

Hearsay and the Interests of Justice,

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The common law has always taken a general exclusionary approach to hearsay evidence (subject to exceptions) because hearsay evidence weakens the common law tradition of orality and the importance of cross-examination. However, Criminal Justice Act 2003 (CJA) section 114(1) allows for the inclusion of hearsay evidence in criminal trials if any of inclusionary subsections (a) to (d) apply. Section 114 (1) (a) sets out the statutory inclusions and this includes the important CJA section 116 (2) which allows for inclusion of hearsay where the witness is unavailable (dead, physically or mentally unfit, outside the UK, cannot be found or is in fear- this last one having an interest of justice requirement). Section 114 (1) (b) preserves eight common law exceptions, for example, the doctrine of *res gestae*. Section 114 (1) (c) allows for the inclusion of hearsay evidence if the parties agree to this. Section 114 (1) (d) provides a court with an inclusionary discretion if it is in the interests of justice to allow the hearsay evidence into the trial (the “safety value”). Section 114 (2) sets out nine factors which a trial judge must have regard to when considering if it is in the interests of justice to admit the hearsay evidence through section 114 (1) (d).

There have been contrary decisions from the Court of Appeal as to whether or not subsection 114 (1) (d) has an equal status to the three other gateways in section 114(1) and thus can be used to circumvent them. A number of early cases took this broad approach to the use of section 114 (1) (d), for example, *Xhabri* [2005] EWCA Crim 3135; *Isichea* [2006] EWCA Crim 1815; *Meade* [2007] EWCA Crim 1116; *Sak* [2007] EWHC 2886 (Admin); *Y* [2008] EWCA Crim 10; *L* [2008] EWCA Crim 937. For example, in *Y* Hughes L J stated at [47]” There is no basis on which section 114 (1) can be read so as to subordinate subparagraph (d) to (b). If that has been intended, the Act would have said so.” The facts of *Meade* illustrate this early approach. *Meade* was convicted at the Crown Court at Croydon of possessing a controlled drug of class A, namely cocaine, with intent to supply and possessing a controlled drug of class A, namely heroin, with intent to supply. His defence was that he was not a dealer but a buyer. At the trial a police officer was allowed to give hearsay evidence that an unavailable user witness had told her that the house where she (the user) was arrested was a crack house and there “was the large male and small male inside that are the two dealers.” *Meade* was the small male. *Meade* appealed on the basis the trial judge had been wrong to admit this hearsay through section 114 (1) (d) because that had circumvented the stringent requirements that are set out under section 116 which relates to cases where the witness is unavailable, in particular the conditions that have to be satisfied under subsection (2). The Court of Appeal dismissed his appeal on the basis it was enough that the trial judge had carefully considered which of the factors in section 114 (2) were relevant before admitting the hearsay in the interests of justice under section 114 (1) (d). The fact that this circumvented section 116(2) was not considered. These decisions represent part of the liberalising of the admittance of hearsay evidence in criminal trials that culminated with the Supreme Court’s decision in *Horncastle* [2009] UKSC 14 that there could be a fair trial even where a conviction was based solely or decisively on hearsay evidence.

However, in the last 12 months the Court of Appeal has slowed this liberalisation in respect of the use of section 114(1) (d). A number of decisions reflect this change: *Z* [2009] EWCA Crim 20; *Maxwell* [2009] EWCA Crim 2552; *R. v C* [2010] EWCA Crim 72; *Ibrahim* [2010] EWCA Crim 1176; *ED* [2010] EWCA Crim 1213; *Khan* [2010] EWCA Crim 1692. The facts of *R. v C* can be used to illustrate the change in approach. The appellant was convicted of a number of sexual offences against his daughters including X and Y. The primary evidence against him was the eyewitness evidence of Y. However, evidence was also given by X's foster parent F that X had told her, over a period of years, that she had been sexually abused the appellant. The trial judge had admitted this hearsay evidence in the interests of justice pursuant to section 114 (1) (d) despite the fact F told the prosecution that X would be willing to give evidence or at least go to court. The appellant appealed against conviction on the ground, inter alia, that the judge had erred in permitting the prosecution to adduce hearsay evidence from F. Although the appeal was dismissed on other grounds, the Court held that the trial judge has been wrong to admit the hearsay evidence of F because first he had not properly focused on factors (e), (g) and (h) of section 114(2) in particular (g) –why X refused to testify. At the very least, the judge should have directed that steps be taken to ascertain why X was unwilling to give evidence. Second the judge had not considered the relationship between section 114 (1) (d) and section 116 and the fact the former should be used cautiously otherwise the conditions laid down in section 116(2) would be circumvented. So it appears that there are conflicting decisions from the Court of Appeal. The decision in *C* and other more recent decisions of the Court represent a narrowing of approach which can be summarised by the comment of Pitchford L J in *ED* [2010] EWCA Crim 1213 at [17] that the court should not “countenance the use of section 114(1) (d) to circumvent the requirements of other gateways to admissibility higher up the section 114(1) hierarchy. It is not permissible to nod through hearsay evidence merely because it is convenient to the party seeking its admission and the evidence is of value upon an important issue in the trial.”

What conclusions can be drawn from these later cases? The first is that section 114(1) (d) should be cautiously applied to avoid generally circumventing section 116(2) where a witness is available but is reluctant to give evidence. That is not to say that section 114(1) (d) can never be invoked when the criteria laid down in section 116(2) cannot be met, but a cautious approach is necessary when consideration is being given to the admission of hearsay evidence where a witness of primary fact is alive and well and able to give oral evidence to the court, particularly if the witness of primary fact is an alleged victim of a serious crime. An example of the cautious approach is *Sadiq* [2009] EWCA Crim 712 where the witness was injured by the defendant and had to testify at a first trial using a communication board but refused to testify at a retrial. His evidence at the first trial was admitted through section 114(1) (d) in the second trial and the defendant was not really disadvantaged because the first trial transcript included the cross examination of the witness. The second conclusion is that section 114 (1) (d) is only a residual power that should only be used if the other gateways to admissibility cannot be used. These later decisions of the Court of Appeal represent a slowing of the liberalisation of the use of section 114 (1) (d) to admit hearsay evidence and are to be welcomed because they mean the principle of orality still has significance. That said there are still decisions by the Court of Appeal that oppose this approach: *L* [2008] EWCA Crim 973; *JS* [2009] EWCA Crim 1856 and *Seton* [2010] EWCA Crim 450. We need another Supreme Court decision to clarify this difficult part of the criminal law.