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Two English hearsay heresies

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<Article title> **Two English hearsay heresies***

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Abstract. Using comparative material from other common-law jurisdictions and Scotland, it is argued that two leading decisions of the House of Lords on the scope of the hearsay rule are erroneous. In *R v Kearley*, the House held that telephone requests by unknown persons for drugs made to the accused were inadmissible hearsay. In *Blastland*, on an appeal against a murder conviction, the House held that statements by a third person indicating that he knew of the victim's death before it became public knowledge were inadmissible. It is noted that the reform of hearsay in the Criminal Justice Act 2003 may have an impact on both rules, but it is submitted that this should not obscure the fundamental errors underpinning these decisions revealed by recourse to better reasoned decisions from other jurisdictions.

<Dropped display cap as per style> Recently, in *R v O'Connell*¹ the English Court of Appeal found itself obliged to allow an appeal against a conviction for possessing heroin with intent to supply because the hearsay rule had, it was said, been infringed. The two callers asked the accused, who they thought had answered the telephone, 'Can you sort me out two?' and 'Can you sort me out one?'. Following *R v Kearley*,² the court was constrained to hold that those statements by the callers, which could easily be interpreted as requests for drugs, were inadmissible as hearsay. This article shows that the view that the callers' statements were hearsay is mistaken,³ and that *Kearley* is opposed by the view taken in all major common-law jurisdictions outside England. Although the decision on the precise facts of *Kearley* may be reversed as a result of the implementation of the

* The author wishes to thank Mr Bruce Greenhalgh of the Library of the Supreme Court of South Australia for his assistance in the research for this article, and Roger Leng for his valuable suggestions on a draft.

¹ [2003] EWCA Crim 502. The accused's reactions at the time of the receipt of the calls were, however, admissible: the accused attempted to inform the callers, by shouting towards the telephone, that they were talking to the police rather than him.

² [1992] 2 AC 228.

³ For an earlier attempt to debunk *Kearley* on historical/precedential lines, see S. H. C. Wong, 'The Common Law on Implied Assertions Re-Considered: *Wright v Tatham* in the House of Lords' (2003) 7 E & P 270.

Criminal Justice Act 2003, its impact may still be felt in other circumstances and other jurisdictions, and it is therefore submitted that the decision should be overruled at the first available opportunity. The second part of the article is concerned with demonstrating that the infamous case of *R v Blastland*⁴ is not only wrong, but also inconsistent with Commonwealth case law.

< A heading > Heresy one—the rule in *Kearley*

The problem presented by cases such as *O'Connell* and *Kearley* is simple to state, but much harder to resolve to the satisfaction of all. Is a statement which appears to be made by a potential customer of an accused drug dealer asking for the supply of drugs admissible to show that the accused was in fact supplying drugs? In *Kearley*, the House of Lords held by the narrow margin of three to two that the requests for drugs were inadmissible as hearsay. This was so whether the evidence was of one request or of many. While the reasoning of their Lordships in the majority was not uniform,⁵ it is reasonably accurate to say that the majority took the view that the evidential significance of a request for drugs was that it implied a belief by the speaker that drugs were available from the person to whom the request was made. That belief was in itself inadmissible because irrelevant, and to the extent that it asserted that drugs were in fact available from the person concerned, mere hearsay. It is that latter portion of the reasoning which this article attacks. It will be argued that the evidence of telephone requests is admissible as circumstantial evidence tending to demonstrate the relevant fact that drugs are in fact available for purchase from a person charged with possession of them as a dealer.

Hearsay is, as is well known, a statement made out of court which is admitted to prove the matter asserted in it. For present purposes, it is not proposed to enter the debate whether implied statements should be treated in the same way as express ones,⁶ as was the law in England when *Kearley* and *O'Connell* were decided. This following discussion will not be concerned with the question whether it is desirable and intellectually defensible to treat implied assertions differently from express ones, and whether it is part of the proper judicial role to 'review ... and adapt ... the rules of evidence to

⁴ [1986] AC 41.

⁵ M. Hirst, 'Conduct, Relevance and the Hearsay Rule' (1993) 13 *Legal Studies* 54, 62 contains a handy overview of the differences.

⁶ As, e.g., their Lordships did in *Kearley* [1992] 2 AC 228, 255. A different view was taken by Mason CJ in *Walton v R* (1989) 166 CLR 283, 292ff.; *Pollitt v R* (1992) 174 CLR 558, 566.

serve present society'.⁷ In England, Wales and Northern Ireland this debate is now affected by s. 115(3) of the Criminal Justice Act 2003 (expected implementation 4 April 2005).⁸ However, the thrust of the current argument will not turn upon the question whether or not an assertion of drug dealing or ownership was express or implied, but rather on the question of whether a request to buy drugs is itself circumstantial evidence of the intentions of a person in possession of drugs to whom such a request is addressed.

Before moving on to that issue, it would be useful to be clear about what a request made to a putative drug dealer cannot prove. In *Kearley*-like circumstances, a question along the lines of 'Can I get drugs from you?' could not possibly be admitted for the truth of any implied assertion that drugs are available from the person to whom it was intended to be addressed ('the addressee'), or that the addressee is an operating drug dealer. In *Kearley* it was argued for the successful appellant that 'the rule against hearsay precluded the jury from concluding that the beliefs of the callers (that the [addressee] would supply them with drugs) were in fact true'.⁹ But this could not possibly be the chain of reasoning on which the Crown seeks to rely by introducing the evidence. This is for the simple reason that the beliefs of the callers are not true at all, but completely false: the addressee has, by the time the calls are made, ceased to deal in drugs, because he has been arrested and his telephone confiscated by the police.

The utterance could not therefore be tendered to prove the truth of any assertion implied in it that the addressee was, at the time, prepared to supply, or in possession of, drugs. It must therefore be admitted for some other purpose, and the task is to determine what that is. (After all, everyone can see that evidence of a significant number of unsolicited requests for drugs is pretty damning, so we need to explain our intuition that it is by teasing out our thought processes.) If the evidence is to be admissible, the purpose for which it is tendered must be both relevant and one which involves a non-hearsay chain of reasoning. The case law from Commonwealth¹⁰ and American¹¹ jurisdictions

⁷ *R v Kearley* [1992] 2 AC 228 at 237.

⁸ See R. Taylor, M. Wasik and R. Leng, *Blackstone's Guide to the Criminal Justice Act 2003* (Oxford University Press: Oxford, 2004) 145.

⁹ [1992] 2 AC 228, 237.

¹⁰ Some of which, at least, continue to apply the hearsay rule in drug-dealing cases in its full rigour, as is shown by the recent case of *R v Nguyen* [1999] 1 VR 457, 463.

¹¹ A comprehensive collection of American cases may be found in H. D. Warren, 'Admissibility of Evidence of Fact of Making or Receiving Telephone Calls' (2004) 13 ALR (2nd) 1409. See also J. H. Wigmore,

suggests a large number of candidates, not all of which were considered by the House of Lords in *Kearley*.

As far as Commonwealth authorities are concerned, only one final appellate court has, as far as the author is aware, dealt with this issue. The issue reached the Supreme Court of Canada in *Ly v R*.¹² The facts of this case were in one respect different from the usual run of cases of this type, given that in the conversation with the unknown person on the other end of the line, a time and place for a meeting was set up, at which the accused appeared; it was not a case in which the accused's mobile phone rang while he was in custody. Nevertheless, Sopinka, Gonthier, Cory, McLachlin¹³ and Iacobucci JJ stated, in words which have since been held in Canada to amount to a refusal to follow *Kearley*:¹⁴

< Beginning of quote >

The telephone conversation was admissible. It was a statement of intention, or a statement tendered to establish the alleged drug transaction, and hence not tendered for the truth of its contents. Accordingly, it was not hearsay. The telephone conversation is merely one of the circumstances which, combined with others, may suffice to establish that the appellant, when he appeared at the designated time and place, in possession of the drugs, did so for the purpose of trafficking. Any frailties in relation to the connection between the appellant and the telephone conversation go to weight and not admissibility.¹⁵

<End of quote>

Their Lordships and her Ladyship have hit the nail on the head: evidence of what is said in telephone calls of this nature is circumstantial evidence of the purpose for which the drugs were possessed. Exactly the same reasoning is available in cases in which the accused's telephone rings after it has been seized by the police, and people ask for drugs. To the extent that the court justifies the evidence as a 'statement of intention', the reasoning can easily be adapted to circumstances in which an unknown person rings the accused: it is evidence of the intention with which the accused possessed the drugs. But first let us consider some alternative candidates for the true solution to this problem.

Evidence in Trials at Common Law, 3rd edn (Little, Brown: Boston, J. H. Chadbourne rev. 1976) Vol. 6, 325.

¹² [1997] 3 SCR 698.

¹³ Now Chief Justice of Canada.

¹⁴ *R v Nguyen* (2003) 180 CCC (3rd) 347, 350ff.

¹⁵ [1997] 3 SCR 698, 699.

Their Lordships in the majority in *Kearley* rightly pointed out that, if telephone calls to the accused are introduced to show that the speaker believed that the accused was a drug dealer, that evidence is simply irrelevant.¹⁶ This can be easily tested by asking whether it would be permissible to ask the unknown callers (should it prove possible to find them) in court whether they believed that the accused was a drug dealer. The objection to this is that the putative witnesses could give evidence only of the transactions they themselves had had with the accused, not of some overall belief formed by them about the accused. Accordingly, the evidence cannot be accepted on this basis.

It has also been said in some Commonwealth authorities that the evidence of the utterances is part of the *res gestae* and thus admissible.¹⁷ The difficulty with this, at least in the drug-dealing cases, is threefold: first, the telephone calls are not part of the *res*. As a rule—the variant facts in *Ly* constituting an obvious exception—the accused is not in the act of dealing in drugs when arrested (otherwise it would hardly be necessary to attempt to tender the utterances) and cannot do so after the arrest. The accused is charged with possessing drugs for sale; the *res* are therefore possession with a certain intention, not the receipt of telephone calls from would-be buyers after the termination of the possession by the seizure of the drugs. Secondly, the speaker is not the accused and accordingly the value of the statement as a spontaneous statement explaining the accused's actions is limited at best.¹⁸ And thirdly, in many cases the only evidence that the *res* were in fact possessing drugs *for sale* will be the evidence of the telephone calls which it is sought to lead to show what the *res* were. *Res gestae* cannot, however, pull themselves up by their bootstraps like that. '[T]o admit the statement as part of the *res gestae* when one of the purposes of its tender was to establish the *res gestae*'—here, that the drugs were possessed for the purposes of dealing—'is to reason in a circle'.¹⁹

It is also not the case that the evidence can be received as a statement having independent legal relevance along the lines of a defamatory statement, an offer and acceptance in contract law or indeed the offer of sexual services in *Woodhouse v Hall*;²⁰ in other words, it is not evidence of a

¹⁶ [1992] 2 AC 228 at 254, 263ff.

¹⁷ *Davidson v Quirke* [1923] NZLR 552, 556; *Lenthall v Mitchell* [1933] SASR 231, 242; *Marsson v O'Sullivan* [1951] SASR 244, 248; Hirst, above n. 5 at 66.

¹⁸ J. Heydon, *Cross on Evidence*, 7th Australian edn (Butterworths: Chatswood, 2004) 1269.

¹⁹ *R v Benz* (1989) 168 CLR 110, 145.

²⁰ (1980) 72 Cr App R 39.

verbal act.²¹ It would clearly be otherwise if it were the caller being prosecuted for attempting to obtain drugs.²² But the situation is different when it is the person telephoned who is being prosecuted for dealing: the act of ringing up no more makes the call a verbal act than the act of speaking face-to-face is made one because you have to open your mouth to do it. It is not an offence to be rung up and receive a request for drugs; it is only an offence if one possesses drugs for the purpose of supply. Therefore, the evidence is not evidence of an act with legal effect or a verbal act.

Three American cases decided in 1990,²³ and apparently Lord Griffiths as well,²⁴ suggest that the evidence of calls is admissible because it is not assertive: ‘can I have drugs?’ is not in terms an assertion at all. However—at least in jurisdictions in which the United States *Federal Rules of Evidence* do not apply²⁵—this too is clearly wrong, for the assertion, or one of the assertions, implied in such a request is that drugs are available from the addressee. (In lectures, to illustrate the concept of implied assertions, I often ask students how they would react if I said to them in the lecture theatre, ‘please pass the salt’. After overcoming their feeling that I must be slightly loopy, they respond that they would say that there is no salt to pass, thus illustrating that a request for something asserts that it is available for supply.)²⁶ Professor Fenner, in an amusing and insightful

²¹ As was suggested in *McGregor v Stokes* [1952] VLR 347, 350; *Gorman v Newton, ex p. Newton* [1958] Qd R 169, 178.

²² C. Tapper, ‘Hearsay and Implied Assertions’ (1992) 108–109 LQR 524, 525ff.

²³ *United States v Oguns*, 921 F (2nd) 442, 449 (1990); *United States v Lewis*, 902 F (2nd) 1176, 1179 (1990); *United States v Long*, 905 F (2nd) 1572, 1579f (1990), 498 US 948 (1990). In *Headley v Tilghman*, 53 F (3rd) 472, 477 (1995), the court stated that the speaker was making an ‘assumption’ rather than an (express) assertion. See also *State v Collins*, 76 Wn App 502 (1995); *Stoddard v State*, 850 A (2nd) 406 (2004) (under appeal at the time of writing: 383 Md 211; 857 A (2nd) 1129 (2004)).

²⁴ *R v Kearley* [1992] 2 AC 228 at 238ff.

²⁵ Rule 801 of the *Federal Rules of Evidence* was taken, in the cases just cited, to exclude implied assertions from the ambit of the hearsay rule. An extended extract from a judgment discussing this is found in *R v Kearley* [1992] 2 AC 228, 248ff. For criticism, see, e.g., M. H. Graham, *Handbook of Federal Evidence*, 5th edn (West: St Paul 2001–2005), § 801.6; J. Ulam, ‘The Hearsay Rule: Are Telephone Calls Intercepted by Police Admissible to Prove the Truth of Matters Impliedly Asserted?’ (1991) 11 Miss CL Rev 349.

²⁶ The belief in the existence and availability of a tangible and illegal object, the drugs, which these words imply may enable those taking a view similar to that of Mr (now Professor) Guest of the betting-shop cases (in ‘The Scope of the Hearsay Rule’ (1985) 101 LQR 385, 394) to distinguish the two situations. However, this point is not pursued here.

article, comments, ‘Why isn’t this hearsay? Am I missing something? I think not. ... [N]o matter how you cut it, the question ‘Does Keith have any stuff?’ ... [a]sserts that he did have some stuff.’²⁷

Clearly it does. But that does not conclude the discussion. Professor Fenner has missed something. So did the majority in *Kearley* by concentrating on whether an assertion was implied in the customers’ calls. It clearly is, but it is not enough to show that a statement could be used to prove something asserted expressly or impliedly in it (and would thus be hearsay if admitted for that purpose) if it can also be used to prove something else in a different, non-hearsay way.²⁸ It is well known that assertions can be admitted to prove something non-testimonially. As long as we are not admitting the evidence to prove that Keith had some stuff, but for some other purpose, we are able to do so. In fact, in the general run of cases, we do not need to admit the statement to prove that Keith had some stuff, as the stuff will have been found on or about his person, in his house or car, etc. In fact, it is hard to imagine a prosecution for possessing drugs for sale or any other purpose if no drugs were actually found.

At this point, then, it is necessary to ask what precisely the prosecution is trying to prove. The accused is charged with possessing drugs of some sort with intent to supply them. Does the accused—as so often—admit to possessing the drugs, but contest the allegation of an intent to supply? Or does he deny that the drugs were his, so that the conversations are relied on by the Crown to show that the accused was the person in possession of the drugs as distinct from, say, a housemate or partner?

If the evidence is offered to prove the identity of the dealer, it is likely to be inadmissible for that purpose. Take a case in which a raid occurs on a house in which a number of people live.²⁹ The police want proof that Fred possessed the drugs, not someone else in the house. The telephone used by all members of the household rings, and someone asks for ‘Fred’ and proceeds to order drugs. If this is the only evidence that the drugs were Fred’s, is the telephone call admissible to show that the

²⁷ M. Fenner, ‘Law Professor Reveals Shocking Truth about Hearsay’ (1993) 62 U Missouri at Kansas City LR 1, 76ff. See also M. Weinberg, ‘Implied Assertions and the Scope of the Hearsay Rule’ (1973) 9 MULR 268 at 274–7.

²⁸ cf. *R v Kearley* [1992] 2 AC 228 at 280, where Lord Browne-Wilkinson sees this point.

²⁹ Or in which a number of phones are found and the accused cannot be definitely be linked with the one that rings with what appears to be an order for drugs: *R v M.* (2003) 186 Man R (2nd) 95.

drugs in the house were Fred's?³⁰ It is not: the use to which the Crown seeks to put this evidence is that Fred is a dealer (and not, say, Jill, who is also present in the house). This involves relying on the truth of the assertion implied in the request that *Fred* is the person to turn to for drugs, *quod erat demonstrandum*. To prove the assertion that Fred (not Jill) was the possessor of the drugs, therefore, the Crown would have to rely on an out-of-court statement introduced to prove the truth of an assertion implied in it. To this extent, the House of Lords was right in *Kearley*³¹ to regard evidence designed to prove the identity of the dealer in drugs as hearsay.

That is not the usual case, however. Their Lordships in *Kearley* failed to make a crucial distinction. In the usual case (such as the more recent case of *O'Connell*),³² some evidence other than the telephone calls links the accused with the drugs—they are found in his room, in his car, on his person, etc. There is then no need to prove that the accused possessed the drugs using the fact that someone rang him up and asked for drugs. The Crown's task is, rather, to prove that the accused possessed the drugs not for personal use, but with a specific intent, namely the intent to supply them to others. Is the assertion that Fred is the person to turn to for drugs inadmissible as hearsay in those circumstances? As numerous Commonwealth and American authorities show, it is not, because it is circumstantial evidence from which the accused's intent in the act of possession can be inferred.³³ Just as we might infer a person's intention to kill by relying on a statement such as 'I hate you, you have caused me untold suffering' in a non-testimonial way, we can infer a person's intention to sell from assertive statements (and the fact that it is not the accused making them makes no difference to this analysis).

Let us remind ourselves that the presence of an assertion in an utterance does not necessarily make the utterance inadmissible. There is an analogy here with cases in which the accused is charged with running an illegal betting-shop. In *R v Fialkow*³⁴—a case which is followed up to the present day in

³⁰ cf. *R v Harry* (1986) 86 Cr App R 105, 110, although of course there the defence wished to call the evidence. It is extraordinarily hard that the hearsay rule should prevent it from doing so (T. Allan, 'Implied Assertions as Hearsay' (1992) 142 NLJ 1194, 1204; Hirst, above n. 5 at 61, 68). Problems about a possible illegitimate use of the evidence against the co-accused in that case might have been solved by ordering separate trials.

³¹ For the details of the facts in that case, see [1992] 2 AC 228, 252ff.

³² [2003] EWCA Crim 502.

³³ See also Hirst, above n. 5 at 65.

³⁴ [1963] 2 CCC 42.

Canada³⁵—evidence was admitted that the equipment found on the site included a ‘newspaper opened at the racing section’.³⁶ That newspaper was no doubt full of assertions about the races that day. Given that hearsay can, of course, be written as well as oral,³⁷ is the newspaper inadmissible as well? After all, it contains plenty of assertions—express ones, too—about which horse is running in what race and so on. What of a betting slip which might be discovered on the premises and which states that Fred Nerk has invested £5 on a particular horse?³⁸ In neither case should the presence of express assertions prevent the admission of relevant evidence because in neither case would the Crown have any interest in proving that which was asserted.

There are in fact several such cases in which express assertions were tendered. In *R v Erdlyn*,³⁹ evidence was admitted of a list of bets carried by a person who walked into an establishment which had just been raided. Also admitted was the fact that the telephone rang 30 times, even though callers hung up when the police officer answered and so no statements were made. It was held in this case that notwithstanding that there was no direct evidence of betting at the premises, the cumulative effect of the circumstantial evidence was such as to establish guilt beyond doubt. In *Mathewson v Police*⁴⁰ there was a list on which was written names and figures, and another list showing which horses had won so far on the day in question, but no one suggested that they were inadmissible although they too clearly contained assertions of fact connected with the bookmaking operation. That is because lists such as these are not tendered in isolation, or to prove the truth of what is stated on them: they—like the telephone calls where the caller hangs up—are tendered because they contribute to the weight of circumstantial evidence which makes it unlikely that the accused was not running a business.

It is necessary to be quite clear here about (a) what is to be proved, and (b) the manner of its proof, bearing in mind that (a) whatever it is that is to be proved (b) cannot be proved by hearsay (a forbidden manner of proof). Let us therefore first ask ourselves: what is to be proved by this evidence? A number of answers could be given, such as ‘the truth of the assertions (express or

³⁵ *R v Edwards* (1994) 91 CCC (3rd) 123, 138; see also *R v Edwards* [1996] 1 SCR 128, 144.

³⁶ [1963] 2 CCC 42, 44. See also *State v DeNegriz*, 153 Conn 5, 10 (1965).

³⁷ *Myers v DPP* [1965] AC 1001.

³⁸ Or take the example of letters from potential customers found on the premises: *Marshall v Watt* [1953] Tas SR 1, 17; *R v Firman* (1989) 52 SASR 391, 396, quoting *Archbold*, 43rd edn, 1086.

³⁹ (1956) 117 CCC 207.

⁴⁰ [1969] NZLR 218.

implied) that the callers had received drugs from the accused in the past’, or ‘that the callers believed that the accused was a drug dealer’. In both cases the evidence should not be admitted: in the first case because it would relate merely to propensity, and in the second case because it would relate to an irrelevant opinion. But the evidence may also be tendered to prove the intent of the accused in possessing the drugs, a relevant issue because an element of the offence. In drug-dealing cases, the fact that the accused receives telephone calls asking for drugs is admitted as circumstantial real evidence of intention—just as lists of telephone numbers and amounts of money owed by various people (containing express assertions) are also routinely admitted in such cases, or exclamations containing assertions in murder cases.

But, of course, such evidence could not be given by hearsay, so that a conversation narrating a past transaction (in some non-incriminating context) clearly could not be admitted. But the assertions of customers are relevant to the intent of the accused not because they narrate past events (and some may not); nor are they relevant for what they assert (recall the racing guides and betting slips). Rather, they are also relevant because they are circumstantial evidence from which the intent of the accused in possessing the drugs can be inferred. The evidence is no different in this respect from evidence that police officers, observing the accused from a distance, saw him hand over packages to people in return for money, but were unable to hear any words that were spoken, or from the racing guides and betting slips. The proposition on which the Crown seeks to rely in tendering the telephone calls is not that particular statements were made, but rather ‘that customers seeking drugs existed’. The fact that they sought drugs using language (there are, after all, few available alternatives) does not detract from the probative value and non-hearsay nature of the evidence that customers kept turning up. In fact, in most cases it will not be necessary, in order to show the accused’s intention, to prove the precise words of the callers at all, merely that they existed, how many of them there were and the general nature of the requests they made.

The Court of Justiciary got this right as long ago as 1913, in its judgment in the brothel-keeping case of *M’Laren v Macleod*⁴¹ (which was unfortunately not cited to their Lordships in *Kearley*). Lord Dunedin, ‘the greatest Scottish Judge of the century, with a fine grasp of principle’,⁴² said:

< Beginning of quote >

If the matter depended upon the truth of what was said in the conversations, that, I think, would be a good objection; but I take it that those conversations became relevant not in respect of their truth, but of their

⁴¹ 1913 SC (J) 61.

⁴² D. M. Walker, *The Oxford Companion to Law* (Clarendon: Oxford, 1980) 534.

character. I think they really came into the same category as any noises or exclamations which were heard, and which might have been testified to by those who were watching.⁴³

< **End of quote** >

Lord Kinnear added:

< **Beginning of quote** >

... [T]he evidence of a man who depones that he heard a certain thing said is just as direct and as little to be confounded with hearsay as the evidence of one who depones that he saw a certain thing happen.⁴⁴

< **End of quote** >

In this respect, evidence of numbers of telephone calls and of their nature is also similar to evidence that a lot of people, some of whom might be drug addicts known to the police, were seen entering and shortly afterwards leaving particular premises,⁴⁵ or that there is an unusual number of telephones⁴⁶ or other equipment associated with drug dealers in the accused's dwelling, or that the accused has contacted suppliers with great frequency.⁴⁷ From such facts we can infer the state of mind of the accused, which is after all what is in question—whether he intended to supply drugs or not. The evidence is offered up as a package to prove ‘the character of the place or ... of the business being carried on there’⁴⁸ (Canada), ‘the fact that an inquiry or offer relating to the sale of drugs was made’⁴⁹ (Australia), ‘not to prove that the statements made in them were true, but as evidence of [illegal] activity’⁵⁰ (United States).

Every first-year law student learns that, short of an admission, intent can be proved only by circumstantial evidence, by the surrounding facts. Here, just as in *Subramaniam v R*,⁵¹ evidence of assertions can be received because of the conclusion it enables us to draw about the state of mind of

⁴³ 1913 SC (J) 61, 67.

⁴⁴ *Ibid.* at 68.

⁴⁵ *R v Babiak* (1974) 21 CCC (2nd) 464; *R v Warner* (1993) 96 Cr App R 324, 329ff.; *R v MacIver* (1996) 153 NSR (2nd) 398; similar *R v Rothwell* (1994) 99 Cr App R 388, 394ff.; cf. Hirst, above n. 5 at 65 (foreign spies entering house of suspected traitor).

⁴⁶ *R v Wilkie* (1950) 97 CCC 381.

⁴⁷ *State v Lombardo*, 163 Conn 241, 242ff. (1972).

⁴⁸ *R v Silvestro* [1964] 2 CCC 116, 121. A further appeal was dismissed without additional consideration of this point: *Silvestro v R* [1965] SCR 155.

⁴⁹ *Abrahamson v R* (1994) 63 SASR 139, 142, affirming *R v Firman* (1989) 52 SASR 391, which overruled *Fingleton v Lowen* (1979) 20 SASR 312.

⁵⁰ *State v DeNegrís*, 153 Conn 5, 12 (1965).

⁵¹ [1956] 1 WLR 965.

another. We must ask ourselves what we can conclude as a result of the fact that the assertion *was made*, without relying on whatever truth-content it may possess.

For the same reasons, the confident tone of voice of the callers—suggesting that they have done this sort of thing using the telephone number in question many times before—and perhaps also any slang they may use are relevant and not hearsay⁵² (on the same basis as the caller’s fearful tone of voice in *Ratten v R*).⁵³ Conversations during the act of dealing overheard by a police officer in person—which may be proved because relevant ‘not on account of their truth but of their character’⁵⁴—are relevant on the same basis. In any event these conversations may be admissible as part of the *res gestae*, but what is important for the present discussion is that they are admitted as circumstantial evidence to prove a state of mind. This purpose may equally justify the reception of evidence involving an assertion in circumstances where the evidence would not be admitted under the *res gestae* principle.

It has been argued that ‘evidence of opportunity cannot *prove* intention to supply—any more than an intention to make a gift to charity can be inferred from evidence of calls made by collectors seeking donations’.⁵⁵ This, however, is a question of the efficacy or weight of the evidence and does not in any way engage with the hearsay prohibition. Evidence is relevant if it tends to prove a fact in issue and it is no objection to admissibility that further supporting evidence is required to satisfy the requisite burden of proof. The hearsay prohibition is not a prohibition against inefficacious evidence. It may also be pointed out that the analogy between charity collection and drug dealing is weak: collectors for charity are likely to ask all and sundry for donations, while drug users are unlikely to request drugs unless they believe there is a substantial chance of getting what they want.

This analysis produces a result in accordance with common sense and sound legal instinct: if the only evidence that the accused (and not someone else) possessed drugs consists of inquiries from

⁵² *Marshall v Watt* [1953] Tas SR 1, 14.

⁵³ [1972] AC 378. The emotional state of the female caller was the relevant, admissible and comparable fact here, although the request to summon the police, for example, might well be thought to have been admitted for the implied assertion that they were needed: Allan [1985] CLJ 345, 347; Allan (1992) 142 NLJ 1194, 1201; Birch [1992] Crim LR 798, 800; Guest (1985) 101 LQR 385, 396.

⁵⁴ *R v Taylor* (1941) 5 Jo Crim Law 97, 99, cited and applied in *R v Owad* (1951) 102 CCC 155.

⁵⁵ Allan (1992) 142 NLJ 1194, 1201; emphasis added. See also J. Savirimuthu and A. Scott, ‘A Question of Hearsay’ [1993] NILQ 164, 168; Odgers (1992) 16 Crim LJ 355 at 356.

potential customers, an acquittal must be entered; but, once possession has been proved *aliunde*, the inquiries from customers can be used to assist in proving that the drugs were possessed with a certain intent.

There is a division of opinion among the Canadian, Australian and New Zealand cases about whether a single inquiry from a potential customer should be admissible. The Court of Appeal for Ontario has held that one inquiry is of insufficient weight to be admissible as it would be ‘unsafe to convict on this type of hearsay evidence’.⁵⁶ That dictum draws a distinction between the prohibited hearsay use of the statement to establish what it impliedly asserts and its use as part of the circumstances surrounding possession. On the other hand, the Court of Appeal for New Zealand has held that only one call is sufficient to make the evidence relevant circumstantially, and that the number of calls goes to weight, not admissibility.⁵⁷ The Full Court of the Supreme Court of South Australia agrees.⁵⁸ Two inquiries have been held sufficient in the Court of Appeal for British Columbia.⁵⁹ Of course, with only one inquiry, there is the possibility that a wrong number might have been dialled or some other mistake made,⁶⁰ although that might be thought to go to weight rather than admissibility. It would certainly be a coincidence if someone seeking drugs dialled a wrong number by mistake and that number happened to be the number of someone else in possession of the illegal drugs sought, although no doubt that could happen, especially with the commoner illegal drugs. What weight such evidence receives will be up to the tribunal of fact having heard the accused’s explanation, if any.

⁵⁶ *R v Wilson* (1996) 107 CCC (3rd) 86, 95. Accord *Quirke v Davidson* [1923] NZLR 546, 551.

⁵⁷ *Police v Machirus* [1977] 1 NZLR 288, 291, 292.

⁵⁸ *R v Abrahamson* (1994) 63 SASR 139, 142.

⁵⁹ *R v Cook* (1978) 46 CCC (2nd) 318, 319ff. See also *R v Nguyen* (2003) 180 CCC (3rd) 347, 351. Contrast *R v Duncan* [2002] 11 WWR 134.

⁶⁰ In *Fingleton v Lowen* (1979) 20 SASR 312, 319, Zelling J gives the following amusing example:

<Beginning of quote in footnote >

[A] well-known set of legal chambers in Adelaide was at one stage, before its acquisition for use as legal chambers, in use for the most ancient of professions. Persons continued to resort to those chambers for some little time after they became law chambers, inquiring about their use for their previous purpose. Surely those enquiries could not be used as evidence that the premises were still dedicated to their prior user ...

< End of quote in footnote >

Surely not; but it might be that there are circumstances in which such evidence could be led to show that nature of the previous user of the property.

< A head > Heresy two—the rule in *Blastland*⁶¹

This heresy is more easily exposed than the previous one. It was committed in *R v Blastland*,⁶² again by the House of Lords. This time, however, it favours the Crown. In *Blastland* the accused wished to argue that the murder of a young boy, with which he was charged, had been committed by someone else, one Mark. The accused sought to lead evidence that Mark had made statements indicating that he had known of the death of the boy before it became public knowledge, thus founding an inference that Mark or at least someone other than the accused was the perpetrator. The House of Lords, in upholding *Blastland*'s conviction, confirmed the trial judge's ruling that Mark's alleged statements were inadmissible hearsay.

A common criticism of the *Blastland* decision is that it is an over-zealous and over-technical application of the hearsay rule which flouts the court's ultimate duty to ensure that justice is done to the accused.⁶³ In future possible unfairness in a similar case might be avoided (at least in England) by reliance on a newly enacted 'safety-valve' discretion to admit otherwise inadmissible hearsay in the interests of justice under s. 114(1)(d) of the Criminal Justice Act 2003.⁶⁴ However, it will be argued here that reliance on the 'safety-valve' is unnecessary since the characterisation of the potentially exculpatory evidence in *Blastland* as hearsay was an error. This again is confirmed by Commonwealth authorities.

It is clear that the statement in question would not have been tendered to establish the truth of what it asserted—that the boy was dead. That could be proved by other evidence—in this case, the finding of the body (just as possession of drugs is normally proved by the discovery of the drugs).

⁶¹ It will be noted that there are no citations to American case law in this section. That is because it is strangely hard to find on this topic. However, cases such as *United States v Hall*, 165 F (3rd) 1095, 1112 (1999) suggest that, in the federal jurisdiction at least, the residual exception (*Federal Rules of Evidence*, Rule 807 (formerly Rule 803(24))) is routinely mobilised when the statement of a third party shows a 'unique knowledge' of the crime.

⁶² [1986] AC 41.

⁶³ Although the European Court of Human Rights has held that the accused's right to a fair trial was not violated: *Blastland v U.K.* (1988) 10 EHRR 528.

⁶⁴ See Taylor, Wasik, and Leng, above n. 8 at 147.

The evidence of Mark's 'esoteric knowledge'⁶⁵ of the offence was ruled inadmissible at trial, and Blastland's appeal against conviction was dismissed. Their Lordships' reasons for doing so were expressed by Lord Bridge of Harwich:

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What was relevant was not the fact of Mark's knowledge but how he had come by that knowledge. He might have done so in a number of ways, but the two most obvious possibilities were either that he had witnessed the commission of the murder by the appellant or that he had committed it himself. The statements which it was sought to prove that Mark made, indicating his knowledge of the murder, provided no rational basis whatever on which the jury could be invited to draw an inference as to the source of that knowledge. To do so would have been mere speculation.⁶⁶

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That is quite true of course. But the general principle of English law is that, if there is a reasonable doubt about the accused's guilt—if speculation reaches the level of a reasonable doubt—the accused is entitled to be acquitted. The statement by Mark might have been used by the jury to found such a doubt. At the very least the accused was entitled to attempt to persuade the jury that such a doubt could be raised by this evidence.⁶⁷ Doubts about how Mark came by the knowledge he had went only to its probative value, not to its admissibility for the purpose for which Blastland wanted to introduce it.

There is nothing in Lord Bridge's further point that a ruling to the opposite effect might 'lead to the very odd result that the inference that Mark may have himself committed the murder may be supported indirectly by what Mark said, though if he directly acknowledged guilt this would have been excluded'.⁶⁸ This argument depends on the rule that confessions and other statements against a person's penal interest are admissible only against the maker, a rule which has been widely and trenchantly criticised, and indeed abandoned in Canada and the United States.⁶⁹ That being so, it is a poor basis on which to build a rule excluding evidence to the disadvantage of the accused. It is also a false analogy, given that statements against interest demonstrate the guilt of a third party,

⁶⁵ The phrase is taken from *R v Szach* (1980) 23 SASR 504, 571.

⁶⁶ [1986] AC 41 at 54.

⁶⁷ Birch [1985] Crim LR 728, 729; Hirst, above n. 5 at 64.

⁶⁸ [1986] AC 41 at 53.

⁶⁹ See the references collected in *Bannon v R* (1995) 185 CLR 1, 8–10. (In that case, the High Court of Australia decided not to decide whether to follow the Canadian lead, although it did show signs of caution about further judicial alterations to the hearsay rule.)

whereas Blastland wanted to introduce evidence of Mark's statement not to demonstrate Mark's guilt directly, but to show that other potential perpetrators (i.e. Mark or anybody that he had observed)⁷⁰ might exist. Lord Bridge himself draws attention to the equivocal nature of Mark's evidence in this respect in the first of the extracts reproduced above.

Unfortunately, it seems that no Commonwealth authority was cited to the House in *Blastland* at all. There is some very persuasive authority directly on point. Had the Australian authority been referred to, its reference to an earlier English case before the Court of Criminal Appeal in 1954⁷¹ might also have been discovered.⁷²

In *R v Szach*,⁷³ the Full Court of the Supreme Court of South Australia, presided over by King CJ, upheld a ruling at trial by Wells J admitting very similar evidence for the purpose of showing knowledge of the crime by others. Those two judges were among Australia's leading authorities on criminal law and the law of evidence. The reasoning in the case has very recently been adopted by the High Court of Australia in another appeal from South Australia.⁷⁴ The case involved the murder of a solicitor, Derrance Stevenson. A receptionist at the legal aid office, Miss Shea, testified that an unknown person (not the accused) came into the legal aid office on the morning after the murder, and before its discovery, and inquired about the availability of a solicitor. He was asked whether he had seen a solicitor, to which he replied: 'Only Derrance Stevenson but when I left him last night he was in no condition to act for anyone'. At trial, the evidence was admitted. King CJ said:

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The basis upon which this evidence was admitted is quite clear ... On a criminal trial it is relevant to show that a person other than the accused committed the crime. Knowledge of the facts surrounding a crime by a person other than the accused at a time when only the culprit could know those facts tends to show that that other person committed the crime. It was open to the jury to take the view that the statements made by the unknown man to Miss Shea tended to show that he had knowledge that the deceased was incapacitated and had been incapacitated on the previous night, at a time when only the person or persons involved in the crime could have known that fact. The statement of the unknown man having been made out of Court could not, however, be used as evidence

⁷⁰ This disposes of the point that it was only Mark's admissions that made the evidence of knowledge on his part relevant: Allan [1985] CLJ 345, 347.

⁷¹ *R v. Ashman* [1954] Crim LR 382, 383.

⁷² See *Re van Beelen* (1974) 9 SASR 163, 215f, and at 225.

⁷³ (1980) 23 SASR 504.

⁷⁴ *Kamleh v. R* [2005] HCA 2, [14]–[16], [40].

of the truth of what was stated therein, namely that the speaker had been with the deceased on the previous night and had left him in an incapacitated condition.⁷⁵

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Note the words ‘tends to show’. The evidence does not of course prove that someone other than the accused committed the crime. The unknown man might have been told by the accused, or someone else, that the crime had occurred, or merely observed it, or for that matter committed it in concert with the accused—who, incidentally, was convicted by the jury despite this evidence. But the accused is entitled to use this evidence as part of his attempt to persuade the jury of his innocence.

Only a few months before *Blastland* was heard by the House of Lords, the Supreme Court of Canada, faced with a comparable factual situation in *Wildman v R*,⁷⁶ allowed an appeal on the grounds that the exclusion of the comparable evidence in that case

< Beginning of quote >

deprived [the accused] of the right to put before the jury the fact that, for some reason, his wife, or someone purporting to be his wife, knew before the body was discovered that Tricia was dead, that she had been murdered and that the instrument used was a hatchet!⁷⁷

< End of quote >

Pace Lord Bridge, the question to be considered in cases such as these is not one of admissibility, but one of weight—a question, in other words, for the jury.

Just as it is beyond contention that the Crown might introduce evidence to show that the accused knew details of the crime before the general public did⁷⁸—even though, in such a case, the accused might have received the information in question from the real perpetrator, merely observed the crime, and so on—it should also be beyond contention that the accused can bring forward evidence to show that someone else knew the details of the crime before the general public did.

⁷⁵ (1980) 23 SASR 504, 571.

⁷⁶ [1984] 2 SCR 311.

⁷⁷ *Ibid.* at 326. The exclamation mark is in the original. See also *R v Klatt* (1994) 94 CCC (3rd) 147, 151, 154ff.; *R v Appleton* (2001) 156 CCC (3rd) 321.

⁷⁸ *R v Straffen* (1952) 36 Cr App R 132, 137.