

The Rashomon effect

A case before the European Court of Human Rights could lead to a fundamental review of the admissibility of hearsay evidence and offer defendants greater protection, says Ben Newton

IN THE PAST couple of years, the 'hearsay' provisions of the Criminal Justice Act 2003 have come to the forefront. In particular, there has been a string of interesting cases where a conviction has been founded on a statement of an absent witness. Typically these have been upheld by the Court of Appeal, but following the decision in *R v Pulley* [2008] EWCA Crim 260 and pending the European Court of Human Rights (ECtHR) decision in *Tahery and Al-Khawaja v United Kingdom* is still awaited. Might the rights of the defendant be making a comeback?

The defendant in *Pulley* was convicted after trial of inflicting grievous bodily harm contrary to s.20 of the Offences Against the Person Act 1861 – specifically that he had stabbed his wife in the thigh with a fork and then partially severed the tip of her little finger with a machete. He denied any stabbing and asserted that she had accidentally trapped her fingers in the door. The complainant had sadly (and unconnectedly) died between the time of the incident and the trial, and so her three statements were the subject of a successful application to adduce hearsay evidence.

Her evidence was, however, undermined in a number of material respects by other aspects of the prosecution case. One of the two paramedics summoned by the appellant, for instance, recalled the complainant to have said "he did it", taking this to mean trapping the fingers in the door, and the second paramedic even reported her as having said that her hand had become stuck in the door as well as saying "he did it". A nurse in the hospital had similar recollection, although another nurse and two police officers reported the complainant as saying the harm had been caused by a machete. A consultant orthopaedic surgeon gave evidence that on the balance of probabilities a sharp object was more likely, but couldn't exclude that a door caused the injuries.

Similarly the forensic evidence was not exactly consistent with the complainant's account. Traces of blood were found on the doorframe at hand level, and the machete had none of the cellular traces from the complainant that would have been expected (traces of non-human material also indicated that it had not been cleaned). Finally, back calculations showed that the complainant would have been several times above the



'Little emerges of favour to the rights of defendants, other than a reminder to properly consider the statutory test'

legal alcohol limit for driving, which was directly contrary to her statement.

Notwithstanding that the trial judge considered these inconsistencies in detail when summing the case up to the jury, it was submitted in the Court of Appeal (Pill LJ, Roderick Evans J, and Walker J) that the decision to admit the statements at all was outside the discretion of the judge if properly exercised, and that the reliability of the maker of the statements had not been properly assessed.

Giving the leading judgment, Pill LJ considered the test of admissibility in s.114(2) CJA 2003, and went on to review the earlier authorities, which had invariably been argued for the appellants on the basis of a violation of Art.6(3)(d) (the right to examine or have examined witnesses against). The main focus was on *R v Cole and Keet* [2007] EWCA Crim 1924, along with *Luca v Italy* [2003] 36 EHRR 46 (which at face value appears to indicate that a conviction based on witness evidence that the defendant was not allowed to challenge breached Art.6).

The Court of Appeal had already considered *Luca* in *Cole and Keet*, distinguishing it on the basis that *Luca* involved a witness who was available to give evidence but, due to the application of the Italian Code of Criminal Procedure, could not be cross-examined. The

court ruled on that occasion that Art.6 does not impose an absolute embargo, and that "there can be only one governing criterion. Is the admission of the evidence compatible with a fair trial? It is that question alone with which Art.6 is concerned".

On this occasion the court did nothing to undermine what had been said in *Cole and Keet* in relation to Art.6, but did find the appellant's case distinguishable on the facts from both *Cole and Keet* and *Al-Khawaja*: "In each of those cases the contents of the statements fit comfortably with other available evidence, which indeed provide substantial support for their accuracy. That is not the situation in this case." It therefore concluded, with particular regard to s.114(2), that the admission of the statements did deprive the appellant of a fair trial.

In finding for the appellant, the court refused to accept that the inconsistencies and weaknesses were helpful to the defence and therefore favoured admission. As Pill LJ observed, "on that approach the court is less likely to admit an apparently reliable statement than an apparently unreliable statement".

The ruling therefore amounts to little more than a criticism of the trial judge's failure to properly interpret and utilise the test in s.114(2), so little emerges of favour to the rights of defendants, other than a reminder to properly consider the statutory test.

Unless, that is, the ECtHR finds for the appellants in *Tahery and Al-Khawaja*. The case was argued before the ECtHR in January of this year, and concerned the admission of hearsay evidence where the witness was in fear, the point being specifically argued that the Court of Appeal had not followed *Luca* in relation to the admission of hearsay evidence that was decisive to the case.

Of particular interest in the case of *Tahery* is the fact that the witness was not the complainant (who could not say whether the appellant was the man who stabbed him), but an eye-witness, and furthermore the appellant was in no way responsible for the fear. If it is found that the Court of Appeal has not applied the hearsay provisions in a manner that complies with Art.(3)(d), then the whole body of domestic authority may need to be reconsidered.

Benjamin Newton is a barrister at Doughty Street Chambers