**Hearsay (recent complaint)** – *R. v Cousins (Junior)* [2021] EWCA Crim 1664, [2022] 4 W.L.R. 18, [2022] Crim.L.R. 252, CA, 10 November 2021.

**Legislation**: Section 120(2) of the *Criminal Justice Act* 2003 (CLW/03/45/40) provides “If a previous statement by [a witness called to give evidence in criminal proceedings] is admitted as evidence to rebut a suggestion that his oral evidence has been fabricated, that statement is admissible as evidence of any matter stated of which oral evidence by the witness would be admissible.”

In circumstances involving the admissibility of a previous statement to rebut allegations of recent fabrication, subsection (2) is the only provision of section 120 in play. The requirements of section 120(4) to (7) do not apply to a statement that meets the requirements of subsection (2). Subsection (2) does not provide a route by which a statement is admitted; it is instead admitted pursuant to the common law rule that previous consistent statements are admissible to rebut an allegation of fabrication, a rule that survives the 2003 Act. But subsection (2) changes the consequences of the admission of that previous statement. At common law it was admissible in response to an allegation of recent fabrication simply to prove consistency between the earlier statement and the oral evidence of the witness; subsection (2) makes it evidence of the truth of its content.

**Key cases cited**: Followed – *R. v KH*, CLW/20/43/2, [2020] EWCA Crim 1363, unreported, 23 October 2020, CA. Considered – *R. v Trewin* [2008] EWCA Crim 484, unreported, 13 February 2008, CA.

***Archbold* 2022 reference**: 2003 Act, s.120, § 11-34.

 Commentary by Andrew Roberts at [2022] Crim.L.R. 253.

COMMENT:

Hearsay
   A camel is a horse designed by a committee. The haphazard and disorganised provisions on the admissibility of hearsay evidence within the [Criminal Justice Act 2003](https://www.criminal-law.co.uk/Members/StatutesService/5) continue to cause difficulties to practitioners and the courts alike. This was a point implicitly acknowledged by the court here (at [37]). Section 114(1)(d) is the so-called "safety valve", enabling admissibility of such evidence if it is in the interests of justice, for which there is a "checklist" (s.114(2)) to encourage the court to make a rigorous assessment of admissibility, in the exercise of its discretion, in accordance with R. v Riat (Jaspal); R. v Doran; R. v Wilson; R. v Clare; R. v Bennett, [CLW/12/40/2](https://www.criminal-law.co.uk/Members/Item/12/40/2), [2012] EWCA Crim 1509, [2013] 1 W.L.R. 2592, CA. Section 116 is the rather more focussed provision that provides for admissibility in cases, for example, where witnesses cannot be found, or are in such fear that they will not attend. This requires, in the most part, no exercise of discretion (R. v Gian and Mohd-Yusoff, [CLW/09/46/3](https://www.criminal-law.co.uk/Members/Item/09/46/3), [2009] EWCA Crim 2553, [2010] Crim.L.R. 409, CA). Section 118 preserves common law exceptions to the rule against hearsay, such as the admissibility of res gestae, and sections 119 and 120 apply to the admissibility of previous statements of a witness, where admittedly inconsistent in the case of section 119 or, as in the instant case, admissibility of a previous statement by the witness under section 120 for a number of purposes, such as to rebut any suggestion that oral evidence by that witness has been fabricated (s.120(2)). There must surely have been a more logical way in which admissibility could be set out, for example by starting with the preserved exceptions and ending up with the provision contained in section 114.

In the instant case, the prosecution alleged that the defendant had penetrated the complainant's anus without her consent. The defence was that this was a concoction to explain why the complainant had grabbed the defendant's testicles. The prosecution relied on a recent complaint to "CH", which the complainant had not mentioned when giving her evidence. The trial judge held that section 120(2) was a stand-alone provision and permitted the statement of CH to be admitted under that provision. The Court of Appeal agreed on the basis that CH was the vehicle by which the previous statement of the complainant to rebut fabrication was given (at [33]).

Prior to the 2003 Act, previous consistent statements were inadmissible hearsay, but admissible at common law to rebut an allegation of recent fabrication, i.e. as an exception to the rule against self-corroboration (or the rule against narrative). Once admitted, the statement was relevant to the witness's credibility, but not as evidence of any matters stated therein. As the Law Commission pointed out in their 1997 Report (Evidence in Criminal Proceedings: Hearsay and Related Topics, LC245) at paragraph 10.17: "To say that a witness's previous statement of x is not probative of x, but makes the witness's evidence of x more credible, seems to … be a distinction without a difference."

The commission proposed that a statement admitted to rebut a suggestion of fabrication should be admissible as evidence of any matter stated of which oral evidence by the witness would be admissible. In other words, a previous consistent statement admitted to rebut an allegation of late invention would become admissible hearsay, fundamentally altering the use that could be made of it by the tribunal of fact. It seems clear that section 120(2) was enacted to give effect to this recommendation and so the defendant's contention on this point was bound to fail. The question then became one of what weight the jury would accord to CH's evidence of what the complainant said, in light of the fact that the complainant did not give evidence of having spoken to CH.

Although the Court of Appeal did not deal with the point, the trial judge had held that, even if he was wrong in his interpretation of section 120(2), he would have admitted the recent complaint to CH under section 114, since it was "very clearly in the interests of justice for that statement to be admitted into evidence". None of the factors in section 114(2) that would apply in exercising such a discretion appear to have been set out in the ruling.

Adverse inference

The defendant provided a prepared statement in interview referring to consensual sexual activity; he chose, as was his right, not to answer any police questions under caution. The statement appears to have been scant in detail, although its full terms are not set out in the judgment. The trial judge directed the jury that the defendant had given "quite a detailed account" of events in his evidence and identified that the defendant had not mentioned the details of that account to the police so that the jury "may hold that failure against him". The Court of Appeal agreed, declining to grant permission for the defendant to appeal on the basis that the drawing of an adverse inference should not have been left to the jury (at [26]–[31]). It is, of course, impossible to know what the jury made of that direction. Section 34(2)(d) of the [Criminal Justice and Public Order Act 1994](http://www.legislation.gov.uk/ukpga/1994/33/contents) provides that a court or jury may draw "such inferences from the failure as appear proper". What "proper" means is entirely within the purview of the court or jury. A jury, unlike a magistrates' court, is not obliged to provide reasons for its verdict. What is also unknown is what disclosure of the allegation was made available to the representing solicitor for the defendant at the police station prior to interview. The experience of this author is that many legal representatives are loathe to advise their clients to comment if disclosure is limited to a summary provided by the police, without the benefit of reading the witness statements, which are often not available at that point. However, not mentioning facts in interview, when a prepared statement is provided, is potentially a dangerous practice. As this case makes clear, simply providing a prepared statement does not grant automatic immunity from the drawing of an adverse inference (see also T v DPP, [CLW/07/42/1](https://www.criminal-law.co.uk/Members/Item/07/42/1), [2007] EWHC 1793 (Admin), (2007) 171 J.P. 605, DC, and R. v Mohammad (Faisal Khan) [2009] EWCA Crim 1871, unreported, 12 June 2009, CA).

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