

Statements made to police/investigators by suspect

Introduction

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 no longer deemed to be hearsay as governed by the Morrison and McCutcheon rules and, subject to the general criterion of fairness which governs admissibility of such statements, are generally admissible as evidence of any facts contained therein against the accused person who made the statement.

Section 261ZA provides as follows:

- “(1) 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.
- (2) 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.
- (3) 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.”

The Morrison and McCutcheon rules on admissibility of exculpatory and mixed statements are disapplied to statements made on or after 25 January 2018 **which meet the foregoing criteria**.

The Morrison and McCutcheon rules on admissibility of exculpatory and mixed statements still apply to a situation where an accused person was not being questioned but made a spontaneous comment to a police officer or other person.

The law as explained in Morrison and McCutcheon continues to apply to all statements made before 25 January 2018 and to statements made to persons other than a constable, or another official, asking questions when investigating an offence and this chapter should be read in conjunction with the guidance in the chapter on Morrison and McCutcheon.

In short, pre-25 January 2018 and for any statement made to someone other than a response to questioning by a police officer/investigating official, statements against interest are evidence to prove fact, wholly exculpatory statements are not evidence to prove fact and there are special rules relating to mixed statements.

Law

Stair Encyclopaedia, Evidence (Reissue) paragraphs 244-245, 254-260, 271

[Renton and Brown Criminal Procedure \(6th edition\), Chapter 24.38-24.45.](#)

1. Prior to 25 January 2018, the general rule was that the content of answers to police questioning about the alleged offence is admissible in evidence *against their maker* unless it was extracted by unfair means.

The content of any answers to police questioning on or after 25 January 2018 is admissible as evidence of any facts contained therein, whether against their maker, exculpatory of them or mixed – see below.

This chapter deals with the evidential value of such statements. In terms of [section 79 of the 1995 Act](#), questions of admissibility relating to the manner in which such statements were obtained ought to have been raised and disposed of as a preliminary issue in advance of the trial diet. Where a party seeks to raise any objection to the admissibility of any evidence, including such statements at the trial diet, then the Court, in terms of [section 79A\(4\)](#) "...shall not, under section 79(1) of this Act, grant leave for the objection to be raised unless it considers that *it could not reasonably have been raised before that time*".

In the case of [Bhowmick v HM Advocate \[2018\] HCJAC 6, 2018 SLT 95](#), the High Court underlined that the judge has a legal requirement to apply that test and only that

test in relation to late objections of this nature, noting that, "there is no dispensing provision attached to the mandatory requirement provided for by section 79A(4)." In that case, the trial judge had erred in making a conscious decision not to comply with the section on the basis that to do so might have, in the judge's view, jeopardised the accused person's right to a fair trial.

With that in mind, it may be helpful to recap the law on admissibility against the remote possibility that it is raised competently at trial.

If a statement is challenged on the grounds of fairness, the issue of admissibility is determined in accordance with the following test:

"In each case where the admissibility of answers by a suspect to police questioning becomes an issue it will be necessary to consider the whole relevant circumstances in order to discover whether or not there has been unfairness on the part of the police ... unfairness may take many forms but "if answers are to be excluded they must be seen to have been extracted by unfair means which place cross examination, pressure and deception in close company" [W]here in the opinions [in] the decided cases the word 'interrogation' or the expression 'cross examination' are used in discussing unfair tactics on the part of the police they are to be understood to refer only to improper forms of questioning tainted with an element of bullying or pressure designed to break the will of the suspect or to force from him a confession against his will." ([*Lord Advocate's Reference \(No 1 of 1983\)* 1984 JC 52](#), 58 per Lord Justice General Emslie).

2. At the early stages of investigations, when a number of persons have to be eliminated from an inquiry and no individual is under suspicion, statements taken by the police are admissible, generally, even although no caution has been administered ([*Chalmers v HM Advocate* 1954 JC 66](#), 78 per Lord Justice General Cooper).

3. Once suspicion has centred upon an individual, further police questioning has to be carried out with special care. Similar care is required in questioning a person who is questioned under the provisions of [section 14 of the Criminal Procedure \(Scotland\) Act 1995](#) ("the 1995 Act") (before 25 January 2018) or the provisions of the Criminal Justice (Scotland) Act 2016 ("the 2016 Act") (on or after 25 January 2018). Even if a suspect is informed of being under no obligation to say anything in terms of section 14(9) of the 1995 Act (before 25 January 2018) or [31\(2\)\(b\) of the 2016 Act](#) (after 25 January 2018), an incriminating statement made by him without a full common law

caution having been administered is likely to be held inadmissible. ([Tonge v HM Advocate 1982 JC 130](#), 145 and 146 per Lord Justice General Emslie).

4. Since a person may be arrested on grounds less strong than those required to bring a charge, there is no justification for a general rule that by arresting a person the police debar themselves from ordinary questioning thereafter fairly conducted ([Johnston v HM Advocate 1993 JC 187](#), 702 per Lord Justice Clerk Ross). This remains the position following the introduction of the 2016 Act (see [section 35 of the Criminal Justice Scotland Act 2016](#)).

5. Statements obtained by threats or inducements are inadmissible ([Harley v HM Advocate 1996 SLT 1075](#), 602 per Lord Justice Clerk Ross).

6. An accused person who, after having been charged, asks particularly to make a statement to the police officer in charge of their case, cannot object to that statement being admitted ([Cordiner v HM Advocate 1993 SLT 2](#)).

7. A judge who has heard the evidence regarding the circumstances in which a statement was made must her/himself determine whether or not the evidence is admissible, even if that decision involves questions of fact: [Thompson v Crowe 2000 JC 173](#). At the conclusion of his opinion in that case, the Lord Justice General summarises the salient points of the decision as follows (at 202):

1. "[Balloch](#) should be overruled. In all cases it is for the trial judge to decide whether any evidence, including evidence of a statement by the accused, is legally competent and can be led.
2. The judge must decide any issues of fact which are necessary to enable that legal decision to be taken.
3. Since the trial judge has to determine any issue of fact before ruling on admissibility, if the facts are disputed, the judge must first hear all the relevant evidence, including any evidence which the accused wishes to give on the point.
4. If the defence ask for the evidence on admissibility to be heard in the absence of the jury, the judge should ordinarily grant that motion.
5. The Crown cannot use any evidence given by the accused in the trial within a trial as proof of his guilt. There may, however, be circumstances in which the accused can be cross-examined about that evidence if he subsequently

gives evidence in the substantive trial which is materially different (cf. [*Wong Kam-ming*](#)). Other witnesses can, of course, be cross-examined on any differences in their evidence.

6. Where an issue arises on the evidence, it is for the Crown to satisfy the judge that the statement is admissible. The appropriate standard of proof would appear to be the balance of probabilities, as the defence conceded in this case.
7. The judge will exclude evidence of a statement if it was taken in circumstances which render it inadmissible under any rule laid down by the law. In other cases the judge will admit the statement if the Crown satisfy the judge that it would be fair to do so, by proving that the statement was made freely and voluntarily and was not extracted by unfair or improper means.
8. Any ruling on the admissibility of the evidence of a statement should be given, in both solemn and summary proceedings, after the evidence of the circumstances has been led and any submissions on the evidence have been heard. In this way, any defence submission that there is no case to answer will fall to be made on the basis of the legally admissible evidence led by the Crown.
9. Where the judge admits the evidence of a statement, evidence of the circumstances in which it was taken remains relevant to any determination of the weight which should be attached to it.
10. If the judge admits the evidence of a statement and fresh circumstances emerge in subsequent evidence which cast doubt on that ruling, the defence may renew their objection and invite the judge to reconsider the ruling. On reconsideration the judge may confirm or reverse the original ruling in the light of the new evidence. If the evidence of the statement has not yet been led, the judge may exclude it. If it has been led, the judge may direct the jury to disregard it or, if, because of its likely impact, the judge considers that the jury could not realistically be expected to put the evidence out of their minds, then, depending on the circumstances, the judge may desert the diet *pro loco et tempore*. In the case of a summary trial, the judge will disregard the evidence in reaching a verdict; only rarely would it be appropriate for the judge in a summary trial to desert the diet

on the ground that it would be impossible to disregard the evidence in reaching a verdict.

8. In a trial within a trial to determine whether or not evidence has been fairly obtained, the judge should decide the relative strengths of the cases for and against admissibility on the balance of probabilities ([Platt v HM Advocate 2004 JC 113](#) at paragraph [10]). If they decide the evidence is admissible, they should not direct the jury that it must hold that the evidence was fairly obtained. The jury can decide for themselves, on the basis of the whole evidence, and in the light of considerations of fairness, what weight, if any, to give to that evidence. ([Platt](#) at paragraph [9]).

Appropriate directions tailored to the particular circumstances may have to be given

9. Where the accuracy of what the accused is alleged to have said to the police is in issue, the judge must give express directions that it is for the jury to decide whether the statement was made, to consider the reliability of what was allegedly said, to determine what this evidence amounts to and what, if anything, it establishes ([Chatham v HM Advocate \[2005\] HCJAC 49, 2005 SCCR 373](#) paragraphs [13] to [15]).

The fact that the defence did not seek to have the statement ruled inadmissible in law and so excluded from consideration by the jury, did not obviate the need, in the particular circumstances of that case, where the evidence was critical to the Crown case and there were considerations bearing on the accuracy of the evidence and the weight to be given to it, for such a direction ([Chatham](#), at paragraph [11]).

10. Where an accused who has been cautioned replies “no comment” to questions put at interview, care should be taken to avoid leaving it open to the jury to draw an adverse inference about e.g. their knowledge of the existence of items recovered at search, about which they have been asked for an explanation. That is because any accused enjoys a right to silence at common law and in terms of [section 14\(9\) of the 1995 Act](#) (pre-25 January 2018) or [section 34 of 2016 Act](#) (on or after 25 January 2018). For cases before 25 January 2018, reference should be made to [section 14\(9\) of the 1995 Act](#). A detained/arrested accused is under no obligation to answer any question other than to give their name, address, date and place of birth and nationality ([Larkin v HM Advocate \[2005\] HCJAC 28, 2005 SLT 1087](#) at paragraph [10]). Likewise, it is improper to leave it to the jury to draw an adverse inference about the

credibility of an accused person in such circumstances. It is advisable to direct the jury specifically that no such adverse inference can be drawn.

This is essential if the prosecution suggests to the jury that such an inference could be drawn ([*Dick v HM Advocate* \[2013\] HCJAC 5, 2013 SCCR 96](#)).

Possible forms of direction on statements made to police by suspect

"In this case there has been evidence about what the accused said to the police when they voluntarily attended the police station/were detained (pre-25 January 2018)/were taken into police custody in terms of the relevant legislation.

"As background, generally nobody is obliged to speak to the police or answer their questions when crimes are being investigated. But a person can voluntarily attend a police station which may occur if that person learns that officers wish to speak to them."

In cases involving detention pre-25 January 2018

"If a person is detained by police officers, during that period of detention they can be questioned. In those circumstances they are entitled to have their solicitor told of their detention. In addition, they are entitled to have a private consultation with their solicitor before being interviewed by the officers and during questioning (if applicable) although, as in this case, the accused is perfectly entitled to decide against having such a consultation. Before the interview starts the suspect should be cautioned that they are not obliged to answer any questions, but if they do, the answers may be noted, tape recorded and may be used in evidence."

In cases involving attending voluntarily or being taken into police custody on or after 25 January 2018

"When a person is interviewed by police officers about an offence after attending voluntarily or being **taken into police custody**, that person has certain rights including being told about the general nature of the offence and the right to have a solicitor present during the interview. The accused, as here, can consent to being interviewed without a solicitor being present. Before the interview starts the suspect

should be cautioned that they are not obliged to answer any questions, but if they do, the answers may be noted, tape recorded and may be used in evidence."

[If applicable]

"In this case you have heard evidence that the accused refused to answer/answered the questions put to her/him by police officers (as appropriate) with the phrase 'no comment'. You cannot read anything adverse against the accused from their acting in this way in the interview. The fact that she/he did so cannot be held against her/him. The accused, in so acting, was simply exercising his/her rights."

Where the accused is recorded as answering questions

"Before you could take account of what the accused said you have to decide if she/he did say anything, if it has been accurately recorded, and in circumstances in which you can rely on the answers given."

Where no challenge

"Here there has been no challenge about there being any irregularity in the procedure followed (*on any of these grounds*), and what was said is part of the evidence in the case."

See below re Morrison and McCutcheon chapter re rules/directions on evidential status of exculpatory/mixed statements pre- and post-25 January 2018.

Where the statement was made **before 25 January 2018**, the judge should select an appropriate direction from those within the Morrison and McCutcheon chapter and augment it as required according to whether there is any denial that the statement was made; any challenge to the accuracy of its recording; or any suggestion that the accused was lying to the police. If so, the following directions provide a starting point.

If on or after 25 January 2018 the accused was being questioned by police or other officials investigating an offence

"Evidence of these answers to questions can be considered by you as evidence of any fact contained in those answers.

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 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."

Where challenge on basis of denial that statement was made

"The defence say these things were never said by the accused. You have heard evidence from the police and from the accused about this. You decide who is telling the truth.

If you thought the accused had not said anything, exclude that part of the police evidence from your consideration. If you thought she/he had said what the police say she/he did, that is part of the evidence in the case and is evidence of any fact contained in the answer you decide was given).

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 decide what you make of it, and what weight you give it. You have then to consider its significance."

Where challenge to accuracy of recording

"The defence maintains the accused said something different from what the police say she/he did. You have heard evidence of the two versions. You decide which is correct. You then have to consider its significance (see below re Morrison and McCutcheon chapter re rules/directions on evidential status of exculpatory/mixed statements pre- and post-25 January 2018).

Once you have reached your decision as to which version is the accurate one then that version becomes part of the evidence in the case of any fact contained in the answer you decide was given.

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 decide what you make of it, and what weight you give it. You have then to consider its significance."

Where alleged that statement to police was lies

"The accused has said that parts of what she/he said to the police are not true. If you believe she/he lied to the police, disregard those parts of what she/he said. If you

disbelieve her/his evidence that she/he lied to the police, and if you think she/he told the police the truth, all she/he said is part of the evidence in the case of any fact contained in the answer (see below re Morrison and McCutcheon chapter re rules on evidential status of exculpatory/mixed statements pre- and post-25 January 2018). Always remember that 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 decide what you make of it, and what weight you give it. You have then to consider its significance.”

Where there are circumstances such as those in [*Chatham v HM Advocate* \[2005\] HCJAC 49, 2005 SCCR 373](#) bearing on the reliability of what was said and the weight to be attached to it by the jury it may be appropriate to direct along the following lines:

“In this case the defence say that although the evidence of what the accused said to the police in interview is evidence in the case for you to consider, the circumstances in which the accused gave the answers are such that you cannot rely on what was said to the police. The Crown say that is not the case. Now you have to look at the circumstances in which these answers were given. It is for you to decide whether you can rely on the answers given and if so to what extent. What weight can you attach to them?”

NB It is suggested that any further directions in this regard are tailored to the point which the defence is making. Depending on the circumstances, it might be useful to refer to one or more of the following considerations, but unless they have possible relevance it will be unhelpful to mention them all or any which is plainly not in issue. If the defence do not take issue with the circumstances of the statement, then ordinarily such further directions would be superfluous and inappropriate.

For example:

- What was the state of understanding on the part of the accused when the questions were asked?
- Were the questions clear or ambiguous?
- Was the information given to the accused accurate?
- Was there such inducement offered, or pressure applied to the accused to answer the questions, such as bail not being opposed at any appearance from

custody, *[or other circumstances as may arise in the particular case]* that you cannot rely on the answers as being truthful?

If you decide that the answers were given in circumstances such that you cannot rely on them, you ignore them. If you decide that you can rely on them then evidence of these answers to questioning can be considered by you as evidence.

[Depending upon the content of the answers the appropriate direction will be required as set out in the Morrison and McCutcheon Rules (Exculpatory and Mixed Statements) chapter.]