

The Morrison and McCutcheon rules (exculpatory and mixed statements)

Law

The rules on the evidential value of statements made by accused persons differ according to:

- (a) whether they were made before or after the commencement of [section 261ZA](#) on 25 January 2018 and, if after that date,
- (b) to whom they were made.

From 25 January 2018, with the commencement of [section 261ZA of the Criminal Procedure \(Scotland\) Act 1995](#), statements made by accused persons in the course of being questioned by police officers or other officials investigating an offence, are admissible in all circumstances as evidence of any facts contained therein against the person who made the statement.

The section provides as follows:

“Evidence of a statement to which this subsection applies is not inadmissible as evidence of any fact contained in the statement on account of the evidence's being hearsay. Subsection (1) applies to a statement made by the accused in the course of the accused's being questioned (whether as a suspect or not) by a constable, or another official, investigating an offence. Subsection (1) does not affect the issue of whether evidence of a statement made by one accused is admissible as evidence in relation to another accused.”

See generally *Stair Encyclopaedia*, Vol 10, paragraph 720.

1. Exceptions to the hearsay rule (see chapter on [Hearsay](#) above) relate to evidence of what the accused person has said other than when giving oral evidence at the trial. Statements made outwith the accused's presence, are dealt with in the chapter on Statements outwith presence of accused.

Statements made to the police by a suspect (including admissions of guilt) are dealt with in the chapter on Statements made to police/investigators by suspect.

Please note that the general rule is that a statement against interest by an accused is admissible as evidence to prove guilt. Lord Justice General Cullen explained in [*McCutcheon v HM Advocate 2002 SLT 27*](#), at paragraph [9];

“Thus the prosecutor is entitled to found on evidence of an admission by an accused in proof of his guilt”

This chapter is primarily concerned with the rules concerning the evidential value of admissible prior statements made by accused persons that are either exculpatory statements or statements in part exculpatory and in part incriminatory made by an accused in other circumstances.

2, The rules on these statements, before the enactment of the above section, were set out in *McCutcheon* by Lord Justice General Cullen at paragraph [16], thus:

i. It is a general rule that hearsay, that is evidence of what another person has said, is not admissible as evidence of the truth of what was said.

ii. Thus evidence of what an accused has been heard to say is, in general, not admissible in his exculpation, and accordingly the defence are not entitled to rely on it for this purpose. Such evidence can be relied on by the defence only for the purpose of proving that the statement was made, or of showing his attitude or reaction at the time when it was made, as part of the general picture which the jury have to consider.

iii. There is, however, an exception where the Crown have led evidence of a statement, part of which is capable of incriminating the accused. The defence are entitled to elicit and rely upon any part of that statement as qualifying, explaining or excusing the admission against interest.” (*McCutcheon*)

Note - The effect of the above section changes that rule insofar as statements made by suspects after 25 January 2018 on being questioned by the police and other officials investigating an offence are concerned – see below. Paragraphs 3-13 apply to statements made to the police/investigators before 25 January 2018 and to statements made to other parties either before or after that date.

3. The admissibility of evidence, in light of the rules in [*Morrison v HM Advocate 1990 JC 299*](#) and *McCutcheon*, is a question of law, the answer to which cannot be affected by inaction on the part of the Crown. (*McCutcheon*, at paragraph [14] in opinion of Lord Justice General Cullen).

4. Whether a statement is a mixed statement does not depend on the accused's purpose in making the statement, or on the Crown's purpose in leading evidence of it. The test is whether the statement, considered objectively, is in any way incriminatory in its effect. ([McIntosh v HM Advocate 2003 SLT 545](#) paragraph [18]). If the statement contains an admission against interest in relation to a matter which is relevant to the proof of the offence, even although the statement may contain exculpatory material, it is to be treated as a mixed statement ([Jamieson v HM Advocate \[2011\] HCJAC 58](#)). Whether or not a statement is a mixed statement, and the use to which any statement can be put, are matters for the judge. It is not for the jury to decide how the statement should be classified ([Jones v HM Advocate 2003 SCCR 94](#), [McGirr v HM Advocate \[2007\] HCJAC 7](#), [2007 JC 83](#) at paragraph [13]).

5. What the defence may found upon as turning an incriminatory statement into a mixed statement, (i.e. being part incriminatory and part exculpatory) has been referred to as a qualification, excuse, or explanation of the admission against interest. A broad approach should be taken to the question whether a part of a statement is so connected to the admission as to form a qualification, excuse, or explanation (*McCutcheon*, at paragraph [11] of opinion of Lord Justice General Cullen). A statement containing an admission which has significance relevant to proof of a charge, and an alternative explanation inconsistent with guilt, is a mixed statement ([Lennox v HM Advocate 2002 SCCR 954](#)). The incriminatory effect of the statement may take a variety of forms, e.g. a factual statement by the accused placing himself at the locus at the relevant time, or it may coincide with what other witnesses said, or it may contradict earlier accounts by the accused ([McIntosh v HM Advocate](#), at paragraph [18]. *Robinson v HM Advocate* 2007 GWD 9 – 161).

6. Where the defence seeks, however, to lead evidence of a statement by the accused which has a close connection in time, place and circumstances to a statement led in evidence by the Crown, the two statements may be regarded as so interconnected that they require to be looked as parts of a single (mixed) statement (*McCutcheon*, at paragraph [13] of opinion of Lord Justice General Cullen).

7. There is no duty on the Crown to lead evidence of a mixed statement or to refrain from objecting to it if the defence seeks to do so (*McCutcheon*, at paragraph [14] of opinion of Lord Justice General Cullen). If the Crown leads evidence of a mixed statement they should be taken as relying on it to incriminate the accused (*McCutcheon*, at paragraph [11] of opinion of Lord Justice General Cullen).

8. It will normally be appropriate for the trial judge to remind the jury that the “mixed” statement was not made on oath, and was not subject to cross-examination, leaving it to the jury to determine what weight should be attached to the statement in such circumstances (*McCutcheon*, at paragraph [17] of opinion of Lord Justice General Cullen referring to *Morrison*, 313).

Where an accused does not give evidence but relies on the exculpatory part of a mixed statement led by the Crown, to invite the jury to regard that “with a pinch of salt” is “not felicitous”. A simple cautionary direction to bear in mind when considering the statement that it had not been given on oath and had not been subject to cross-examination would have been preferable (*Murphy v HM Advocate* [2006] HCJAC 54, 2006 SCCR 407 at paragraph [8]).

9. Where the Crown leads evidence of such a [mixed] statement, the trial judge must direct the jury that its contents are available as evidence for or against the accused, whether or not the accused gives evidence (*Jones v HM Advocate* 2003 SCCR 94); and that they must determine whether the whole or any part of the statement is to be accepted by them as the truth. He should also specifically direct them that if they believe the exculpatory part or parts of the statement, or if the statement creates in their minds a reasonable doubt as to the guilt of the accused, they must acquit (*Scaife v HM Advocate* 1992 SCCR 845, 848; *McGirr v HM Advocate* [2007] HCJAC 7, 2007 JC 83 at paragraph [12]).

10. Where the defence lead evidence of a statement which is wholly or partly exculpatory and the Crown does not object, the trial judge should direct the jury that evidence of the statement is admissible solely for the purpose of proving that the statement was made or of showing the accused's attitude or reaction at the time it was made (*McCutcheon*, at paragraph [18] of opinion of Lord Justice General Cullen).

11. The jury should be directed that they must determine whether the whole or any part of a statement is accepted by them as the truth. The jury should also be specifically directed that if they believe the evidence of the accused, they must acquit them. In addition, it must also appear from the charge as a whole that the jury were directed that if this evidence created in their minds a reasonable doubt as to whether the accused was guilty of the charge libelled, they must acquit them of that charge (*Scaife*, 848 (opinion of the court)).

12. None of the rules described in *Morrison* applies to the use of a statement made by one accused against another accused in their absence. Such statements cannot be

used to incriminate or exculpate a co-accused, nor are they admissible even for the limited purpose of showing that the co-accused's story has been consistent ([*Mathieson v HM Advocate* 1996 SCCR 388](#), 398 (opinion of the court)).

13. It is not the law that if an admission is accepted as true the qualification attached to it must also be accepted as true: the jury must consider both the admission and the qualification and decide which to accept and which to reject, bearing in mind the burden of proof. It is open to a jury to accept an incriminating admission and reject a qualification. They may find the qualification inconsistent with other evidence they accept; or they may find it inherently unconvincing; or, if the accused gives evidence, their demeanour may belie their account of events ([*McInally v HM Advocate* \[2006\] HCJAC 48, 2006 JC 224](#), at paragraph [8]).

Statements made to the police on or after 25 January 2018

14. The impact of the commencement of section 261ZA above on 25 January 2018 is that, where a statement was made under questioning by the police or other officials investigating an offence by an accused on or after that date, it is admissible against that accused as evidence of any fact contained therein, whether it is exculpatory, incriminating, or mixed. Thus, the rules set out in paragraphs 3-13 above do not apply to such statement.

Possible forms of direction on Morrison and McCutcheon rules

Exculpatory statements

(Where led by Crown and where accused has not given evidence)

"This statement to witness (specify) could point to the accused's innocence. Where, as here, the accused has not given evidence, this statement is evidence only to show that it was made, and the accused's attitude or reaction at that time, that is part of the general picture which you have to consider. But it is not evidence of the truth of what he said."

(Where led by Crown and where accused has given evidence or where led by accused whose credibility has been challenged)

"This statement could point to the accused's innocence. Where, as here, the accused has given evidence, this statement is evidence only to show that he has been consistent in his account from an early stage. But it is not evidence of the truth of what he said."

(Where brought out in cross by defence, and accused does not give evidence)

"This statement could point to the accused's innocence. Where, as here, the accused has not given evidence, this statement is not evidence of the truth of what he said. If he wishes to establish the truth of what is in his statement, he can go into the witness box and give evidence. He is not obliged to do so, but if he does, that evidence can be tested by cross-examination. That can reinforce or undermine a witness's evidence. This statement is no substitute for the accused giving evidence. He cannot rely on evidence of what he said on an earlier occasion as evidence of what occurred."

Incriminating statements

"This statement could point to the accused's involvement in the crime charged. It contains things which could be taken as admissions of guilt or which help the Crown to prove the accused's guilt. This is evidence against him, because it is a statement against his interest."

Mixed statements

(Where led by Crown (whether relied on by Crown or not))

"In this statement the accused said some things that could point to innocence (e.g. he acted in self-defence, he denied the critical allegations) and some which could point to his guilt (e.g. he placed himself at the scene of the crime, he admitted use of a weapon, he admitted he was in the children's company at the relevant time).

"You can look at the whole of it. You then have to decide if what was said was true, in whole or part. You can prefer one part of the statement to another.

"You could disbelieve the part pointing to innocence if there is other evidence in the case you think points to guilt, or if you thought that part was inherently

unconvincing, or if the accused, by his body language at interview or in giving evidence, gives the lie to his account of events.

"If you believe the part pointing to innocence, or if it raises a reasonable doubt in your mind about the accused's guilt, you must acquit him. But remember this. What was said was not said on oath. It was not subject to cross-examination. That can reinforce or undermine a witness's evidence. So, you decide what you make of it, and what weight you give it."

(Where led by defence, or brought out in cross of Crown witness by defence)

"In this statement the accused said some things that could be taken as pointing to innocence (e.g. he acted in self-defence, he denied the critical allegations) and some which could point to his guilt (e.g. he placed himself at the scene, he admitted the use of a weapon, he admitted he was in the children's company at the relevant time)."

[Where the statement was led or elicited by the defence give one of the following directions, as appropriate, after giving the direction above:]

(Where the accused has not given evidence)

"Where, as here, the accused has not given evidence, this statement is evidence only to show that it was made, and the accused's attitude or reaction at that time, that is part of the general picture you have to consider. But it is not evidence of the truth of what he said."

(Where the accused has given evidence)

"Where, as here, the accused has given evidence, this statement is evidence only to show that he has been consistent in his account from an early stage. But it is not evidence of the truth of what he said."

Statements made to the police etc after 25 January 2018 and the accused was being questioned by police or other officials investigating an offence

Note: this applies to all such statements meeting these criteria – whether exculpatory, incriminating, or mixed, or introduced by the Crown or defence; and whether the accused has given evidence.

[Select as appropriate]

"This statement to the police could point to the accused's innocence /

"This statement to the police could point to the accused's involvement in the crime charged. It contains things which could be taken as admissions of guilt, or which help the Crown to prove the accused's guilt. /

"In this statement to the police the accused said some things that could point to innocence (e.g. they acted in self-defence / denied the critical allegations) and some which could point to guilt (e.g. s/he placed him/herself at the scene of the crime, admitted use of a weapon, admitted being in the children's company at the relevant time, etc).

"You can consider this statement to the police as evidence of any fact contained in the statement.

"However, remember this. What was said was not said on oath. It was not subject to cross-examination. That can reinforce or undermine the weight given to an answer. So, you can decide what you make of it and what weight you give it. As with any other evidence you can accept all of it, none of it, or you can accept some parts and reject other parts."