

Hearsay rule case analysis al khawaja v uk law essay



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Hearsay rule is among the remarkable rules of the law of evidence which was first developed in English-speaking countries during the second half of the eighteenth and the first years of the nineteenth century. The admissibility of hearsay evidence has been a controversial issue while some people asserted that it should be abolished. In fact, segregates those statements which possess high probative value from hearsay evidence as exceptions of hearsay will undoubtedly fit the development tendency of history. Remove the hearsay evidence completely could somehow go against the effectiveness of fact-finding. Meanwhile, unadmissible of hearsay could lead to dismissal of appeal when the fact in issue can reached the right conclusion by applying hearsay evidence. Since the new provision of hearsay evidence rule in the Criminal Justice Act 2003 finally came into force for the purpose of criminal proceeding, it is widely believed that the trend of hearsay rule began with excluded hearsay, set up exceptions of hearsay, restricted the exceptions and to extended the exceptions. Thus, development in hearsay rule had consequently gave rise to the difficulty of applications. Hearsay rule is one the oldest and prominent exclusionary rules of evidence in common law yet also the most complicated[2]. Instead of concerned with the detail of hearsay exceptions the ultimate purpose of this article is to criticize the admission of deceased witness written statement as decisive evidence in the case of Al-Khawaja v United Kingdom.

The principal argument raised by the appellants was that, the conviction involved an infringement of the right to a fair trial under art. 6, as the admission of hearsay evidence were based solely or to a decisive degree on the convictions, therefore, unsafe.[3]In this case the defendant was charged

with two counts of indecent assault, one of the complainants (known as S. T) had died before the trial. During the trial the written statement from S. T that she made to the police prior to her death had been taken into account as decisive evidence against the appellant. There are thousands of assumptions that the defence lawyer could make against an untested written statement. In this case, the credibility of the deceased written statement which had been considered as sole or decisive degree of statement remained to be proved. Assume that the written statement had made under intimidation or for some purposes as to incriminate the appellant, the veracity of the police report remained to be proved. Obviously, the appellant would not able to testify the origin of the statement unless he got the opportunity to confront with the witness himself. However, the problem here was the witness was deceased person and it was unjustifiable if the appellant appealed for the breach of right of confrontation.

It is generally believed that a forceful direct evidence could lead to a guilty verdict but there was a doubt if the appellant could be sentenced with only a piece of hearsay evidence which its admissibility have been questioned for centuries. Therefore, to some extent people believed that if written statements considered as " first-hand hearsay", it was undoubtedly that a written statement made by deceased witness to the police which was then being read out in the court should be considered as " second-hand hearsay". Ironically, in this case the appellant received a 12 months' imprisonment on count two, but a 15 months' imprisonment on count one (which involved deceased witness's statement) which was 3 months longer than a charge with direct witnesses evidence!

When traced back to the trial, the court stated that "...We should also say that overall the evidence against the appellant was very strong. We were wholly unpersuaded that the verdicts were unsafe.[4]" The word "overall" here meant the evidence from other witnesses in count two and the only evidence in this count which was a deceased written statement. Some people would have question on whether the two counts were separated and whether the evidence on count two was also the evidence on count one since the paragraph 10 of Al-Khawaja v United Kingdom (26766/05) indicated that 'The jury heard evidence from a number of different witnesses and the defence were given the opportunity to cross-examine other witnesses who had produced similar fact evidence, including the second complainant who had produced supportive evidence...[5]'. In this case, the appeal court should not hold that the evidence in count two was sufficient to corroborate the complainer and refused the accused appeal. As the involvement in an earlier offence is irrelevant to proof of involvement in a latter one[6].

In Delta v France[7], the applicant was convicted of robbery and his conviction was solely based on the written statements of the victim to the police. The accused complained that the conviction was in the contrary of paragraphs (1) and (3) (d) of the Article 6[8]and he had not had a fair trial. Beside the statements made by the two witnesses to the police, the evidence taken by the Paris Criminal Court and Court of Appeal was not based on any other evidence. The Commission, therefore, concluded unanimously that there had been a breach of paragraph (3) (d) of Article 6 taken together with paragraph (1). Also at the paragraph 40 of Lucà v Italy[9]suggested that where the defendant had no opportunity to question

the witness whether during the investigation or at any stage of the trial, the statement must not be allowed to be read as sole or decisive evidence against the defendant.

From other similar cases *Unterperinger v Austria*[10], *Kostovski v Netherlands*[11], and *Saidi v France*[12] in European Court of Human Rights, the Court upheld the applicant's arguments that they had been denied fair trials on the basis of violation of Article 6(3)(d). In all of these cases, the out-of-court statements constituted the only evidence, or an important part of the evidence, against the applicant. The Court had reached to a same conclusion that, if the conviction relied to a large extent on untested witnesses' evidence, in these circumstances, the use of this evidence involved such limitations on the rights of the defence that applicant cannot be said to have received a fair trial. There had thus been a violation of paragraph (3)(d), taken together with the paragraph (1), of Article 6.

Some scholars believed that 'the prima facie exclusion of hearsay at common law rested on the generalisation that such evidence is potentially afflicted by dangers of misunderstanding or distortion in transmission or receipt, by the fact that the original maker of the statement was almost certainly not under oath and by the difficulty of challenging the truth or accuracy of a hearsay assertion when the person repeating it to the court has no real knowledge of its truth'[13]'.

The same principle was used in *Sealey v. Trinidad and Tobago*[14], Lord Hutton had adopted this passage from Blackstone's *Criminal Practice* 2002:

[I]n the ordinary course of events, where the identifying witness has testified adequately against the accused at trial, the pre-trial identification serves to prove his consistency and his ability to make an identification under fair and objective circumstances. It is admissible, in other words, by way of an exception to the rule against previous consistent statements If the police officer who supervised the identification parade is called to testify as to the identification, he can do so only in support of the identifying witness. His testimony cannot go to the issue of the accused's guilt, because he has no first-hand knowledge of it...[15]’.

As what had illustrated above, it is showed that there is a risk to an unsafe conviction of relying solely or decisively on an untested hearsay evidence. However, it is better to put hearsay evidence in a supporting or corroboration position when it came into conviction. In other words, hearsay evidence should be banned on playing a role as the only evidence to a conviction as its admissibility would consequently lead to the infringement of the accused right to a fair trial under Article 6(1). Always bear in mind that a criminal conviction may never rest ‘solely or to a decisive degree’ on the untested evidence of an absent witness[16].

Also in this case, the appellant complained that the admission of witness statements in evidence at his respective criminal trials had breached his right under the European Convention on Human Rights 1950 article 6 where he had had no opportunity to cross-examine the witness. Right to confrontation is a right of the defendant ‘to examine or have examined witnesses against him to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him’.

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Different from Article 6(3) (d) of the European Convention on Human Rights 1950, Section 116(2) of the Criminal Justice Act 2003 permits hearsay statements to be admitted where the declarant is unavailable to testify as a witness for one or more of the five designated reasons: death, physical or mental illness, absence abroad, disappearance, and fear. For this reason it could not be denied that there was no violation on article 6(3)(d) since S. T the witness had died before the trial. However, it must be admitted that by the same time the appellant losing his opportunity of challenging the deceased statement, he was also losing his opportunity to defence himself from adverse evidence. Obviously, it was advantageous for the prosecution to persuade the jury with deceased statement as they did not know the admission of the statement would ultimately brought disadvantage to the appellant[17]. As a result, the appellant was in ' double losses' situation, while the prosecution was in ' double wins'. It could not be said that the appellant had received a fair trial. In this situation, the prosecution would need to make every effort to present any other evidence against the appellant instead of taking the deceased statements as the only evidence in this case. It is clearly that the conviction was indiscreet yet not persuasive enough.

Another issue arose in this case was that whether the deceased statement could prove the case beyond reasonable doubt as a sole and decisive evidence. In practice there may be objected that where hearsay evidence is the ' only evidence' it would indeed have to prove the issue ' beyond the reasonable doubt'. The English legal system always regarded as the paradigm of the adversarial system. In criminal cases, the state is a party;

the accused is far less able to influence matters than the defendant in a civil case. Witnesses for the prosecution are not in the position of the plaintiff as they may not choose whether or not to proceed, and they cannot select the charge. Meanwhile the most important is the prosecution carries the burden of proof and the accused is presumed innocent until proved.[18]]. Jackson takes the plea of guilty as an example, "...adversary procedure is not concerned with the truth of the material facts but only the truth of facts put in issue by the accused. As a result pleas of guilty, if considered voluntary, are not investigated...[19]" It is believed that unless there is sufficient of evidence to support the conviction otherwise the defendant cannot be convicted.

Also when looking at the Scotland criminal law there is a corroboration rule that required each piece of evidence should be ' confirmed' or ' supported' or ' strengthened' by other evidence before the case can go to the jury. And of course the question is that whether the two evidences can back each other up. There is a real risk that an innocent person may be convicted unless the evidence against the accused is confirmed by other evidence.

[20]As in Bisset v Anderson[21], Lord Clyde expressly disapproved a statement by Lord Cooper that : ' the evidence of a single witness, however credible, is insufficient at common law to establish the truth of any essential fact required for a criminal conviction'. Also Lord Justice-Clerk Thomson summed up the law on corroboration in Gillespie v Macmillan[22]as follows: ' I do not think that the sufficiency of proof of a criminal charge can be any more precisely defined than by saying that there must be facts emanating from at least two separate and independent sources'. Although some

scholars want to reject the corroboration rule because of the number of guilty people it allowed to escape and as it put an additional strain on scarce that it lengthens trials[23], some believed that ' it is better that ten guilty persons escape than one innocent suffer[24]', the standard of proof required is beyond the reasonable doubt. Justice has long arms, as long as the crime happened there is always other factors tending to identify the accused as the offender. However in this case we can see, when satisfied the need on interest of justice (closed the case in short time, avoided from lengthy trial) , on the other hand there came miscarriage of justice(put a man into jail with one piece of unconvincing deceased statement). Many would have doubted that whether the ultimate purpose of the legislation is to find the truth or just to shorten the length of trial.

Above all, there are three requirements for admissibility under any of the hearsay exceptions,(a)proof of admissibility ;(b)credibility of the maker of a statement and (c) warning the jury. In regard of admissibility of the hearsay, the court should hear oral evidence on oath about the cause of the witness's unavailability. Medical report should be read out in the court by prosecution or defence lawyer, if the witness is a deceased person. If there is disputed issue on admissibility during the trial, the judge has the right to ask for corroborative evidence. In deciding on the admissibility of a document, inferences may be draw from the face of the document about the personal knowledge of the person who supplied the information, the purpose of the document and its provenance[25]. In this case, neither the accused nor his lawyer had an opportunity to challenge with the authenticity of the deceased statements, the statements was then read out in the court without any

convincing proof whether when and where and under what situation had it been taken. It remained a question if the statement was made under abetment of the police who was then presented the evidence on the court. Secondly, if a statement is admitted for a hearsay purpose under the provisions of the Criminal Justice Act 2003 and the maker of the statement does not give oral evidence in connection with the subject matter of the statement, s124(2) permits evidence to be adduced which, had he given evidence, would have been admissible as relevant to his credit[26]. The judge should stop the case if the prosecution relies wholly or mostly on a hearsay evidence that is unpersuasive and obviously unfair to the party. In this case, the maker of the statement was the victim who made the statement before the trial prior to her death, the credibility of the maker was somehow reliable and should not be doubted. Thirdly, when evidence is admitted for a hearsay purpose, in trials on indictment the judge should give the jury a warning which, points out to the jury the absence of opportunity to cross-examine the declarant[27]. In this case, the judge directed the members of the jury, on two separate occasions, as to how they should regard the read statement of the deceased complainant. However, none of them concerned about the confrontation right of the accused. It was considered unjustifiable.

To sum up, after the 19th century, the changes in exceptions of hearsay rules has showed an increasing trend, plenty of hearsay exceptions have been established while the strict and rigid rules of hearsay no longer exists. To some extent, the complicity of hearsay exceptions made hearsay rules the most complex exclusionary rules of evidence in common law countries.

In order to prevent the misused of right to confrontation which might caused inefficiency and delay of litigation, it is reasonable to impose restrictions on it. Section 116 of the Criminal Justice Act 2003 creates an exception to the hearsay rule for statements made by witnesses who are 'unavailable'. It applies where the witness is unavailable for any one of five listed reasons: death, physical or mental illness, absence abroad, disappearance, and fear[28], which means the defendant's right to confrontation has not been infringed under those five conditions. On the other hand, the premises of hearsay evidence are its credibility and necessity, however, it is all depends on the discretionary power of judge to direct an acquittal or discharge the jury because of the unconvincing hearsay evidence. Consequently, in the increasing of hearsay exception, the power of judge to direct the admissibility of hearsay rules became more flexible.

Besides, the evidence of one witness will not in any case be sufficient. When these sorts of evidence are presented there is a natural tendency to look for other evidence from a different source which points forwards the same conclusion.[29]

In short, in trials on indictment, if the court is satisfied 'at any time' after the close of the prosecution case that the case against a defendant is 'based wholly or partly' on an out-of-court statement which is so unconvincing that, considering its importance to the case against the defendant, his conviction would be so unsafe, the judge must either direct the jury to acquit the defendant or discharge the jury and order a retrial.[30]