

Law essays - witness evidence defendant



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Introduction

There are several evidential issues that arise in the above scenario. In order to be able to advise on the reliability of the various witnesses above it is necessary to consider the law regarding compellability and competence, as well as the usage of circumstantial evidence and the age and mental capacity of the witness. There also needs to be a discussion on how the evidence of a co-defendant can be used and when a co-defendant would be entitled to give evidence against the co-accused.

This essay will also look at the law regarding the way in which the judge should direct the jury in relation to a defence of self defence and provocation. This will include examining whether a defendant is required to rebut the defence of provocation where he has not sought to rely on such a defence.

Within the defence of self defence this study will examine where the burden of proof lies in asserting this defence and the standard of that burden. As a conclusion the essay will consider the summing up of the judge were he states that the jury must be 80% certain of the defendants guilt in order to find the defendant guilty.

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Competence of witnesses

Under the Youth and Criminal Evidence Act 1999 it is a requirement that all evidence must be given on oath or affirmation. S55 of this Act removes this requirement where the witness is under the age of 14. The Oaths Act 1978

s1 requires an oath to be administered in the correct manner unless the witness objects to the oath or is physically incapable of taking the oath.

Persons not wishing to swear under the Christian or Jewish oath can affirm or swear in the manner prescribed by any other religion. The courts will accept such affirmations so long as the courts are of the opinion that the manner used is binding on the conscience of the individual.

Very few people are regarded as unable to testify. The most common application of the inability to testify principle generally centres on the ability of children to testify. In order for children to testify the court have to be satisfied that the child understands the nature and the significance of the oath.

Compellability of witness

It is the generally held opinion that every witness who is competent is also compellable. In *Ex P Fernandez* Willes J made the comment that

Every person in the kingdom except the sovereign may be called upon and is bound to give evidence to the best of his knowledge upon any questions of fact material and relevant to an issue tried in the Queen's courts, unless he can shew some exception in his favour.

In civil cases spouses used to be regarded as incompetent to give evidence under the Evidence Act 1851. This anomaly was amended by the Evidence Amendment Act 1853 s1 making the spouse competent and compellable.

Although a spouse can be compelled to give evidence they cannot be compelled to co-operate by supplying a witness statement before the court

hearing. For this reason spouses who refuse to co-operate are unlikely to be called as witnesses as those calling them would not know in advance what the witness is likely to say when they are on the stand.

Co-defendants and defendants as witnesses

Prior to the introduction of the Criminal Evidence Act 1898 defendants were not allowed to give evidence at trial. The introduction of this Act made it so that all defendants can now be regarded as competent but not compellable. Co-defendants are also competent but cannot be compelled to give evidence against the co-accused. If the co-accused pleads guilty to the offence or the prosecution dismiss the charges as no case to answer, or the two defendants are to be tried severally that co-accused can then become compellable.

Defendants cannot be compelled to give evidence in court; however, those who opt not to testify can have adverse inferences drawn from their refusal. Under the 1898 Act the judge and counsel were allowed to comment on the defendant's decision not to testify, although the judge had a duty to warn the jury that they are not entitled to infer guilt on the basis of the silence of the defendant at trial.

This has been changed by the introduction of the Criminal Justice and Public Order Act 1994 s35(3) which now allows a jury to draw inferences from the failure of the defendant to testify. In order for these inferences to be drawn the defendant must have pleaded not guilty; be mentally and physically fit to testify and understand the risks involved with opting to remain silent.

Spouses of defendants and criminal prosecutions

Under s53(1) of the YJCEA 1999 all persons are competent to give evidence. There is no exclusion under this Act for the spouses of the accused therefore in the eyes of the court they are deemed to be competent as witnesses. S80 (2) of the Police and Criminal Evidence Act 1984 has the effect of making it so that the accused's spouse is always compellable. The only time when an exception would be made in this instance would be if the spouse was also subject to charges in relation to the offence.

In those circumstances making the spouse compellable could amount to self-incrimination or the spouse having to incriminate her husband in order to avoid charges against herself. There are certain specified offences set out under s80(3) where the spouse will be compellable and these include sexual offences, assaults on the spouse or any person under 16 and attempting or conspiring to commit either of the aforementioned offences.

Children as witnesses

Although all witnesses can be deemed to be competent regardless of their age etc s53(3) of the YJCEA 1999 states that a person is regarded as not competent if in the opinion of the court the person does not understand the questions put to them as a witness and cannot answer the questions in a way that can be understood by those present at the trial.

The decision as to whether the child is considered to be competent to testify is assessed on the balance of probabilities test. S55(2) of the Act governs whether the child would be required to swear an oath. Under this section the

child must be 14 or over and *must have a sufficient appreciation of the solemnity of the occasion and of the particular responsibility to tell the truth which is involved in taking an oath*. Where the child does not satisfy the above conditions the evidence can be given unsworn.

Persons of defective intellect

A similar test to that applied to the competence of child witnesses is applied to persons with defective intellect. If the basic test for competence is satisfied then that person will be able to give evidence. The court will determine whether this should be on oath or not based on the witnesses ability to appreciate the solemnity of the occasion as mentioned above.

Circumstantial evidence

Circumstantial evidence is not a fact that can be proven but that can be inferred from the evidence supplied. In this particular scenario above the statement of Beryl could be deemed to be circumstantial evidence as she has stated that she sold a knife to the defendant 2 days before the killing.

In the above scenario it is not stated what kind of knife was used in the stabbing and therefore adducing evidence to show that the defendant bought that particular knife 2 days earlier is only circumstantial unless there is definite proof that this was the knife used in the attack.

In the case of R v Lydon the court adduced evidence of 2 pieces of paper found near the discarded gun to prove that the gun had been in the possession of the defendant. On the paper was written the words Sean rules and the defendant's first name was Sean. In this case the court of appeal stated that it was right for this to be adduced as circumstantial evidence to

show that the defendant had had possession of the weapon and the conviction was upheld.

The defence counsel attempted to argue that the paper should be classified under the hearsay rule and is inadmissible; however the judges disagreed stating that the proximity of the paper to the discarded gun was sufficient for such an inference to be drawn.

Defence of provocation or self defence

Under s101 of the Magistrates Courts Act 1980 where the defendant is seeking to rely on *exception, exemption, proviso, excuse or qualification* as a defence the burden of proof falls on the defendant. For a defence of either provocation or self defence the evidential burden of proof is placed on the defendant. Such defences are referred to as confession and avoidance whereby the defendant admits the offence but raises new issues to explain their actions. The courts have repeatedly held that placing the evidential burden on the defendant is compatible with Art 6(2) of the Human Rights Act 1998 as it does not breach the presumption of innocence.

Standard of proof in criminal cases

When the judge is summing up the case he has a duty to remind the jury that they must be satisfied beyond reasonable doubt that the accused is guilty. Throughout the summing up the judge should remind the jury of the standard of proof required and instruct them that if they cannot find the defendant guilty beyond reasonable doubt they must acquit.

In this particular case the summing up is defective as he does not remind them that they have to be satisfied beyond reasonable doubt and suggests

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that they need only be 80% certain of the guilt of the defendant. The judge has to direct the court on the evidential burden in proving self defence or provocation and he can offer the jury the defence of provocation even if no such defence has been raised by the defendant. The defendant has no obligation to rebut this defence and the direction can be given to the jury despite the objections of the defendant.

Hostile witnesses

In *R v Prefas* the court adopted the definition of hostile witnesses as described by Sir Stephen which defined a hostile witness as someone who *is not desirous of telling the truth to the court at the instance of the party calling him*. In the above scenario Diane has refused to answer any further questions and has therefore been declared a hostile witness. Such witnesses can be cross-examined by the party calling them in an attempt to show that the witness has previously given a different version of events. The authority to cross-examine is contained within s3 of the Criminal Procedure Act 1865. If the person cross-examining the hostile witness can prove that the witness has made previous inconsistent statements the evidence of the witness will be discredited.

Conclusion

The court would have to determine whether Charlie was competent based on his age and mental capacity. If they decide he is competent any evidence he gives will not be on oath due to him being under the age of 14. Beryl's evidence might be excluded because it is circumstantial, however, if the knife used is similar to the one bought then the evidence will be allowed. The

defendant's wife is competent and compellable, however she can refuse to co-operate with the questioning.

The declaring of her as a hostile witness allows her testimony to stand and inferences to be drawn from her refusal to co-operate. The co-accused can testify as no evidence has been offered in respect of the charges against him. The court should remind the jury of the standard of proof required in finding the defendant guilty and should also direct the jury with regard to the defences being proffered to the court.

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