 2003 Act, namely, s.118 and s.128, but the explanatory notes to the 2003 Act specifically deal with confessions in the context of three provisions, namely, s.114, s.118 and s.128.

Section 114(1) details the four gateways under which hearsay evidence is admissible in criminal proceedings. Section 114(3) provides that: "Nothing in this Chapter affects the exclusion of evidence of a statement on grounds other than the fact that it is a statement not made in oral evidence in the proceedings." The explanatory note to s.114(3)⁴¹ indicates that:

"Subsection (3) provides that out of court statements may still be excluded even if they fulfil the requirements in this Chapter. For example, confessions must meet the additional

requirements of sections 76 and 78 of the Police and Criminal Evidence Act 1984 before admission.”

Section 118(2) abolishes all common law rules that govern the admissibility of hearsay in criminal proceedings other than those preserved by s.118(1). Section 118(1) 5 preserves: “Any rule of law relating to the admissibility of confessions or mixed statements in criminal proceedings.” The explanatory notes to s.118(1) 5 indicate⁴² that: “Confessions’ will be admissible as long as they fulfil the requirements of sections 76, 76A and 78 of the Police and Criminal Evidence Act 1984;...” Similarly, the footnote to the Law Commission’s recommendation, which was reproduced above, that “...the current law be preserved in respect of admissions, confessions, mixed statements, and evidence of reaction”, refers to clause 6(6) of the Law Commission’s draft Bill, which was enacted as s.118(1) 5 of the 2003 Act.

Thus, recourse to the explanatory notes to the 2003 Act and to the Law Commission’s Report suggests that the statutory provisions of the 1984 Act which govern the admissibility of confessions made by defendants in criminal proceedings are “preserved” by the cumulative operation of s.114(3) and s.118(1) 5 of the 2003 Act. If this is correct then the s.114 gateway under which such evidence is admitted must be s.114(1)(b) under which hearsay evidence is admissible in criminal proceedings if “any rule of law preserved by section 118 makes it admissible”. The problem with this analysis is that the side note to s.118 refers to “preservation of certain common law categories of admissibility” whereas the rules contained in ss.76(1) and 76A(1) of the 1984 Act, under which confessions made by defendants are admissible, are clearly statutory in origin. The s.114 gateway under which statutory exceptions to the hearsay rule are preserved is s.114(1)(a), which provides for the admissibility of hearsay evidence in criminal proceedings if “any provision of this Chapter or any other statutory provision makes it admissible.”

It may be that a more logical explanation of the way in which the relevant provisions of the 1984 Act dovetail into the 2003 Act’s hearsay regime is that the “automatic admissibility” hearsay exceptions created by ss.76(1) and 76A(1) are preserved by s.114(1)(a), that the exclusionary provisions of those sections contained in ss.76(2) and 76A(2) are preserved by s.114(3) and that, as Spencer suggested⁴³, s.118(1) 5 applies in those circumstances in which the admissibility of confessions is still governed by the common law.⁴⁴ Conversely, it is possible to support the explanation of s.118(1) 5 in the explanatory notes as preserving ss.76(1) and 76A(1) on the basis that whilst the side note refers to “common law categories of admissibility”, the words of s.118(1) itself merely refer to the preservation of “rules of law”. Headings or side notes to sections (like explanatory notes

themselves) are admissible as aids to construction but are not debated in Parliament and should be given less weight than the parts of an Act that are debated in Parliament.⁴⁵

In practice, provided that it is accepted that the regime in the 1984 Act which regulates the admissibility of confessions made by defendants has been preserved by Chapter 2 of the 2003 Act, it may be that whether this has been achieved by s.114(1)(a) or by s.114(1)(b) of the 2003 Act is a matter which is of little practical significance. That it was Parliament's intention to preserve, indeed, to enhance, the confession's regime contained in the 1984 Act is made clear by the existence of s.128 of the 2003 Act. Section 128(1) inserted the new s.76A into the 1984 Act, providing that: "Subject to subsection (1), nothing in this Chapter makes a confession by a defendant admissible if it would not be admissible under section 76 of the Police and Criminal Evidence Act 1984..." Had Parliament not intended to preserve the 1984 Act's confessions regime the enactment of s.128 would have been unnecessary.

Unfortunately, whilst the explanatory notes to s.128 deal with the operation of s.76A they provide no assistance in relation to the operation of s.128(2). Similarly, the Law Commission's Report provides no explanation of how clause 25(2) of its draft Bill, which now exists as s.128(2), is intended to operate. Moreover, the nature and significance of section 128(2), which has been described by Hirst as the "the 'forgotten provision' of the 2003 Act"⁴⁶, is yet to be considered by the Supreme Court, by the Court of Appeal or by the Divisional Court.

Spencer⁴⁷ has suggested two possible interpretations of s.128(2). The narrower interpretation is that:

...section 128(2) merely provides that none of the other hearsay provisions of the CJA 2003 will allow the Crown to use, *as evidence against the person who made it*, a confession that section 76(2) required to be excluded if there is an attempt to admit it under section 76(1).

The wider interpretation is that:

'The only route by which the extra judicial confessions of accused persons are admissible is PACE 1984, section 76. To that route no bypass is created by any provisions of this Act except for the new section 76A of PACE 1984, which now enable them to be used by co-defendants. Section 76 allows the Crown to use confessions against those who made them but not against others, and nothing in any other provisions of the CJS 2003 alters that.'

Spencer⁴⁸ prefers the narrower interpretation, which he regards as "the most obvious reading of the provision" because a consequence of the wider interpretation is that the prosecution could deploy

one defendant's self-serving statement against a co-defendant but could not deploy one defendant's confession against a co-defendant. Hirst⁴⁹ regards Spencer's narrower interpretation as avoiding the paradox that the wider interpretation would create in preventing one co-defendant's confession from being evidence against another but not producing this result if the co-defendant who made it died or pleaded guilty or if the indictment was severed and separate trials were ordered.

It is suggested that there is a third viable interpretation of s.128(2), which falls between Spencer's wider and narrower interpretation, namely, that a confession that is excluded under s.76(2) is not admissible under the hearsay provisions of the 2003 Act but may still be admissible under s.76A whereas a confession that is not excluded under s.76(2) may, potentially, be admissible under s.76, under s.76A and under provisions of the 2003 Act. It is suggested that this intermediate interpretation is to be preferred to Spencer's narrower interpretation because nothing in the wording of s.128(2) suggests that the operation of the subsection is merely intended to render a confession excluded by s.76(2) inadmissible against its maker under the 2003 Act's hearsay provisions whilst still permitting its admission under those provisions for other purposes. Interestingly, Hirst's treatment of Spencer's narrower interpretation seems to equate with the intermediate interpretation proffered above in that Hirst, whilst apparently applying Spencer's approach, suggests that:

“a confession procured by oppression, etc., will remain inadmissible, but one that is legitimately obtained may in exceptional cases (and if it is in the interests of justice to do so) be used against any co-defendant it also incriminates, by virtue of s. 114(1)(d).”⁵⁰

Contrary to Hirst's treatment of Spencer's approach, on a strict application of Spencer's narrower interpretation, a confession procured by oppression would be inadmissible against its maker but would exceptionally be admissible under s.114(1)(d) against a co-defendant it incriminated whether or not it had been obtained legitimately because s.128(2) would not regulate the admissibility of confessions against persons other than their makers.

Recourse to the Law Commission's Report does not make clear which interpretation of s.128(2) it would have intended the courts to adopt. As was seen above, the Law Commission stated its intention to retain the principle that “A hearsay admission is...evidence only against the person who made it...”⁵¹, which might suggest that is the wider interpretation that is in line with its proposals. It was also seen above, however, that the Law Commission envisaged that there would be circumstances in which confessions could be admissible against persons other than their makers under provisions of the 2003 Act, though none of the examples that the Law Commission provided

concerned a confession made by a defendant. If the Law Commission intended that a confession made by a defendant might, exceptionally, be admissible against a person other than its maker under its safety-valve inclusionary discretion, this would be consistent with the narrower or intermediate interpretations of s.128(2), but the Report does not make this clear.

The jurisprudence of the Court of Appeal concerning the admissibility of confessions made by defendants against their co-defendants under the hearsay provisions of the 2003 Act has not patently dealt with the question whether it is the wider, the narrower or the intermediate interpretation of s.128(2) that the courts should adopt. Indeed, none of the decisions concerning the admissibility of confessions against persons other than their makers have even referred to 128(2). Consequently, whilst the following decisions demonstrate the approach that the courts have adopted to date concerning the admissibility of confessions made by defendants under provisions of the 2003 Act, they must be viewed with caution to the extent that they are inconsistent with the potential operation of s.128(2).

In *R v McLean*⁵² the Court of Appeal held that a hearsay statement made by one co-defendant was potentially admissible for another co-defendant under s.114(1)(d) of the 2003 Act and if admitted would be “evidence in the case generally”.⁵³ Whilst *McLean* has been referred to as providing implicit support for the proposition that a confession made by one defendant may be admissible against another under s.114(1)(d)⁵⁴, the statement that the case concerned did not amount to a confession and consequently s.128(2) (to which the Court of Appeal did not refer) was inapplicable. Consequently, the *McLean* case provides no authority in relation to the issue of whether the courts should adopt the wider, the narrower or the intermediate interpretation of s.128(2). Moreover, the Court of Appeal in *R v Y*⁵⁵ indicated that *McLean* is not “authority for the proposition that the inhibition upon the Police interviews of one defendant being relied upon against another has simply been “abrogated””. Rather, as was seen above, their Lordships in *R v Y*⁵⁶ made clear that the admission of such evidence will not normally be in the interests of justice. Consequently, even if the courts adopt either the narrower or the intermediate interpretation of s.128(2), the admissibility of confessions made by defendants against persons other than their makers under s.114(1)(d) of the 2003 Act will be the exception rather than the rule.

In *R v Ibrahim & Omar*⁵⁷ a confession admitted by one co-defendant was admitted in evidence for another co-defendant under s.76A of the 1984 Act in circumstances in which the co-defendant who had made the confession did not seek to challenge its admissibility. The Court of Appeal accepted that had the confession been admitted under s.114(1)(d) of the 2003 Act it would have been admissible against its maker’s co-defendants. Their Lordships, with reference to *R v Y*, made clear,

however, that s.114(1)(d) was not a routine pathway to admissibility and adopted the observations made by the Court of Appeal in *R v Y* that “the greatest care” must be taken before admitting hearsay evidence under s.114(1)(d).⁵⁸ As regards the relationship between s.76 of the 1984 Act and s.114(1)(d), their Lordships indicated that: “In theory [the confession] was admissible under both sections, but subject to the respective protections provided by each.”⁵⁹ This suggests that the Court of Appeal in *Ibrahim* envisaged that evidence of a defendant’s confession could be admissible both against its maker and against its maker’s co-defendants under s.114(1)(d) even if the circumstances were such that it would not be admissible for the prosecution under s.76 in consequence of exclusion under s.76(2). If the courts regard confessions made by defendants as potentially admissible against their makers in such circumstances this will render s.128(2) otiose. In reaching its decision, however, the Court of Appeal in *Ibrahim* did not refer to s.128(2) and *R v Y*, the authority on which the Court of Appeal did rely, concerned a confession made by a third party, to which s.128(2) was inapplicable. Consequently, since the Court of Appeal did not consider s.128(2), *Ibrahim* provides no guidance when determining whether the courts are required to adopt the wider, the narrower or the intermediate interpretation of s.128(2). Moreover, since the admissibility of the confession was not challenged by its maker, the facts of *Ibrahim* do not provide an example of circumstances in which a confession which was inadmissible under s.76 of the 1984 Act might potentially have been admissible under the provisions of the 2003 Act.

So far as the operation of s.76A of the 1984 Act (which the 2003 Act inserted into the 1984 Act) is concerned, it was suggested above both that the Law Commission did not intend s.76A either to render a confession made by a defendant which was adduced by a co-defendant admissible against its maker and that it may not have intended s.76A to render such a confession admissible against persons other than its maker.⁶⁰ Whilst reference to the wording of s.76A does clearly resolve either of these issues⁶¹, the Court of Appeal in *Ibrahim* appears to have accepted (arguably in line with the Law Commission’s intention) that the admission of the accused’s confession under s.76A did not make it evidence against its maker’s co-defendants, hence the need for recourse to s.114(1)(d) if the confession was to be admissible against them. So far as the question whether s.76A renders a confession admissible against its maker, *Ibrahim*, being a case in which the accused did not oppose the introduction of his confession under s.76(2), does not seem to provide any assistance on this point. In the subsequent case of *R v L*⁶², however, a case which did not concern the admissibility of confessions under provisions of the 2003 Act, the Court of Appeal seems to have accepted (contrary, it seems, to the Law Commission’s intention) that if a confession which had been excluded under s.78 of the 1984 Act and which might also potentially have been excluded under s.76(2) had been admitted under s.76A the jury could properly have considered the confession as evidence against its

maker. Moreover, in the previous case of *R v Johnson*⁶³, which concerned the admissibility of a vacated guilty plea and basis of plea, the Court of Appeal seems to have accepted that where a confession which the judge would have excluded under s.78 was admitted under s.76A the confession was evidence against its maker.

In *Thakrar v R*⁶⁴, the Court of Appeal upheld the trial judge's decision to admit multiple hearsay evidence for the prosecution. The evidence took the form of statements made by witnesses of confessions made to them by one of several co-defendants whilst, during a holiday in Cyprus, he was boasting about his role in committing a murder. The confessions also incriminated a second co-defendant, namely, their maker's brother. The witnesses whose hearsay evidence was relied upon to prove the confessions had made their statements overseas, were unwilling to come to the UK and were unwilling to testify. The trial judge held that the hearsay exception created by s.116 of the 2003 Act applied because, in accordance with s.116(2)(c), the witnesses were outside the UK and it wasn't reasonably practicable to secure their attendance. The judge held that the additional requirement for the admissibility of multiple hearsay imposed by s.121 of the 2003 Act was satisfied because, in accordance with s.121(1)(c), the value of the evidence (taking the apparent reliability of the statements into account) appeared to be so high that the interests of justice required the later statements to be admissible to prove that the earlier statements were made. The Court of Appeal upheld the judge's decision to admit the multiple hearsay and, in addition, held both that there had been no justification to exclude those parts of the defendant's confessions that incriminated the second co-defendant and that no special direction had been required in relation to the relevant parts.

In his comment upon *Thakrar*⁶⁵, Ormerod recognised that the Court of Appeal had not considered:

...whether there is a problem because of s.128(2) of the 2003 Act...D1's statement would be admissible against him under s.76, but would it be admissible against D2?

Had their Lordships adopted Spencer's wider interpretation of s.128(2), the confessions should not have been admissible against their maker's brother whereas adopting the narrower interpretation (or, since the confession had not been excluded under s.128(2)) the intermediate interpretation there was scope to admit them against their maker's brother under the 2003 Act's hearsay regime. As Hirst recognised⁶⁶, however, not only did their Lordships make no reference to s.128 of the 2003 Act they also made no reference to s.76 of the 1984 Act itself. Consequently, like *Ibrahim, Thakrar* provides no assistance when determining whether the courts are required to adopt the wider, the narrower or the intermediate interpretation of s.128(2). Moreover, since the confession was not

excluded under s.76(2), the facts of *Ibrahim* do not provide an example of circumstances in which a confession which was inadmissible under s.76 of the 1984 Act was admitted under the provisions of the 2003 Act.

Apart from the failure to consider s.128(2) (which, upon the facts of *Thakrar*, is only a problem if Spencer's wider interpretation is adopted), another problem encountered when considering the reasoning of the Court of Appeal in *Thakrar* is that, as the side note to s.121 of the 2003 Act makes clear, s.121 does not itself amount to a hearsay exception but, rather, imposes an "additional requirement" that must be satisfied if multiple hearsay is to be admitted. Consequently, in order for the confessions that *Thakrar* concerned to be admissible, it was necessary, in addition to satisfying the requirements of s.121 itself, both to identify a hearsay exception which was applicable to the accused's confessions and to identify a hearsay exception which was applicable to the statements made by the absent witnesses which were relied upon to prove the confessions.⁶⁷ The hearsay exception considered by the Court of Appeal in *Thakrar*, namely s.116 of the 2003 Act, applied to the statements made by the absent witnesses but the Court of Appeal did not refer to a hearsay exception in relation to the confession itself. Had their Lordships considered the matter, the obvious hearsay exception to have applied to a confession made by the accused would have been s.76(1) of the 1984 Act but the problem is that, as Ormerod recognised, s.76(1) would not have made the confessions admissible against their maker's brother. The solution would have been to admit the confessions under s.114(1)(d). Since the judge in *Thakrar*, having considered the factors specified by s.114(2) of the 2003 Act⁶⁸, held that the s.121(1)(c) interests of justice test had been satisfied (a test that "imposes a higher threshold" than the s.114(1)(d) interests of justice test⁶⁹), presumably neither the judge nor the Court of Appeal would have had any difficulty in regarding the confession as admissible in the interests of justice under s.114(1)(d). Thus, provided that the wider interpretation of s.128(2) is not adopted, it is possible to justify the admission of the confessions in *Thakrar* against their maker's brother on the basis that the admission of the confessions under s.114(1)(d) was in the interest of justice, the statements made by the unavailable witnesses to whom the confessions were made were admissible under s.116 and, in compliance with s.121, the interests of justice required the admission of the later statements to prove that the earlier statements were made.

Hirst⁷⁰, in the context of considering the admissibility of confessions against persons other than their makers, regarded *Thakrar* as "The high-water mark of this new approach". It is arguable, however, that the case is best categorised as one of those exceptional cases in which the admission of a confession against a person other than its maker was justified, the Court of Appeal in *Thakrar* having

regarded the reliability of those parts of the confessions that incriminated their maker's brother as being as high as the reliability of those parts of the confessions that incriminated their maker himself.⁷¹ Thus, upon the facts of *Thakrar*, a factor that the Court of Appeal in *R v Y* had indicated was relevant when the court is determining whether a confession is admissible against a person other than its maker under s.114(1)(d), namely, that the maker of the confession may well have a motive to make a false allegation against another, did not operate against the admission of the confessions against their maker's brother. It is, perhaps, unfortunate that in *Thakrar*, unlike *Ibrahim*, the Court of Appeal did not make clear either that evidence of a confession made by one defendant should not be admitted against another co-defendant as a matter of routine or that *Thakrar* was one of those exceptional cases in which the admission of a confession for this purpose was justified.

The subsequent case of *R v Thorpe & Clark*⁷² concerned a statement by a defendant to a prison chaplain, denying that she had been involved in her father's death but admitting that she had been present when the man she was with had killed her father. The defendant who made the confession did not challenge its admissibility under s.76(2) or s.78 of the 1984 Act. The Court of Appeal accepted that the statement had been admissible against its maker as a mixed statement⁷³ but indicated that the prosecution had "well repented of" its initial suggestion that the statement might have been admissible against her co-defendant (the man whom it implicated) under s.114(1)(d). Indeed, the Court of Appeal could envisage "practically no circumstances in which a conversation of this kind, purportedly implicating a co-accused, would be admitted under section 114(1)(d)".⁷⁴ As in *Ibrahim* and *Thakrar*, however, the Court of Appeal in *Thorpe* did not refer to s.128(2) and, consequently, like the earlier two cases, *Thorpe* provides no assistance when determining whether the courts are required to adopt the wider, the narrower or the intermediate interpretation of s.128(2).

Hirst⁷⁵ regarded the approach of Hughes LJ in *Thorpe* as a continuation of a process that his Lordship had initiated in *R v Y* via which he had "backed...away" from the approach that he had taken in *McLean*. It is important to note, however, that, in *Thorpe*, Hughes LJ did not suggest that a confession made by a defendant may never be admissible under s.114(1)(d). Rather, his Lordship's comments in *Thorpe* concerning the operation of s.114(1)(d) related to "a conversation of this kind", i.e. a mixed statement denying participation and implicating a co-defendant. Consequently, it is possible to distinguish the confessions in *Thakrar* from that in *Thorpe* on the basis that the Court of Appeal in *Thakrar* considered the reliability of the confessions that *Thakrar* concerned as evidence against the co-defendant whom they also implicated as being as high as it was against their maker whereas the reliability of the mixed statement in *Thorpe* against the co-defendant whom it

implicated was, presumably, of a much lower order. The importance of *Thorpe* is that, unlike *Thakrar*, it makes clear that those circumstances in which a confession made by a defendant should be admitted against co-defendants under s.114(1)(d) must be regarded as wholly exceptional.

If the Court of Appeal, if and when it is eventually referred to s.128(2) of the 2003 Act, adopts Spencer's wider interpretation of that provision, there will be no potential for admitting a confession made by a defendant against co-defendants under provisions of the 2003 Act. If, however, the Court of Appeal adopts the intermediate interpretation of that provision suggested above or Spencer's narrower interpretation, the position would appear to be as follows.

First, where a confession made by a defendant is excluded under s.76(2) and s.76A of the 1984 Act, adopting the intermediate interpretation of s.128(2) the confession will not be not admissible under any provisions of the 2003 Act. This may result in the problem, identified by Hartstone, that preventing a co-defendant from adducing evidence of a confession made by a defendant may have "the potential to prevent him from adducing evidence that is both relevant and reliable".⁷⁶ Spencer's narrower interpretation of s.128(2) would appear to avoid this problem, by rendering the confession inadmissible against its maker whilst permitting the court to admit it in the interests of justice under s.114(1)(d) on the application of a co-defendant whom it exculpated. Arguably, however, this would negate s.76A in permitting a co-defendant to adduce evidence of a defendant's confession in circumstances in which s.76A(2) required its exclusion. Spencer's narrower interpretation would also produce the result that a confession that the court may not have regarded as sufficiently reliable to admit in evidence even against its maker could potentially be admitted for the prosecution against co-defendants whom it implicated.

Secondly, where a confession made by a defendant is excluded under s.76(2) of the 1984 Act but is admitted for a co-defendant under s.76A, *R v L* seems to support the view that (arguably contrary to the Law Commission's intention), the confession is admissible against its maker under s.76A but, adopting the intermediate interpretation, s.128(2) would prevent its admission under provisions of the 2003 Act. Consequently, relying on *Ibrahim* in support of the proposition that s.76A does not render a confession made by the accused admissible against co-defendants, the confession would not be admissible against its maker's co-defendants. If Spencer's narrower interpretation of s.128(2) is adopted, whilst the confession would be inadmissible against its maker the court could potentially admit it for the prosecution under s.114(1)(d) if, exceptionally, this was in the interests of justice.

Thirdly, where a confession made by a defendant is excluded under s.78 of the 1984 Act it could still be admissible for a co-defendant under s.76A(1), in which case *R v Johnson* and *R v L* both suggest

(again arguably contrary to the Law Commission's intention), that it could be relied on as evidence against its maker. Moreover, since the confession was not excluded under s.76(2) it would not matter whether the court adopted the intermediate interpretation of s.128(2) or Spencer's narrower interpretation as s.128(2) would not be operative and the confession would potentially be admissible against its maker's co-defendants under s.114(1)(d). As *R v Y*, *R v Ibrahim* and *R v Thorpe* all make clear, however, the court should only admit a confession against its maker's co-defendants under s.114(1)(d) in exceptional circumstances.

Finally, where the admissibility of a confession is not challenged by the defendant who made it, it may be admitted for the prosecution under s.76(1) of the 1984 Act, for a co-defendant under s.76A(1) and may potentially be admissible against its maker's co-defendants under s.114(1)(d) but, again, its admission against its maker's co-defendants under s.114(1)(d) would appear to be exceptional rather than a matter of routine. Again, in such circumstances it would not matter whether the court adopted the intermediate interpretation of s.128(2) or Spencer's narrower interpretation as s.128(2) would not be operative.

The admissibility of non-hearsay confessions

Traditionally confessions have been regarded as a form of hearsay evidence admissible under an exception to the hearsay rule. As Lord Steyn put it in *R v Hayter*⁷⁷:

A voluntary out of court confession or admission against interest made by a defendant is an exception to the hearsay rule and is admissible against him. That was so under the common law. That is also the effect of s 76 of the Police and Criminal Evidence Act 1984 (PACE).

As was seen above, the Law Commission intended that ("subject to the existing statutory safeguards") confessions would continue to fall within an "automatic admissibility" category of hearsay evidence.⁷⁸ Indeed, nothing in the Law Commission's Report suggests that it envisaged that its proposed reforms to the hearsay rule would result in the possibility that some confessions would no longer amount to hearsay statements.

It has now become clear that, unlike the previous common law regime, the statutory hearsay framework created by the Criminal Justice Act 2003 encompasses most but not all confessions. This is a consequence of s.115(3) of the 2003 Act which provides that:

A matter stated is one to which this Chapter applies if (and only if) the purpose, or one of the purposes, of the person making the statement appears to the court to have been—

(a) to cause another person to believe the matter, or

(b) to cause another person to act or a machine to operate on the basis that the matter is as stated.”

The Court of Appeal has recognised that where evidence of statements which were not made in oral evidence in criminal proceedings and which are relied on as evidence of matters stated therein falls outside the ambit of the hearsay rule due to the operation of s.115(3), the admissibility of such evidence is not governed by the hearsay provisions of the 2003 Act but, rather, is governed by the common law test of relevance.⁷⁹ Where such evidence is tendered by the prosecution, its admissibility is subject to the exercise of the court’s exclusionary discretion under s.78 of the Police and Criminal Evidence Act 1984⁸⁰.

More specifically for present purposes, the decision of the Court of Appeal in *R v Twist*⁸¹ (in the context of the *Lowe* appeal) has demonstrated that where the maker of a confession did not make it for the purpose of causing another person to believe the matter stated, the confession will not fall within the ambit of the 2003 Act’s hearsay provisions and its admissibility will not be subject to the operation of those provisions even though it is relied upon as evidence of the matters stated. The fact that some confessions might fall outside the ambit of the 2003 Act’s hearsay rule had been anticipated by Birch and Hirst⁸² prior to *Twist*, such confessions subsequently being described by Hirst⁸³ as “non-hearsay confessions”. For present purposes, the crucial question is whether the existence of the hearsay/non hearsay confessions dichotomy has resulted in distinct rules governing the respective admissibility of hearsay and non-hearsay confessions.

Before the Court of Appeal in *Twist* it was submitted that the non-hearsay confession that the *Lowe* appeal concerned should have been excluded under s.76 of the 1984 Act. Their Lordships held that: “...there was no basis for so doing. It was not the defendant's case that he had said what he did in consequence of something said or done by another that would render his confession unreliable.”⁸⁴ Thus, the Court of Appeal in *Twist* did not suggest that the admissibility for the prosecution of a non-hearsay confession made by the accused is not governed by s.76 of the 1984 Act.

Prior to *Twist*, Birch and Hirst⁸⁵ had already suggested that confessions in secret diaries (which would not amount to hearsay evidence due to the operation of s.115(3) of the 2003 Act) would fall within the ambit of the definition of a confession in s.82(1) of the 1984 Act⁸⁶ and, thus, that the admissibility of such confessions would depend upon the operation of s.76(2).⁸⁷ The validity of their

submission depended both upon accepting that such a confession is a “statement” for the purposes of s.82(1) of the 1984 Act and upon accepting that the law relating to confessions does not merely regulate the operation of an exception to the hearsay rule. Subsequent to *Twist*, Hirst’s analysis of *Twist*⁸⁸ was that the non-hearsay confessions in *Lowe* were admissible under s.76(1) and that had they not been admissible under s.76(1) due to the operation of s.76(2) then, regardless of whether they were hearsay, they would have been inadmissible under the hearsay provisions of the 2003 Act due to the operation of s.128(2). Whilst Hirst does not make this clear in his article, presumably the basis of his argument is that since s.128(2) provides that “nothing in this Chapter makes a confession by a defendant admissible if it would not be admissible under section 76 of the Police and Criminal Evidence Act 1984”, s.128(2) both prevents a hearsay confession which is excluded by s.76(2) of the 1984 Act from being admissible under a hearsay exception other than s.76A and also prevents s.115(3) of the 2003 Act from operating so as to render such a confession admissible at common law by taking it outside the ambit of the 2003 Act’s statutory hearsay regime. Section 114(3), which was reproduced above, would also appear to confirm that the provisions of the 2003 Act (other than s.128(1), which inserted s.76A into the 1984 Act) are not intended to render admissible a confession excluded by virtue of the operation of s.76(2) of the 1984 Act. This approach would seem to be in line with the Law Commission’s intention that the admissibility of confessions would continue to be governed by s.76 and s.78 of the 1984 Act and the exercise of the common law exclusionary discretion preserved by s.82(3) of the 1984 Act, augmented by s.76A when a confession is tendered by a co-defendant. Indeed, as was seen above, the example provided by the explanatory notes to the 2003 Act regarding the operation of s.114(3) indicates that the admissibility of confessions continues to be governed by ss.76 and 78 of the 1984 Act.

Whilst the Court of Appeal in *Twist* implicitly appears to have accepted that the admissibility of a non hearsay confession made by a defendant is subject to the operation of s.76 of the 1984 Act, a question that the Court of Appeal in *Twist* was not required to consider is whether a non-hearsay confession made by a defendant may be admissible against its maker’s co-defendants. The problem is that whilst the hearsay exceptions created by the 2003 Act are capable of prevailing over the common law rule that confessions are only admissible against their makers⁸⁹, in the case of a non-hearsay confession which falls outside the ambit of the 2003 Act’s hearsay provisions, there is no applicable hearsay exception to prevail over the common law rule. This is so because the hearsay exceptions created by the 2003 Act render evidence admissible as evidence of “any matter stated”⁹⁰ and the effect of s.115(3) is that the matters stated in a non-hearsay confession are not matters stated to which the hearsay provisions of the 2003 Act are applicable.

It is suggested that the answer to this problem is that the provision that prevails over the common law rule in the context of the non-hearsay confession is s.115(3) itself. This is so because whilst there is no reason to believe that the Law Commission intended its proposals to result in the creation of the non-hearsay confession, such confessions falls within a wider class of evidence that the Law Commission intended to render admissible. As the Law Commission indicated when explaining the basis of the provision that now exists in the form of s.115(3): “If...the risk of deliberate fabrication can be discounted, the possibility of a mistake is not necessarily sufficient reason to exclude evidence of...words or conduct”.⁹¹ Thus, the Law Commission’s view, expressed in the context of “implied assertions”⁹², was that:

...where the person from whose conduct a fact is to be inferred can safely be assumed to have believed that fact to be true – we do not think a court should be precluded from inferring that fact merely because that person may have been mistaken in believing it.⁹³

Applying this reasoning to non-hearsay confessions, the justification for removing them from the ambit of the hearsay rule would be that since the person who made the confession did not make it for the purpose of making anyone else believe the matter stated the risk that it was fabricated can be discounted. Indeed, the distinction drawn by the Court of Appeal in *R v Y*⁹⁴ between confessions relied on as evidence against their makers and confessions relied on as evidence against others as regards the potential existence of a motive to fabricate where a confession implicates a person other than its maker is not applicable in circumstances in which the person who made the confession did not make it with the purpose of making another person believe the matter stated.

Upon the assumption that s.115(3) does prevail over the common law rule that confessions are only admissible against their makers in the context of non-hearsay confessions, the result so far as non-hearsay confessions made by defendants are concerned seems to be that provided that such a confession is not excluded by virtue of the operation of s.76(2) of the 1984 Act and assuming that the courts adopts the intermediate interpretation of s.128(2) which was suggested above, the confession, subject to the common law test of relevance (and to the exercise of exclusionary discretion if they were tendered by the prosecution) will be admissible not only against its maker but also against other co-defendants implicated thereby. If Spencer’s narrower interpretation of s.128(2) is adopted, the confession could be admitted against co-defendants even if the operation of s.76(2) prevented its admission for the prosecution. In contrast, if Spencer’s wider interpretation is adopted it would seem that even if the confession was admissible against its maker under s.76(1) it could still not be admissible against its maker’s co-defendants as it would not be admissible against them under s.76(1) or s.76A(1).

A final question to which the authorities currently do not provide an answer is whether a non-hearsay confession made by a third party is admissible in criminal proceedings. As was seen above, none of ss.76 and s.76A of the 1984 Act and s.128(2) of the 2003 Act apply to a confession made by a third party. It was also seen above in relation to the admissibility of confessions made by third parties that s.114(1)(d) of the 2003 Act "...prevails over the...common law rule that hearsay contained in a confession is inadmissible except against its maker."⁹⁵ Since non-hearsay confessions fall outside the ambit of the statutory hearsay framework created by the 2003 Act, a non-hearsay confession made by a third party, like one made by a defendant, cannot be admissible under s.114(1)(d) or any other of the hearsay exceptions created by the 2003 Act. If, however, it is correct that, as was suggested above, s.115(3) of the 2003 Act prevails over the common law rule that confessions are only admissible against their makers in the context of non-hearsay confessions then the admissibility of non-hearsay confessions made by third parties will be governed by the common law test of relevance subject, if the confession is tendered by the prosecution, to the exercise of the court's exclusionary discretion.⁹⁶

Conclusion

The Law Commission's Report leaves several issues relating to the admissibility of confessions under its proposed statutory hearsay regime unclear. Whilst the Law Commission clearly intended to preserve the admissibility regime created by s.76 of the Police and Criminal Evidence 1984 and to enhance this via the addition of s.76A and the Report suggests it did not intend s.76A to render a confession made by a defendant admissible against its maker when tendered by a co-defendant, whether its intention was that such a confession could be admissible against persons other than its maker is less clear. Moreover, the Report neither provides any explanation of how the provision that now exists as s.128(2) of the Criminal Justice Act 2003 nor recognises that the provision that now exists as s.115(3) Act has the potential to create non-hearsay confessions. The Report does, however, make clear that the Law Commission did intend that there would be circumstances in which confessions made by third parties to criminal proceedings would be admissible under its proposed hearsay regime.

The jurisprudence subsequent to the coming into force of the 2003 Act's hearsay provisions has established that confessions made by third parties may, exceptionally, be admissible in the interests of justice under s.114(1)(d) of the 2003 Act and also may have established that where a confession made by defendant is admitted under s.76A it may be relied upon as evidence against its maker. Moreover, there is authority for the proposition that a confession made by a defendant may be

admissible in the interests of justice against its maker's co-defendants under s.114(1)(d) though, again, the admission of such evidence appears to be exception rather than a matter of routine. The case law has both established the existence of the non-hearsay confession and has indicated that the admissibility of a non-hearsay confession made by a defendant is subject to the operation of s.76 of the 1984 Act, though as of yet there is no authority concerning either the admissibility of non-hearsay confessions made by third parties to criminal proceedings or the admissibility of non-hearsay confessions made by defendants against persons other than their maker.

The most significant defect of the existing case law is the absence of any analysis of s.128(2) of the 2003 Act. Whether its operation totally precludes the admission of confessions made by defendants under any provisions of the 2003 Act, precludes the admission of such confessions under provisions of the 2003 Act in circumstances in which they are not admissible under s.76 of the 1984 Act or merely prevents the admission of such confessions as evidence against the accused in such circumstances has not yet been established.

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² The others two automatic admissibility categories relating to unavailable witnesses (see, now, s.116 of the Criminal Justice Act 2003) and to reliable hearsay (see, now, for example, s.117 and s.118(1) 4 (a) of the 2003 Act).

³ Above n. 1 at [1.38].

⁴ Above n. 1 at [1.38].

⁵ Above n. 1 at [8.90].

⁶ Above n. 1 at [8.92]. Similarly, in its consultation paper "Hearsay in Civil and Criminal Cases" (LRC CP 60 – 2010) the Law Reform Commission of Ireland provisionally recommended at [3.51] that the inclusionary exception to the hearsay rule relating to admissions and confessions which exists in Irish Law should be retained.

⁷ For the position prior to s.76A of the Criminal Justice Act 2003 coming into force (but subsequent to the Law Commission's Report) see the decision of the House of Lords in *R v Myers* [1998] AC 124.

⁸ Above n. 1 at [8.95].

⁹ Above n. 1 at [8.96].

¹⁰ Gregory Durston, "The Admissibility of Co-Defendants' Confessions Under the Criminal Justice Act 2003" (2004) 168 JPN 488 at 489.

¹¹ *R v Spinks* (1982) 74 Cr. App. R. 263 at 266. See, also, *R v Gunewardene* [1951] 2 KB 600 and *R v Hayter* [2005] 2 Cr. App. R. 3). Where "a confession made by an accused person" is admissible under s.76(1) of the Police and Criminal Evidence Act 1984 it is admissible "against him". Thus, S.76(1) does not render a confession made by an accused person admissible against the person's co-defendants.

¹² Above n. 1 at [8.97]. In *R v Blastland* [1986] AC 41 the House of Lords had approved the decision of the Court of Appeal in *R v Turner* (1975) 61 Cr App R 67, the Court of Appeal in *Turner* having held at p.87 that third party confessions are inadmissible because they were "...hearsay evidence which did not come within any of the well settled exceptions to the general rule that hearsay evidence is not admissible."

¹³ Above n. 1 at [8.99].

¹⁴ Above n. 1 at [8.147].

¹⁵ Above n. 1 at [10.101].

¹⁶ Above n. 1 at [8.149].

¹⁷ Above n. 1 at [8.133].

¹⁸ In relation to persons who have never been charged in the proceedings see *R v Y* [2008] EWCA Crim 10, [2008] 1 WLR 1683. In relation to persons who have pleaded guilty or been convicted see, respectively, *R v Finch* [2007] EWCA Crim 36, [2007] 1 W.L.R. 1645 and *R v Siad* [2008] EWCA Crim 2495. All three cases concern the operation of s.76A but there is no reason to doubt that the position is the same in relation to the operation of s.76.

¹⁹ Above n. 18.

²⁰ *Ibid.* at [40].

²¹ Above n. 18 at [48].

²² Above n. 18 at [47].

²³ Section 114(2) directs the court's attention to a variety of factors when it is considering the admissibility of hearsay evidence under s.114(1)(d).

²⁴ Above n. 18 at [54].

²⁵ Above n. 18 at [58].

²⁶ Above n. 18 at [59].

²⁷ Above n. 18 at [57].

²⁸ Above n. 18 at [60].

²⁹ Above n. 18.

³⁰ Whether the statements that *Finch* concerned (being statements made at the same time as an admission) amounted to a confession was not finally determined by the Court of Appeal (see *Finch*, above n.18, [12] and also see *R v Y*, above n. 18 at [3]).

³¹ Tapper, in "Use of third party confessions: *R v Finch*" (2007) 11 E&P 318 at 321, suggests that it was arguable that the evidence that *Finch* concerned might have been admissible under s.116(2)(e) on the basis that the witness was in fear.

³² [2008] EWCA Crim 1816.

³³ [2006] EWCA Crim 3347.

³⁴ *Ibid.* at [35].

³⁵ [2012] EWCA Crim 1509, [2013] 1 Cr App R 2 at [7].

³⁶ The effect of s.124 is to permit the credibility of the maker of a hearsay statement to be challenged in the witness' absence.

³⁷ Where hearsay evidence is tendered under s.116 on the basis that the person who made the hearsay statement is unavailable through fear, admissibility is dependent upon the leave of the court being obtained under s.116(2)(e) and leave may only be given if the interests of justice test imposed by s.116(4) is satisfied.

³⁸ The court's discretion to exclude evidence tendered by the prosecution either under s.78 of the Police and Criminal Evidence Act 1984 or at common law is preserved by s.126(2) of the 2003 Act. Section 126(1) of the 2003 Act empowers the court to exclude prosecution or defence evidence the admission of which would result in undue waste of time, the precise ambit of s.126 currently being unclear (see *Riat* above n.34, [24].

³⁹ Where section 125 applies the court will be required to stop a jury trial in which the prosecution case is based on unconvincing hearsay.

⁴⁰ The common law exclusionary discretion is preserved by s.82(3) of the 1984 Act.

⁴¹ At [399] of the Act's explanatory notes.

⁴² At [411] of the Act's explanatory notes.

⁴³ In 'Hearsay Evidence in Criminal Proceedings' Hart, Publishing, Oxford, 2008 at [10.29].

⁴⁴ An example is provided by the failure of a defendant to deny an allegation made in his presence by a person who was speaking to him on equal terms in circumstances in which the defendant could reasonably have been expected to deny the allegation (for a recent example see *R v Coll* [2005] EWCA Crim 3675). The common law rule under which the court may be entitled to draw an inference in such circumstances was expressly preserved by s.34(5), s.36(6) and s.37(5) of the Criminal Justice and Public Order Act 1994, provisions relating to the evidential significance of the defendant's silence.

⁴⁵ *R v Montila* [2004] UKHL 50, [2005] 1 All ER 113 Lord Bingham at 31-37.

⁴⁶ Michael Hirst, "Hearsay, Confessions and Mobile Telephones", (2011) 75 JCL 482 at 501.

⁴⁷ JR Spencer, "Hearsay Evidence in Criminal Proceedings", Hart Publishing, Oxford, 2008 at [10-44].

⁴⁸ Above n. 47.

⁴⁹ Above n. 46.

⁵⁰ Above n. 46.

⁵¹ Above n. 1 at [8.96].

⁵² [2007] EWCA Crim 219; [2008] 1 Cr App R 11.

⁵³ *Ibid.* at [1.20].

⁵⁴ David Ormerod, "Evidence: multiple hearsay - written statements from witnesses abroad describing defendant's confessions to murder" [2011] Crim LR 2011 399 at 402-403.

⁵⁵ Above n. 18 at [57].

⁵⁶ *Ibid.*

⁵⁷ [2008] EWCA Crim 880; [2008] 2 Cr. App. R. 23 (the paragraphs of their Lordships' judgment which relate to the issues dealt with in this article are omitted from the Criminal Appeal Reports and Weekly Law Reports version but may be found in the official transcript).

⁵⁸ *Ibid.* at [151].

⁵⁹ Above n. 57 at [150].

⁶⁰ Where a confession made by a defendant is admitted under s.76A on behalf of a co-defendant the jury is entitled to take account of those parts of the confession that are exculpatory of the co-defendant (*see R v Nazir* [2009] EWCA Crim 213).

⁶¹ Whereas s.76(1) renders a confession made by an accused person admissible against "him", s.76A merely makes a confession made by an accused person admissible "for another person".

⁶² [2011] EWCA Crim 649.

⁶³ [2007] EWCA Crim 1651.

⁶⁴ [2010] EWCA Crim 1505, [2011] Crim. L.R. 399.

⁶⁵ [2011] Crim LR 2011 399 at 402-403.

⁶⁶ Above n. 46.

⁶⁷ Whilst not all of the authorities concerning the operation of s.121 have made clear that prior to considering whether the additional requirements imposed by s.121 are satisfied the court must first apply hearsay exceptions to each statement in the multiple hearsay chain, that this is so was made clear by the Court of Appeal in *R v Walker* [2007] EWCA Crim 1698.

⁶⁸ Whilst under the 2003 Act's hearsay regime the court is only required to consider the s.114(2) factors in the context of the hearsay exception created by s.114(1)(d), in practice the courts have found the s.114(2) factors to be of use in other contexts, as was the case in *Thakrar*.

⁶⁹ *R v Walker*, above n. 67 at [29].

⁷⁰ Above n. 46 at 500.

⁷¹ See *Thakrar*, above n. 64 at [53].

⁷² [2011] EWCA Crim 1128 at [28].

⁷³ The definition of a confession in s.82(1) of the 1984 Act encompasses not only wholly exculpatory statements but also statements that are “partly adverse” to their makers, i.e., “mixed statements” (see *Thorpe*, above n. 69 at [25]).

⁷⁴ Above n. 72 at [28].

⁷⁵ Above n. 46 at 500-501.

⁷⁶ “John Hartstone, Defensive use of a co-accused's confession and the Criminal Justice Act 2003” (2004) 8 E&P 165 at 171 (165). Hirst argued (in “Confessions as Proof of Innocence” (1998) 57 CLJ 146 at 162) that s.76A, neglects “the rights of a co- defendant who may be exculpated by” an excluded confession, it being “wrong to create a rule that introduces new limitations on a defendant's right to prove his innocence”. Hartstone (at 177) doubted whether the possibility of a defendant adducing evidence of a co-defendant’s confession as a previous inconsistent statement which formerly existed at common law (see *R v Rowson* [1986] 1 QB 174 and *Lui Mei-Lin v R* [1989] 1 AC 288) has survived the coming into force of the 2003 Act’s hearsay provisions. Certainly, s.128(2) would prevent the use of s.119 to admit a confession in circumstances in which it was excluded by s.76(2) of the 2003 Act. It might be arguable that a confession could still be relied on at common law (i.e. outside the 2003 Act’s statutory framework) in such circumstances as a previous inconsistent statement for the purpose of discrediting its maker whilst not being admitted as evidence of the matters stated, but a similar argument raised in the context of s.120 in relation to previous consistent statements was unsuccessful (see *R v Athwal* [2009] EWCA Crim 789; [2009] 2 Cr App R 14).

⁷⁷ [2005] 2 All ER 209 at [7].

⁷⁸ Above n. 1 at [1.38].

⁷⁹ See: *R v Twist* [2011] EWCA Crim 1143, [2011] 3 All ER 1055; *R v Knight* [2007] EWCA Crim 3027; *R v N* [2006] EWCA Crim 3309; (2007) 171 JP 158.

⁸⁰ See, for example, *R v Twist*, *ibid.* at [44].

⁸¹ Above n. 79.

⁸² Diane Birch and Michael Hirst, “Interpreting the New Concept of Hearsay” (2010) 69 CLJ 72 at 94-97.

⁸³ Above n. 46 at 498.

⁸⁴ Above n.79 at [43].

⁸⁵ Above n.82 at 94.

⁸⁶ Section 82(1) defines a confession “as any statement wholly or partly adverse to the person who made it, whether made to a person in authority or not and whether made in words or otherwise...”

⁸⁷ Birch and Hirst recognised that if non-hearsay confessions did not fall within the ambit of ss.76 and 76A of the 1984 Act, this would give rise to the problem that whilst the court would still be able to exclude such a

confession under s.78 if tendered by the prosecution this would not be the case if such a confession was tendered by a co-defendant (above n. 82 at 97).

⁸⁸ Above n.46 at 499.

⁸⁹ See *R v Y* [2008] EWCA Crim 10, [2008] 1 WLR 1683 at [48].

⁹⁰ See, for example, s.114(1), s.116(1), s.117(1) and s.119(1).

⁹¹ Above n.1 at [7.19].

⁹² In suggesting the enactment of the provision that now exists as s.115(3) of the 2003 Act, the Law Commission intended to reverse the decision of the House of Lords in *R v Kearley* [1992] 2 AC 228 under which evidence of implied assertions had been held to fall within the ambit of the hearsay rule; see *R v Twist* above n. 71 at [8].

⁹³ Above n .1 at [7.20].

⁹⁴ Above n. 18.

⁹⁵ *R v Y* above n. 18 at [43].

⁹⁶ But not to the exercise of its exclusionary discretion under s.126(2) of the 2003 Act, which only applies to hearsay evidence.