



UNIFORM EVIDENCE LAW GUIDEBOOK

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CHAPTER 3: ROLES OF JUDGE AND JURY AND THE JUDICIAL DISCRETION TO EXCLUDE EVIDENCE

ASSESSMENT PREPARATION (PP 63-64)

REVIEW PROBLEMS – ADDITIONAL NOTES

1. The prosecution would arguably seek to use this as evidence of flight going to Don's consciousness of guilt in relation to the aggravated robbery committed approximately 25 minutes prior to the police attending the Jaegar's house. Don has set up an alibi defence so he denies any responsibility for the robbery. The primary fact in issue is the identity of the perpetrator of the robbery so the evidence of flight is relevant (s 55 EA). Defence counsel seeks that the evidence be excluded under s 137 EA. The unfairness in these circumstances must arise from Don's belief as to why the police were coming to see him rather than anything about what the police had done to make Don react in this way. The stronger basis for exclusion is an argument as to unfair prejudice to Don in presenting an explanation as to his flight that is not in any way linked to a consciousness of guilt for the robbery of Beryl Finch. Section 137 EA is a mandatory provision requiring the court to refuse to admit the evidence adduced by the prosecution where its probative value is outweighed by the danger of unfair prejudice to the defendant. This scenario has similarities to the case of *R v Cook* [2004] NSWCCA 52 where the explanation for the accused's flight would have exposed his criminal record to the jury and in particular expose that he had history of violence against women when he was being tried for an aggravated sexual assault offence.

Applied to the current facts, to counter the probative value of the 'flight' evidence Don would have to explain his 'flight' from the police. This would involve revealing that he had 'received some stolen car parts' and he considered that he was in breach of his parole order, having recently been released from prison after serving

4 years imprisonment for two robbery offences. In these circumstances although the 'flight' evidence has some probative value it is certainly arguable that it would be outweighed by the risk of unfair prejudice to Don. The argument would be that the jury would misuse the evidence in that it would provoke an illogical response, such as a desire to ensure Don is punished due to his criminal record. Although the 'receiving' aspect is not directly prejudicial it is the breach of the parole order and the reason for his earlier imprisonment being robbery offences that would be clearly prejudicial in these circumstances. This would constitute a 'real risk' of unfair prejudice (*Lisoff* [1999] NSWCCA 364) and Don would be put in a similar position to the accused in *Cook* where his explanation would necessarily disclose to the jury a prior history of similar offences (that is 'revealing prior criminality of a related kind' at [37]) to 'remove the sting from the flight evidence'. Directions to the jury would not ameliorate the impact of the jury having such knowledge of Don's prior conduct (cf *R v Quinlan* [2006] NSWCCA 284). Overall, it is likely that the trial judge (following the reasoning of Simpson J in *R v Cook*) would rule that the defence objection to the evidence is upheld and the 'flight' evidence would be excluded.

2. Clearly the evidence of the items seized from the search of the car is relevant to who perpetrated the robbery of Beryl Finch. They constitute real evidence and strong circumstantial evidence relating to the robbery of Beryl Finch that can be directly linked to the car that Don was driving. The question for the trial judge would be as to the legality of the search and whether the handbag and its contents were illegally or improperly obtained such as to trigger consideration of s 138 EA. The police did not obtain a search warrant or consent from Don or Sharon Jaegar to search the vehicle. As to the legality of the search, the prosecution could put forward alternative arguments based on common law and statutory search powers. At common law there is a power of search as an incident to arrest whereby the police can search the person and detain anything found through the search believed to be material evidence in relation to the crime for which the person was arrested. This power extends to those things in possession of a person at the time of arrest. Therefore, the handbag and its contents may well be illegally obtained unless 'things in possession' can be argued to extend to the things in Sharon Jaegar's Commodore at the time of Don Jaegar's arrest given that he had just been observed driving the vehicle.

A stronger alternative argument could be based on any available statutory search power, such as s 36 *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW). This provision allows a police officer to search vehicles and seize things without warrant where the police officer suspects on reasonable grounds that '(1)(a)

the vehicle contains, or a person in the vehicle has in his or her possession or under his or her control, anything stolen or otherwise unlawfully obtained or (b) the vehicle was or may have been used in or in connection with the commission of a relevant offence'. Therefore, where reasonable grounds for suspicion exist, which the police could establish based on the information received from an eyewitness about the car, including the registered number, the police may seize and detain anything reasonably suspected of being stolen or otherwise unlawfully obtained or may provide evidence of the commission of a relevant offence found as a result of the search [s 36(3)].

Accordingly there is a strong argument that the evidence has not been illegally obtained so s 138 is not triggered. However, if it is held that the evidence was illegally obtained because the police did not have a search warrant then s 138 arguments must be considered. Arguably the failure to obtain a search warrant is a grave impropriety but there is no information to determine whether it was reckless police conduct or a deliberate abuse of process. This would involve consideration of the experience of the officers involved in the search and the pressing need to preserve evidence in the circumstances. A search does involve a fundamental invasion of a person's property but there is a very serious offence involved and clearly important circumstantial/real evidence to which the car can be directly linked. Balancing of the s 138(3) factors involves a discretionary question for the trial judge of the desirability of admitting the evidence against the undesirability of condoning the way in which such evidence was illegally obtained. Arguably the police had to act very quickly to ensure any evidence of the robbery was secured so the trial judge is likely to overrule the defence objection and order that the evidence of the items seized from the search is admissible.

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