Case Law on Hearsay Evidence in Criminal Cases

Index

1. Hearsay definitional difficulties post 2003

R v Twist and Others [2011] EWCA Crim 1143
Section 115 CJA 2003 was intended to address the definitional problem of the implied assertion which so vexed the House of Lords in **R v Kearley [1992] 2 AC 228** where the prosecution sought to prove an intention to supply drugs by adducing evidence of anonymous calls to K's telephone requesting to be supplied: the implication being that K was a drug dealer. The House of Lords concluded that an implied assertion had a hearsay quality if relied on to prove the truth of a fact implicitly asserted.

Section 115 CJA 2003 re-defined hearsay to exclude any statement which was not made to cause another person (the receiver) to believe the matter or cause another person to act on the basis that the matter is as stated (s 115 (3)).

In **Twist and Others**, two of the appeals concerned text messages asking for drugs. The prosecution relied on the messages to prove intention to supply. Another appeal concerned robbery where the key issue was whether the defendant had a gun in his possession when he committed the robbery. He had sent a text to his co-defendant on the morning of the robbery asking for a gun. The final appeal concerned an allegation of rape where consent was in dispute. The prosecution sought to rely on text messages sent by D to the victim's phone apologising for raping her. Were the text messages hearsay and therefore subject to the statutory code?

Following a review of earlier authorities, the Court of Appeal concluded that it is no longer helpful to talk in terms of an implied assertion. The important question that needs to be answered is: **is the matter stated (whether it be implied or expressly asserted) one which the maker or speaker of the statement intended to cause the recipient to believe or to act upon it? If it is, it amounts to hearsay.** A statement can be evidence of a relevant fact (implied or otherwise) that needs to be proved but, if the speaker's purpose was not to cause the recipient to believe that fact or to act on the basis of it, it lacks a hearsay quality and is admissible subject to the ordinary principles of relevance.

Hughes LJ proposed a three-prong test in *Twist*:

i. "identify what relevant fact (matter) it is sought to prove;

ii. ask whether there is a statement of that matter in the communication. If no, then no question of hearsay arises…"

iii. If yes, ask whether it was one of the purposes of the maker of the communication that the recipient, or any other person, should believe that matter or act upon it as true? If yes, it is hearsay. If no, it is not." (s 115 (3)

In none of the conjoined appeals in *Twist* did the statements assume a hearsay quality. The drug-related texts were requests to be supplied and there was no statement that the defendants had supplied drugs (it failed the second prong). The gun request text failed the third prong as it was not the sender's purpose to cause the recipient to

believe that he was in possession of a gun (that was assumed). Similarly, the admissions to rape were not sent to cause the victim to believe she had been raped (she already knew that). The purpose in sending them was to make an admission and to apologise.

*Twis*t was applied in *R v Midmore* [2017] EWCA Crim 533**.** A (a drug dealer) and B, his half-brother, were charged with causing grievous bodily harm to C with intent to cause grievous bodily harm. Both A and B strongly suspected that C had set up a robbery in which a quantity of drugs was stolen from B. Sulphuric acid was thrown into C's face, the prosecution alleged as an act of revenge. B admitted throwing the acid into C's face. (A) remained silent in interview and denied involvement. (A) was charged on the basis that he had aided and abetted B by being with him when B purchased the acid and being present when the acid was thrown. (A) denied aiding and abetting B maintaining that B had told him he needed the acid to unblock a drain. There was no eye-witness evidence placing A at the scene.

The disputed hearsay evidence concerned *WhatsApp* messages sent from B's mobile phone to his girlfriend's phone. In the message there was a picture of a box of *One Shot* sulphuric acid with the caption: "This is the one face melter." (A) denied knowing the existence of the message. The trial judge admitted the message into evidence against A, rejecting a defence application that it was inadmissible hearsay. The trial judge concluded the evidence was relevant and its admission would not prejudice a fair trial, thus rejecting a s 78 PACE application. Reviewing the decision, and applying three-prong *Twist* test, the Court of Appeal concluded that:

(i) the prosecution sought to use the message to show that the product was not purchased with the intention of using it as a drain cleaner but was purchased with the intention of using it as a highly injurious substance to be thrown in the complainant's face.
(ii) the message was an implied representation of the intention on B's part, not simply a comment from which the intention could be inferred. It therefore fell within the definition in s. 115(2) as it was a statement of the matter intended to be proved, **but**
(iii) nothing in the message could possibly suggest that it was sent to cause B's girlfriend to believe *One Shot* would actually melt a face or to cause her to act on that basis or to believe that it was his intention so to use it or to act on that basis.

The message therefore lacked any hearsay quality and was rightly admitted as relevant evidence in the context of the case.

2. Establishing the pre-requisites for admission under s116-the unavailable witness ground

s. 116 (2) (c) CJA 2003- W is outside UK AND it is not reasonably practicable to secure W's attendance –some of these cases are based on the pre-2003 Act hearsay provisions which are still applicable.

R v Case [1991] Crim LR 192 confirms that where the prosecution wishes to rely on this ground, both reasons (the fact that the witness is outside the UK and that it is not reasonable to secure his attendance) must be proved. In this case, Portuguese tourists were the victims of theft. In their statements to the police the address they had given was that of a London hotel together with an indication that their stay in England was of a temporary nature. The statements did not include the date on which they were expected to return to Portugal, nor how long they were expected to remain in England. The Court of Appeal concluded the prosecution was unable to prove that it had not been reasonably practicable to secure the witnesses' attendance.

R v Castillo [1996] 1 Cr App R 438
The Court of Appeal usefully reviewed the factors a court should bear in mind in deciding whether it was reasonably practicable to secure the absent witness's attendance. They include:

- the importance of the witness
- the extent of the prejudice it would cause to the defendant were the absent witness's statement read out, affording no opportunity to cross-examine
- the expense and inconvenience of securing the witness's attendance.
- the seriousness of the offence itself

Where the charge is one of smuggling Class A drugs for instance, and the witness's evidence is important to the prosecution, the court may well require greater efforts to be made than perhaps would be the case were the charge less serious with the result that the defendant's liberty was not at stake.

Where the absent witness is a prosecution witness, the court must be satisfied beyond reasonable doubt that all reasonable efforts have been made. If the defence allege that the attendance of a witness is impracticable, or he is untraceable, then the civil standard of proof on balance of probabilities will suffice.

R v DT [2009] EWCA Crim 1213 (post 2003 Act)
The appellant (T) appealed against a conviction for grievous bodily harm with intent. Witness (X) had made a witness statement in which she said that T had confessed the incident to her immediately after it had happened. At the end of her statement, X said that she was leaving the area the following day and would not have made the statement otherwise, due to fear. She also stated that she would not attend court to give evidence. At a preliminary hearing it was made clear that X would be needed for the trial, and a witness summons was issued to the address she had provided. It transpired that X had moved. X's mobile phone was also called, but it was switched off. At the trial the judge held that the Crown had taken reasonably practical steps to locate X and allowed her statement to be read pursuant to the Criminal Justice Act 2003 s.116(2)(d).

HELD: All efforts should be made to get witnesses to court with all the necessary support, *(R v Horncastle (Michael Christopher)* [2009] 4 All ER 183) applied). There was a long-standing right to confrontation in the European Convention on Human Rights 1950 Art.6, which should not be departed from lightly, and the Act needed to be observed carefully. Therefore, there was insufficient evidence on which to establish that the prosecution had taken all reasonably practical steps to find the witness. If cost had been a problem, that also should have been dealt with by evidence, but there was no such evidence. The hearsay evidence was wrongly admitted. The conviction was quashed and a re-trial ordered. In *R v Adams* [2008] 1 Cr App R 430, the key prosecution witness had been contacted three months before the trial and had confirmed he would attend. He was contacted again the night before the trial. There was no reply. The Court of Appeal observed that leaving contact with a witness until the last working day before a trial was not taking 'such steps as reasonably practicable'.

Proving fear under s.116 (2) €- R v Anita Davies [2006] EWCA Crim 2643
In this case the evidence of the victim and two eye-witnesses on an allegation of a serious assault was admitted as hearsay evidence under the fear provision (s. 116 (2) €). Each of these witnesses indicated in their statements to the police, that they did not wish to attend court because they were fearful of the consequences. On appeal it was

argued on behalf of the appellant that it was all too easy for witnesses to say that they were frightened and that the judge had failed to scrutinise the evidence of fear. It was argued that the judge had made no attempt to explore the use of special measures as a way of perhaps allaying the witness' fears or of at least using special measures as a way of assessing their assertions of fear. Rejecting the submissions, the Court of Appeal observed:

"In our judgment, the judge was perfectly entitled to reach a conclusion as to the genuineness of the witnesses' fears on the basis of the evidence to which we have referred. It must always be recalled that fear is to be widely construed (see section 116(3)) and that it was the purpose of this part of the 2003 Act to alter that which had previously been the law under section 23 of the Criminal Justice Act 1988…. Indeed, courts are ill-advised to seek to test the basis of fear by calling witnesses before them since that may undermine the very thing that section 116 was designed to avoid."

See also section 5 below:- in particular statements made by the Court of Appeal in *R v Sellick and Sellick* [2005] 1 WLR 3257 and the observations of the Grand Chamber of the ECtHR in *Al-Khawaja* and *Tahery* [2011] ECHR 2127.

3. Article 6 –a selection of ECHR case law

Hearsay and a fair trial (an important issue and considered further towards the end of this compendium)

Some ECtHR's decisions (in addition to Kostovski)

Luca v Italy (2003) 36 EHRR 46 (emphasis added)

> *The evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence. As a general rule, Art.6(1) and (3)(d) require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statement or at a later stage [See Ludi v Switzerland: (1993) 15 E.H.R.R. 173, para.49; Van Mechelen v Netherlands]*

As the Court has stated on a number of occasions, it may prove necessary in certain circumstances to refer to depositions made during the investigative stage (in particular, where a witness refuses to repeat his deposition in public owing to fears for his safety, a not infrequent occurrence in trials concerning Mafia-type organisations). If the defendant has been given an adequate and proper opportunity to challenge the depositions, either when made or at a later stage, their admission in evidence will not in itself contravene Art.6(1) and (3)(d). ***The corollary of that, however, is that where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Art.6.***

The 'sole and decisive' has occupied and extraordinary amount of judicial time culminating in the very significant **Supreme Court decision in R v Horncastle [2009] UKSC 1.**

SN v Sweden-(2004) 39 EHRR

This case concerned an appeal by a Swedish national who had been convicted of sexually abusing a child. As part of the police investigation and before the applicant's arrest the child M, had been interviewed by an experienced police officer. M's parents and a representative from the Swedish equivalent of social services were present in an adjoining room. The interview was recorded. The applicant was subsequently questioned and made aware of the allegation. He was given a copy of the preliminary report into the investigation and was told he could request additional interviews and other investigatory measures. The applicant's counsel requested the child be interviewed a second time to clear up ambiguities in the child's evidence. The interview was set up but the public prosecutor, who was unable to attend at the last minute, objected to the presence of one counsel only in the interview. The decision was taken to allow the interview to go ahead. Counsel for the applicant was not present in the actual interview room but did discuss with the officer the questions that he wished to see addressed. A transcript of the interview was given to the applicant who was subsequently charged with several offences of sexual indecency. He was convicted following a trial at which the first interview was shown and the transcript to the second interview was read out. Under Sweden's Judicial Procedure Code, children below the age of 15 do not normally give evidence in person before a court.

The ECHR reiterated that an accused's right to secure the appearance of witnesses in court is not an absolute right. The Court noted that prosecutions concerning sexual abuse, especially those involving children, raise special difficulties. Victims of sexual abuse have the right to respect for their private life however; this must be balanced against the need for the defendant to have a fair trial. There had to be sufficient safeguards to counterbalance the obstacles faced by the defendant. Had there been sufficient safeguards in this case? The child's evidence had been the main evidence against the applicant and in this regard an assessment of the child's credibility had been a crucial consideration for the court. Much was made of the fact that the applicant's counsel could have asked for the second interview to be postponed and videotaped. He had been able to put questions to the child through the investigating officer and had indicated afterwards that he was satisfied with what had occurred. The child's videotaped interview had been played to the trial court and appeal court. In these circumstances the court had been able to make an assessment of the child's credibility and the applicant had been afforded the opportunity to challenge what the child had said. The applicant had therefore had a fair trial.

The judgment of the ECHR in this case as in many other instances, depend for the most part on the facts. Clearly the Convention allows the use of hearsay evidence providing the defendant has sufficient safeguards to effectively challenge the evidence either through pre-trial procedures or at trial. Earlier case law had suggested a conviction should not in principle be based solely or mainly on hearsay evidence-this decision arguably suggests otherwise.

The outcome in the Swedish case may be contrasted with an earlier an earlier decision of the ECHR in **P.S. v Germany (2003) 36 EHRR 61**. The applicant in this case, had been convicted of sexually abusing a pupil. The child was said by her mother to be emotionally disturbed by the events. At no stage did a judge ever question the child nor was the applicant ever afforded the opportunity of having the child's demeanour during questioning observed. The main evidence at the trial had come from the child's mother. The applicant’s request to have the child examined by a psychologist had been refused. During the appeal proceedings the court appointed a psychologist who concluded that the child was a credible witness. At the insistence of the girl's parents the girl did not appear in person at the appeal court. Taking all the above into account the ECHR's unsurprisingly came to the conclusion that the applicant had been denied the right to a fair trial. Whilst the judicial process had been right to be concerned about the child's

mental well-being the safeguards afforded to the defendant had been inadequate. The evidence of the psychologist was dismissed by the Court since it had been prepared some eighteen months after the original accusation.

The pre-2003 Act position

Under the CJA 1988, having proved a reason for a witness's unavailability, the court had to separately exercise discretion under either s. 25 or 26 CJA 1988 to admit the hearsay evidence if it was in the interests of justice. In exercising discretion under these sections, the court was required to have regards to inter alia:

i. the contents of the statement;

ii. the extent to which the statement appears to supply evidence which would otherwise not be readily available;

iii. the relevance of the evidence that it appears to supply to any issue which is likely to have to be determined in the proceedings;

iv. any risk, having regard in particular to whether it is likely to be possible to controvert the statement if the person who made it does not attend court to give oral evidence, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them; and

v. any other circumstances that appear to the court to be relevant

Note: the requirement to specifically exercise judicial discretion to admit or exclude hearsay evidence under the CJA 1988 was left out of the hearsay code under CJA 2003. Providing the hearsay evidence is admissible under s. 116 or 117 CJA 2003, it is admissible subject only to an application by the defence to have it excluded under s. 78 PACE 1984.

4. Domestic cases giving rise to Article 6 issues of fairness in the context of hearsay evidence

R v Dragic [1996] 2 Cr App R 323

The sole identification witness was too ill to give evidence at the trial. The prosecution sought leave to admit the statement the witness had made to the police under section 23 CJA 1988 **(pre-2003 Act)**. Leave was granted. The defendant appealed pointing out the importance of this witness to the prosecution and the inability of the defence to conduct a cross-examination. The Court of Appeal rejected the argument pointing out that D could have given evidence on oath and called an alibi. Furthermore, D had been able to explore the shortcomings in the identification process as part of his trial. The Court of Appeal refused to interfere with the judge's exercise of discretion in this case.

"The fact there is no ability to cross-examine, that the witness who is absent is the only evidence against the accused and that his evidence is identification evidence is not sufficient to render the admission of written evidence from that witness contrary to the interests of justice or unfair to the defendant per se. What matters in our judgment, is the content of the statement and the circumstances of the particular case bearing in mind the considerations which section 26 require the judge to have in mind." per Lord Taylor CJ

R v W [1997] Crim LR 678 **(pre-2003 Act)**
The defendant was convicted of indecent assault, rape and attempted buggery against his children and his wife in relation to a series of offences which occurred over a period of twenty years. The defendant's wife made a written statement and an application was made by the defence under section 23 and 26 of the Criminal Justice Act 1988, for her statement to be read to the jury. The trial judge concluded that the defendant's wife could not give evidence because she was unfit and that her statement had been prepared for use in criminal proceedings. The judge ruled further that it was not in the interests of justice to admit the evidence for three reasons:

1. The wife had originally been a co-accused, and was therefore in a position (as a result of police disclosure) , to anticipate most of the prosecution case;

2. If the statement were admitted the prosecution would have no opportunity to ask the defendant's wife about other events and would not be able to assess her as a witness;

The defendant was convicted and was granted leave to appeal. In dismissing the appeal, the Court of Appeal found that the "interests of justice" ground in section 26 CJA 1988

applied to both prosecution and defence. The judge had correctly weighed up the prejudice to the prosecution to admit the document against the unfairness to the accused not to admit it, and had come to the conclusion that it was in the interests of justice not to admit the document.

R v Thomas and Flannagan [1998] Crim LR 887
This case afforded the Court of Appeal the opportunity of directly considering whether the admission of hearsay evidence in accordance with section 23 of the CJA 1988 was compatible with the Convention. The hearsay evidence of an accomplice was admitted under section 23, the trial judge having concluded it was in the interests of justice to admit it under section 26. The Court of Appeal was of the view that the admission of the evidence in this case did not infringe Article 6 (3)(d), given the numerous safeguards available. Those safeguards included the fact that the trial judge had carefully weighed up the argument for its admission under section 26 and that he had warned the jury about the dangers of relying too heavily on the statement. Furthermore, counsel for the appellants had been afforded the opportunity of attacking the credibility of the absent witness.

R v Radak [1999] Crim LR 223 (pre- 2003 Act)
In this case, the Court of Appeal took the view that Article 6 (3)(d) had been infringed. The witness was in the USA. He refused to attend trial. The witness's evidence was of importance to the prosecution. Had the prosecution chosen to do so, it could have taken advantage of section 3 International Co-operation Act. Under this Act, testimony under cross-examination could have been elicited in the USA. Given the importance of the evidence and the inability to cross-examine or contradict with other evidence, the Court of Appeal concluded the trial judge had been wrong to admit the evidence in the exercise of his discretion.

5. Article 6 considerations in the context of witness fear (and the sole or decisive test….)

R v M [2003] 2 Cr App R 21 (pre-2003)
This case involved an allegation of murder. The defendant was found unfit to plead and could not give instructions at his trial. The main prosecution witness was TB. He was not a reliable witness. The trial judge exercised his discretion under s. 26 CJA 1988 and admitted the evidence. M appealed.

The evidence of fear

> *So far as the admissibility of the statements of TB was concerned, the Crown applied that they should be admitted and read to the jury on the basis that the witness was in fear. He had been in the Witness Protection Scheme since making his statements in October 2000. There was evidence however that he had been threatened in an anonymous telephone call or calls, and that he had been assaulted by having his face burned with a cigarette by a friend of a co-defendant as a warning not to give evidence, albeit TB denied that fact before the judge on a voir dire. There was also evidence that his sister had been approached by youths who threatened that there would be adverse consequences if he gave evidence.*

The Court of Appeal was referred to the jurisprudence of the ECtHR and to the statements made in *Luca v Italy* on the point that a conviction could not be based solely or to a decisive degree on hearsay evidence. On this issue, the Court of Appeal agreed with the trial judge:

> *The judge rejected the submission for the defence that the last sentence of that paragraph could admit of no exceptions. Certainly, if it did, then ss.23 and 26 of the 1988 Act could never apply in a case such as the present where the essential or only witness is kept away by fear. That would seem to us an intolerable result as a general proposition and could only lead to an encouragement of criminals to indulge in the very kind of intimidation which the sections are designed to defeat. Certainly, decisions of this court before the passage of the Human Rights Act 1998, as well as common sense, suggest that no invariable rule to that effect should be either propounded or followed. Where a witness gives evidence on a voire dire that he is unwilling to give evidence as a result of a threat which has been made to him,* ***and the judge draws the inference that the threat was made, if not at the instigation of the defendant, at least with his approval****, this should normally be conclusive as to how the discretion under s.26 should be exercised…*
>
> *…we would not subscribe to any formulation of the approach to be adopted which states without qualification that a conviction based solely or mainly on the impugned statement of an absent witness necessarily violates the right to a fair trial under Article 6.*

The Court of Appeal held:

Nonetheless, having considered the matter anxiously in this case, we find ourselves unable to support the judge's exercise of his discretion to admit the statement of TB. It is not in dispute that the entire case for the prosecution rested upon TB's statement. Thus, while it was plainly in the interests of justice so far as the prosecution was concerned that the statements should be before the jury, it was also in the interests of justice from the point of view of the defendant that he should not be unduly disadvantaged by admission of the statements in circumstances where they could not be made the subject of cross-examination. This was particularly so, as it seems to us, because TB was potentially a completely flawed witness. He had initially been approached by the police on the basis that he was suspected of being a member of the group which had chased and killed Hamza and had, in those circumstances, refused to answer any questions. On that view, his evidence would need to be approached with the same caution as that of an accomplice. His apparent change of heart had come at a time when he was himself on bail in respect of a charge of robbery and appears to have been directly motivated by the offer of a reward for information in respect of the murder. He had considerably 'improved' his evidence between the time of giving his first and second statements. There was thus every reason to question his motive and his veracity in pinning the murder on the defendant, a person with the mind of a child who, if involved, was likely to have been no more than a 'hanger-on' in a group such as that involved in this offence. Further, this was a case where, being unfit to plead, the defendant could have no realistic opportunity of going into the witness box and defending himself, nor to give coherent instructions to his advisers. Yet he was to be deprived of the only opportunity directly to challenge the evidence of Bona by cross-examination on his behalf. This was not a case where it would reasonably be suggested, nor did the judge suggest, that the defendant had the opportunity to call witnesses to establish his innocence. The judge also acquitted him of any involvement in threats to Bona. Thus the jury would be presented with two statements of T B, credible on their face, but susceptible of challenge only by counsel's comments upon the circumstances surrounding the giving of the statements and such suspicions as he might invite the jury to entertain in a case where the defendant was the sole member of the group charged with murder of the victim.

From the judgment in R v Arnold [2004] EWCA Crim 1293

> *We cannot leave this case without sounding a word of caution. The reference in Luca to the not infrequent occurrence of the phenomenon of frightened witnesses being unwilling to give evidence in trials concerning Mafia-type organisations is echoed across a wider range of serious crime in this country. Counsel both confirmed that this problem was becoming commonplace and the experience of the members of this Court concerned with the conduct of criminal trials is likewise. Inevitably, applications under section 23 will follow but this judgment should not be read as a licence for prosecutors. Very great care must be taken in each and every case to ensure that attention is paid to the letter and spirit of the Convention and judges should not easily be persuaded that it is in the interests of justice to permit evidence to be read. Where that witness provides the sole or determinative evidence against the accused, permitting it to be read may well, depending on the circumstances, jeopardise infringing the defendant's Article*
> *6(3)(d) rights; even if it is not the only evidence, care must be taken to ensure that the ultimate aim of each and every trial, namely, a fair hearing, is achieved.*

R v Sellick and Sellick [2005] 1 WLR 3257

This is an important case on the admission of hearsay evidence and its compatibility with Article 6. Although the appeal arose out of the hearsay provisions under the CJA 1988, the same considerations are likely to apply to the CJA 2003. Under the previous law, the court had to exercise judicial discretion based on the interest of justice under either s 25 or 26 CJA 1988, before admitting hearsay evidence. This was felt to be a particularly important safeguard for ensuring compliance with Article 6 in the context of admitting hearsay evidence.

The charge in this case was murder. The context for the killing related to drug dealing. Significant prosecution evidence from two key witnesses was presented in hearsay form. There was strong evidence to suggest that the accused or those close to him had tried to intimidate the two witnesses concerned. Shortly before the trial both witnesses (who had been placed in witness protection programmes) disappeared. It was suggested by the accused that each of the witnesses had a purpose of their own to serve in giving false evidence against them. Was the admission of hearsay evidence in this case (given its importance) compatible with Article 6?

Unlike most Continental criminal justice systems, in the English system, the defendant has one opportunity to cross-examine a witness and that is at trial. The Court of Appeal observed that the ECtHR had yet to deal with a case where the main prosecution witness (whose evidence had been read to the court) had effectively been disabled from giving live testimony due to the actions of the defendant. It can be argued that, in such a case, it is the accused that deprives himself of a right to a fair trial. The judgment contains a useful review of Strasbourg authorities. From that review, the Court of Appeal highlights the following propositions:

i. *"The admissibility of evidence is primarily for the national law;*
ii. *Evidence must normally be produced at a public hearing and as a general rule Article 6(1) and (3)(d) require a defendant to be given a proper and adequate opportunity to challenge and question witnesses;*
iii. *It is not necessarily incompatible with Article 6(1) and (3)(d) for depositions to be read and that can be so even if there has been no opportunity to question the witness at any stage of the proceedings. Article 6(3)(d) is simply an illustration of matters to be taken into account in considering whether a fair trial has been held. The reasons for the court holding it necessary that statements should be read and the procedures to counterbalance any handicap to the defence will all be relevant to the issue, whether, where statements have been read, the trial was fair.*
iv. *The quality of the evidence and its inherent reliability, plus the degree of caution exercised in relation to reliance on it, will also be relevant to the question whether the trial was fair".*

What of the situation where the defendant has no opportunity to question a witness at any stage and that witness's evidence is the sole or decisive evidence? Where are the counterbalancing measures to ensure a fair trial? The ECtHR has never addressed this question in the context of a murder trial where the chief witness has been kept out of the way by the defendant or his associates. What counterbalancing measures did the Court of Appeal identify in this case?

- The evidence of the witnesses was credible;
- The credibility of the witnesses was challenged;
- The trial judge gave a clear direction as regards the witness's credibility and the shortcomings of hearsay evidence compared to oral evidence;

- Regard should be had to the fact that the defendant was to a large extent the author of his own inability to cross-examine witnesses against him;
- Regard should also be had to the rights of victims and their families;
- If there was a rule that a defendant could not be said to enjoy a fair trial because the main evidence against him constituted hearsay evidence, it would lead to greater intimidation of witnesses. Such an absolute rule cannot have been intended by the ECtHR.

The Court of Appeal cautions that care must be taken and that prosecutors should not regard s 116 (4) CJA as a licence to seek to have hearsay evidence admitted on the basis that a witness is in fear.

> *"Our view is that certainly care must be taken to see that sections 23 and 26, and indeed the new provisions in the Criminal Justice Act 2003, are not abused.* ***Where intimidation of witnesses is alleged the court must examine with care the circumstances. Are the witnesses truly being kept away by fear? Has that fear been generated by the defendant, or by persons acting with the defendant's authority? Have reasonable steps been taken to trace the witnesses and bring them into court? Can anything be done to enable the witnesses to be brought to court to give evidence and be there protected? It is obvious that the more "decisive" the evidence in the statements, the greater the care will be needed to be sure why it is that a witness cannot come and give evidence****. The court should be astute to examine the quality and reliability of the evidence in the statement and astute and sure that the defendant has every opportunity to apply the provisions of Schedule 2. It will, as section 26 states, be looking at the interests of justice, which includes justice to the defendant and justice to the victims. The judge will give warnings to the jury stressing the disadvantage that the defendant is in, not being able to examine a witness."*

The provisions under the Criminal Justice Act 2003 remove section 25 and 26 CJA 1988 discretion. However, s 126 CJA 2003 preserves the application of s 78 PACE. The reference to the interests of justice highlighted in the quotation above can be taken to apply to the exercise of judicial discretion under s 78 PACE which is likely to be raised by defence advocates in a case where the main or decisive evidence against the defendant is sought to be admitted in hearsay form. Under s 116 (2) and (3) the fear ground has been relaxed still further. A key safeguard in ensuring a fair trial, in addition to s 78

PACE, is and the requirement to seek leave to admit hearsay evidence of a witness said to be in fear (s 116 (4)). The other principle safeguards in relation to the admission of hearsay evidence under the CJA are contained in ss 121-126.

6. Article 6 considerations in the context of the death of a witness (and the sole or decisive test….)

R v Dr Imad Al Khawaja [2006] 1 Cr App R 9

The defendant, a doctor had been convicted of indecent assault on two female patients. His treatments included hypnotherapy. Prosecution witness one (W1) and witness two (W2) did not know each other. W1 committed suicide shortly before the trial. Her witness statement was admitted as hearsay evidence in the exercise of the trial judge's discretion under s 23 CJA 1988. On appeal, the defence cited *Luca* and *Kostovski* in that the defendant had not been given and could not now be given any effective opportunity to challenge the written evidence and given its importance to the prosecution's case, the defendant could not be said to have enjoyed a fair trial. Affirming the conviction and citing *Sellick* with approval, the Court of Appeal observed:

> *"Where a witness who is the sole witness of a crime has made a statement to be used in its prosecution and has since died, there may be a strong public interest in the admission of the statement in evidence so that the prosecution may proceed. That was the case here. That public interest must not be allowed to override the requirement that the defendant have a fair trial. Like the court in Sellick we do not consider that the case law of the European Court of Human Rights requires the conclusion that in such circumstances the trial will be unfair. The provision in Art.6(3)(d) that a person charged shall be able to have the witnesses against him examined is one specific aspect of a fair trial: but if the opportunity is not provided, the question is "whether the proceedings as a whole, including the way the evidence was taken, were fair-……". This was not a case where the witness had absented himself, whether through fear or otherwise, or had required anonymity, or had exercised a right to keep silent. The reason was death, which has a finality which brings in considerations of its own……."*

The safeguards identified in this case included;

- The fact that the judge had carefully weighed up the arguments for and against;
- The defendant had been afforded the opportunity of having the evidence excluded;

- The prosecution would have to have abandoned its case had the evidence been excluded;
- The defendant could still challenge the witness's credibility by adducing expert evidence of altered perceptions under hypnosis;
- There was no evidence to suggest collusion between the two principal witnesses;
- The jury had been appropriately directed

Article 6 developments

Dr **Al Khawaja** took his case to the European Court of Human Rights and won [2009] 49 E.H.R.R. 1(1)-the ECHR adopting the principle in **Luca v Italy** that the doctor could never have enjoyed a fair trial because the hearsay evidence was the sole and decisive prosecution evidence in the case. The Court of Appeal had to deal with the fallout from this decision in **R v Horncastle**. It concluded that the ECtHR was wrong. The **Supreme Court's** highly influential decision in **Horncastle** [2009] UKSC 14 upheld the Court of Appeal's decision and its analysis of the hearsay provisions in England and Wales as being entirely compatible with Article 6 even in cases where the hearsay evidence is decisive. **Lord Phillips, whilst acknowledging the important protections provided to a defendant by Article 6(3)(d), held the principle was not absolute**. There were sufficient safeguards (summarised at para 38 of the judgement) within the statutory requirements and procedurally to ensure that prosecution hearsay evidence would not be admitted in contravention of the defendants' right to a fair trial under Article 6. Accordingly, the sole or decisive evidence test propounded by the ECtHR in *Al-Khawaja* was rejected.

The UK government asked for the case of **Al-Khawaja** to be referred to the Grand Chamber of the ECtHR but the request was deferred pending the decision of the Supreme Court in Horncastle. The *Al-Khawaja* and *Tahery* [2011] ECHR 2127.

The Grand Chamber concluded that Al-Khawaja's trial overall had in fact been fair though Tahery's had not. A number of important statements of principle are made in this judgment. **Perhaps the most important being confirmation of the fact that the 'sole and decisive rule' articulated in previous judgments of the European Court of Human Rights, must not be applied in an inflexible manner and that where hearsay evidence is the sole or decisive evidence against a defendant, its admission as evidence will not automatically result in a breach of Article 6.** However, 'sufficient counterbalancing factors, including the existence of strong procedural safeguards' are required so as to permit a fair and proper assessment of the reliability of that evidence

to take place in such circumstances: "*The dangers inherent in allowing untested hearsay evidence to be adduced are all the greater if that evidence is the sole or decisive evidence against the defendant."*

It was the view of the Grand Chamber that the safeguards under the statutory scheme (ss 121-126 CJA 2003) plus the requirement for leave where fear is relied on as the reason for a witness's absence were, in principle, strong safeguards/counterbalancing factors designed to ensure fairness. In A-K's case, the counterbalancing factors had been sufficient to ensure that he had in fact had a fair trial. In Tahery's case where the main prosecution witness (who provided uncorroborated eye-witness evidence of T's involvement in the crime) had refused to give evidence out of fear, the Grand Chamber concluded that the counterbalancing measures had not been sufficient to ensure a fair trial. There were serious questions about the reliability of the evidence provided by the absent witness which T had been unable to challenge.

The Grand Chamber additionally made some important statements of principle in relation to the need for there to be a good reason (requiring enquiry by a court) for the absence of the witness (death, serious illness or real and significant fear of testifying) before any consideration is given to the 'sole or decisive rule'.

In relation to fear caused by the defendant or his agents, the Grand Chamber was clear:

> "*When a witness's fear is attributable to the defendant or those acting on his behalf, it is appropriate to allow the evidence of that witness to be introduced at trial without the need for the witness to give live evidence or be examined by the defendant or his representatives even if such evidence was the sole or decisive evidence against the defendant.* ***To allow the defendant to benefit from the fear he has engendered in witnesses would be incompatible with the rights of victims and witnesses. No court could be expected to allow the integrity of its proceedings to be subverted in this way.*** *Consequently, a defendant who has acted in this manner must be taken to have waived his rights to question such witnesses under Article 6 (3)(d). The same conclusion must apply when the threats or actions which lead to the witness being afraid to testify come from those who act on behalf of the defendant or with his knowledge and approval."*

The Grand Chamber acknowledged however that many witnesses have a general fear of testifying without that fear being directly attributable to threats made by the defendant or his agents. Such instances require careful consideration. Whilst acknowledging that there is no requirement that a witness's fear be attributable directly to threats made by the defendant in order for that witness to be excused from giving evidence at trial and that fear of death or injury of another person or of financial loss are all relevant considerations in determining whether a witness should not be required to give oral evidence, the Grand Chamber cautioned that this does not mean that any subjective fear of the witness will suffice. The trial court must conduct appropriate enquiries to determine whether or not there are objective grounds for that fear, and, whether those objective grounds are supported by evidence as allowing the admission of a witness statement in lieu of live evidence at trial must be a measure of last resort. The Grand Chamber held that before a witness can be excused from testifying on grounds of fear, the trial court must be satisfied that all available alternatives, such as witness anonymity and other special measures would be inappropriate or impracticable. In short, receiving hearsay from frightened witnesses is a "last resort."

In ***Al-Kawaja***, the Court formulated a <u>three-step test:</u>

i. was there a good reason for the non-attendance of the witness and, consequently, for the admission of the absent witness's untested statements as evidence;
ii. was the evidence of the absent witness the sole or decisive basis for the defendant's conviction; and
iii. were there sufficient counterbalancing factors, including strong procedural safeguards, to compensate for the handicaps caused to the defence as a result of the admission of the untested evidence and to ensure that the trial, judged as a whole, was fair

Schatschaschwili v Germany [2015] ECHR 1113

In this case, the Grand Chamber reconsidered the principles it had formulated under the three-steps *Al-Kawaja* test.

Mr Schatschaschwili had been convicted of aggravated robbery and extortion but maintained that his trial had been unfair, as neither he nor his lawyer had had an opportunity at any stage of the proceedings to question the only direct witnesses to one of the crimes allegedly committed. The Grand Chamber concluded there had been a breach of Article 6 (1) and 6 (3) (d). Whilst there was a good reason for the witnesses'

non-attendance, their evidence, although not the sole evidence had been decisive in the case. Given the importance of the witnesses' evidence, the counterbalancing measures (which in this case had included the defendant's giving evidence and a careful examination of the credibility of the absent witnesses and the reliability of their statements) had not been sufficient to **'permit a fair and proper assessment of the reliability of the untested evidence'.** The Court observed that under German law the prosecution authorities could have appointed a lawyer for Mr Schatschaschwili, who would have had the right to be present at the witness hearing before the investigating judge, but this had not happened. At no point in the proceedings had Mr Schatschaschwili or his lawyer had the possibility to put questions to the two witnesses indirectly, for instance in writing.

In reaching its conclusion, the Grand Chamber observed that as a rule the three-step Al-Kawaja test should be approached in order but were interrelated and that it may be appropriate, in some cases to examine the steps in a different order, particularly if one of the steps proved to be particularly conclusive as to either the fairness or the unfairness of the proceedings. Significantly, the Grand Chamber stated that the absence of good reason for the non-attendance of a witness could not of itself be conclusive of the unfairness of a trial but was a very important factor to be weighed in the balance when assessing the overall fairness of a trial.

What amounted to 'decisive' evidence should be narrowly interpreted (as per *Al-Kawaja*) as evidence of such significance or importance as is likely to be determinative of the outcome of the case. Where the untested evidence of a witness is supported by other corroborative evidence, the assessment of whether it is decisive will depend on the strength of the supporting evidence; the stronger the corroborative evidence, the less likely that the evidence of the absent witness will be treated as decisive. Importantly the Grand Chamber added that even in cases where the untested evidence is not the sole or decisive evidence against the accused, if it carried 'significant weight' counterbalancing factors are still important.

> **'***The extent of the counterbalancing factors necessary in order for a trial to be considered fair will depend on the weight of the evidence of the absent witness. The more important that evidence, the more weight the counterbalancing factors will have to carry in order for the proceedings as a whole to be considered fair.'* (116).

Applying these principles to the facts of this case, whilst there was a good reason for the witnesses' non-attendance, their evidence had been decisive in the case (they were the only eyewitnesses) thereby making the counterbalancing measures a key consideration in determining the fairness of the trial. Given the importance of the witnesses' evidence, the counterbalancing measures (which in this case had involved the court carefully examining the credibility of the absent witnesses and the reliability of their statements and Mr Schatschaschwili giving evidence) had not been sufficient to '**permit a fair and proper assessment of the reliability of the untested evidence**'. The Court observed that under German law the prosecution authorities could have appointed a lawyer for Mr Schatschaschwili, who would have had the right to be present at the witness hearing before the investigating judge, but this had not happened. At no point in the proceedings had Mr Schatschaschwili or is lawyer had the possibility to put questions to the two witnesses indirectly, for instance in writing**.**

R v Ibrahim (Dahir) [2012] EWCA Crim 837

The appellant (X) appealed against his conviction on three counts of rape. The victim (V) in respect of the first count had died before the trial and the Crown had applied to admit her statements under s 116 Criminal Justice Act 2003. All three statements were made under s9 Criminal Justice Act 1967. The defence had accepted that, in principle, they were admissible under s.116 and that any argument to exclude them would be under s78 Police and Criminal Evidence Act 1984. No such argument was made but a submission of no case to answer was refused. Agreed facts in relation to V's credibility were put before the jury. X appealed against his conviction on Count 1 following the decisions of the Court of Appeal and the Supreme Court in R v Horncastle [2009] UKSC 14, [2010] 2 A.C. 373 and the Grand Chamber in Al-Khawaja v United Kingdom [2012] 54 EHRR 807.

The appeal was allowed. There was proper justification for admitting the statements as hearsay evidence, subject to the issue of sufficient counterbalancing measures. V's statements were central to the Crown's case. However, she was a heroin addict and that put her in the category of potentially unreliable witnesses and she had previously made and withdrawn a false allegation of sexual assault. There had also been no explanation for the delay in making her statements. Those matters had to be balanced against the fact that X had admitted that he had encountered V on the evening in question, independent evidence from a witness (T) who had heard a scream of "rape", and X's actions on arrest at the scene when he had tried to run away.

On the central issue of whether X had non-consensual sexual intercourse with V that evening, V's principal statement could not be shown to be reliable. The only directly supporting evidence was T's account, which was not enough to demonstrate that the statement was reliable, given the contrary factors. If the defence had had the benefit of the judgments in *Horncastle* and *Al-Khawaja*, it would have been bound to make a submission that the court should exclude the hearsay statements under s.78. It had to follow, in the light of the instant court's findings on the importance of the statements to the Crown's case and their lack of reliability, that the admission of that untested hearsay evidence would have had such an adverse effect on the proceedings that the court ought not to have admitted it*Horncastle* followed, *Al-Khawaja* applied). (2) The Crown's submission that the question of reliability and the credibility of V's evidence was properly left to the jury was not accepted. The clear effect of the judgments in *Horncastle* and *Al-Khawaja* was that it was a pre-condition that the untested hearsay evidence had to be shown to be potentially safely reliable before it could be admitted. It was a matter for the judge to rule on, either at the admission stage or after the close of the Crown's case. Even if that view was wrong, the judge should have acceded to the defence submission of no case to answer. He had erred in stating that the evaluation of V's untested hearsay evidence was a matter for the jury. Under s.125(1)(a) CJA 2003 Act the judge had a duty to decide whether the case against X on Count 1 was based wholly or partly on V's statements, and it was plainly based partly on her statements. In deciding, under s 125(1)(b), whether the evidence was so "unconvincing" that the conviction would be unsafe, the judge had to have uppermost in his mind whether the statement had been shown to be reliable in the light of all the other evidence adduced. If an untested hearsay statement was not shown to be reliable and formed a central part of the Crown's evidence, the effect of the decisions in *Horncastle* and *Al-Khawaja* was that the statement was almost bound to be unconvincing such that a conviction based on it would be unsafe. In the instant case, V's principal statement was sufficiently unconvincing that X's conviction was unsafe. The counterbalancing measures contained in the 2003 Act and in common law had not been properly applied. Accordingly, in relation to Count 1, X had not had a fair trial and his rights under Art 6 ECHR had been infringed. The conviction on Count 1 was unsafe and would be quashed.

Riat, Doran, Wilson, Claire, Bennett [2012] EWCA Crim 1509

In a series of conjoined appeals, the Court of Appeal provided further clarification of the application of the CJA 2003 in admitting hearsay post the decisions of the Grand

Chamber in *Al-Khawaja and Tahery v UK* (2011) and the Supreme Court in *Horncastle* (2009).

The decision offers valuable guidance on hearsay. The Vice-President set out five crucial propositions:

- The law to be applied is that in the 2003 Act.
- If there is any difference, on close analysis, between the judgment of the Supreme Court in *Horncastle* and that of the European Court of Human Rights in *Al-Khawaja and Tahery v United Kingdom* the obligation of a domestic court is to follow the former.
- There is no overarching rule, either in the ECtHR or in English law that a piece of hearsay evidence which is 'sole or decisive' is for that reason automatically inadmissible.
- A Crown Court judge need not ordinarily look further than the statute and *Horncastle*.
- Neither under the statute, nor under *Horncastle*, can hearsay simply be treated as if it were first-hand evidence and automatically admissible.

The judgment also provides a very useful, practical framework for the application of the 2003 Act provisions described as involving the following steps:

(1) Is there a specific statutory justification (or 'gateway') permitting the admission of hearsay evidence (ss116–118)?

- It remains the default rule that hearsay is not admissible.
- Ss117 and 118 should give rise to little debate.
- S116 (2) is likely to be more controversial.
- Preconditions for admissibility include s116(1)(b) (W must be identified; see *Mayers* [2008] EWCA Crim 2989- see final section, below);
- The absent witness (W) must be competent; s123.

The preliminary question in s116 cases is clearly that the necessity for resort to second-hand evidence must be demonstrated.

A court considering an application in respect of a witness said to be in fear should note the observations in *Horncastle* [2009] EWCA Crim 964; [2010] 2 AC 373 at paras 83–88. All these considerations illustrate in the case of fear the general principle

applicable to all hearsay cases that second-hand evidence is only to be admitted if the trial will nonetheless be fair and any conviction resulting from it safe.

(2) What material is there which can help to test or assess the hearsay (s124)?

- If a specific gateway for admission is passed, a court should always at that point consider the vital linked questions of (i) the apparent reliability of the evidence and (ii) the practicability of the jury testing and assessing its reliability.
- Section 124 is critical at this point.
- A judge considering admissibility will need to consider the importance of the evidence and its apparent strengths and weaknesses, what material is available to help test and assess it.
- If the hearsay is important prosecution evidence, the judge is entitled to expect that very full inquiries have been made as to the witness's credibility and all relevant material disclosed; that will not be confined simply to a check of the Police National Computer for convictions.
- If it is defence hearsay, the judge can expect that the defendant has supplied sufficient information about the witness to enable such proper checks to be made.

(3) Is there a specific 'interests of justice' test at the admissibility stage?

- Section 114(1)(d) contains a general residual power to admit hearsay evidence which does not otherwise pass a statutory gateway, if the judge is satisfied that it is in the interests of justice for it to be admitted.
- If this gateway is invoked, the judge is specifically directed to have regard to the (non-exhaustive) considerations set out in s114 (2). It must not become a route by which all or any hearsay evidence is routinely admitted without proper scrutiny. That would be to subvert the express provisions which follow in ss116–118 (**see *D (E)* [2010] EWCA Crim 1213).**

(4) Even if *prima facie* admissible, ought the evidence to be ruled inadmissible (Police and Criminal Evidence Act 1984 s78 and/or Criminal Justice Act 2003 s126)?

- Section 78 of PACE applies to evidence which the prosecution wishes to adduce, and s126 of the Criminal Justice Act 2003 applies to all tendered hearsay.
- The non-exhaustive considerations listed in s114(2) as directly applicable to an application made under s114(1)(d) are useful *aides mémoire* for any judge

considering the admissibility of hearsay evidence, whether under that subsection or under s78 of PACE, or otherwise.

- Section 126 provides a free-standing jurisdiction to refuse to admit hearsay evidence. It goes further than s78 because it applies also to evidence tendered by a defendant.
- Whichever is the statutory power under consideration, it is clear that hearsay must not simply be 'nodded through'. A focused decision must be made whether it is to be admitted or not. This does not involve a precondition that the hearsay be shown independently to be accurate. But it does involve a careful assessment of (i) the importance of the evidence to the case, (ii) the risks of unreliability, and (iii) whether the reliability of the absent witness can safely be tested and assessed.

It follows that considerations such as the circumstances of the making of the hearsay statement, the interest or disinterest of the maker, the existence of supporting evidence, what is known about the reliability of the maker and the means of testing such reliability are all directly material at this point, as is any other relevant circumstance.

(5) If the evidence is admitted, then should the case subsequently be stopped under s125?

- Section 125 is a critical part of the apparatus provided by the Criminal Justice Act 2003 for the management of hearsay evidence.
- In a non-hearsay case, the judge does not assess the reliability of the evidence; the rule is different for hearsay cases. There, the judge is required by s125 to look to see whether the hearsay evidence is so unconvincing that any conviction would be unsafe. That means looking at its strengths and weaknesses, at the tools available to the jury for testing it, and at its importance to the case as a whole.
- Section 125 may be confronted either at the end of the Crown case or at any time thereafter (see s125 (1)). Whether it arises, and, if it does, when, must depend on the circumstances of each individual trial. Counsel and the judge should keep the s125 question under review throughout the trial. As the terms of the statute indicate, the exercise involves an overall appraisal of the case. It may often, therefore, best be dealt with at the end of all the evidence.

You can see that this case is of importance. It should be read by all practitioners. The judgment:

1. Recognises that s126 affords a general discretion to exclude hearsay evidence, and that it is therefore available to exclude defence evidence.
2. It declares that s 114(1)(d) is a ground of last resort..
3. It emphasises the significance of s125.
4. It confirms that a judge need not be satisfied that the evidence is reliable as an element of admissibility – merely that the evidence may be safely left to a jury.

R v Spraggon (Alfred) [2022] EWCA Crim 128

(A) made a complaint of historic sexual abuse against D to the police in 2002. (A) was placed in an orphanage at the time. No action was subsequently taken against D and A died in 2013. In 2016, B, a fellow orphan, made a video recorded complaint to the police detailing historic sexual abuse against him and other boys at the hands of E, a co-accused in this case. B also described D sexually abusing another child, C in his presence.

As a result of B's complaint, the police traced C. C also made a complaint of historic sexual abuse against D. Neither A, B or C knew of each other's complaints. By the time D was charged in July 2019, B had died. C died in December 2019. E, the co-accused pleaded guilty to the charges against him. The prosecution's case against D was therefore constructed entirely on hearsay evidence of the three complainants. The prosecution's applications to admit the written/video recorded complaints as hearsay were opposed by the defence who contended it would be impossible for D to have a fair trial in such circumstances. This was rejected by the trial judge in a comprehensive written ruling based on the principles in ***R v Riat (2013)***. A similar argument was advanced before the Court of Appeal on the basis that the trial had been devoid of 'the essential adversarial element of challenge synonymous with fairness in the common law tradition.' This was rejected by the Court of Appeal as being tantamount to a submission that there was a 'sole and decisive' rule which has no application in English law. It was further contended that the complainants had been made many years after the event and could not therefore be said to be reliable. This was also rejected by the Court of Appeal pointing to the similarities in the complaints being made by wholly unconnected individuals. The Court of Appeal noted that when directing the jury, the judge was scrupulous in setting out matters relevant to the jury's consideration of the hearsay evidence. His written directions included the questions that would have been put to each witness in cross-examination. He also set out the evidence which potentially could

affect the witness's credibility. The admission of hearsay evidence had therefore been correct on the facts in this case.

There was a further bad character issue addressed in this case. It was contended that B's evidence was evidence of bad character against E and therefore relevant only if it came within the test under s 100 CJA 2003. The trial judge had admitted B's evidence under s 98 CJA 2003 as being outside the bad character provisions because in his view it was had to do with the alleged facts of the offence with which the defendant is charged was relevant because the activity of the co-accused (the main focus of B's evidence) was inextricably linked to the allegations against the applicant. It disclosed an orchestrated general practice of sexual abuse within the dormitories at the orphanage.

Note: -the hearsay provisions and their Article 6 dimension should be considered alongside the controversial reforms in the Criminal Evidence (Witness Anonymity) Act 2008 which were brought in to deal with the implications of the House of Lord's judgment in R v Davis [2008] which held that such a draconian special measure was incompatible with the defendant's right to a fair trial. Anonymity orders give rise to similar Article 6 arguments which is why they are referred to in the judgment in Horncastle.

7. Admitting hearsay in the interests of justice-application of s. 114 (1) (d) and s 121 (1) (c)-the safety-valves

Case law on s. 114 (1) (d)
R v Xhabri [2005] EWCA Crim 3135
The appellant (X) appealed against his conviction for false imprisonment, rape, threats to kill and control of prostitution for gain. The complainant had been working as a prostitute in brothels described as saunas. The complainant maintained that she had been raped, held against her will and forced to work as a prostitute by X. X denied the allegations, but maintained that he and the complainant had a consensual sexual relationship. The prosecution sought to adduce under s 114 and s 120 CJA 2003, hearsay evidence relating to telephone communications alleged to have been made by the complainant, either directly or indirectly, with her mother, her father and a neighbour stating she was being held against her will. The prosecution also sought to call a police

officer who spoke with two informants who told the police officer that X had contacted them to say she was being held against her will at a particular address.

The trial judge held that the evidence of the father, mother and the neighbour was admissible under s.120, or alternatively under s.114 of the Act, and the evidence of the police was admissible under s.121(1)(a) or s.121(1)(c).

X submitted that the evidence did not fall within the provisions of s.120(4) of the Act, that its admission was not in the interests of justice and it should have been excluded pursuant to s.126 of the Act. X also argued that admitting the evidence of the police was unfair because the informants who had conveyed the information were not available for cross examination. X maintained that as s.114 permitted the court to adduce in evidence a hearsay statement by a witness who was not available for cross examination, this was incompatible with Art.6.

Held that in relation to the evidence of the complainant's father, mother and friend as to the statements made by the complainant during the time when she alleged she was effectively imprisoned by the appellant, the requirements of s.120 (7) of the 2003 Act **(previous complaint)** were, or were likely to be, satisfied. The complainant claimed to be a person against whom an offence had been committed, the offence was one to which the proceedings related, the complaint was about conduct which would, if proved, constitute part of the offence, the complaint was made as soon as could reasonably be expected after the alleged conduct (or, in fact, while the alleged conduct was continuing), the complaint was not made as a result of a threat or promise and the complainant was expected to give evidence before the material evidence relating to her previous statements was adduced. Alternatively, the evidence plainly fell within the judge's discretion under s.114 (d) and there was no basis upon which it could be suggested that its admission was not in the interests of justice.

In relation to the police officer's evidence, which was **double hearsay**, s 121(1) (a) was satisfied since the earlier hearsay statement, the complainant's statement to the two people who visited the police station, was admissible under s.120. Section 121(1)(c) was also satisfied since the evidence was very damaging to the appellant and its value was so high that the interests of justice required it to be admitted. There was no question of s.114 being incompatible with Art.6 of the European Convention on Human Rights. The discretion to admit hearsay evidence under s.114 of the 2003 Act was not restricted to

situations where the maker of the statement was not available for cross-examination. To the extent that the right to a fair trial under Art.6 would be infringed by admitting such evidence, the court had a power to exclude the evidence under s.126 of the 2003 Act and a duty so to do by virtue of the Human Rights Act 1998. Article 6(3)(d), under which a defendant had the right to examine witnesses against him, was designed to secure "equality of arms". The hearsay provisions of the 2003 Act applied equally to prosecution and defence, so there was no inherent inequality of arms arising out of those provisions. Article 6(3)(d) did not give a defendant an absolute right to examine every witness whose testimony was adduced against him. The touchstone was whether fairness of the trial required that. Almost all the hearsay evidence adduced by the prosecution against the appellant derived directly, or indirectly, from the complainant and she was available for examination. That satisfied the requirements of Art.6(3)(d).

R v Taylor [2006] 2 Cr App R 14

In this case, the Court of Appeal made observations about what was expected of a judge in considering the many factors for the admission of hearsay evidence under s. 114 (1) (d):

> *"What is required of him is to give consideration to those factors. There is nothing in the wording of the statute to require him to reach a specific conclusion in relation to each or any of them. He must give consideration to those identified factors and any others which he considers relevant (as expressed in s.114 (2) before the nine factors are listed). It is then his task to assess the significance of those factors, both in relation to each other and having regard to such weight as, in his judgment, they bear individually and in relation to each other. Having approached the matter in that way, he will be able, as it seems to us, in accordance with the words of the statute, to reach a proper conclusion as to whether or not the oral evidence should be admitted."*

McEwan v DPP [2007] EWHC 740

On the day of trial, the prosecution sought an adjournment as an important witness for the prosecution had failed to turn up. The prosecution had instructions that the witness was unfit to attend trial. An adjournment was sought to enable the prosecution to make further enquiries in order to support an application to have the witness's evidence admitted as hearsay under s. 116 (2) (b). The magistrates' court refused the application to adjourn. There had been nine previous pre-trial reviews owing to failings on the part

of the prosecution. Faced with a choice of continuing the prosecution or abandoning it, the prosecution sought, without notice, to admit the witness's statement under s. 116 (2) (b) and s. 114 (1). The former could not be established but the magistrates acceded to the latter.

The Divisional Court held it had **been wrong for the magistrates' court to have admitted important hearsay evidence under the safety-valve**. It was not in the interests of justice having regard to the **importance of the witness;** the **defendant's inability to cross-examine** and the **failings on the part of the prosecution to ensure attendance of its witnesses**:

> *"Although it is clear, section 114 (1)(d) provides a free standing ground for admitting hearsay evidence-admissibility under that subsection does not at all depend on the satisfaction of the conditions contained in section 116 of the Act-it must be recognised that reliance on section 114 (1)(d) is most unattractive in the circumstances of this case…..For my part, the safety-valve is there to prevent injustice. It would have to be an exceptional case for it to be relied upon, as it is sought to do here, to rescue the prosecution from the consequences of its own failure"*

In **R v Musone [2007] EWCA 1237**, the trial judge admitted hearsay evidence under s. 114 (1) (d) and s. 121 (1) (c).

The witness (P) had heard the dying declaration of a fellow prisoner (V) and had given an account of this and other matters which he had observed to a prison officer in the course of an investigation into V's death which resulted in a murder charge against the defendant and others. The account had been written out by the prison officer and signed by P. P refused to give evidence for the prosecution. The prosecution therefore sought to adduce the statement P had given to the prison warden both in relation to the victim's dying declaration and P's account.

Working through the statutory factors set out in s. 114 (2) CJA 2003, the trial judge concluded that P's statement had probative value. He took account of inconsistencies in P's statement compared to other witnesses in the case and of his previous convictions, observing that the reliability of P was a matter for the jury. The Court of Appeal upheld the convictions in this case but observed that the reliability of the maker of the

statement was a matter for the judge when determining admissibility under s. 114 (1) (d). In relation to the dying declaration witnessed by P, the judge rightly admitted this under s. 121 (1) (c) taking into account the same considerations as under s. 114 (1) (d).

R v Boguslaw Sak [2007] EWHC 2886

Circumstances prevented a professional witness (a doctor) from attending trial on behalf of the prosecution. No fault lay at the hands of the prosecution in this regard. An application to adjourn the trial was refused. The prosecution therefore sought to adduce the doctor's witness statement under ss 116 and 114 (1) (d). On the facts, s. 116 CJA 2003 was clearly not available to the prosecution. The Divisional Court concluded that the magistrates' court had not erred in permitting the doctor's evidence to be adduced under s. 114 (1) (d). The court had applied its mind to the relevant factors. The witness was reliable; he was independent; the accused would have the opportunity to address the prejudice a failure to cross-examine had caused him etc…

RL v R [2008] 2 Cr App R 18

L, the appellant was found guilty of 5 counts of indecent assault and 4 counts of rape. All the offences had been committed against the complainant (C), who was L's youngest daughter, on various occasions from when she was 11-years old until she was aged 19. The final offence was alleged to have occurred at the complainant's flat on 9 January 2007. C alleged that after locking the flat's door, L forced her to have sexual intercourse with him on the sofa. As a result of C's complaint, the police undertook a forensic examination of the flat and found L's seminal fluid on the carpet near the sofa and on a towel lying on the sofa. L was arrested and in interview explained the finding of his semen by stating that he had sex with his wife on the sofa when they had stayed in the flat in October 2006.

Whilst L was in custody, the police asked L's wife about the stay in the flat in October. She gave a written statement to the police in which she stated that did not recall having sex with her husband on that night but that if intercourse had occurred it would have been in bed and not anywhere else in the flat. L pleaded not guilty, denying the offences.

The prosecution sought to call L's wife to undermine the account L had given in his interview. Prior to the wife being called to testify at L's trial, she told the Witness Service that her statement was all lies and that it had all been made up by the police.

At trial the prosecution called Mrs L as a witness. After being sworn she only gave evidence to identify herself as L's wife. Legal argument then followed about whether Mrs L could be compelled to give evidence against her husband. The judge accepted that her evidence related to offences committed when C was aged 19 and not therefore a compellable prosecution witness against her husband as C's age fell outside the ambit of s80 PACE 1984. The prosecution then sought to admit Mrs L's statement as hearsay under s 114 (1) (d) CJA 2003 on the basis that it was in the interests of justice. This was opposed by the defence who argued its admission would effectively circumvent the provisions in s 80 PACE 1984 which make a spouse a non-compellable witness for the prosecution save in certain instances. Counsel invited to trial judge to conclude that it would accordingly be contrary to the interests of justice and that, in any event, the judge should exercise his discretion to exclude the evidence under s78 PACE 1984. The judge rejected the defence submissions and admitted the evidence as hearsay under s114 (1)(d). The appellant was convicted and appealed on the ground that the admission of his wife's statement if rendered unlawful would make his conviction 'unsafe.'

Applying the specific 'interests of justice' factors under s114 (2) CJA 2003 to the present case, the Court of Appeal considered the following points were relevant. Mrs L's evidence had cogent probative value to a critical issue in the proceedings - namely L's assertion that he had sex with his wife on the sofa in October 2006 and therefore could account for the presence of the semen stained towel on the sofa; there was no other evidence on that particular issue that could be given to counter L's argument; the issue about the presence of the towel on the sofa was important in the context of the case a as whole; there was nothing to suggest that Mrs L's statement was inaccurate; whilst the reliability of the statement was later thrown into doubt by Mrs L's assertion that it was untrue it was open to the jury to conclude that this later claim was untrue rather than the original statement; no issue was taken about the reliability of the circumstances in which the statement was made; oral evidence could not be heard from Mrs L as she had declined to testify against her husband and she was not a compellable witness under s80 PACE 1980; it was open to the appellant to challenge his wife's assertion that they had not had intercourse outside the bedroom. The Court concluded that when taking these considerations into account the trial was entitled to rule that the admission of the wife's statement was fair and in the interests of justice.

'In the circumstances of the present case, we can see no injustice in admitting the

statement. The law has made it clear that the interests of convicting a husband of child abuse take precedence over the demands of marital duty and harmony that would otherwise protect the wife from being compelled to give evidence. Here, as we have said, the appellant was charged with a lengthy course of sexual abuse of his daughter, much of it at a time when she was under 16. Whether or not in these circumstances the wife could have been compelled to give evidence, we consider that the public interest was served by the admission of her evidence, adding weight as this did to the overall case against her husband as well as to the case against him in respect of the non "specified offences".'

See also: R v Horsnell [2012] EWCA Crim 227

The issue arising on this appeal against conviction was whether the trial judge was justified in permitting the prosecution to adduce hearsay evidence under s114 (1)(d) CJA 2003 in the form of witness statements and diary entries from a wife who had declined to give oral evidence at her husband's trial.

H was convicted of conspiracy to produce cannabis. His wife was arrested in the early stages of the investigation but was not charged. The couple had been married for twenty years but their relationship was deteriorating. Mrs Horsnell's solicitor had advised her to keep a diary of events at the matrimonial home. The contents of the diary (including an account of finding a large sum of cash under her daughter's bed and in her husband's wardrobe) were of relevance to the police investigation into her husband's suspected illegal activities.

Although Mrs Horsnell also provided witness statements to the police, she refused to testify for the prosecution at her husband's trial. Under s 80 PACE 1984, she could not be compelled to do so. The trial judge held in the circumstances of the case it was 'in the interests of justice' to admit the statement and diary entries under section 114(1)(d) CJA 2003.At his appeal, the appellant contended that his wife's evidence was crucial to the prosecution, that the first witness statement was based on an interview conducted under caution by the police without access to legal advice and with no indication from the police that she was not required to give evidence against her husband. Also, in view of their matrimonial difficulties, the diaries were self-serving and not reliable.

It was further said that realistically the defence could not call Mrs Horsnell and, even if they did, Mrs Horsnell would then be liable to cross-examination by the prosecution;

and that the admission of her statement and the diary entries effectively forced the defendant to give evidence himself. Overall the defence submitted that the power to admit evidence in this way in such circumstances was strictly circumscribed. The present case was not an appropriate use of the hearsay provisions, and it was not fair or in the interests of justice to admit the evidence in this way.

As the decision in *RL v R* [2008] 2 Cr App R 18, makes clear, whether or not to admit the statement of a non-compellable spouse depends on the specific facts of the case. In this case, the appeal court found no fault in the judge's appraisal of the various factors; and observed that the appellate court will be very slow to interfere where the trial judge has exercised his or her judgment under s114(1)(d), adopting a proper approach.

Dismissing the appeal, the Court of Appeal held that looking at the proceedings as a whole, Mrs Horsnell's evidence was not the sole evidence in the case nor was her evidence (if accepted) potentially decisive evidence in the case (Grand Chamber judgment in *Al-Khawaja and Tahery* applied). As to the submission that the appellant had been put in an "impossible position," and had in effect been deprived of his right to silence, the Court considered that the judge was quite right to reject that argument. The judgment continued:

> *"The appellant had retained a choice whether or not to give evidence himself. What he had lost was the right to cross-examine Mrs Horsnell. Moreover, he did indeed have the choice of whether himself to call Mrs Horsnell, who was both a competent and a compellable witness on his own behalf. We can entirely appreciate the potential dangers in calling her, and it is entirely understandable why he elected not to call her. But it was his decision. Since the judge carefully and properly weighed all the relevant factors set out in section 114(2) CJA 2003,and had carefully considered the position of the non-compellability of Mrs Horsnell as the appellant's spouse, and since the judge reached a conclusion properly open to her, there is no basis for this court to interfere. We therefore dismiss this appeal against conviction".*

R v Z [2009] 1 Cr App R 34 **(trying to establish an unproven allegation of past bad character by hearsay evidence sought to be admitted under s. 116 (deceased witness) and under s. 114 (1) (d) -the safety-valve). This case also explores the possible use of the safety-valve provision in a case where the witness is available (hence-s.116 had no application) but is reluctant to give evidence.**

Z was charged with an historic rape. He was alleged to have repeatedly raped the complainant when she was aged between 9 and 13, between 1985 and 1989. Z denied the allegations maintaining they were a complete fabrication.

The prosecution sought to adduce hearsay evidence from two witness (D and X who was Z's former wife). D had alleged that she had been sexually abused by Z in 1993, when she was young. **D refused to give evidence at Z's trial, maintaining that she wanted to put the past behind her (note D did not say that she was in fear).** D had reported the rape to her doctor at the time. The doctor had made a contemporaneous note. The prosecution relied on **s. 114 (1) (d) in relation to D.**
X (Z's former wife) had made a complaint of rape against Z in 1994 which had been recorded in a social service file. X had not sought to pursue a formal allegation and was now dead. The only basis upon which X's previous complaint of rape could be adduced as evidence was under the hearsay provisions. Z denied both allegations made by D and Z (we therefore have disputed evidence of past bad character-see R v McKenzie in your bad character case compendium). The trial judge allowed the hearsay evidence to be admitted.

In quashing the conviction, the Court of Appeal observed that an application to adduce hearsay evidence of disputed serious misconduct as bad character was far from straight-forward. The trial judge had erred in admitting hearsay evidence of **D's** allegations.

> *"If the judge had considered the matters listed in section 114(2), he would have had to consider in particular paragraphs (a), (g), (h) and (i). As to (a), this evidence was of very considerable importance; if accepted by the jury, it would undermine the defence and point powerfully to a conviction. This made the other factors even more significant, and in particular (g). It is important to note that paragraph (g) refers to the inability of the witness to give evidence, not her reluctance or unwillingness, understandable though her attitude may be. That is consistent with the restrictions in section 116.* ***Cases must be rare indeed in which such significant potentially prejudicial evidence as that of D should be admitted as hearsay where the maker of the statement is alive and well and able, although reluctant, to testify, and her reluctance is not due to fear (i.e., the condition in section 116(2)(e) is not satisfied)."***

In summary, D's evidence was potentially very damaging and was untested. She was available to give evidence but unwilling to do so. The jury had to be sure of her allegations before it could take them into account for the purposes of propensity. In the circumstances, the admission of D's evidence as hearsay was unfair. Similarly, the jury would have to be satisfied that X's complaint was true before it could be taken into account for the purposes of bad character - this could not be meaningfully and fairly assessed. In the circumstances of this case, it was unfair to admit the evidence.

Note the case of **R v Musone** above, is an example of a case where the evidence was felt to be admissible in the interests of justice notwithstanding that the witness was physically present in court and refused to give evidence..

R v Seton [2010] EWCA Crim 450

(S) appealed against his conviction for murder. The victim (V) had been shot in the head and had died instantly. S had owed V £24,000 for drugs and there was a large amount of circumstantial evidence linking him to V's murder which included mobile phone cell site evidence showing S was in the vicinity at the time of the murder and S's purchase of a car on the day of the murder which was used as a get-away car and subsequently set on fire. Two days after the murder S fled to France but was later extradited back to the United Kingdom to face a trial. He subsequently claimed that he had been involved in a drug deal with V and another man (P), and that P was responsible for V's murder.
P was by then serving a prison sentence for a separate offence of murder.

When interviewed by police P made no comment but that evening he telephoned his family denying any involvement in V's murder. P's calls were recorded and adduced as evidence for the prosecution in S's trial under s 114 (1) (d) CJA 2003. The trial judge found the evidence to be strong and that P was not prepared to give evidence. S submitted that the judge should not have adduced the taped calls without first trying to call P to give evidence. S further argued that the admission of the tapes gave the prosecution an unfair advantage as S was unable to cross-examine P.

Conviction upheld: The trial judge had found, as a fact, that P would not give evidence. Whilst P could have been compelled to come to court that would have been a fruitless exercise. P would have had the right to exercise the privilege against self-incrimination. The prospect of any sensible evidence being given by him was, on any realistic view, nil. The trial judge considered P's evidence to be important and the defence had been able

to raise before the jury points about P's statements being self-serving and made by a serious criminal who knew that his conversations were being recorded. What was of central importance was whether the judge had addressed the matters required to be addressed by s.114 (2). The judge had taken all relevant matters into account.

R v Freeman [2010] EWCA Crim 1997

The appellant (F) appealed against his conviction for two offences of assault occasioning actual bodily harm and one offence of blackmail. It was alleged that F had kidnapped his girlfriend (B) and then phoned her mother (M), demanding money and threatening to injure B if she failed to pay. B managed to escape but was recaptured by F. Two independent witnesses gave evidence that they had seen F assaulting B. M attended at a police station where she told the officer that her daughter had been kidnapped. While at the police station M received a phone call from B; the officer could hear B sounding very distressed and a male voice in the background shouting. B made no complaint against F,and refused to give evidence against him at trial. M sought to withdraw her statement and stated that she was in full agreement with B's position. M did not attend on the first day of the trial, and when a police officer went to her home in order to present her with a witness summons, she responded that she would not be attending. M's husband indicated that they would get a doctor's certificate. A medical certificate was produced before the court, which stated that M was receiving ongoing medical treatment and had recently been an in-patient at hospital. The judge refused to allow the prosecution to rely upon s 116 CJA 2003, in respect of M's evidence. However, the prosecution also sought, and was granted, an order under s114 2003 Act to admit M's evidence in statement form. F argued that the judge had erred in concluding that it was right in the interests of justice to admit the evidence of M in statement form pursuant to s.114.

> *Held: 26 "There is now ample authority on the correct approach to section 114. As Lord Phillips made clear in describing the scheme of this part of the 2003 Act in R v Horncastle [2010] 2 WLR 47, the jurisdiction to admit such a statement under section 114 is a residual jurisdiction if the interests of justice require it. Not only is it residual, it is limited: see paragraph 31. In a number of cases this court has stressed that section 114 should not be used by the prosecution or the court as a way of circumventing the requirements of section 116. Indeed, it would be wholly contrary to the scheme of the Act if the prosecution, having failed to identify a condition under section 116(2),could as a matter of routine rely upon section 114(1)(d) in*

particular in circumstances where to do so would circumvent the requirements of section 116. If authority is required for that proposition, which is evident from the structure of the Act, it can be found in the decision of this court in R v Y [2008] EWCA Crim 10 (this case is considered later).

29 It is vital that courts bear in mind that there is no provision under the 2003 Act that permits statements to be read merely because a witness is reluctant to give evidence: see, for example, the decision of this court in R v Z [2009] EWCA Crim 20, at paragraph 25, and that part of the decision of the Supreme Court (Horncastle) where, in Annex 4 , Lord Judge CJ applied domestic jurisprudence to a number of cases considered by the European Court of Human Rights.

On the facts the Court of Appeal concluded that the judge had been too quick to deploy s.114; rather, more pressure should have been brought to bear on M to compel her attendance. The judge had erred in permitting M's statement, which went importantly to the count of blackmail, to be read. The conviction for blackmail would be quashed. However, there was sufficient independent evidence to support the conviction on the two counts of assault.

R v ED [2010] EWCA Crim 1213
(D) appealed against his convictions for historic offences of rape, attempted rape and indecent assault. The offences were committed against family members, all of whom were under 16 years of age at the time. The issue on appeal was whether it had been in the interest of justice, within the meaning of s 114 (1) (d) CJA 2003 to admit in evidence the hearsay statement of a witness (M) who had been warned but had failed to attend to give evidence for reasons personal to herself in circumstances where the provisions relating to witness unavailability under s.116 were not engaged. (It is evident that there had been a breakdown of communication between M and witness care-M had told witness care the dates on which she would be on holiday). M had been a friend of a particular complainant (L).

In her witness statement, M recalled a conversation that she had had with L in which L had told her that D had put his hand up her skirt. The prosecution adduced M's evidence to rebut D's allegation that the complaints had been recently fabricated. Although the prosecution had not attempted to produce M to give evidence, the judge admitted her statement under s.114(1)(d), in the interests of justice, on the basis that the

circumstances surrounding the conversation and M herself seemed reliable and that D would be able to adequately respond to it. D submitted that M's evidence should not have been admitted and that the judge had failed to give adequate consideration to s.114 (2) (g) and why oral evidence could not be given by M.

Held: Courts should not countenance the use of s114(1)(d) to circumvent the requirements of admissibility gateways higher up the s.114(1) hierarchy. However, the terms of s.114(2)(g), read in the context of the other paragraphs in s.114(2), seemed to suggest that there were limited occasions when evidence, that could not be given orally for reasons other than those provided for in s.116, might be admitted.

> *'We are aware of other circumstances in which evidence has been admitted under section 114(1)(d) when its purpose has been to fill a continuity gap or similar. However, as Lord Phillips reminded us in Horncastle and Others (2009) UK SC14 at paras 15-26 and 53, it is our common law tradition that the defendant is entitled to examine the witnesses against him and only in strictly circumscribed circumstances will a hearsay statement be admitted in the interest of justice. The trial judge is the gatekeeper responsible for the fairness of the trial (see paragraph 38 of Horncastle), and the examination of the factors set out in section 114(2) and any other relevant factors must be performed with caution when the object is to fill a gap caused by the non-attendance of a live witness on grounds which do not fall within section 116.'*

On balance the Court of Appeal concluded that the trial judge **ought not to have been admitted under s114(1)(d).** However, the admission did not have such a prejudicial effect upon the nature and conduct of the defence that the safety of the jury's verdicts was affected.

R v Stewart John Burton [2011] EWCA Crim 1990

The appellant (B) appealed against his conviction for sexual activity with a child. B, who was aged between 26 and 27 at the time, had been arrested following the discovery of letters from him to a 14-year-old girl (X). Gifts from B and pregnancy test kits were also found in X's bedroom. The letters referred to them having kissed and cuddled. B had previously been in a relationship with X's older sister. X refused to discuss the matter with her mother but told a police officer that she and B had been boyfriend and girlfriend. She said they had kissed and cuddled but denied having had sexual

intercourse with him. She later refused to provide a statement or be interviewed. B referred in interview to having kissed and cuddled X but later stated in evidence that he had been referring to her sister. The Crown sought to adduce evidence of what X had said to the police officer**, under s 114 (1) (d) CJA 2003**. The hearsay evidence (the conversation between the victim and the police officer) could not be admitted under s 116 CJA 2003 because the victim who was 14 was available to give evidence albeit she flatly refused to give a written statement or to attend court. The prosecution could have witnessed summonsed her but that would have been counterproductive. The only basis upon which the conversation between the girl and the police officer could have been admitted was under the interests of justice ground **s 114 (1) (d).**

B objected on the basis that the Crown was trying to circumvent the restrictions on hearsay evidence under s116 CJA 2003and argued that the Crown was able to call X to give evidence. The judge concluded that the Crown was right not to force X to give oral evidence given her age and admitted the evidence in the interests of justice.

Comment: Hearsay evidence should only be admitted exceptionally under the safety valve (**s 114 (1) (d)**). The preferred form of evidence in a criminal trial is of course oral testimony as this permits the jury to observe the witness and the witness's evidence can be tested in cross-examination. In this case, important evidence from a complainant witness was admitted against the accused because she refused to support the prosecution. Upholding the conviction, the Court of Appeal concluded that this was an exceptional case and therefore it was in the interests of justice that the evidence be admitted. Particular emphasis was placed on the fact that the absent witness was a child of 14 who clearly had feelings for the accused. She was not best place to assess what was in her own best interests and that there was therefore a clear public interest in protecting young people from sexual exploitation by older men. It was right for the jury to be informed of her immediate reaction to the discovery of the defendant's letters, particularly since otherwise they would have wondered whether her possession of pregnancy testing kits was due to his having had sexual intercourse with her. Indeed, to the extent that she denied that he had done so, the evidence was helpful to B. In any event the use that the prosecution intended to make of the statement was not as the sole or primary evidence but to confirm the accuracy of the admissions made in interview and it had been open to the defence to call the girl.

R v Saunders [2012] EWCA Crim 1185

S appealed against his conviction for murder. It was the prosecution's case that S had stabbed and killed the victim (V). At the trial the prosecution applied to adduce hearsay evidence of a phone call between V and his wife at the time of the stabbing during which V stated that S had stabbed him. This hearsay was admitted under s 118 on the basis of res gestae (Ratten v The Queen [1972] AC 378).

The prosecution also applied under s 114(2) (d) CJA 2003 to have the hearsay evidence of a woman (Y) to be admitted. Y had told others, including V's mother, that she had seen the stabbing but was too scared to tell the police for fear of repercussions. Each of these witnesses were allowed to give evidence of what Y had told them. Y was called to give evidence. Y denied seeing the stabbing or that she had told others that she had seen the stabbing.

S submitted that it would be wrong to call the evidence of those that Y had spoken to as it was inherently unreliable.

Upholding the conviction, the Court of Appeal concluded that the judge was entitled to reach the conclusion that Y's evidence was admissible on the basis of the material before him. He had correctly considered all the factors within s.114(2) and ruled that provided Y was called to give evidence, the safeguards would be met, and the jury would have all the evidence before them with which to assess whether or not the hearsay statements were true.

> *"This provision (s 114 (1) (d) CJA 2003)....., is drafted in vague terms and is an unruly horse. There is considerable authority to the effect that this paragraph must be cautiously and narrowly construed and applied (R v Z [2009] 1 Cr App R 34). The prosecution case was that Y would not tell the court what she had seen because she was in fear for herself and her children. She was willing to testify, but would not tell the whole truth out of fear. This case was therefore not within s 116 (2) (e), because Y was willing to, and did give, evidence. The prosecution case was that her evidence would be false, or incomplete, because through fear she would not incriminate the appellant. We accept that if this case is made out, the prosecution were entitled to seek to adduce the evidence of what Y had said under s114((1)(d) . The difference between a case in which it is alleged that a witness is unwilling to give evidence at all (section 116(2)(e)) and that in which it is alleged that a witness is willing to give evidence, but through fear is unwilling to give truthful evidence or a complete account of what he or she saw or heard, may not be substantial, and it would be*

curious if in such a case the witness's previous statements could not, in an appropriate case, be adduced in evidence." (paras 34 and 35).

See also s 114 (1) (d) being used in conjunction with anonymous hearsay in (9), below.

8. Use of a confession by a co-accused to establish innocence and its hearsay implications…(further developments under the safety-valve)

Starting point:
(A) confesses and implicates B. A's confession is evidence against A alone. It is hearsay evidence against B. If A gives evidence, A can repeat his confession and directly implicate B on oath.

Suppose co-accused (A) makes a confession, which in whole or in part, exonerates (B). The prosecution does not propose to rely on A's confession in evidence. Can B?

(B) may not know whether A will give evidence and therefore be available to be cross-examined.. This was the issue in **R v Myers [1998] AC 124** (HL). The following certified point of law was considered by the House of Lords:

"In a joint trial of two defendants A+B, is an out of court confession by A, which exculpates B, but which is ruled or conceded to be inadmissible as evidence for the crown nevertheless admissible at the instigation of B in support of B's defence or does such a confession in all the circumstances offend the rule against hearsay?"

The House of Lords ruled that A's confession could be adduced by B if it was relevant to his defence. In doing so (and without explaining the basis upon which it was doing so), the HL effectively created a further exception to the hearsay rule in the circumstances that had arisen in this case. It was canvassed in argument what B's position would be if A's confession would not in fact have been admissible on behalf of the prosecution under s. 76 PACE 1984. The HL's concluded that for B to place reliance on a co-accused's confession, it had to be admissible in accordance with s. 76 PACE 1984.

As a result of this decision, s. 76 PACE 1984 was amended by s. 128 CJA 2003 inserting a new s76A into PACE 1984. Section 76A PACE permits a confession to be given in evidence for a co-accused ***charged in the same proceedings*** in so far as it is relevant to any matter in issue in the proceedings subject to it not having been obtained by oppression and it not being unreliable. The co-accused's burden of proof is on the balance of probabilities.

What about a confession or out-of-court statement made by a third party not charged in the proceedings? Can D adduce the third party's confession in evidence? This was the issue in R v Blastland [1986] AC 41. Although the HL came to the conclusion that the statements made by the third party in this case were not relevant, had a different view been taken on this, (and purely on an obiter basis), Lord Bridge concluded that it was a well-established principle, *"never since challenged, that it was for the legislature, not the judiciary, to create new exceptions to the hearsay rule. To admit in criminal trials statements confessing to the crime for which the defendant is being tried, made by third parties not called as witnesses, would be to create a very significant and, many think, a dangerous new exception."*

Third party confessions may now to be admissible under s. 114 (1) (d) if the court concludes it is in the interests of justice for it to be admitted. In its Report No 245 (1997): Hearsay and Related Topics, the Law Commission opined at paragraph 8.99:

> *"Under our proposals a relevant third-party confession could be admitted if the confessor has died, is too ill to attend court, cannot be found or it outside the UK: such statement would be automatically admissible ... Where the confessor is too frightened to testify, the confession could be admitted with the leave of the court. In other cases -- for example where the confessor's whereabouts are known but he or she disobeys a witness order, or the confessor testifies but refuses to answer questions which may incriminate him or her --the confession will still be unavailable to the court. In such cases, the defence would have to fall back on the safety valve in order to have evidence of the confession admitted."*

This very issue arose in the case of **R v Finch [2007] 1 WLR 1645**

F was convicted of being in possession of a firearm. He had been a passenger in a car driven by X. Under the front passenger seat was a loaded pistol wrapped in plastic bag.

X's fingerprints and one of F's were found on the bag. F denied any knowledge of the pistol and explained his fingerprint by saying he had reached down for some drinks that were in the foot-well. X pleaded guilty. F sought to rely on statements X had made in his interview with the police in which he admitted guilt but exonerated F. X was produced at court but was reluctant to give evidence. He was not called by F to give evidence. This was not a case where s. 76(A) PACE could be invoked by F as X was no longer a person charged in the proceedings. The trial judge's refusal to admit the evidence under the safety-valve was upheld. He had formed a view that, by his reluctance to give evidence, X's credibility was severely in question.

R v McLean and others [2007] EWCA Crim 219

M, P and H were jointly charged with murder. Each denied murder. Whilst on remand H had a conversation with a prison officer who was escorting him to hospital. In the conversation, H stated that P had stabbed the deceased and that P was putting the blame on him. **The prosecution did not adduce this evidence.** The conversation with the prison officer was not recorded in a contemporaneous note. H had not been cautioned nor reminded that he was entitled to legal advice. It appeared that H had been encouraged to talk by a prison officer who had a strong belief in God. **M sought to have the conversation admitted in evidence.** This was not a confession by H, thus s. 76A PACE had no application. It was an out-of-court accusation against P made by H. The only basis upon which M could adduce the evidence was under s. 114 (1) (d), if it was in the interests of justice to admit it. P opposed its admission. The trial judge concluded that even if the statement by H was admissible under s. 114 (1) (d), the historic position that an out-of-court statement is only evidence against its maker remained so the statement could not be relied on by M. **The Court of Appeal concluded that the judge's reasoning on this point was in error.** If the evidence was admissible under s. 114 (1) (d), it was evidence generally admissible in the case. However, the Court of Appeal concluded that notwithstanding the judge's error in this regard, his decision not to admit the evidence under the safety-valve was correct. The Court of Appeal reviewed the list of factors in s. 114 (2) CJA 2003 against the facts in this case and concluded that it was not in the interests of justice to admit the statement. Amongst a number of points made, the Court of Appeal observed:

> "*We observe in passing that an assertion of this kind, exculpating oneself and blaming another, is wholly unlike a confession made against interest. Of course a confession can be false but it is inherently likely to be true for in the absence of a*

reason why he should do so a person is unlikely to own up to committing a very serious crime unless he did commit it. Precisely the reverse might be thought to apply to an assertion that one did not commit the offence but somebody else did"

As can be seen from the above cases, the 'safety-valve' is giving rise to some interesting admissibility problems. A significant development in this area, which follows on from the **McLean** case, is **R v Y [2008] EWCA Crim 10.** This case reverses the starting point highlighted in the shaded text at the outset of this section, that a confession is only ever evidence against its maker-it cannot be used as evidence against anyone else implicated by it.

The facts in **R v Y [2008]:**
Y was on trial for murder. X had previously pleaded guilty to the murder. X had confessed his guilt to his former girlfriend and implicated Y in that confession. The prosecution sought to rely on X's confession as evidence against Y. The trial judge refused to admit the confession under s. 114 (1) (d) because of the historic rule that a confession is only ever regarded as evidence against the person who made it. Thus, the prosecution could not rely on X's confession as evidence against Y. The prosecution appealed the decision to the Court of Appeal. The argument centred on sections 118 and s. 114.

Section 118 preserves the common law exceptions to hearsay. In relation to confession evidence, the Law Commission stated at paragraph 8.96 of its report that*: '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.'*
Does s. 118 therefore prevent the prosecution from adducing an out-of-court confession made by X implicating Y as evidence against Y? The Court of Appeal was clear that the gateways under s. 114 which permit hearsay evidence to be admitted are alternatives. Section 118 is concerned with the admissibility of material and not with its inadmissibility. **Consequently, hearsay contained in a confession can be admitted under s. 114 (1) (d) and used against someone other than its maker!** The Court of Appeal was at pains to state that such hearsay evidence would not be routinely admitted. As the Court of Appeal observed, the reliability of the maker of the statement and his motives for making such a statement are important considerations when weighing up the interests of justice:

> *"The interests of justice test will require, in a case such as the present, attention to the difference between an admission against interest and an accusation against someone else. That consideration no doubt also comes into play under section 114(2) (e), the reliability of the maker of the statement, and (d), the circumstances in which the statement was made. Absent inducement, mental instability or perhaps an incentive to protect someone else, it can no doubt normally be said that a person is unlikely to confess to a serious crime unless he did it. Precisely the reverse may well be true of an accusation against someone else, whether it is combined with a reliable confession or not. It may be evident that the maker of the accusation has a possible motive to blame someone else when no-one else was in fact involved, or (where plainly someone else was involved) to cast the blame on the wrong person. Self interest, to which Judge Gordon sagely referred in his ruling in the present case, is one obvious such motive; it is of course not the only one ,for diversion of the accusation to protect another or out of animus against the person accused, may also, on the facts of different cases, fall for consideration. Sometimes it may be impossible to know whether such a motive exists or not. Sometimes it will be significant that the possibility of mistake cannot adequately be explored. In a few cases, it is possible that the accusation can be regarded as sufficiently reliable for it to be in the interests of justice to admit it, even though it cannot be tested by questioning the maker. It seems to us that it is likely that that will be the unusual case."*

A further relevant consideration is which party is seeking to rely on the out-of-court statement:

> *"Although section 114(1) (d) is available to the Crown as it is to a defendant, the identity of the applicant is plainly relevant to the interests of justice test. 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. Section 114(2)(i) moreover requires consideration of the injurious consequences of admission ('prejudice') to the party facing the evidence which will arise from the difficulty of challenging it. 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. In such a case if there is genuine difficulty in the defendant challenging, and the jury evaluating, the evidence, the potential damage to the defendant from that difficulty is very large."

9. Admissibility of anonymous hearsay

Can anonymous hearsay be admitted under s 114 (1) (d)?

Based on *R v Brown (Nico) [2019] EWCA Crim 1143*, the answer is yes and would seem to overrule statements to the contrary in the Court of Appeal's much earlier decision in ***R v Kahmal Ford [2010] EWCA Crim 2250.***

In ***R v Brown (Nico)*** **[2019] EWCA Crim 1143,** a passenger on a bus witnessed an incident and immediately recorded the registration number of the assailant's car on her mobile telephone. The passenger could not be identified but another passenger had read the car registration number from the screen to the police in a 999 call. This passenger was able to give evidence. The first passenger who had captured the registration number was an untraceable, not an unwilling witness. Whilst the evidence of the anonymous witness could not be admitted under s 116 CJA 2003 as the witness was unidentifiable, the Court of Appeal concluded that it was admissible under the res gestae exception (on the facts) **and under s 114 (1) (d).**

R v Kahmal Ford [2010] had followed statements made in in ***R v Mayers and others [2008] EWCA Crim 1418*** where the Court of Appeal observed**:**

"No surviving common law power to allow for witness anonymity survives the 2008 Act. The 2008 Act addresses and allows for the anonymity of witnesses who testify in court. This jurisdiction is governed by statute, and any steps to extend it must be taken by Parliament."*

*[*Note ss 86-88* **Coroners and Justice Act 2009** re-enacted the Criminal Evidence (Witness Anonymity) Act 2008)].

It was therefore believed that the witness anonymity provisions overrode **s 114 (1) (d) CJA 2003** and, as they made no reference to the admission of anonymous hearsay evidence, there was no legal basis for admitting it. In ***Brown***, the Court of Appeal distinguished ***Mayers*** on the basis that the witness in this case was untraceable as opposed to being able available but unwilling to give evidence except under conditions

of anonymity. In addition, there was no realistic scope for questioning the credibility of the maker even though their identity remained unknown.

It is clear that anonymous hearsay evidence cannot be admitted under either **s 116** or **117 CJA 2003**. These sections require the absent witness to be identifiable. Can such evidence therefore be admitted under the safety-valve in s. 114 (1) (d) CJA 2003? The answer according to the case of ***R v Kahmal Ford [2010] EWCA Crim 2250*** would appear to be 'no'. *R v Ford* concerned an attempt by the prosecution to adduce the evidence of an unknown female witness who, in the aftermath of a drive-by shooting, handed the police a note containing the registration number of the getaway car. The car was subsequently recovered and was forensically linked to F. The unidentified woman's statement was described in court as being 'untainted' however, it comprised anonymous hearsay evidence. Following earlier statements in ***R v Mayers and others [2008] EWCA Crim 1418*** and **R v Horncastle [2009] UKSC 14**, the Court of Appeal concluded that there was no legal basis for admitting anonymous hearsay. **Sections 86-88 of the Coroners and Justice Act 2009,** which re-enact the Criminal Evidence (Witness Anonymity) Act 2008) govern the admissibility of anonymous witness testimony. As the Court of Appeal observed in ***Mayers*:**

> "*No surviving common law power to allow for witness anonymity survives the 2008 Act. The 2008 Act addresses and allows for the anonymity of witnesses who testify in court. This jurisdiction is governed by statute, and any steps to extend it must be taken by Parliament.*"

The witness anonymity provisions would therefore seem to override **s 114 (1) (d) CJA 2003** and, as they make no reference to the admission of anonymous hearsay evidence, there is no legal basis for admitting it. It remains to be seen whether Parliament will ultimately feel the need to address this legislative oversight.