

'Unavailable' Evidence

Part 2, Clause 5, Dictionary to the Evidence Act (NSW) 1995

It is quite common for the police to attempt to lead hearsay evidence of a video or audio recording on the basis that the original is not available. This is usually on the grounds that the original has been misplaced or is not compatible with the courtroom media player. Such material is objectionable and should be excluded from evidence. This article aims explain the applicable principles in simple terms.

Meaning of 'Document'

The terms 'document' and 'unavailable' are defined in the Dictionary of the Evidence Act.

document means any record of information, and includes:

- (a) anything on which there is writing, or
- (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them, or
- (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else, or
- (d) a map, plan, drawing or photograph.

Meaning of 'Unavailable'

The concept of Unavailability is defined narrowly in Part 2, Clause 5 of the Dictionary of the Evidence Act:

For the purposes of this Act, a document or thing is taken not to be available to a party if and only if:

- (a) it cannot be found after reasonable inquiry and search by the party, or
- (b) it was destroyed by the party, or by a person on behalf of the party, otherwise than in bad faith, or was destroyed by another person, or
- (c) it would be impractical to produce the document or thing during the course of the proceeding, or
- (d) production of the document or thing during the course of the proceeding could render a person liable to conviction for an offence,

....

So, the burden falls on the police to prove on the balance of probabilities that their situation falls within one of these definitions.

Cannot Be Found

To fall within this definition, the police must explain how the evidence was lost and what efforts they have made to find it. It is not sufficient for the police to simply assert that they have misplaced it. If the police do accept responsibility for losing the evidence, the Defence will make the submission that the Defendant should not be prejudiced by carelessness on the part of the police.

Destroyed Otherwise than in Bad Faith

This seems straightforward until you realize that the police must prove that the evidence has been destroyed and not merely misplaced. Only once they jump that hurdle can they assert that the act was not performed in bad faith to prejudice the accused.

The Defence will again make the submission that the police should have acted to obtain and preserve the evidence and, once again, the defendant should not be prejudiced by carelessness on the part of the police. The Defence will also make the submission that the hearsay evidence is so prejudicial that it should be excluded under s137.

Impracticality

This is the most common assertion that the Defence advocate will face. A typical example will be that CCTV can only be played on a proprietary system and not on a regular computer. As such, the informant cannot play the video but is eager to give a hearsay account of what he saw when he viewed it earlier.

The burden is on the police to bring themselves within this definition. This means the informant will have to give an explanation of:

1. How he or she served a copy of the recording on the defendant, and
2. What efforts he or she made to procure a machine to play the recording in court.

After the court has heard this explanation, the Defence will be in a position to respond with submissions that the proposed hearsay evidence is prejudicial to the accused. You may even have instructions that the CCTV will in fact exonerate the accused.

Illegality

Examples of this ground would be that the evidence is subject to privilege. This would include communications between husband and wife, lawyer and client, priest and penitent, or national security considerations. As always, the burden is on the police to bring themselves within this definition. Only then should the Defence respond with a submission as to the prejudice suffered by the accused.

The Final Submission

The Defence submission regarding the admission of hearsay evidence will hammer two key points:

1. The prejudice suffered by the accused and,
2. Whether the same fact in issue can be proved with eyewitness evidence.

It would go something like this:

Your Honour, the Defence objects to the witness giving hearsay evidence of this document. The concept of 'unavailable evidence' is defined in Part 2, Clause 5 of the dictionary to the Evidence Act. The definition given is much narrower than the ordinary usage and the burden is on the police to show that this situation falls within one of the subsections.

[POLICE OFFER THEIR EXPLANATION]

a) YH, I submit that the police have not made every reasonable effort to find the document and this situation does not fall within subsection (a).

b) YH, I submit that the police did not make reasonable efforts to preserve this document and this has caused prejudice to the Accused. While this carelessness does not amount to bad faith, I submit that the police should not be advantaged or the Defence disadvantaged by the shortcomings of the police.

c) YH, I submit that the informant was well aware of this issue before today's proceedings and he has made inadequate efforts to put the evidence before the court. It is incumbent on the informant to prove his case, and so it should be as he has the enormous resources of the state at his disposal. It may be inconvenient to put this document before the court, it may even be difficult, but I submit that it is neither impossible nor impractical.

d) YH, my friend has asserted that the document cannot be produced as it would render a person liable to conviction for an offence. I submit that that is a question for the court to decide. It may be that the matter can be resolved with a certificate under s128. In any event, it is prejudicial to the Accused to admit this hearsay evidence and deny the Defence the opportunity to test the evidence.

In addition, I submit that this proposed hearsay evidence of the CCTV is not essential to prove any fact in issue. The complainant himself will give evidence of what occurred at the time and place of the alleged offence and so it is not necessary to receive a questionable second-hand version from a biased source.

I am available every day if you have any interesting issues.

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