

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

NATHAN LEE

APPELLANT

AND

THE QUEEN

RESPONDENT

Lee v The Queen (S20-1998) [1998] HCA 60
30 September 1998

ORDER

1. *Appeal allowed.*
2. *Set aside the order of the Court of Criminal Appeal of New South Wales made on 5 May 1997 dismissing the appeal to that Court against conviction. In lieu thereof, order that the appeal to that Court be allowed, the conviction be quashed, and there be a new trial.*

On appeal from the Supreme Court of New South Wales

Representation:

T A Game SC with S J Odgers for the appellant (instructed by Arden & Associates)

G S Hosking SC with D M Woodburne for the respondent (instructed by Office of the Director of Public Prosecutions (New South Wales))

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CATCHWORDS

Lee v The Queen

Evidence – Hearsay rule – Previous representation by witness including alleged confession by accused – Whether entire previous representation could be admitted as prior inconsistent statement – Whether report of confession could be used to prove the truth of the alleged confession.

Evidence Act 1995 (NSW), ss 60, 137.

1 GLEESON CJ, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ. At the appellant's trial, evidence was admitted of out of court statements made by a witness which included a report of a confession made by the appellant to that witness. The evidence of these out of court statements was given because the witness gave evidence at the trial denying (or at least not admitting) that he had heard the appellant make these confessional statements. The evidence that the witness had made earlier statements in which he had said that he had heard the appellant confess was treated at the trial as evidence of the truth of the alleged confession.

2 At common law, evidence of prior inconsistent statements could not have been used in this way. It was held at the appellant's trial, and on appeal to the Court of Criminal Appeal, that s 60 of the *Evidence Act* 1995 (NSW) ("the Act") permitted the tribunal of fact to treat the evidence of the prior statements of the witness as evidence of the truth of the confession reported in those statements.

3 Section 60 provides that:

"The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of the fact intended to be asserted by the representation."

The question in this appeal is whether s 60 permitted an out of court statement that is itself a report of what someone else said, to be used as proof of the truth of what was reportedly said.

The facts

4 Nathan Lee (the appellant) was indicted in the District Court of New South Wales on a charge that on 21 March 1995, when armed with a pistol, he assaulted Patricia Edith Jones with intent to rob her. Mrs Jones was the owner of a video store in Paddington. Two men came into her shop at about 8.15 pm on 21 March 1995. One produced a gun and demanded money. She was later to describe this man as "Asian in appearance" with "a full round face ... black hair ... [and] hooded eyes". (It was common ground that the appellant was of Asian appearance.) Mrs Jones responded to the demand for money by picking up a cast iron tape dispenser and throwing it at the man with the gun and then picking up the stool on which she had been sitting and starting to jab at him across the counter. The man with the gun pointed it at her and made a motion with his hand. Nothing happened. He then made a stronger motion with his hand and the gun discharged. Mrs Jones smelt the gunpowder and was momentarily deafened and blinded by the discharge. Seeing that the man who had fired the gun had picked up the cash

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register, but had fallen on the floor, she again hit him with the stool. The men left empty-handed. Mrs Jones shut and locked the shop door behind them.

5 A short time later, at about 8.25 pm, two police officers saw the appellant and another man in Kings Cross Road. The appellant was found to have a handgun tucked in the front of his jeans and a further search revealed a black holster. He was sweating profusely. The two men were arrested.

6 The appellant told police that two other men "did the holdup and they ran out and gave me the gun". The other man who was arrested, Romeo George Calin, told police that he had seen the appellant in the street and asked him to repay \$80 he owed him. Mr Calin told police that the appellant had said "Don't bother me I have just done job, I fired two shots". Mr Calin was interviewed at the police station and a written statement was prepared for and signed by him. That statement repeated the same story, saying, in part:

"3. On Tuesday 21 March 1995, roughly eight thirty I was just walking up the street, near the Hyatt, where the Oz Rock is in Kings Cross. I saw this bloke who owes me eighty dollars. I only know him from the street, an acquaintance I met a couple of times and a few months ago I lent him the eighty dollars to help him out with rent and that.

4. He is Asian, pretty chubby, dark hair, I don't know his name I just know him from the street. When I saw him, he was walking fast up past the Hyatt, He walked past me and I saw he was sweaty and that. I said to him, 'Where's my eighty dollars, you owe it to me.' He said, 'No leave me alone leave me alone.' I said, 'I'm not fuckin going to leave you alone, til you give me my eighty bucks, Where is it.' He said, 'I haven't got it, leave me alone, cause I'm running because I fired two shots.' I said, 'What do you mean you fired two shots.' He said, 'I did a job and the other guy was with me bailed out.'"

After giving this statement Mr Calin was allowed to go home.

7 In December 1995, Mr Calin told police he was still willing to give evidence about the matter but in March 1996 he told police that he was not willing to do so because he had heard that he was being called a dog.

8 At the trial of the appellant, the prosecution called Mr Calin to give evidence. He gave evidence in chief of speaking to the appellant just after 8 o'clock on 21 March 1995 and asking him when he was going to pay some money that he owed him (Calin). He said that he could not recall any other conversation with the

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appellant. The prosecution then sought leave to cross-examine Mr Calin about what he had said in the written statement to police.

9 Trial counsel for the appellant made a number of submissions in answer to the application but it is not necessary to notice all of these different aspects of the matter in any great detail. She submitted that the written statement of Mr Calin which it was sought to put to him in cross-examination and tender in evidence was a statement that Mr Calin denied making. Trial counsel contended that although Mr Calin had signed the document he was affected by alcohol at the time, he had not read it or understood it and he signed it simply to be able to leave the police station. (After a lengthy voir dire the trial judge ruled not just that there was evidence from which the jury could conclude that Mr Calin had made the statement relied on by the prosecution, but also that he was satisfied beyond reasonable doubt that Mr Calin had done so. It is not immediately apparent why the judge made such a finding. No point now arises about this, however, and we do not pause to examine it further.)

10 Trial counsel submitted that evidence of what Mr Calin had reported the appellant as saying to him was not admissible or, if it was admissible, should be excluded in the exercise of one or more discretionary powers to do so. The trial judge rejected these contentions.

11 The prosecution then cross-examined Mr Calin in front of the jury. Mr Calin admitted signing the document that had been prepared by the police but denied that the statements in it were his. The police officer who prepared the written statement gave evidence of the taking of the statement. Another officer deposed to Mr Calin having made a similar oral statement to him. The written statement that Mr Calin had signed was tendered in evidence.

12 The trial judge instructed the jury that if they accepted that Mr Calin had told police what the accused had said to him ("leave me alone, because I'm running, because I fired two shots ... I did a job, and the other guy was with me bailed out") that was evidence of the fact that the appellant did say those words to Mr Calin. Taken as a whole, however, the charge to the jury would have been understood as an instruction that if the jury were satisfied that the appellant said these words to Mr Calin, they were a confession by the appellant to the crime with which he was charged.

13 The appellant was convicted and sentenced to six years imprisonment with an additional term of two years. He appealed to the Court of Criminal Appeal. Of the grounds of appeal to that Court it is necessary to notice only the contention

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which challenged the use of the evidence of what Mr Calin had told police (in writing and orally) to establish that the appellant had committed the offence.

14 The Court of Criminal Appeal rejected this and the other grounds of the appeal. The members of the Court (Cole JA, Dowd and Sperling JJ) agreed that the trial judge had not erred in permitting cross-examination of Mr Calin on his prior inconsistent statements¹ and in permitting proof of the making of the statements². They concluded that once these statements were admitted "s 60 provided that the hearsay rule did not apply to the statement" of the appellant that was contained in those statements, and they "became evidence of the fact that the [appellant] had made the statement to him which Mr Calin recited to the police"³. Although not said expressly in the Court's reasons, the rejection of the appellant's argument necessarily entailed accepting that the trial judge had rightly directed the jury that the evidence of what Mr Calin had said out of court was evidence that the appellant had committed the offence charged.

15 By special leave, the appellant now appeals to this Court.

16 Several grounds of appeal were canvassed in this Court. Again, it is necessary to deal only with the contention that evidence of what Mr Calin had said out of court reporting the appellant's statement to him did not establish the truth of this alleged confession.

17 The statements made by Mr Calin had several elements. Those elements can be most easily identified from his written statement but a similar analysis could be made of what he told police orally. First, in his written statement, Mr Calin gave an account of what he had done: "I was just walking up the street, near the Hyatt". The statement gave an account of what he saw: "I saw this bloke ... [h]e walked past me and I saw he was sweaty and that." It recorded matters that appear to have been intended to explain events: "I lent him the eighty dollars to help him out with rent and that." It recorded the conversation he had had with the appellant, part of which the prosecution contended amounted to an admission: "... leave me alone,

1 s 43(1) of the Act.

2 s 43(2).

3 *R v Lee*, unreported, New South Wales Court of Criminal Appeal, 5 May 1997 at 10 per Cole JA, with whom Dowd and Sperling JJ agreed on this point.

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cause I'm running because I fired two shots ... I did a job and the other guy was with me bailed out."

The hearsay rule

18 Examination of the relevant provisions of the Act must begin from consideration of the general exclusionary rule created by s 59(1) (which is referred to in the Act as "the hearsay rule"). Section 60 is an exception to the general rule of exclusion created by s 59. The hearsay rule does not apply to certain previous representations. But the exception operates upon the rule and it is to the rule that attention must be directed first.

19 Section 59 of the Act provides:

"59 The hearsay rule - exclusion of hearsay evidence

(1) Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by the representation.

(2) Such a fact is in this Part referred to as an **asserted fact**."

20 A "previous representation" is defined in the Dictionary to the Act as "a representation made otherwise than in the course of giving evidence in the proceeding in which evidence of the representation is sought to be adduced". A "representation" is defined to include, among other things, "an express or implied representation (whether oral or in writing)"⁴, while a representation contained in a document is taken to have been made by a person if the representation "was recognised by the person as his or her representation by signing, initialling or otherwise marking the document"⁵.

21 "Representation" is often used in the law to refer to words that are intended to induce action or inaction by the person who hears or reads them. It may, therefore, seem to be an unusual word to use in this context. But it is clear from the Interim Report of the Law Reform Commission on evidence⁶ that, in the

4 par (a) of the definition of "representation".

5 cl 6(b) of Pt 2 of the Dictionary.

6 Australia, The Law Reform Commission, *Evidence*, Report No 26 Interim, (1985).

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proposals that were later formulated in the Act, the term "representation" was used to apply to statements and to conduct and was used to encompass all that those statements or that conduct would convey to the observer. It is also clear that the proposal was intended to resolve

"the issue of whether the proposed rules should apply to implied assertions as well as express assertions, by recommending that a distinction be drawn between intended and unintended implied assertions, with the latter outside any hearsay rule"⁷.

In its Interim Report, the Commission went on to state why it excluded unintended implied assertions from the operation of a hearsay rule and its exceptions. Chief among those reasons was the conclusion that it is unlikely that the person making some implied assertion would deliberately attempt to mislead if the implied assertion was not intended⁸.

22 Section 59 must be understood in this light. The rule's operation requires consideration first of why it is sought to lead evidence of something said or done out of court (a previous representation). What is it that that "previous representation" is led to prove? In particular, is it sought to lead it to prove the existence of a fact that the person who made the representation intended to assert by it? The fact that the statement or the conduct concerned might unintentionally convey some assertion is not to the point. The inquiry is about what the person who made the representation intended to assert by it.

23 The previous representations made by Mr Calin that it was sought to adduce in evidence could be seen as being of two kinds: statements of what he had done or seen, and statements of what he had said or heard. Again it is convenient to treat the matter by reference to the written statement signed by Mr Calin. There can be little doubt that Mr Calin intended to assert that he had done the things recorded in the statement, that he had seen the things that were recorded in it and that he had said and heard the words set out in it. But there is no basis for concluding that Mr Calin intended to assert as a fact that the appellant had "fired two shots", had just done "a job" or that the "other guy" had "bailed out". Mr Calin had no way of knowing these facts. All Mr Calin intended to assert was that the

7 Australia, The Law Reform Commission, *Evidence*, Report No 26 Interim, (1985), vol 1 at par 684 (footnote omitted).

8 Australia, The Law Reform Commission, *Evidence*, Report No 26 Interim, (1985), vol 1 at par 684.

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appellant had told him these things and (perhaps, on one view of the matter) that Mr Calin believed (or at least did not disbelieve) what he had been told.

24 Mr Calin's belief (or lack of disbelief) in what he was told was of no relevance to the issues that arose at the trial. Accepting that Mr Calin believed what the appellant had told him would not, directly or indirectly, rationally affect the assessment of the probability of the existence of the facts in issue in the proceeding⁹. Knowing that Mr Calin had said out of court that the appellant had confessed to the crime was relevant only to the question whether he, Mr Calin, should be believed. No doubt, an assertion *by the appellant* that he had fired two shots, had done "a job" and that the "other guy" had "bailed out" would be relevant to the issues at the trial. But *Mr Calin's statement* contained no such assertion; it contained only an assertion that the appellant had said these things.

25 Even if the trial judge was right to conclude, as he did, that Mr Calin could be cross-examined about his prior inconsistent statements and was right to conclude that evidence could be given of those prior statements, it was necessary to identify how those prior statements might properly be used by the jury. There are several steps in that process of identification. They can be described in these terms.

26 Evidence that Mr Calin had seen what was recorded in his statements was relevant to the issues in the case. Mr Calin's representation out of court that he had seen these things was hearsay. Because his representation out of court (that he had seen these things) was relevant for the purpose of showing that he had made a prior statement that was inconsistent with his evidence in court, the hearsay rule did not apply and the representation was admissible to prove the existence of the fact that Mr Calin intended to assert by his earlier representation.

27 By contrast, Mr Calin did not, in his out of court statements, intend to assert any fact about his conversation with the appellant other than that he had said certain words and that he had heard the appellant say the words he attributed to him.

28 The nature of what Mr Calin said in his statements to the police was such that evidence of those statements was evidence both of representations made *by* Mr Calin to the police (about what Mr Calin had seen and heard) and of representations made *to* Mr Calin by the appellant (about what the appellant had done). By virtue of s 59, the evidence was not admissible to prove the existence

9 s 55(1).

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either of the facts which Mr Calin intended to assert to the police or of the facts which the appellant intended to assert to Mr Calin. Section 60 operated only upon the former representations; it had nothing to say to the representations made by the appellant to Mr Calin. It was only the representations made by Mr Calin to the police that were relevant for a purpose referred to in s 60: the purpose being to prove that Mr Calin had made a prior inconsistent statement and that his credibility was thus affected. The hearsay rule was rendered inapplicable to Mr Calin's representations, but not to the representations allegedly made by the appellant. And, of course, the representations allegedly made by the appellant were not admissible under the confession exceptions to the hearsay rule created by s 81 because the evidence of these confessional statements was not first hand¹⁰.

29 To put the matter another way, s 60 does not convert evidence of what was said, out of court, into evidence of some fact that the person speaking out of court did not intend to assert. And yet that is what was done here. Evidence by a police officer that Mr Calin had said, out of court, that the appellant had *said* that he had done a job was treated as evidence that the appellant *in fact* had done a job - a fact which Mr Calin had never intended to assert. (Of course, it would be different if Mr Calin had said in evidence in court that the appellant had said he had done a job. Then the representation made out of court would be the appellant's, not Mr Calin's.)

30 It follows that evidence that Mr Calin had earlier reported that the appellant had confessed was not evidence of the truth of that confession. It should not have been received at the trial of the appellant, as it was, as evidence establishing that the appellant had committed the offence.

31 The conclusion that the evidence of the reported confession by the appellant was inadmissible as evidence of the truth of the alleged confession is consistent with basic principle and with the scheme of the Act as a whole; it is not to be seen as some retreat to outdated and outworn technical distinctions.

32 The common law of evidence has long focused upon the quality of the evidence that is given at trial and has required that the evidence that is given at trial is given orally, not least so that it might be subject to cross-examination. That is why the exclusionary rules of the common law have been concerned with the quality of the evidence tendered - by prohibiting hearsay, by permitting the giving of opinions about matters requiring expertise by experts only, by the "best evidence rule" and so on. And the concern of the common law is not limited to the quality

of evidence, it is a concern about the manner of trial. One very important reason why the common law set its face against hearsay evidence was because otherwise the party against whom the evidence was led could not cross-examine the maker of the statement. Confrontation and the opportunity for cross-examination is of central significance to the common law adversarial system of trial¹¹.

33 Over the years various inroads have been made on the rule that evidence at trial is essentially oral evidence of first-hand observation. Business record provisions of evidence legislation provide an obvious example.

34 It is not surprising, then, that Divs 2 and 3 of Pt 3.2 of the Act provide certain exceptions to the hearsay rule. But the exceptions are of a limited kind. First, Div 2, which concerns the tender of certain hearsay statements at both civil¹² and criminal trials¹³ is confined to "first-hand" hearsay: previous representations made by persons who had personal knowledge of the asserted facts¹⁴. Division 3 makes other exceptions but they relate to business and like records.

35 The provisions for these exceptions are to be understood in light of the view expressed by the Law Reform Commission that "secondhand hearsay is generally so unreliable that it should be inadmissible except where some guarantees of reliability can be shown together with a need for its admissibility"¹⁵. As the Commission went on to point out, where A gives evidence of what B said that C had said, the honesty and accuracy of recollection of B is a necessary link in the chain upon which the probative value of C's statement depends¹⁶. Estimating the weight to be attached to what C said depends on assessing B's evidence about it.

11 Smith and Holdenson, "Comparative Evidence - The Uniform Evidence Acts and the Common Law", (1998) 72 *Australian Law Journal* 363 at 364.

12 ss 63, 64.

13 ss 65, 66.

14 s 62.

15 Australia, The Law Reform Commission, *Evidence*, Report No 26 Interim, (1985), vol 1 at par 678.

16 Australia, The Law Reform Commission, *Evidence*, Report No 26 Interim, (1985), vol 1 at par 678. See also Great Britain, Law Reform Committee 13th Report, *Hearsay Evidence in Civil Proceedings*, (1966) Cmnd 2964 at par 15.

36 Admissions are dealt with separately by Pt 3.4 of the Act. Section 81 provides that the hearsay rule (and the opinion rule) do not apply to evidence of an admission. Section 82, however, excludes evidence of admissions that is not first-hand. It provides:

"Section 81 does not prevent the application of the hearsay rule to evidence of an admission unless:

- (a) it is given orally by a person who saw, heard or otherwise perceived the admission being made, or
- (b) it is a document in which the admission is made."

37 Section 9 of the Act says that the common law in relation to evidence in a proceeding is to operate "except so far as this Act provides otherwise expressly or by necessary intendment". To hold, as was held by the trial judge and by the Court of Criminal Appeal, that the statements made by Mr Calin out of court could be admitted as evidence that the appellant had committed the crime with which he was charged because, in the evidence he gave in court, Mr Calin had denied making statements that the appellant had confessed, leads to a result that not only is sharply at odds with the other provisions of the Act to which we have referred but is at odds with the common law in relation to evidence in a proceeding. It is at odds with the common law because it shifts the focus of the process of proof away from what witnesses say in court that they have seen or observed to what a witness reports that another person earlier said had been heard. And the contention was that the evidence of the reports might be led in evidence, not because the person who was alleged to have heard the words was called to give evidence, but because that person denied that they had been said. The curiosity of the result can then be seen in stark relief.

38 Nothing in the reports of the Law Reform Commission that preceded the passing of the Act suggests that it was intended by s 60 to provide for the tendering in evidence of reports of the kind contained in Mr Calin's out of court statements.

39 At common law, a previous inconsistent statement put to a witness was evidence only of the fact that the witness had made an inconsistent statement; it was not evidence of the truth of the contents of that earlier statement¹⁷. It was evidence that went only to credit. The Law Reform Commission was very critical

17 *Taylor v The King* (1918) 25 CLR 573.

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of this rule which, it said, imposed a "schizophrenic task" on the tribunal¹⁸ and its recommendations for change of the law must be understood in the light of its trenchant criticism of this aspect of the common law. Similarly, its recommendations must be understood in the light of its criticism of the result that follows from the application of the common law rule against hearsay to the evidence of experts. At common law, an expert (such as a medical practitioner) may give evidence about the factual basis for the opinion expressed (such as the history given by the patient) only as evidence showing the foundation for that opinion, not as evidence of the truth of the facts recounted¹⁹.

40 It is then clear that s 60 was intended to work a considerable change to the common law. But there is no basis, whether in the considerations which we have mentioned as having influenced the Commission or otherwise, for concluding that s 60 was intended to provide a gateway for the proof of any form of hearsay, however remote. As has been indicated earlier in these reasons, that that was not intended is made plain by the terms of s 59 to which s 60 is an exception.

41 Evidence of Mr Calin's prior statements of what the appellant had said should not have been admitted as evidence of the truth of the confession allegedly made by him to Mr Calin. Because those prior statements of what the appellant had said went only to Mr Calin's credit, the trial judge could either have rejected those parts of the statements²⁰ or, if that course was not followed, would have had to give clear directions to the jury about the very limited use to which they could be put. In the circumstances of this case, the former course was to be preferred.

The proviso

42 The respondent submitted that, even if the evidence of Mr Calin's report of the appellant's confession was wrongly admitted, the appeal should nevertheless be dismissed on the ground that the evidence against the appellant was so strong that the proviso to s 6 of the *Criminal Appeal Act* 1912 (NSW) should be applied.

18 Australia, The Law Reform Commission, *Evidence*, Report No 26 Interim, (1985), vol 1 at par 334.

19 See, for example, *Ramsay v Watson* (1961) 108 CLR 642 at 647-649 per Dixon CJ, McTiernan, Kitto, Taylor and Windeyer JJ.

20 s 137.

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43 The case against the appellant was strong. He was apprehended within a short time of the offence carrying a firearm that was almost certainly the weapon that had been used. His description accorded with the description the victim had given of one of her attackers. His photograph had been picked from a group of photographs shown to the victim and his photograph had also been picked by a man who had observed two men leaving the shop at the time of the offence. The appellant's explanation for having the firearm when arrested was an explanation that a jury might view with great scepticism.

44 It is, however, not possible to say in a case such as this, which depended to a significant extent upon evidence of identification, that the wrongful reception of evidence of an apparent confession did not deprive the appellant of "a real chance of acquittal"²¹ or "a chance which was fairly open to him of being acquitted"²². That being so, this is not a case for application of the proviso.

45 The appeal should be allowed, the order of the Court of Criminal Appeal dismissing the appeal to that Court against conviction should be set aside and in lieu it be ordered that the appeal be allowed, the conviction quashed and a new trial be had.

21 *R v Storey* (1978) 140 CLR 364 at 376 per Barwick CJ.

22 *Mraz v The Queen* (1955) 93 CLR 493 at 514 per Fullagar J.