Ch 6: Examination-in-chief

Previous inconsistent statements

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It is submitted that if a witness denies the truth of the previous statement, in effect 'he admits making a previous inconsistent statement' for the purposes of s 119(1)(a) (witness statements contain a declaration of truth by the witness and are signed by her). Concerning s 119(1)(b), if a witness stands by what she said in her earlier statement and genuinely cannot remember the matters contained in it, it cannot be treated as a previous inconsistent statement (*R v Chinn* [2012] 1 WLR 3401, CA). However, if a witness stands by what she said in her previous statement, is likely to be able to remember the matters in question but claims she is unable to or states that she is unwilling to give evidence about those matters, it would seem that that the previous statement can be treated as a previous inconsistent statement (see *Griffiths v CPS* [2018] EWHC 3062 (Admin). However, the reasoning is unclear. See also *R v Bennett* [2008] EWCA Crim 248.)

Where the witness is properly deemed to be hostile because she retracts a previous statement without saying it is untrue and/or steadfastly refuses to give any response to questions asked (which might be referred to as 'hostile silence'), the statement cannot be treated as an inconsistent statement: *R v Muldoon* [2021] EWAC Crim 381. The appropriate response might be to treat the refusal to answer questions a contempt of court: *R v Muldoon* [2021] EWAC Crim 381 at [39], citing *R v Honeyghon and Sayles* [1999] Crim LR 221. While the prosecution '….is entitled [at common law] to call such a witness to explore the possibility that the witness will return to his original witness statement…', (*R v Muldoon* [2021] EWAC Crim 381 at [39]), the witness has not admitted making an inconsistent statement, which is required by s 119(1)(a). Nor could the statement be proved under s 3 of the Criminal Procedure Act 1865 that the witness has made an inconsistent statement, as is required by s 119(1)(b): *R v Muldoon* [2021] EWCA Crim 381 at [42]. In addition, it cannot be said that the witness has given oral evidence, as is required by s 119(1). The witness may well have given evidence about preliminary matters such as his name, age and so on, but it would unduly strain the language of s 119(1) to suggest that this meets the requirement, considering the context and purpose of the subsection (*Ibid*).

However, although the statement is not admissible under s 119(1), it is potentially admissible under s 114(1)(d), in the interests of justice: *R v Muldoon* [2021] EWCA Crim 381 at [45] – [46]. See also **Ch 12**.

Where an inconsistent statement is made by an accused in a police interview, it would seem from the decision in *R v Nguyen* [2020] 1 WLR 3084 that the statement is only admissible under s 119 as evidence of matters stated against the accused (being the person who made the statement) and not any co-accused who the accused might have implicated in the statement (at [62]). However, such an approach is not easy to reconcile with the language of s 119(1), which states that an inconsistent statement 'is admissible as evidence of any matter stated of which oral evidence by him would be admissible.' What an accused says in interview implicating a co-accused *would be* admissible by him in oral evidence against the co-accused. The justification for the approach taken in *R v Nguyen* may simply lie in the fact that s 119(1) was never intended to permit an inconsistent statement to be used in this way, that is, to be used as evidence against a co-accused. However, statements of an accused in interview may be admissible against a co-accused under s 114(1)(d) in the interests of justice (Ibid). Concerning the use of s 114(1)(d) for this purpose, in *R v Nguyen* the court noted (at [44] & [61]) the cautionary approach advocated by Hughes LJ in *R v Y* [2008] 1 WLR at [57]: interviews should not be routinely admissible against accused persons other than the accused who is interviewed and 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'.

Unfavourable and hostile witnesses

Hostile witnesses

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In *R v Muldoon* [2021] EWCA Crim 381 at although it was not necessary to decide the point in *R v Thompson*, it was held that in cases of 'hostile silence', the witness's earlier statement cannot be proved against her under s 3 of the 1865 Act. This is simply because the witness has not said anything to make the earlier statement 'inconsistent'.