Ch 2: Preliminaries

Facts open to proof or disproof

Relevant facts

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In the case of facts in issue, the law operates a binary system: the fact will either be proved and therefore be taken to have happened or will not be proved and therefore will be taken not to have happened. However, the evidence of a relevant fact may lead to a conclusion that the relevant fact happened or didn't happen or, a third possibility, *may* have happened. If the evidence leads to the conclusion that the relevant fact *may* have happened, then it can be taken into account in deciding whether the fact in issue to which it relates has been proved or disproved (*Shagang Shipping Co Ltd (in liquidation) v HNA Group Co Ltd* [2020] UKSC 34 at [99]).

Collateral facts

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In a criminal case, a finding by the judge on a preliminary fact, generally decided in the absence of the jury, is not binding on the jury. Thus if the prosecution prove beyond reasonable doubt that a confession was not obtained by oppression, and the confession is therefore admitted in evidence, and evidence of the oppression is then given in the trial, the jury may conclude that the confession was in fact obtained by oppression. In a civil case tried by a judge alone, it would be irrational for the judge, having reached a finding on a preliminary fact for the purpose of deciding the question of admissibility, thereafter, and on the same evidence, to reach a different factual conclusion. However, if the judge concludes that a preliminary fact has not been established on a balance of probabilities, and this results in the admission of the evidence in question, but also finds that the preliminary fact may well have happened, this finding may then be taken into account when assessing the weight to be attached to the evidence admitted. For example, if the judge cannot be satisfied on a balance of probabilities that a confession was obtained by torture, and the confession is therefore admitted in evidence, but also finds that the confession may well have been obtained by torture, then she may not decide that it was obtained by torture but may take into account her finding that it may have been so obtained in deciding what weight to give to the confession (*Shagang Shipping Co Ltd (in liquidation) v HNA Group Co Ltd* [2020] UKSC 34 at [101]).

The varieties of evidence

Circumstantial evidence

Examples

Non-disclosure or deletion of electronic records

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In *R v Bater-James* [2020] EWCA Crim 790 the court considered the consequences where a prosecution witness refuses to permit access to a potentially relevant digital device or deletes relevant material, issues which arise frequently in sexual cases in relation to material stored on complainants' mobile telephones. The court held as follows.

1. It is important to look carefully at the reason for a refusal to prevent access and to furnish the witness with an explanation and reassurance as to the procedure that will be followed if the device is made available.

2. If it is suggested that the proceedings should be stayed, the court should not guess at the content and significance of the material in question, but must assess the impact of the absence of the missing evidence against whether the trial process can sufficiently compensate for its absence and ensure fairness to the accused, particularly by cross-examination of the witness and appropriate directions to the jury.

3. An application can be made for a witness summons for the device to be produced and the witness would then have the opportunity to make representations in relation to his or her right to respect for private life under Art 8 of the European Convention on Human Rights.

4. If a witness deletes relevant material, consideration should be given to his or her reason for doing so, the timing of the deletion, whether it followed any warning not to delete and, insofar as it can be ascertained, the material. Each case will turn on its own facts.

5. The uncooperative stance of the witness, investigated by appropriate cross-examination, will be an important factor that the jury should be directed to take into account when deciding whether to accept the evidence of the witness and whether they are sure of the guilt of the accused.

Lies

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In the case of lies told by a prosecution witness, in the normal case the judge should consider whether to give a strong warning to the jury to exercise caution and to look for some supporting evidence before acting on the evidence of the witness (*R v Makanjuola* [1995] 1 WLR 1348, CA). However, an additional direction may be called for where the lies are relied upon by the defence as demonstrating that the witness

committed the crime. In such a case, although a *Lucas* direction is inapposite, in appropriate circumstances the jury may be directed to consider whether the witness lied for innocent reasons and not because he committed the offence (*R v Pitcher* [2021] EWCA Crim 1013).

Judicial discretion

Exclusionary discretion

Criminal cases

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The test under s 78 is most unlikely to be met simply on the basis that the evidence in question is to be given by a witness whose credibility is open to challenge, a matter that can be investigated in cross-examination; that is entirely different from a challenge based on substantive unreliability or unjust prejudice, for instance because the evidence was obtained illegally or improperly (*R v Thomasson* [2021] EWCA Crim 114 at [31]).