**2. Hearsay** – *R. v Muldoon* [2021] EWCA Crim 381, [2021] 2 Cr.App.R. 8, CA, 18 March 2021.

**Legislation**: Section 119(1) of the *Criminal Justice Act* 2003 (CLW/03/45/40) provides “(1) If in criminal proceedings a person gives oral evidence and – (a) he admits making a previous inconsistent statement, or (b) a previous inconsistent statement made by him is proved by virtue of section 3, 4 or 5 of the Criminal Procedure Act 1865 (c.18), the statement is admissible as evidence of any matter stated of which oral evidence by him would be admissible.”

Where, other than answering some preliminary questions, two prosecution witnesses simply indicated that they were not prepared to answer any further questions when in the witness box, in particular, in relation to statements given by them to the police, although both witnesses were clearly hostile to the Crown, neither had made an earlier statement that was in any way inconsistent with their essentially non-existent testimony in court, and section 119 was not, therefore, available. For the purposes of section 119, neither witness had admitted making a previous inconsistent statement, nor could a previous inconsistent statement made by either witness be proved by virtue of section 3 of the *Criminal Procedure Act* 1865 (ss.4 and 5 not being relevant). It would unduly strain the language of section 119 to suggest that either witness had given oral evidence, as required by subsection (1), in the context of a provision that is directed at inconsistent statements; they simply had not given any evidence regarding or relating to any matters in their witness statements. In such circumstances, section 114(1)(d) of the 2003 Act (that “the court is satisfied that it is in the interests of justice for it to be admissible”) was the only potential gateway to admissibility (and thus to rely on s.114 was not to seek to avoid or ignore restrictions on the use of hearsay in other provisions), and the evidence could properly have been adduced under that gateway. It would be anomalous for there to be a distinction between a witness who accepts he or she made a previous statement but who otherwise gives no evidence and a witness who accepts he or she made a previous statement and suggests that it was untrue. It would also be against the interests of justice for the prosecution to be able to introduce into evidence the statement of a hostile witness via section 119 who had been cross-examined under section 3, but for the prosecution to be unable to introduce into evidence the statement of a hostile witness under section 114(1)(d) who had been cross-examined under the common law.

**Key cases cited**: Considered – *R. v Thompson* (1977) 64 Cr.App.R. 96, CA; *R. v Honeyghon and Sayles*, CLW/99/01/20, [1999] Crim.L.R. 221, CA.

***Archbold* 2021 references**: 1865 Act, ss.3 to 5, §§ 8-241, 8-314 and 8-316; 2003 Act, ss.114 and 119, §§ 11-2 and 11-33.

 COMMENT:

Prior to the 2003 Act, a witness who gave evidence that was inconsistent with a previous oral or written statement could be cross-examined on that statement. If the witness accepted the earlier statement was true, that statement was evidence of the truth of its contents. However, if the witness maintained that the earlier statement was false, it was relevant only to the credibility of the witness. The Criminal Law Revision Committee had argued that a previous inconsistent statement should be admissible as evidence of the truth of its contents, suggesting that it was too subtle a distinction to admit such a statement as relevant only to neutralise the effect of the witness’s testimony (*CLRC Evidence Report* (1972) (Cmnd 4991), para. 236). Section 119 makes a previous inconsistent statement admissible as evidence of any matter stated therein, provided oral evidence of the relevant matter would be admissible.

Section 119 applies either if the witness admits making the previous inconsistent statement (which was not the case here), or if a previous inconsistent statement is proved under sections 3, 4 or 5 of the 1865 Act. Here, the trial judge determined that section 3 of the 1865 Act was relevant. Section 3 provides:

“A party producing a witness … may, in case the witness shall in the opinion of the judge prove adverse, contradict him by other evidence or, by leave of the judge, prove that he has made at other times *a statement inconsistent with his present testimony* …” [emphasis added].

The difficulty for the prosecution was that both witnesses gave “only slight oral evidence” (at [37]) and refused to answer any questions about the matters dealt with in their previous statements. Accordingly, the statements were not inconsistent with their present testimony and section 3 had no application.

The Court of Appeal circumvents this problem by affirming the continued existence of the common law discretion to permit the cross-examination of a hostile witness. In accordance with *Thomson*, where a witness refuses to answer questions, the party who called the witness may be permitted to question him about an earlier statement. However, section 119 does not apply where a witness has been cross-examined on a previous inconsistent statement at common law. Instead, the Court of Appeal holds that the hearsay statements were admissible as evidence of the matters stated, under the inclusionary discretion in section 114(1)(d).

This decision ensures that there is no distinction between a hostile witness who gives evidence that is inconsistent with a previous statement and a hostile witness who refuses to answer questions. However, it does represent a relaxation of the hitherto conservative approach to the section 114(1)(d) “safety valve”.

In *R. v Riat (Jaspal)*; *R. v Doran*; *R. v Wilson*; *R. v Clare*; *R. v Bennett*, CLW/12/40/2, [2012] EWCA Crim 1509, [2013] 1 W.L.R. 2592, the Court of Appeal emphasised (at [20]) that section 114(1)(d) should not be used to circumvent the statutory conditions for admitting hearsay under sections 116 to 118 of the 2003 Act. In the instant case, the court concluded (at [48]) that this was not a case to which section 116 applied, so section 114(1)(d) was not being used to subvert the statutory protections governing the use of hearsay evidence. Yet no consideration is given to the potential applicability of section 116(2)(e), under which an out-of-court statement may be admitted where the witness “through fear … does not give (or does not continue to give) oral evidence in the proceedings, either at all or in connection with the subject matter of the statement”.

The victim had stated at one point that “[h]e was seriously worried for the safety of his children as the appellant was extremely dangerous”. The second prosecution witness, his partner at the time, had initially made a statement saying that the appellant had broken their windows and threatened to “torch” their house. When retracting that statement, she said (at [14]) “that if she avoided giving evidence she would not have to move house and her life could return to normal”. This is all highly suggestive of fear.

The difficulty for the prosecution in fear cases is that a number of authorities have suggested that fear must be proved to the criminal standard before a statement can be admitted under section 116(2)(e) (see, for example, *R. v Acton Justices, ex p. McMullen and others*; *R. v Tower Bridge Magistrates’ Court, ex p. Lawlor* (1991) 92 Cr.App.R. 98, CA, *R. v Horncastle and another*; *R. v Marquis and another*; *R. v Carter*, CLW/09/45/3, [2009] UKSC 14, [2010] 2 A.C. 373, SC, at [38], and *R. v Shabir*, CLW/13/18/2, [2012] EWCA Crim 2564, (2013) 177 J.P. 271, CA, at [64]). Such a high standard of proof presents challenges where the index offence is said to be the source of the witness’s fear, as the hearsay application in effect invites the judge to determine the guilt of the defendant in order to make a ruling on the admissibility of the evidence. This is particularly problematic in magistrates’ courts, where the district judge or magistrates are the tribunal of both fact and law and a ruling on fear risks pre-determining the outcome of the trial.

It is by no means axiomatic that the criminal standard of proof must apply to evidence upon which hearsay applications are based. In Scotland, for example, the balance of probabilities applies (*Criminal Procedure (Scotland) Act* 1995, s.259(8)(b)). The European Court of Human Rights has held that there must be “good reason” for the non-attendance of a witness. Where the suggestion is that the witness does not attend through fear, the court must determine “whether or not there are objective grounds for fear”, which need not be proved but merely “supported by evidence” (*Al Khawaja v UK*, CLW/11/46/7, (2012) 54 E.H.R.R. 23, ECHR (Grand Chamber), at [124]; see also *Horncastle v UK*, CLW/15/02/2, (2015) 60 E.H.R.R. 31, ECHR, at [133]).

The application of the criminal standard of proof to evidence of fear in England and Wales is one reason section 116(2)(e) will often be unavailable in domestic abuse cases, where a complainant may decline to give evidence for reasons other than fear, such as: embarrassment or internalisation of blame for the abuse suffered; still being invested in the relationship; financial and/or emotional dependence on their abuser; and/or pressure from others to stay in the relationship (HM Inspectorate of Constabulary and Fire & Rescue Services, *A progress report on the police response to domestic abuse* (HMICFRS, 2017), p.30). The *res gestae* exception preserved by s.118 of the 2003 Act has provided courts with a convenient way around this problem, which has been used quite liberally (and which also avoids having to consider the ‘interests of justice’ test in s. 116(4): see Karl Laird, ‘Re-evaluating the admissibility of res gestae’ [2020] 6 Archbold Review 4). In contrast both to these cases and to the instant case, the Court of Appeal has shown some reluctance to admit statements under section 114(1)(d) in domestic abuse cases (e.g. *R v C*[2007] EWCA Crim 3463; *R v Freeman* [2010] EWCA Crim 1997). Further discussion and reflection on the approach to section 114(1)(d) in such cases would be welcome.

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