IN THE SUPREME COURT OF NEW ZEALAND SC 92/2008

DERYCK JOSEPH MORGAN

Appellant

v

THE QUEEN

Respondent

Hearing:	16 July 2009
Coram:	Elias CJ Blanchard J Tipping J McGrath J Wilson J
Appearances:	K H Cook with A Bailey for the Appellant D B Collins QC with J Murdoch and L C Preston for the Respondent

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CRIMINAL APPEAL

MR COOK:

May it please the Court. Counsel name is Cook and I appear with Mr Bailey for Mr Morgan.

ELIAS CJ:

Thank you Mr Cook, Mr Bailey.

SOLICITOR-GENERAL:

Ms Murdoch and Ms Preston appear with me this morning Your Honours.

ELIAS CJ:

Thank you Mr Solicitor, Ms Murdoch, Ms Preston. Yes Mr Cook?

MR COOK:

I prepared a skeleton which the Registrar has, it's just outlining the order in which I hope to deal with matters. It is submitted that this appeal directly involves the relationship between section 8 and the evidence of a hostile witness who, for whatever reason, cannot be properly cross-examined. It also involves the ambit of the discretion in section 94 of the Evidence Act which deals with hostile witnesses and in a related point the ramifications of allowing a statement of a hostile witness to be produced as an exhibit will also be discussed.

Historically a previous statement of a witness was hearsay. The dangers of admitting a prior inconsistent statement were the hearsay dangers. That changed with the Evidence Act in terms of its admissibility. There is a new definition of hearsay in the Evidence Act and it is submitted that that definition, or shift, of hearsay assumes an ability to cross-examine the original maker of the statement. Under the new law the previous statement of a testifying witness does not satisfy the first limb in the definition of a hearsay statement. That's in section 4 and Mr Solicitor has kindly provided an Evidence Act for the Court. It's the first limb (a) "was made by a person other than a witness".

ELIAS CJ:

Sorry, what are you referring to?

MR COOK:

Section 4 of the Evidence Act.

ELIAS CJ:

Yes.

MR COOK:

The definition –

ELIAS CJ:

Thank you.

MR COOK:

– of hearsay and it's the limb (a). Underpinning that rationale was – underpinning the change of that rationale was the Law Commission's view that the most legitimate criticism of evidence classed as hearsay was the lack of opportunity to cross-examine the original maker. It was the opportunity to test the original witness through cross-examination which the appellant submits was designed to test the reliability of that evidence and it was when the ultimate fact finder, the jury, views that cross-examination they have a full picture in which to assess the weight, if any, to attach to a particular piece of evidence. It's the appellant's submission that those factors are crucial to the disposition of this appeal.

It is submitted that the new definition of hearsay to the hostile witness scenario is not as straightforward as the respondent suggests, when one examines that rationale that underpins the change, and what happened in the case at the bar really shows that. If a witness is an amnesiac or consistently uses the phrase "I can't remember" then there is often no effective cross-examination which removes the ability to test the reliability of that evidence. The traditional hostile witness, it's a lot easier if the witness on the prior statement says "black" which is adverse to the accused and then comes to Court and says "white" which is favourable to the accused and "I made up what I said before." Then the jury, the fact finder, is given both of those stories, the full benefit of cross-examination from counsel for the Crown, because the witness has been declared hostile, and counsel for the accused and they can assess which story is correct. If the witness for whatever reason

says, “Well I can't remember,” to the majority of the questions, then that weapon, tool of cross-examination is absent and the dangers are still –

TIPPING J:

This is a witness who said “black” in the first statement and then “I can't remember” at trial?

MR COOK:

Yes and then the statements put to him by the prosecutor and he’s saying “I can't remember, I can't remember,” and I hope to show that it’s going to be admissible for the truth, it’s just that you’re not given a counter-balancing side for the jury to have a look at because that witness is just saying, well “I can't remember, I can't remember.”

TIPPING J:

You’re not suggesting that makes it inadmissible, you’re suggesting, or about to suggest are you, that it makes it very, you need considerable caution?

MR COOK:

Yes it’s not, prima facie it’s admissible but you have to go through an exercise to check the reliability, to get a sufficient threshold level of reliability and probative value to admit it in.

ELIAS CJ:

Is that just section 8?

MR COOK:

Section 8. That’s the –

ELIAS CJ:

Is there, I have a vague recollection, I don’t know this Act as well as I should, but that there is a general section I thought later on about orality, is there –

MR COOK:

Section 83 deals with the principle of orality if that's the –

ELIAS CJ:

That'll be what I'm thinking of.

TIPPING J:

To be absolutely clear Mr Cook, you're not saying that it becomes even prima facie inadmissible, you're saying it remains admissible but it immediately throws up the possibility of invoking section 8?

MR COOK:

It remains admissible and then immediately throws up that possibility of invoking section 8 and that's one of the two ways the appellant suggests that you control this evidence. First, section 8 when you do the balancing exercise and then secondly through the discretion in section 94 and through those two methods a Court can ameliorate the risks that we suggest are inherent in this sort of evidence. So I don't want to be thought that I'm suggesting that it's inadmissible. I suggest it's prima facie admissible but then you go through those two, it's almost a sort of a gate scenario, a door scenario. If there is a sufficient apparent reliability, the door is open because the probative value outweighs the unfair prejudicial effect and the discretion can be used to see how far that door can open.

ELIAS CJ:

I don't quite understand why you say it's prima facie admissible. It's not hearsay.

MR COOK:

Yes.

ELIAS CJ:

But don't you have to first decide that section 83 shouldn't be observed?

MR COOK:

I suggest –

ELIAS CJ:

Leaving aside the whole hostility aspect to this.

MR COOK:

That's a limb to our argument and obviously it gets over the relevance and then you move to that orality principle and that's a factor that comes into the balancing exercise and I hope to show the Court why I say it's prima facie admissible because of the definitional change. In this, the case –

TIPPING J:

But this evidence was produced orally.

MR COOK:

It was because the Crown Prosecutor put –

TIPPING J:

Whether it should have been is quite another matter but just looking for the moment about section 83, what is the – you say that's a limb or thread of your argument. What is that thread?

MR COOK:

That thread, which I hope to show later on, is that generally, and this is really most relevant to the production of the exhibit, generally evidence is given viva voce and this is a written piece, a document, going with the ultimate fact finder to the, with them when they make their decision. But that, I will definitely –

TIPPING J:

Are you suggesting that 83 somehow or other controls the prima facie admissibility demonstrated by the definition of hearsay or the –

ELIAS CJ:

I don't think he is suggesting that. I'm just wondering myself about the impact of section 83.

MR COOK:

I will hopefully show later on that I don't think its impact is significant in terms of the other factors that I'm putting forward but it is something to be thrown into the mix. Now with this case at the bar the admission was enough to prove the offence and if that admission was before the jury and they are able to use it for the truth of the contents, then the defence needed to be able to argue, show, raise a reasonable doubt over that alleged admission. In other words, suggest it didn't happen. Unfortunately because of the amnesia and the reluctance of the witness, the defence could not properly cross-examine to raise that reasonable doubt which, in my submission, would have enabled the jury to be properly equipped to make a finding as to the weight to attach to the evidence and hopefully I will show in my submissions that the probative value was low of this evidence and that the unfair prejudicial effect was such that it should have been excluded as no directions could have cured this unfairness.

In the alternative, if the evidence did have a probative value which outweighed the unfair prejudicial effect, the appellant submits that was low and the manner of the cross-examination went beyond the bounds of what should have been permissible, pursuant to the discretion in section 94, and that the directions actually given by the District Court Judge in this case were not sufficient. The jury was left in a state where they could not properly assess the weight to be given to the most damaging piece of evidence that the Crown possessed.

Just moving to point two of the skeleton which is the facts and these are in my written submissions at paragraphs 14 to 17. This is the case where the issue was identity. A store had been robbed at gunpoint and the question facing the jury was had the Crown proven beyond reasonable doubt that the appellant was one of the two robbers. That's how the District Court Judge put it, case

on appeal page 228 at paragraph 19. Amongst other evidence in a circumstantial Crown case was an alleged admission by the appellant to Mr Roskam, that's the witness that we're dealing with. The appellant was sharing a cell with Mr Roskam and he alleges that the appellant said to him, "I did the offence." In the summing up, right at the beginning, so this is case on appeal page 224, paragraph 1, the Judge says to the jury, and this is three lines in, "The Crown says this is a strong circumstantial case confirmed by the accused's confession to his cellmate." And that's why, the reason I emphasise something which might seem a little bit obvious because I want to talk about how important this was to the Crown case at a later point.

The details of the cellmate confession are also important. It is alleged to have occurred whilst they were celled together and in two parts. Firstly watching the Police Ten 7 programme which shows various police incidents around the country and then at a subsequent date a few days later a reference back to that with the appellant allegedly saying, "You know that robbery on the programme? I committed that."

Now Mr Roskam gave evidence at the preliminary hearing which I think is in the supplementary case on appeal that Mr Solicitor has handed to the Court which was consistent with that statement. However at the trial, and this part is in the absence of the jury, Mr Roskam indicates to the Judge, sort of brought into Court and says, "I've got nothing to say today," and this is at the case on appeal, page 153, line 25.

BLANCHARD J:
Mr Cook he'd given evidence at an earlier trial, hadn't he?

MR COOK:
Yes.

BLANCHARD J:
What happened at that trial? Was there a hung jury?

MR COOK:

It was a mistrial as I understand it Sir. Some prejudicial evidence about a previous prison sentence was before the jury and I think it was aborted.

BLANCHARD J:

Thank you.

MR COOK:

So Mr Roskam said, page 153, line 25, "I've got nothing to say today" and that "I won't be saying nothing." The trial Judge then indicates the legal position to him regarding contempt and compellability and notes that his stance may affect the chance of a successful bail application. He is then called to give evidence and after some initial reluctance to be sworn he is affirmed. From the case on appeal page 162, line 17, he develops his amnesia. At the bottom of page 163 the Crown prosecutor makes an application for the witness to be declared hostile under section 94 of the Evidence Act and it was granted by the Judge over the page in a very brief decision.

The cross-examination continues for the majority of his evidence, as does his amnesia. He doesn't remember the date of his remand in custody. He doesn't remember being celled with the appellant. He does not remember the appellant saying those things to him. At case on appeal 171, line 3, the Crown prosecutor then begins. He's already put the important parts of his written statement to the police. At this point then begins to put the important parts of his deposition to him. And then I say, I submit that a crucial question and answer occurs from the bottom of 171, line 30, through to 172, line 9.

In my submission the Crown prosecutor is saying, "Hey look, you don't want to talk today but you haven't lied before so what's written there is true, isn't it? You just don't want to remember today?" He says, "Yep," and then an explanation is given for why he doesn't want to remember, because he's fearful for his safety. In the appellant's submission that leaves the jury –

ELIAS CJ:

Had that been said in chambers, the acknowledgement that he was fearful?

MR COOK:

Yes there was a –

ELIAS CJ:

Because I don't remember reading it in the evidence in chief earlier.

MR COOK:

My understanding is that the officer in charge was in the back of the court and this appears in page 154, 155 of the case on appeal where the officer in charge talks about there being some threats, especially at page 155, lines 14 and 15.

ELIAS CJ:

Right, thank you.

MR COOK:

And then he says it in court in front of the jury in the case on appeal at 161.

ELIAS CJ:

Oh I see yes, thank you.

MR COOK:

If I could just return to case on appeal the question and answer from 171 to 172. In my submission that sequence of question and answer leaves the jury with the unmistakable impression that Mr Roskam has told the truth in his earlier statement and his deposition and that today he has forgotten, not because he can't remember, or because it isn't true, but rather he's forgotten because he's frightened for his safety. It gives the impression that the statements were true and gives a plausible explanation for his reluctance and the jury would have been thinking at that point what he said is true and

therefore the onus comes to the defence, perhaps a poor choice of words, to try and – the defence has got to do something about it.

TIPPING J:

Is the effect of this effectively that if we'd been under the old law, it might well have been arguable that he had adopted his earlier statement as true before the jury?

MR COOK:

It would be getting –

TIPPING J:

Very, very close –

MR COOK:

Very close to it.

TIPPING J:

– if not actually. I'm just thinking if I'd been a Judge at trial having to make a decision on this as to whether or not I would let it go to the jury as evidence of truth because he had adopted it, one would have been very, very close if not actually ruling that.

MR COOK:

Yes then when he denies the defence the opportunity –

TIPPING J:

Well that's another matter.

MR COOK:

Yes.

TIPPING J:

But just pausing at this point I would have thought probably the better view is that he had adopted it but you know you may be able to argue against that but it's certainly very arguable that he had adopted –

MR COOK:

It is.

TIPPING J:

– his earlier statement.

MR COOK:

It is. Could I consider that in the back of my mind –

TIPPING J:

Yes, please do.

MR COOK:

– while I continue on.

TIPPING J:

It could be relevant because I think it's more than arguable that under the old law it would have been in as truth.

MR COOK:

Yes Sir. Just parking that, intending to come back to it –

TIPPING J:

Yes, yes, please do.

MR COOK:

– for a moment, the defence counsel then at 172 begins the cross-examination and because given that the jury's heard something which could even be taken as him adopting the truth of that previous statement the

only weapon available is cross-examination. Now for the defence it was accepted, and it had to be because other evidence proved it, that Mr Roskam was celled with the appellant. Two, the Police Ten 7 show did feature the robbery and three, that the appellant, because this wasn't proved by any other evidence, that the appellant did say something to Mr Roskam. That was put at the case on appeal 172, lines 31 to 33, counsel put that the appellant said to Mr Roskam, "'The police think I've done that' or something to that effect, didn't he?" At 173, again I suggest a very important answer. "If I don't remember who I was being celled up with how could I answer that question?" The defence also wanted to cross-examine about the inherent unlikelihood of the scenario being suggested by the witness with the view to showing the jury that it should not be accepted. They were only celled together for a short period of time. Prisoners, more so than anyone, are usually quite guarded about facts detrimental to their liberty at such an early stage in a relationship and that the layout of the prison is such as to make it unlikely that such a detrimental comment would have been made as others could have overheard it, possibly guards.

The lack of the engagement by the witness meant that what occurred was not a meaningful cross-examination. It denied the jury the ability to properly assess the evidence. The jury were left with a knowledge of an admission singularly able to prove the offence and no counter balancing cross-examination testing the reliability of that purported admission.

ELIAS CJ:

I'm just wondering how far that submission might go. Does that mean in any case where a witness is unhelpful in answers in cross-examination one can say that the evidence in chief should be disregarded or is undermined because you haven't had a fair crack? I mean it happens a lot.

MR COOK:

Yes. I'm trying to distinguish this from a difficult witness who might just stick to their guns and say, "No, no." But to evade cross-examination by feigning a memory of anything, things that you should clearly should remember, really

you're not even being involved in the trial process. Whereas in the situation that I think Your Honour may be suggesting, even if it's a detrimental answer, a "No" or "No, that's ridiculous. He said it to me, I remember it clear as day." That's still putting it before the jury and you've tried to shake them and then you can submit to the jury at the end, look he stuck to his guns but this is a dishonest witness for A, B, C and D. He's got a history of lying. He's a prison inmate.

ELIAS CJ:

But that submission could have been made in any event and was made –

MR COOK:

Yes.

ELIAS CJ:

– in this case. It's really that you're saying that the statement shouldn't have been admitted as truth of its contents because you weren't able to cross-examine the maker of the statement effectively.

MR COOK:

Yes and really if at all because of his refusal to participate in the trial process by just this constant refrain of "I can't remember, I can't remember."

TIPPING J:

Does this mean that there would be different categories of hostile witness? The one that is an amnesiac, as you elegantly described this gentlemen, and ones who are hostile in a more active or direct sense?

MR COOK:

Yes.

TIPPING J:

Because you couldn't make the same submission, could you, as to what you might call the classic hostile witness?

MR COOK:

Let's say there are three scenarios. One, he sticks to his brief. Two, the classic hostile witness where he now says, originally saying "black" detrimental, now says "white." And three, I can't remember at all. I do say they are different categories because forensically from a defence point of view and from a fairness point of view, situation one and situation two are much better and the third is the worst possible situation that you can get.

TIPPING J:

Well particularly if Crown counsel, if I may so, rather skillfully got an adoption.

MR COOK:

I was very forensically aware.

TIPPING J:

It was a very, very – and I think it was scrupulously fair and very astute.

MR COOK:

The problem that I have is once that's there and the jury can say, well, that is true what he said, for that witness to not engage in having the reliability of that tested, lowers the probative value such that the unfair prejudicial effect of such a central piece of evidence clearly outweighs it and it should be excluded pursuant to section 8.

TIPPING J:

Is the submission really this: That because counsel couldn't effectively cross-examine, that means that section 8 should be invoked?

MR COOK:

Yes Sir.

TIPPING J:

That's really the nub of it I suspect?

MR COOK:

It is Sir.

TIPPING J:

But then we're going to get into all sorts of difficulties, aren't we, of degree, I suppose you would answer that section 8 is always a matter of degree.

MR COOK:

It is and I was hoping to tiptoe through a choreography of the reform of the hearsay rules from *Baker* through to, then you've got the preliminary paper 15 and then *Bain* and that's *Bain* '96 with Justice Thomas leading the Court of Appeal's decision, and then through to *Manase* which I'll deal with in a short period which show that the whole reform of his hearsay rule and it was all about reliability …

AUDIO STOPPED: **10.33 AM**

COURT RESUMES: **10.56 AM**

ELIAS CJ:

Yes Mr Cook?

MR COOK:

With those paragraphs of the Law Commission's report, both volumes 1 and 2, in my submission it's the ability to cross-examine the witness that has led to this change. That ability to cross-examine enables the opposing party to test the reliability of the evidence which is what the hearsay rule is directed towards.

This issue arose in a post-Evidence Act situation in the case of *Vagaia* which is in the Crown bundle at tab 9. It's a decision of His Honour Justice Asher and it was the first case to deal with the point where the Crown proposed to call a witness who had indicated that he would not answer questions if called. The defence objected relying on the rule that was announced, the rule from

R v O'Brien. At paragraph 15, having cited the Law Commission report and a text, Justice Asher concluded that the primary rationale for the principle set out in *O'Brien*, the undesirability of calling a hostile witness as a conduit through which to introduce prior inconsistent statement, and this is pre-Evidence Act, that is not admissible as the truth. Now, post the Evidence Act, no longer exists. His Honour said that the effect of the new definition of hearsay is that such a statement can now be the evidence of the truth of the fact stated. The appellant takes no issue with that point but it submitted, importantly, that Justice Asher in the paragraph, in the sentences that follow that, does not go so far as to say that the *R v O'Brien* no longer has any application.

In the final sentence of paragraph 15 Justice Asher says "To call such a witness might be to adduce blatantly unreliable evidence of little probative value but considerable prejudicial effect". In my submission that's the scenario that we're into in the case at the bar and His Honour Justice Asher was very aware that the probative value of a hostile witness's evidence is often very questionable. Because this also involves the discretion in section 94 of the Evidence Act if we can just turn to, it's the Law Commission Report, volume 1 again, and it's paragraph 413 which is at page 109.

TIPPING J:

The Commission's faith in section 94, I just wonder how strong a point that is in favour of the Commission's view because you don't normally know what's going to happen next when you declare a witness hostile.

MR COOK:

Yes Sir.

TIPPING J:

And it's possibly a little naïve to think that the discretion in section 94 gives, well it's capable of giving some protection I suppose, but it would be very hard to administer on that basis, sort of on the ground I would have thought.

MR COOK:

Yes Sir.

TIPPING J:

Because you've got to, in effect, anticipate what might happen.

BLANCHARD J:

Well I think the Law Commission from the use of the word "preserve" believed that it wasn't changing the law in that respect.

TIPPING J:

Yes but the idea here, as I understand it, is that in the light of the change elsewhere there is some comfort to be had from section 94 which is the point I'm just wondering about.

BLANCHARD J:

Well I just wonder whether that's reading too much into it.

TIPPING J:

Well, we'll see no doubt.

ELIAS CJ:

The questions put were not evidence and didn't elicit any evidence. The evidence was the statement and the problem is that the Judge doesn't seem to have addressed whether the statement should be admissible.

MR COOK:

Yes Your Honour. And following on from that also –

ELIAS CJ:

And he probably, if there hadn't been a statement to be put, he would probably have had to direct the jury that the questions posed by the prosecutor weren't themselves evidence. I'm just thinking of oral hearsay.

TIPPING J:

Well there's an analogy there with *Halligan*. When assertions are made in a police interview and are not adopted, the jury have got to be very careful not to build something out of the assertion.

ELIAS CJ:

Yes.

MR COOK:

The Court of Appeal in a very well reasoned judgment in *O'Brien* drew that very –

TIPPING J:

Did we? Well that's nice. At least I'm consistent.

ELIAS CJ:

What's the section, sorry there's all sorts of bits that we have to consider with this Act because we haven't had occasion to really consider it across the board at the moment. What's the, there's a provision as to leading questions too, isn't there?

MR COOK:

There is. I think that comes a little bit after. I just can't place my Act at the moment. I think it might be 96 or 97. And leading questions defined in section 4 as well.

TIPPING J:

They left nothing to chance, did they?

ELIAS CJ:

Nothing to Judges which I suppose is chance, isn't it?

MR COOK:

Statement is even defined.

TIPPING J:

I think the primary control here has to be section 8.

MR COOK:

That's the appellant's submission.

TIPPING J:

Section 94 may be a subsidiary control able to be exercised in perhaps obvious circumstances but in the end I think it's likely to turn on section 8.

MR COOK:

I was hoping to walk to the mountaintop before I showed the promised land but that's exactly the point that I want to try and make because section 8 is crucial. First it's either there's probative value that outweighs the unfair prejudicial effect or there's not. Section 94 could sometimes when they're very close in the scales, through that discretion or directions, could tip it and say right it's in but we're going to make sure we keep you online and then we're going to tell the jury how you haven't seen cross-examination here, be careful. I could almost sit down there but I think there are another few things that I want to go through Sir.

TIPPING J:

No, no, I'm not trying to steal your thunder at all Mr Cook, I'm just trying to think it through as we go along.

ELIAS CJ:

So how do they define leading question?

MR COOK:

A question that directly or indirectly suggests a particular answer to the question.

ELIAS CJ:

I see. All right. So it doesn't have in mind leading through documents, is the question that was in the back of my mind.

TIPPING J:

Of course I suppose in a sense the whole point of declaring a witness hostile is to be able to lead them.

MR COOK:

It doesn't need to be read now but just as a cross-reference because you've got these two volumes and they both deal with both matters. In report 55, volume 2, paragraph 340, that's where the discretion in 94 is dealt with there. That's volume 2, paragraph 340, and that's page 219.

TIPPING J:

Do you seek to make anything, Mr Cook, out of the definition of witness?

MR COOK:

I do but it's only - Mr Roskam came very close to not even being a witness under that definition because of his refusal to engage in cross-examination, able to be cross-examined.

TIPPING J:

So you accept that technically he, or we couldn't have, it would be very difficult to set up any test as to the extent, wouldn't it, but you say because of that –

MR COOK:

Yes.

TIPPING J:

Because he came so close to not even being a witness, then that is a factor under section 8?

MR COOK:

Yes Sir, it goes into the balance.

TIPPING J:

Into the mix, yes.

MR COOK:

Yes. Now I'm at point 5 on my skeleton now which is section 8 the general exclusionary rule and as Your Honour Justice Tipping put it much better than I, this is the first fetter I submit on the evidence of a hostile witness. It's the primary ground for this appeal is that the Judge should have excluded the evidence of Mr Roskam pursuant to section 8. This section has recently had a very eloquent and erudite examination in *Bain* '09 in this Court and that's at tab 1 of the appellant's bundle of authorities. I won't outline the facts of *Bain* because I think they're well known to any New Zealander with the ability to read. The sounds, what were they if anything.

Whilst I respectfully submit that the Court was split over whether the exclusion was pursuant to section 7 or 8, in my submission there was unanimity regarding that if it had jumped that first hurdle, that those sounds would have been excluded pursuant to section 8 and in the case at the bar I submit that section 8 is appropriate because the admission cannot be said to be so far removed as the indistinct sounds in *Bain*. At paragraph 41 –

TIPPING J:

Well you're not putting it on the grounds of lack of relevance I take it?

MR COOK:

No Sir.

TIPPING J:

No.

MR COOK:

No. That was an argument that would seem to be dealt with in *Bain* and I just –

TIPPING J:

But – yes quite.

MR COOK:

Yes. At paragraph 41 of learned Chief Justice's judgment and Justice Blanchard's judgment, it's noted that section 8 serves the interests of accuracy, fairness and efficiency in fact finding. If I could jump to paragraph 82, His Honour Justice McGrath deals with probative value and what the Law Commission said about that. If I could just briefly step outside *Bain*, but I intend to return to it almost immediately, and move to paragraph 41 of the appellant's written submissions, I'm sorry paragraph 48. There is a quote at paragraph 48 which Mr Mahoney in the Evidence Act and Analysis uses and it's from a criminal law review: "Prejudice in the evidentiary context means the drawing of an inference […] along an impermissible chain of reasoning – not one of logic, common sense and experience […] it's the reaching of a conclusion for the wrong reason." In my submission in this sort of context the concern is with the path taken rather than the destination.

TIPPING J:

Would it also be unfair if a piece of evidence was apt to be seized on as close to decisive when the context could not reasonably bear that connotation?

MR COOK:

Yes Sir. In *Bain*, and I submit in the case at the bar, the disputed evidence, both admissions capable of proving the charge if accepted, and the jury could look at that and say, tick, and then look at all the other evidence and just funnel it towards that conclusion that they've already reached and if that

conclusion is not reached properly then it has a significant unfairness. That's, in my submission, what was being dealt with also at paragraph 84 of the *Bain* decision where again the Law Commission reports quoted from –

ELIAS CJ:
Sorry what paragraph?

MR COOK:
Paragraph 84.

ELIAS CJ:
Yes, thank you.

TIPPING J:
I see, they say if it appears far more persuasive than it really is –

MR COOK:
Yes Sir.

TIPPING J:
That's what I think I was –

MR COOK:
Yes Sir and that's what I will try and establish in the case at the bar. In the hostile witness context it's submitted that the rationale for the change is the backdrop and when I say the rationale for the change I mean in the hearsay definition is the backdrop which this probative value versus unfair prejudicial effect should be viewed. The point made before by His Honour Justice Tipping was that under the old law the witness Mr Roskam might have adopted this statement. In my submission that still requires the Court to undergo the section 8 balancing exercise and it's akin because we are not saying that it was inadmissible because it was hearsay. The appellant submits that it's inadmissible because it fails at the section 8 test.

TIPPING J:

Well you're saying that under the old law it was admissible if adopted, under the new law it's admissible anyway?

MR COOK:

Yes.

TIPPING J:

Ergo the control, in both instances if you like, has to be section 8?

MR COOK:

Yes Sir.

WILSON J:

Was section 8 raised at trial?

MR COOK:

No Sir and I submit that's obviously preferable it would have been, it should have been raised, but section 8 is mandatory for the Judge, it's a must. The Judge is the gatekeeper and the exercise should have been undertaken. In my submission the reform of the hearsay rule was to reduce the rigid rejection of reliable evidence but it cannot be said that that reform was to allow evidence of little reliability to be before juries. Other common law jurisdictions have recognised this through different methods of reforming the hearsay rule. The Canadian position is dealt with in the written submissions as is to a briefer extent the UK position. Canada, through the vehicle of the common law, has changed the orthodox rule with regard to previous inconsistent statements, on the basis of indicia of reliability, and I won't deal with it anymore, also necessity.

The antipodean equivalent of the Canadian test in *KGB* which is, the case is in the appellant's bundle, is section 8 in my submission. That's where the reliability or probative value has to be assessed. The evolution in New Zealand to the hearsay rule began with Lord Cooke in *Baker*. Now I

have three supplementary authorities to hand forward with the leave of the Court, that being *Baker*, *Bain* and *Manase* – sorry four, and another one, *R v L*. If those could be handed forward now. The evolution, as I mentioned, began with the president of the Court of Appeal in *Baker* at page 4 where indicative as being significantly quoted in many other cases, His Honour said, "It may be more helpful to go straight back to basics and ask whether in the particular circumstances it is reasonably safe and of sufficient relevance to admit the evidence notwithstanding the dangers against which the hearsay rule guards."

That's four lines down on page 4. The next step, and this is not quoted, was the Law Commission's preliminary paper 15 where three Commissioners with foresight really talked about various reforms that could be undertaken. The evolution reached its adolescence in the first *Bain* decision where at page 4 His Honour Justice Thomas, halfway down the page at the paragraph beginning "certain points" in a sentence –

ELIAS CJ:

Sorry what page?

MR COOK:

Page 4.

ELIAS CJ:

Yes, thank you.

MR COOK:

Halfway down where the paragraph says, "Certain points need to be stressed and importantly the evidence must be of such relevance and reliability that it can reasonably be said that the dangers inherent in hearsay evidence do not exist or do not exist to an appreciable extent." And then I also think it's the important tag that His Honour Justice Thomas says, "Or if they do can reasonably meet by giving the jury an instruction". That was the point I was trying to make earlier to His Honour Justice Tipping that if the scales are

evenly balanced then a direction could cure any unfair prejudice and allow the evidence to be admitted.

The evolution reached its teenage years in the *R v Manase* which was a decision of the full court of the Court of Appeal and at paragraph 30 which is on page 8 and it's indentation C, and importantly I submit paragraph 31 which is the common law equivalent of the Evidence Act section 8.

The adulthood of hearsay reform is the Evidence Act. There's the exclusionary rule in section 17 and then the main exception to the exclusionary rule in section 18. It's been regarded as the legislative equivalent of *Manase* and the criteria for the admissibility are reliability and unavailability or undue expense. Again the jumping around of the Evidence Act you have to go to section 16 which defines circumstances as used in section 18. So the phrases are reasonable assurance from the Evidence Act. Sufficient apparent reliability in *Manase*. Reasonably safe in *Baker*. All, in my submission, equal that the evidence is reliable enough for the fact finder to consider it and draw its own conclusions as to weight because it's passed the threshold reliability test.

And the important point, I suggest, in respect of the case at the bar, is that just because the previous inconsistent statement of a witness is not now labeled hearsay, does not mean that there are not dangers with it. This is especially so where the very reason the previous inconsistent statement is not now hearsay, the availability of the ability to cross-examine the original maker, is absent because of the original maker or the witness, they're one and the same, because of his or her refusal to usefully engage in cross-examination. So whilst by strict definition the evidence is not hearsay, the dangers are ever present and unmitigated and the probative value must be examined against that danger pursuant to section 8.

I don't know whether Your Honours want to take a morning adjournment given the earlier…

ELIAS CJ:

I think we'll probably plug on if that's all right.

MR COOK:

Thank you. I just want to very briefly highlight the importance of cross-examination. It's almost self-evident but there are so many quotes on the matter from eminent people I've just chosen three just to highlight importance. The first is from Lord Irvine who is a former Lord Chancellor. "There is no advocate who has not experienced countless cases where a story that seemed consistent and watertight when set down on paper was destroyed by a proper and skillful cross-examination". That's the importance we place on it and it can't be understated. John Henry Wigmore who was referred to in the *Bain* decision along with James Bradley Thayer for their treaties on evidence, he regarded cross-examination as "the greatest engine ever invented for the discovery of the truth". That's paraphrased by the President Richardson in *R v L* which is a decision I have handed forward and will refer to shortly. And the Court in *Manase* at paragraph 43 stated that "cross-examination is after all one of the central ingredients of a fair trial from the accused's point of view".

This was a point that I was submitting earlier on in discussions with the Chief Justice about why I submit there hasn't been an effective cross-examination here. Counsel, I submit, was in an impossible situation of the three scenarios. One, sticking to his brief. Two, the change of the story from the "black" to the "white." The third, forgetting everything. The third is forensically, for counsel for the accused, the worst and it's aggravated by the witness saying, "Oh I forget but actually what I did say was true but I forget so I can't be engaged in any cross-examination." Because in the first two scenarios I gave, the jury can assess the witnesses answers and his demeanour and whether he sticks to his guns, whether there's any hesitation, all those various things that cross-examination brings to the fore. But "I don't remember" doesn't allow that to happen. This is dealt with extensively in the Canadian decision of *R v KGB* which is at tab 3 of the appellant's bundle.

ELIAS CJ:

Sorry, I'm just thinking about what you said there. "I don't remember," I mean in this case it's not "I don't remember," it's "I won't say," really. But suppose you did have a witness who could not remember, and then the previous statement is put in, isn't counsel in exactly the same dilemma that you're talking about here? They can't cross-examine effectively because the witness doesn't remember but that can't be something that is not envisaged to be evidence under the Act?

MR COOK:

I submit that they are in the same situation, for a different reason, because this is a genuine forgetfulness in the example that's being suggested. But one still has to go back and look at the probative value of that evidence. Now, if it's –

ELIAS CJ:

But that's true of all evidence, I mean, it has nothing to do with whether the witness is hostile, or whether the witness says, "I can't remember".

MR COOK:

I agree with that proposition, but the probative value in a hostile witness context is always very much an issue because of, especially when you can't engage in cross-examination as well, because of the dangers of that hearsay.

ELIAS CJ:

So it's just that it's an indication of danger?

MR COOK:

Yes.

ELIAS CJ:

And something that prompts close attention to section 8?

MR COOK:

Yes. If, for example, Jack was charged with assaulting Jill. And Bill came along to give evidence and said that Jack had told him he assaulted Jill, it was up a hill when they were getting a pail of water. Now, as ridiculous as that sounds, it's going to serve a point. Because if that information wasn't publicly available, that it was up a hill, getting a pail of water, then there's some reliability to Bill's statement, because how else would he know that? But if it's evidence that had been broadcast on TV, or there was, it's not an indicator of reliability. It doesn't give it that ring of reliability. And the best example is often when you see scientific evidence, that gives it that sufficient reliability. And in the example that was given, if the statement is reliable, then it may go in, because there's no unfair prejudice. There would be directions about the fact that you haven't seen cross-examination on it, and the extent might be limited to which the cross-examination can go to, but it would be admissible, because there's that sufficient probative value. And that case, *R v L* which is being handed forward, is a scenario where under the old law, the evidence of a dead complainant in a sexual case, the deposition of a dead complainant in a sexual case, was admitted, basically because the Court said that cross-examination could not have achieved anything. It can be admitted with directions, because there are these independent indicators of reliability. There were scientific evidence that she had, there was forceful intercourse. There was signs, there was evidence of a break-in. It was those strands that gave it that sufficient reliability.

I was just turning to tab 3 of the defence bundle, the appellant's bundle, rather, and paragraph 41 of the *KGB* decision. That gives examples there about how a witness can be tested, in a hostile context, by cross-examination. But in my submission it doesn't deal with the example of a forgetful witness, because if you look right at the bottom of the page, where they've quoted "work more", they're saying in this "black" and "white" classic scenario, there is ample opportunity to test him as to the basis of his former statement. Here, because of the witness' failure to engage, there hasn't been that ample opportunity. If Wigmore said that the cross-examination was the greatest

engine ever invented, then the witness in this case has snatched the keys from counsel. In the minority decision, in the minority judgment, rather, at *KGB* at paragraphs 164 and 165.

TIPPING J:

Who were the Judges who were in the minority, Mr Cook, do you recall?

MR COOK:

Justice Cory delivered the decision.

TIPPING J:

And Justice L'Heureux-Dube, was she also –

MR COOK:

I think she concurred with him, yes, Sir. Now, Justice Cory, as well as pointing out what cross-examination could achieve in that classic scenario, also assumes that there is a reliable transcript available. This split the Court in *KGB*, because you had the majority saying that we want the previous statement to be videotaped, or, if it's not that rigid, something showing it's very reliable and Justice Cory thinking that's getting back to the rigours of the common law, which led to reliable evidence being excluded for not a very good reason. But in the case at the bar, we've got a statement that is produced at the case on appeal, page 185 to 189, those few pages took from 3.12 to 5.05 to produce, and that's a long time for those few pages. So we haven't seen the very things that Justice Cory and the majority is talking about, how much the interviewer's questions have influenced the answers, all these things that cross-examination could bring out, the grey areas. In my submission, given that there was little, if any, cross-examination, the dangers of a lack of reliability, and the jury placing undue weight on the evidence of Mr Roskam, and considering, also, that he was very close to not even being a witness within the definition of the Act. It's too high, and it could not be cured, in this case, by even the firmest of directions from the trial Judge. I'm not suggesting that the way to guard against these dangers is by a blanket

exclusion, but it's initially through the section 8 exclusionary process and then, if admissible, through section 94 discretion and firm direction.

TIPPING J:

I understand the submission that the dangers were too great to be capable of being cured. But would you accept that if one gets past that point, the Judge's direction was about as favourable to the appellant as it could have been, assuming it was capable, or do you still have any suggestions in that respect?

MR COOK:

I do, Sir, and I'll deal with his.

TIPPING J:

Oh, you're coming to that, are you? Yes.

MR COOK:

At point 7.

TIPPING J:

All right, thank you, we'll leave it.

ELIAS CJ:

Where are you up to in terms of your skeleton? We've taken you around.

MR COOK:

I'm really on 5B.

BLANCHARD J:

Well, just before you leave 5A, was the Judge entitled, had he done a section 8 exercise, and is this Court entitled, in looking at the matter through the lens of section 8, to factor in that there was not just the statement, but there was also deposition evidence on oath, where there had been

cross-examination, and evidence at the first trial, on which there had been cross-examination, in considering the question of reliability?

MR COOK:

I agree with the deposition. But my submission, from the evidence at the first trial, is that there's – the fact that he stuck to his guns is a factor that goes in the scale, but it's not a very weighty one because the jury, at that first trial, we don't know what they thought of him, but they would have at least been able to see how he reacted to the questions, what his responses were like, his demeanour and those various things. So, the short answer is yes, those factors can be taken into account but the weight to be given to the fact that he stuck to his story on two previous occasions is, in my submission, not as great as it would seem at face value.

BLANCHARD J:

But you accept that those are aspects that can be taken into account in considering whether there was sufficient reliability?

MR COOK:

Yes, but there has to be a careful examination of other factors pointing to the reliability.

TIPPING J:

Would the compass of a statement as a whole, as opposed to just focusing on the critical part, also be relevant and available?

MR COOK:

Yes, because if there are some independent indicators of reliability in that statement, then that raises the reliability. If he said something that hadn't been publicly released, then yes, I definitely agree with that.

TIPPING J:

I think in *Manase* we talked about either inherent or circumstantial reliability, didn't we?

MR COOK:

Yes.

TIPPING J:

And that's really what I'm getting at here.

MR COOK:

Yes, and that's what I submit has got to be taken into account in the balancing exercise. In *Manase*, Dr Matheson QC criticised the law being advanced on an ad hoc basis. The Court accepted that to a degree and said the residual category is not an ad hoc basis because there are sufficient signposts to enable reasonable predictability, consistency and fairness. Now, earlier, when Your Honour Justice Tipping asked me about categories of hostile witnesses, I suggest that there are categories of hostile witnesses, but that's not an ad hoc basis, that enables sufficient signposts, which will promote predictability, consistency and fairness to all parties.

TIPPING J:

I think I'd be inclined to agree with you that we should say quite firmly that section 8 should always be in play in a hostile witness situation, it's just the weight of it in this particular case is not immediately self-evident, if you like.

MR COOK:

Turning to this particular case, and it's dealt with at paragraphs 50 to 55 of my submissions, I submit that the probative evidence is very low. Because he's, Mr Roskam, is saying "Oh, I can't remember" and in response to one of counsel's questions, one of the defence counsel at trial's questions, "How would I answer that if I can't remember who I was even celled up with?" Then the jury, the fact finders, is just not given that opportunity to properly assess it. There's no hesitation, there's no degree of commitment to the original

statement, there's no ability to test the extent to which the statement was the product of questioning, and this is the dangers that were alive in that *KGB* decision, in those paragraphs that I took Your Honours to beforehand. The jury are also denied the valuable opportunity of seeing how easily Mr Roskam recalled the admission, what detail he recalled it in, whether he changed his story, embellished it. I submit, on behalf of the appellant, that this is one of those situations that Lord Irvine referred to where it may have seemed a consistent, but it could have been destroyed by a proper examination.

TIPPING J:

Is it relevant that, is the explanation given for inability to now remember and all those matters surrounding that, a relevant issue? Because the jury, as I think is referred to in the Canadian case, could well be assisted, one way or the other by having that exposed in front of them, and here it was, for some extent, wasn't it?

MR COOK:

Yes, but we only had a bland assertion of it and then no more examination of whether it was true, or the other possibility is maybe he's forgetting because he doesn't want to be exposed as a liar.

TIPPING J:

Right.

MR COOK:

Earlier, when I was dealing with the facts, I said the defence wanted to accept those things that were patently true. They were celled together and the independent evidence, evidential references for those are case on appeal 142, lines 27 to 33, and 143 lines 1 to 3. The officer in charge has confirmed that they were celled together. Then the evidence that the relevant robbery did feature on the Police Ten 7 programme, it was an admitted fact and that's the case on appeal, page 137B. I submit that that's one of the particularly damaging aspects of this statement, is because there were aspects of truth to it. The jury might think, well, he hasn't lied about these

things that are true, so the rest of the statement must be true, and in closing, that's one of the very lines of reasoning that the Crown prosecutor suggested to the jury. The best lies do have a foundation of truth to them.

Also, the defence wish to examine, and I dealt with this earlier, the inherent unlikelihood of the scenario that Mr Roskam was suggesting. The appellant and Mr Roskam were only celled together for a short period of time and propositions would have been put that that time wasn't sufficient for a relationship to develop where the appellant would feel such that he could admit to committing a crime that's going to send him to jail for a significant period of time, and to a lesser extent, the layout of the prison was such that it would have been unlikely. That's not a knockout blow, I'm not suggesting it's a knockout punch that the defence was denied doing, but it would have been taken into account by the jury when assessing the reliability of that statement, because it was absolutely necessary for the defence to explain these things as the jury was left with the impression which was the intent of the Crown prosecutor that what Mr Roskam had said on a previous occasion was true.

BLANCHARD J:

How much more effective would cross-examination be on a point like the unlikelihood of admissions being made to somebody you'd only been celled with for a short time, than putting that as a submission from counsel in closing?

MR COOK:

I suggest it would be more reliable, because you're going to see his reaction to it and you're going to get to know his demeanour. Now, I can't give evidence about what he acted like at the first trial but it would have been, and I think the Court can take their experience as trial Judges, that hostile witnesses are usually not the equivalent of the lamb on the left hand side of Jesus, they're usually give and take a bit, and that's quite a good display to have in front of the fact finder because it gives a true indication of what this person's really like, who's coming along and saying, "I'm telling the truth."

TIPPING J:

What would be the difference between cross-examining him from the statement, which undoubtedly was attempted, and cross-examining him on the statement which would have occurred once the statement was an exhibit? I would have thought the high probability is he would have remained equally obdurate.

MR COOK:

Yes.

TIPPING J:

Now, I can understand the complaint that counsel wasn't given the opportunity to be heard on the point, and I have some sympathy for it, but in the end, I can't see it as, I think it's highly speculative and highly unlikely as to whether it would actually have made any difference.

MR COOK:

Yes Sir, and perhaps what I should have outlined right at the start of these submissions is that, and this is a hospital pass in the extreme, Mr Bailey is going to deal with that point in regards of the exhibit being admitted.

TIPPING J:

All right, well I won't press you any further, but I give fair warning that I think I would need a lot of persuasion that it was something that would have any materiality, if you like, to the outcome.

BLANCHARD J:

Yes, I too had noticed it was somewhat of a tail-ender in your list.

MR COOK:

Yes.

McGRATH J:

It wasn't actually a point made in the Court of Appeal either, was it, the Court of Appeal seemed to be under the impression that nothing was said, could be said in this respect.

MR COOK:

Yes, I think that's correct, yes Sir. In that case, *Manase*, you had a three and a half year old complainant. Now I'm by no means equating Mr Roskam with a three and a half year old complainant, but there are material similarities. Both, for very different reasons, could not be cross-examined. In *Manase*, the inability to cross-examine was not through any deliberate action of the complainant, compared with this scenario, where Mr Roskam has chosen not to participate and he's chosen to mislead the jury about his ability to remember, he's done it very shrewdly, because he's also said, "What I said was true."

TIPPING J:

Well, I have to put it to you that the very fact of all that being exposed quite vividly before the jury, surely gave a fair bit of capital to the defence to say, well, look at this fellow, you know, he's complete, absolute no-hoper, he doesn't know which way is up, can't possibly put any reliance on anything he says at any time whatever.

MR COOK:

Yes Sir.

TIPPING J:

And I'm sure that was, no doubt, effectively done.

MR COOK:

Two points. Firstly, defence counsel should not have been put in that position, because of the unreliability and the lack of probative value.

TIPPING J:

Well I understand you say it shouldn't have been in there at all, yes.

MR COOK:

And secondly, even if the defence delivers a stunning closing address, the Judge has got to follow that with firm directions to the jury about –

TIPPING J:

I thought he was pretty firm about taking considerable care and he almost told them that they couldn't accept it as truth unless he'd adopted it, which is about as good as it could have got under the old law, other than a complete exclusion.

MR COOK:

If we could turn to that right now then Sir, and if I could deal with the Crown closing first.

TIPPING J:

Yes.

MR COOK:

And that's at case on appeal, page 203. And it's the last paragraph on 203, and it's dealt with through to page 205. Just highlight some key points, but I submit it should be read in its entirety, on page 204 the last line of the first paragraph, sorry the last two lines, "Now, Mr Roskam didn't simply in his statement, and you heard me put sections of it to him, just give those two bare details at all." So the Crown prosecutor is praying in aid these other factors that the detail of the statement. At page 206, his evidence is, it's the bottom of page 205 to 206, which ultimately he reluctantly accepted is the "last nail in the coffin" in this case, and it has a resonance with the rest of the evidence.

TIPPING J:

Well the fact that it has a resonance with the rest of the evidence, I was going to ask you about. Now, is it or is it not acceptable to reason that if this had stood alone, it might have had insufficient probative force to be safe to lead,

but as it was highly consistent with the rest of the circumstantial case, that that is capable. I'm asking you genuinely, I'm not expressing a view here at all, that that was a material factor in the probative prejudicial balance.

MR COOK:

In a spectrum from completely unreliable at one end to reliable at the other, it's not at the complete absolute unreliability where there's no consistency with any of the other parts of evidence, but it's very far down that end of the spectrum, because these are factors that, given the innocent explanation that was proffered through counsel to him, could be answered by that. They were celled together, that TV show –

TIPPING J:

No, I think we may be at slightly cross purposes, I'm putting to you the proposition and asking for your response, that here we have, quite apart from this evidence of so-called admission, what could be regarded as quite a strong circumstantial case from other pieces of evidence. Now, is that relevant?

MR COOK:

It is, but I suggest it's not a strong circumstantial case in this case. It's an identification case. There is a gun that's similar and Mr Bailey deals with the –

TIPPING J:

If you want to go into that detail, that's fine, but I just wanted you to give a response on the concept, if you like. You accept it's capable of informing the section 8 assessment?

MR COOK:

Often a very significant indicator.

TIPPING J:

If you want to go on or come back to it, then that's fine, I'm not trying to…

MR COOK:

No Sir, just continuing with the, I've just finished with the Crown, with the "final nail in the coffin." Now, admittedly, the Crown prosecutor does follow that with, "If you put it to one side, we've still got enough to convict", but that's, in my submission, a bit of adversarial bluster, because really, that's Mr Roskam's evidence being trotted uphill and down dale. If I could turn to the Judge's summing up, and that's at page, I would like to go to case on appeal, page 231 and remembering that the first thing that I pointed Your Honours out to earlier, is that the Judge has said that this case is "circumstantial but confirmed by Mr Roskam's evidence" which, I'm reluctant to use this word, but primes the jury about the importance of the evidence. At paragraph 30, the Judge gives some details which, whilst factually correct, fails to point out that they haven't seen that tested. And then the point Your Honour Justice Tipping was making at 31, which is the Judge giving the incorrect, the old law direction, but in my submission, that's put in context by paragraphs 32 to 33.

TIPPING J:

Well the Judge is there saying that it's open to them and, in effect, he's almost inviting them to take the view that there was an adoption.

MR COOK:

Yes, and he's saying that you can use it for the truth, which in a pure Evidence Act application is correct, but where in his closing address has he said "Be careful though"? He said it at paragraph 34, the bottom lines, "You will need to, I suggest, treat his evidence with a good deal of caution." The Judge doesn't say why, what the jury's missed out on.

TIPPING J:

Well he does say in part why, you're just saying he doesn't go on to say and furthermore, he hasn't been able to be effectively cross-examined.

MR COOK:

Yes, and just point out what you miss out on in cross-examination. I'll just intersperse here. This is a man who is not a stranger, and I think the Crown even accept that in their closing address, to the Court environment. He's given evidence on a previous occasion. He's got convictions. So we've got the category of a cellmate confession, which, historically, has led to large cases where there have been the potential of a miscarriage of justice, combined with, this is an identification case, which, again, is a category that's been historically recognised as leading. That's really dealt with in the written submissions and I'm happy to rely on those. Just back to –

TIPPING J:

But this isn't, even though it's an identification case, this isn't within the scope of the ordinary identification warning, is it?

MR COOK:

Agreed, Sir, yes. At paragraph 35, which goes over onto page 232, the Judge says, "You certainly know that some of the matters that he said he could not recall have, indeed, been independently proved and accepted". And in my submission, that, really is important, because in the *Bain* decision of this Court, it's a similar scenario. The prejudicial effect of that particular evidence, the admission, can be profound, because the jury is entitled to find the accused guilty simply on the basis of that inculpatory, of that admission, not tested by cross-examination. And it's at paragraph 67 of the *Bain* decision, and it's the decision of the Chief Justice and Justice Blanchard. I'm checking it's tab 1 of the appellant's bundle. To apply that to this, "Even if Mr Roskam's evidence were rejected by the jury, the admission of that statement "could, nevertheless", unconsciously – my word – "impermissibly" – the Court's word – "affect the jury's consideration of the other evidence", and, at the very least, "and would necessitate directions from the trial Judge".

BLANCHARD J:

But that was an unusual case in which there was no context.

MR COOK:

I agree that was an unusual case, Sir, and I'm not putting this on the basis that it was so inherently unreliable as the indistinct sounds from the *Bain* decision.

TIPPING J:

Are you just drawing attention to the danger that if you start with something shonky, which shouldn't be there, that might unconsciously enhance the value of everything else?

MR COOK:

Yes, Sir. Especially when that shonky piece of evidence is a central strand.

TIPPING J:

I just wanted to make sure I understood.

MR COOK:

Now, I jumped forward, and I really missed out 6 on my skeleton, and I'm happy not to deal with that, because the primary thrust is the section 8, and the discretion. The only point that I'd very briefly make is that section 12 of the Evidence Act is relevant, because, in my submission, that discretion in section 94 is not absolute, so, and it doesn't provide for how the discretion is to be exercised, so resort to the mechanism in section 12, and then you look at the purposes and principles in sections 6, 7 and 8, and must look to the common law if it's consistent with those purposes and principles, and that brings into play the *O'Brien* decision, which is tab 3 of the Crown bundle. Really building on an interchange between Justice Tipping and myself about the evidence, and the importance it could have had in this trial, is paragraph 87 of the *Bain* decision, which is in the judgment of His Honour Justice McGrath. And it's subject to the caveat that I mentioned to His Honour Justice Blanchard that I'm not suggesting that this is exactly the same with the inherent unreliability of the *Bain*, but if you flick over the page to the sentence immediately preceding paragraph 88, "The impact of this superficially-reached perception that there is an admission is likely to be seen

as more persuasive than the taped evidence actually is in the context of the Crown case". Applying that to this scenario, the "superficially-reached perception": It's superficially reached because the evidence hasn't been tested. The impact of that perception is unfair, because the admission can be seen as more persuasive than it really is, and that's a factor that goes into the scales, which His Honour Wilson J talks about in the *Bain* decision, and, I think, drawing from a decision of Turner J. But it's an image that's deeply rooted in the common law.

So, in conclusion of this aspect of the appeal before Mr Bailey deals with points 9 and 10, my submission is that, generally, the section 8 exclusion is fundamental with this sort of case, because it operates to exclude otherwise admissible evidence because of the unfair prejudicial effect. And then you've got the section 94 discretion, which is a safeguard, and that must be tagged with proper directions, which are absent in this case. And if I could just hand over to Mr Bailey for points 9 and 10 of the skeleton.

ELIAS CJ:

Yes, thank you, Mr Cook. Yes, Mr Bailey?

MR BAILEY:

May it please the Court, I am going to try and strictly deal with actual exhibiting of the statement that my friend has talked about. Just before I do, in terms of Mr Roskam's statement that's in the casebook that's been referred to, it is, although the probative value is really, as it has been pointed out, "Mr Morgan confessed a robbery to me". The statement itself is a lot more than that because, using another analogy, it's like a picture that Mr Roskam has painted regarding the making of the, or the telling of the alleged confession. I also think it's worthwhile to emphasise that that statement was given in a completely different context than the courtroom. Obviously, it hasn't been subject to cross-examination, as has been pointed out. The object of cross-examination, I think Mr Cook read some quotes out while I was out of court, can be seen in the context of Mr Roskam's statement, which I describe as a picture really, is trying to paint over that picture, or, at least, alter it in

some way. His refusal, again, as has already been pointed out by Mr Cook, is that the landscape, or the picture of Mr Roskam's statement or evidence, as it became, remains intact, once it has been omitted as it has been by the Judge in this case.

In terms of whether, I think this was discussed at the beginning, in Mr Cook's submissions, whether the Evidence Act allows statements to be exhibited in a physical form, I think my position would be that, as the Crown pointed out, section 94 does allow it, or the Evidence Act does allow it in certain circumstances. But like under the old Evidence Act 1908, there should be, as the case law is clear, in the case of the dealing with that section, sections 10 and 11, a strong presumption against it, and the starting point is that evidence should be given orally. That's, as has also been pointed out, confirmed by section 83, now, of the Evidence Act, and in many ways, it could be argued that that's a code. It deals with ordinary ways of giving evidence, which doesn't make allowances for exhibiting statements, and then there's alternative ways of giving evidence. And there, there's no mention of statements being exhibited. That position of a presumption against statements being admitted into evidence.

ELIAS CJ:

So section 83 really isn't directed at written documents, is it? I mean, it's about mode of delivery of evidence?

MR BAILEY:

Yes, and that being orally, and I think the Law Commission's report, it may have already been referred to, said, most New Zealanders think of evidence in giving by witnesses in Court through the normal question and answer process.

BLANCHARD J:

Well, the heading of sub-part 4 is questioning of witnesses. So it's really got nothing to do with documents.

MR BAILEY:

Yes. In some ways this Act can be contrasted to the Criminal Justice Act mentioned in the *Hulme* decision, which I'll come to shortly, and that specifically allows for statements or evidence to be exhibited in written form. The absence of it in the Evidence Act, or our Evidence Act, may suggest that it shouldn't take place.

TIPPING J:

We're talking here about inconsistent statements, I take it?

MR BAILEY:

Yes.

TIPPING J:

You've submitted that there's a presumption against the exhibiting, as you put it, of inconsistent statements. Are you saying, what are you relying on for that presumption?

MR BAILEY:

The Crown case, I think, *R v Thompson*, that was dealing with an application to have the statement exhibited, basically said it's not normally done, and if it is done, it should be done with the strongest of warnings.

WILSON J:

Can't you rely on 83(1)(b)?

MR BAILEY:

Yes.

WILSON J:

The implication seems to be that absent consent, evidence can't be given by way of a written statement in a criminal proceeding.

MR BAILEY:

The difficulty is, I have to accept that, if a hostile witness a fair previous inconsistent statement can be admitted into evidence, how can that be done?

WILSON J:

But in terms of the policy of the Act upon which I understand you were relying?

MR BAILEY:

Yes.

WILSON J:

In terms of the general?

MR BAILEY:

Yes.

TIPPING J:

Are you saying this presumption applies equally to evidence in chief, i.e. the Crown examining the hostile witness?

MR BAILEY:

Yes, Sir. Or whether it's done in cross-examination or evidence in chief.

TIPPING J:

So you're saying it really is a bit of a side issue that it was put in at re-examination, that you don't really rely so much on that aspect, but the fact that it shouldn't have been put in at all?

MR BAILEY:

Yes, Sir. That's the first of them. If the Act does permit statements to be exhibited, and, again, Mr Cook has given the "black" and "white" examples, I think it should only be done, if at all, when, I think it's Mr Cook's second example, a person has given a statement saying "X", and then a completely

different version of events on the stand. That's obviously unfavourable against the party calling that witness. In that position or situation the Court or the jury can look at the statement, the previous statement, which might be detailed like Mr Roskam's statement is, and they can look at the statement that he's, or the evidence that he's given on the stand, and compare them like a picture on the wall, and say which one do we prefer, which one do we accept? In this case, as Mr Cook pointed out, it's not the situation. We've got Mr Roskam's picture or statement, and you've got nothing to compare it with. Further, not only have you got nothing to compare it with, but really, the statement or the picture's been unblemished by any cross-examination, or any meaningful cross-examination.

The English decision of *R v Hulme*, as I've touched upon already, and it's section 122 of the Criminal Justice Act, again, that's expressed, although it allows statements to be exhibited, as that being an exception rather the general practice that should take place, and I've set out the, the appellant's set out in the written submissions particular passages that we rely on the *Hulme* decision, and in my submission it's very on point. If I can just refer to the appellant's written submissions at page 27. Halfway down the first quoted paragraph at 23, "There was no special feature of the document that made it necessary for the jury to have the document itself before them". My submission in this situation here is exactly the same. The jury knew that Mr Roskam had apparently, according to him, been told that Mr Morgan had confessed the crime and that's really, as I've mentioned, the probative value of it. They didn't need to know all the detail regarding it, especially when Mr Roskam wouldn't talk about it.

TIPPING J:

If the previous contradictory evidence, or statement, is now capable of being evidence of its truth, subject, of course, to being excluded for various reasons. It seems to me rather odd to continue, if there ever was, with a presumption against producing it. And I'm not sure that *R v Thompson* does go as far as a presumption, but we won't debate that. But *R v Thompson* was written well before the law change.

MR BAILEY:

Yes.

TIPPING J:

And I just feel a little diffidence in accepting the proposition that with the law change, there should be presumption against it. I would have thought there might be a presumption in favour of it, unless there was some very good reason why not, because the jury is going to find it very odd to be told that the statement is evidence of its truth, and not have it in front of them.

MR BAILEY:

And that's why I think there's at least two situations, one, where they've got the detailed statement, and then a different, completely different story on another occasion, and then you compare.

TIPPING J:

I'm talking solely about the exhibiting of it, not its admissibility.

MR BAILEY:

Yes.

TIPPING J:

Are you able to help me with that concern, that it does seem counter-intuitive, now that it is evidence of its truth, not to allow it to go before the jury, because how else do you prove it, other than the witness identifying it, saying it's his statement, and saying, well, will you please produce it, then? Whatever else he may or may not say.

MR BAILEY:

I think there the Crown prosecutor's questioning it was proved that he did tell the detective that Mr Morgan had confessed to crime, and that's all that needed to be elicited, if it was permissible under section 8 to elicit that at all.

TIPPING J:

It's the statement that becomes evidence of its truth, not an oral version of it.

MR BAILEY:

No. And it's all the detail in that statement, which he won't talk about, that also becomes in the one hit –

TIPPING J:

Well, that's the question of editing.

MR BAILEY:

Yes.

TIPPING J:

That's a different matter. You're asking us, as I understand you, to carry forward this so-called presumption into the new legislative regime. I have two worries about that. One, I'm not sure that it ever was a presumption. And two, even if it was, I don't see it necessarily as being appropriate.

MR BAILEY:

In my submission, if the probative value of the previous statement was simply "Mr Morgan confessed this robbery to me", then there was no need to have all the detail regarding it going before the jury as it did, once it's produced as an exhibit. There was some editing, but that wasn't much at all. It was regarding him being beaten up in prison, regarding another matter. It might be fair, if Mr Roskam's statement going in, the whole statement goes in before the jury, if Mr Morgan was permitted to do a similar thing, and write out a statement in a different environment in his own time in prison and saying what he thinks or his version of events is and then hand that to the jury and then say "I'm not going to answer any questions about it" –

TIPPING J:

The jury might have a certain view about that. It might be technically open under the present law, I don't know, but the jury would have a certain view, I would have thought, if that went on.

MR BAILEY:

Well I don't think the Act allows it and of course the Crown if he wants to give evidence about anything that opens himself up all questioning and he'd have to answer the questions put by –

TIPPING J:

Well okay but my primary concern is as earlier stated and you've given me some help with that. Thank you.

MR BAILEY:

The actual act –

ELIAS CJ:

There wasn't any notice served in this case, was there, that this statement was going to be produced because there is a provision in this Act somewhere, isn't there, for that?

MR BAILEY:

Oh yes, that's for hearsay when admitted under section 18.

ELIAS CJ:

I see, yes, thank you.

MR BAILEY:

The act of actually having something exhibited, especially in the context of this case, where all the other exhibits were firm items that had been established is also relevant. In my submission it will have heightened the weight the jury were likely to attach to it and really gave it a status that it didn't deserve. Especially –

ELIAS CJ:

Are you really in part or perhaps tending towards the submission that where a witness is not available or where the witness will not be cross-examined, the statement should be treated as hearsay?

MR BAILEY:

Yes, effectively. Like was discussed –

ELIAS CJ:

But which doesn't mean to say it doesn't come in, it just means that you look at different provisions?

MR BAILEY:

That's – if Mr Roskam didn't turn up or didn't say, "yep" to the affirmation, and I think it's still arguable whether he is a witness under the definition, then the only way the Crown would have been able to get his evidence in would have been under section 18. As I think has been touched on already, one of the criteria for that is reasonable assurances that statements were reliable when you go onto factors that we're saying aren't reliable so that would be the only way. So when a –

ELIAS CJ:

Or at any rate even if technically not under those provisions the legislative policy embodied in them should be taken into account by the Judge in considering questions of admissibility.

MR BAILEY:

Yes and the more so in my submission when they are closer to not being a witness then actually answering questions.

WILSON J:

Mr Bailey could I ask you this? Wouldn't that exchange that occurred at trial and is recorded at the top of page 179 of the case on appeal when

Ms Preston sought to produce the statement and you as I read the transcript sought to state the position and were prevented from doing so. Are you able to tell me what was the prosition that you were seeking to take on this question?

MR BAILEY:

I can't remember the exact details but I'm pretty sure I can say at that stage Ms Preston had the document in her hand and I knew what she was about to do with it and that's what I was objecting too so.

TIPPING J:

You were wanting to resist its production?

MR BAILEY:

Yes.

WILSON J:

Yes. I assume that was its intention but I was just seeking the confirmation of that.

MR BAILEY:

And I know the transcript doesn't tell the full story but things were quite heated there and I sort of stood up quite quickly and the Judge said what he did in the transcript and that's why I guess I didn't come back to it.

WILSON J:

The Judge effectively ruled without giving you the opportunity to make the submission that you had been seeking to make. That's what appears, is that what happened?

MR BAILEY:

Yes it was. As I was saying when this statement was objected to I don't think in hindsight that would have helped the appellant's position because the jury probably go into the room, well he hasn't told us anything, what did he say in

the statement. This is what the defence counsel didn't want us to see and again would place much more weight than it deserved.

ELIAS CJ:

Sorry, if it wasn't admitted? Oh sorry I must have mistook your submission there.

MR BAILEY:

Once it was admitted into evidence –

ELIAS CJ:

Yes.

MR BAILEY:

– by the Judge as an exhibit –

ELIAS CJ:

Ah, yes.

MR BAILEY:

– the jury would likely say, well what did he say in the previous occasion, let's look at the statement that the defence seem quite anxious not to let us see and again would place more weight on the statement and the matters -

ELIAS CJ:

Well it was treated as an exhibit. I always I must say had a question about documentary evidence being treated as exhibits but you're saying that they had it there in front of them. It probably doesn't matter now that they get the evidence transcription as well.

MR BAILEY:

I think I am right in saying the case for, I think this is again in *Thompson* and some of the other cases, it states that if an exhibit was – a statement was exhibited or is exhibited the strongest warnings are required including why it has been produced as an exhibit. Secondly, and I think again this is probably been pointed out but I'll say it again, to emphasise that it was made in a completely different environment and it hasn't been subject to cross-examination and that was absent in the Judge's summing up

Also in my submission that was missing from the Judge's summing up was a direction that you may think you're so unreliable that you shouldn't place any weight on his evidence at all. In my submission at paragraph 33 of the summing up –

TIPPING J:

Well if he was of that view he should have kept it out.

MR BAILEY:

Yes, yes.

ELIAS CJ:

Does he make it clear also that his evidence included the previous statement?

MR BAILEY:

He just –

ELIAS CJ:

In that direction?

MR BAILEY:

I think he just generally talked about the statement he had given earlier –

ELIAS CJ:

Right.

MR BAILEY:

– and his lack of memory today but at page 231 of the casebook at paragraph 33 of the summing up, I think Mr Cook may have read this out, but you will need to decide whether what he said to the police or what he said to the Court on earlier occasions was truthful so it's almost inviting a which one, was it truthful, was it not, as opposed to saying, "well we're not sure at all and just disregard everything he said including the previous statements" and in many ways it's analogous to the *Bain* decision where it was either an admission or not and if it was it was fatal to the case in many respects. If they decided, "yeah we probably think he said it", then that invites, in my submission, that direction for them to rely on it even though it may be dangerous to do so.

Turning to the re-examination of course that's when this exhibit was admitted. In my submission it's telling and I'm not quite sure why the prosecutor made the application to have it admitted but obviously they thought it was going to help the Crown case somewhat and I think it did. But as I said at the start everything, once it becomes an exhibit, in that statement is admitted to evidence and Mr Cook has discussed what matters and the Court's discussed, have been corroborated by Mr Roskam's evidence and of course as Mr Cook pointed out the Crown closed on what such a detailed statement that he had made to the police. He didn't just go to the police saying, Mr Morgan confessed to this crime, he had a lot more to it.

What was actually corroborated and just moving on the basis that my instructions were correct was that as we know they were celled together. The Police Ten 7 programme comes on and then he says something to the effect that "the police think I'm involved in that" or I've been charged with that". Also, and this is a matter which I would have raised in cross-examination if I knew the statement was going to be produced as an exhibit, is Mr Morgan, based on my instruction, had told Mr Roskam, basically it had been put to him by the police that he was in basically a gang of people going around committing robberies and of course he had been charged with another robbery which he was 347'd on. Proceeding on the basis that's what Mr Morgan had told Mr Roskam, Mr Roskam knows that he can go to the police with those pieces

of information and it's going to corroborate their beliefs that he's involved as a crew whereas Mr Morgan is just saying "it's what the police have put to me" and "the police think I've done it" as opposed to "I have done it". So two pieces of important information that would in many ways, at least in the police's eyes, corroborate what they thought, obviously they had already charged them and I think –

WILSON J:

Mr Bailey, if that's the case why didn't you seek leave to cross-examine further after the statement was produced?

MR BAILEY:

I should have. I didn't. I can't say at that time if I even knew there was a right to re-examination if matters had been raised –

WILSON J:

I think there's no right but there's always the opportunity for counsel to seek leave and I would expect it to be granted in a situation like this.

MR BAILEY:

Yes and I think it's section, in terms of the Act, the Act says re-examination must be restricted to matters arising under cross-examination except with the leave of the Judge and if the Judge does grant leave, I don't know. I probably didn't know at that time that that was what the Act said. So from the appellant's perspective, and this is the appellant's position, he had tailored those two pieces of information. "The police think I've done it" and of course he had been charged and "the police think I'm involved with a number of other people" and he'd manipulated that into what may seem to have been quite a credible statement. So it was important from defence to be able to explain away that detail as best that could be done.

TIPPING J:

Why was that not equally capable of being raised before the re-examination?

MR BAILEY:

In terms of the crew being involved?

TIPPING J:

Well both those points.

MR BAILEY:

Well I did put to him.

TIPPING J:

But would you have wanted another go, so to speak, in the light of the fact that it was now going to come in as an exhibit, so called?

MR BAILEY:

The two pieces of information that I say that Mr Roskam used to tailor his confession was the police think I've done it and that was put twice to Mr Roskam.

TIPPING J:

Yes, yes I remember reading that.

MR BAILEY:

And the police think I'm involved with a number of other people –

TIPPING J:

This is the crew point?

MR BAILEY:

Yes the crew point. I wouldn't have raised that in cross-examination because Ms Preston hadn't raised it and I think it's only really prejudicial until it's raised because if the jury think he was involved in a crew –

TIPPING J:

I see. So this was a point that hadn't emerged from the Crown's examination –

MR BAILEY:

No it hadn't Sir.

TIPPING J:

– of the witness. No, fair enough.

MR BAILEY:

So once it was in I think it was better for me to try and –

TIPPING J:

You need say no more.

MR BAILEY:

Yes. One matter that hasn't been talked about a lot and I did propose to include it in the appellant's casebook on appeal is Mr Roskam's evidence that he gave at a trial which was about two months before or after this alleged confession made to him by the appellant and –

ELIAS CJ:

Why is it relevant?

MR BAILEY:

My submission is it's relevant because if the Judge has a discretion to allow previous statements to be exhibited, that has to be balanced by the whole case, and part of the case is there's an application made by defence before the trial was to have Judge Erber's decision, 347 decision, produced before the jury and it's a lot shorter, or somewhat shorter, than Mr Roskam's four page or five page statement.

TIPPING J:

Judge Erber's ruling on the – that sounds pretty odd.

ELIAS CJ:

On a charge that's 347, that's not before the jury?

MR BAILEY:

Yes.

TIPPING J:

That sounds a very odd proposition. You may be able to justify it but prima facie it sounds odd.

MR BAILEY:

Obviously his credibility was essential and if we can show that he had given evidence which is so unreliable and in the 347 judgment Judge Erber says in my 556 trials that I've presided over, I've only once section 347'd somebody on the basis of credibility.

TIPPING J:

And you're it. Or you're the second. Well it's good solid stuff but I think it would be fairly dubious admissibility before the jury in the trial that was going ahead.

MR BAILEY:

Well what the Judge did allow, and this is what we're left to, was an admission of fact to that effect but it was very limited and the Judge had ruled that the whole thing couldn't go in so we were sort of in the Crown's hands on how much they would let us, how much of that ruling they would allow into evidence. The actual admission, agreed facts rather, it was agreed to is at paragraph 138B of the casebook on appeal. The decision was more than a view about Judge Erber regarding Mr Roskam. What it said was you've given three different versions of events effectively. One in your statement, one in depositions and another at trial and this was a trial which he wasn't declared hostile. It wasn't like this case. So those were proven things that really no

issue could be taken on and that's why I think the Crown would have accepted them.

ELIAS CJ:

What was this document? Is this an admitted fact?

TIPPING J:

A potted version of Judge Erber.

ELIAS CJ:

You did very well.

MR BAILEY:

If you'd like to see the actual –

TIPPING J:

No I don't want to see it.

ELIAS CJ:

I don't think it's relevant. I do think you did very well to get this as an agreed fact before the jury.

TIPPING J:

They're very generous with the Crown down in Christchurch obviously Mr Bailey.

MR BAILEY:

I think I've covered everything I'd like to under that head. I'm also dealing with the proviso if I might just quickly cover that.

ELIAS CJ:

Yes.

MR BAILEY:

If the Court gets to this position effectively I think the starting point would be the importance, as Mr Cook said, of Mr Roskam to the Crown case. I think that's shown in a number of things but one that the Crown knew he was going to be hostile prior to being called. Mr Roskam was, and the Crown –

ELIAS CJ:

Why do you say that?

MR BAILEY:

Because he said he's not going to say anything, he's got nothing to say.

TIPPING J:

He told the officer in charge –

ELIAS CJ:

Oh the officer.

TIPPING J:

Yes, but what's that got to do with the proviso? The proviso surely is whether there was enough evidence –

MR BAILEY:

Yes.

TIPPING J:

– otherwise, to be inevitably guilty.

MR BAILEY:

Yes what I'm trying to say is I think the Crown knew how important he was to their case –

TIPPING J:

I see.

MR BAILEY:

And they went to extraordinary lengths to call him despite and he's got, at the time of the trial, had 12 pages of history including a number of offences of dishonesty.

TIPPING J:

Is your submission that without this a conviction could not inevitably be postulated?

MR BAILEY:

Yes and if I just quickly deal with the five circumstantial pieces of evidence that the Crown have listed in their submissions. Obviously there's quite a lot to the evidence but the Crown theory, and I think it diminished slightly because of the evidence, was that this was an inside job. The appellant's cousin worked at that place as a mail sorter. She knew the code. Now it's not disputed that the robbers came in through the door which had a code on it but the evidence, in my submission, did not establish that they needed the code at all. For example, and I just for the record list them at lines 1 to 26, page 33 of the case on appeal. What the staff knew is the door had been closed but they didn't know if it was actually locked and it's one of those doors where you could snip the lock and so leave it open. That door led to a storeroom which then led to the premises, the main premises where the books and things were. So it's quite conceivable for someone to go through shortly before close, snip that door open and then leave it and then come back once the store is closing.

At page 70, I think I might have slightly misled you in the references, lines 16 to 25, that's where it's talked about the snipping of the door. "If someone goes from the inside of the store to the outside of the store through the split door, you don't need a code going that way do you?", "no". "Can that lock on the red door also be snipped effectively so you can push the" – "you could yes" - "locking mechanism in", "you could", "and shut it", "yes".

Once the robbers got inside everything, in my submission, pointed to them not knowing what they were doing and therefore not being an inside job. They asked where the safe was after entering the store, page 36, lines 5 to 9. "He came up to where I was and then decided to go through the middle till through the wires. He didn't let me open a door to let him in, he just went through the wires and I was like, 'Okay' and he goes 'Where's your safe?'" Also, the next page, lines 24 to 29, the robber's enquired about getting money out of a safe that was never used by any of the staff or the store to keep money in. The answer's at line 26, at least twice while they were inside, they asked about alarms and there was two witnesses, more than two witnesses of the store that were called but neither of the two victims knew about the alarm or they thought there could have been one but they were told not to use it or they didn't even know where it was, that's at lines 1 to 28 on page 19, and also just for the record at lines 9 to 18 of page 38.

BLANCHARD J:

Just out of interest, what's happened to Ms Morgan? Has she been located?

MR BAILEY:

As far as I'm aware Sir, she hasn't been located for quite some time now.

ELIAS CJ:

So, sorry, this submission is simply that if it was an inside job, they weren't very well informed?

MR BAILEY:

Yes, and therefore pointing away to it being an inside job. And just lastly on that matter, prior to leaving the store, they asked how they could exit the store, because the door that they came through was quite far down the store and they were enquiring about other doors closer to where they had taken the money from and just for the record, that's at lines 27 to 34 on page 23, and 21 to 26 at page 38. One other matter that the Crown have raised as supporting an inside job was Danielle Morgan leaving early that day. That was certainly not exceptional at all, I put a question, "Did she leave about 70 percent of the

time?" to the manager, and she said "No, she left most of the time", that's at lines 10 to 13 on page 31 of the case book on appeal. What was unusual was her asking to leave early prior to doing so, lines 22 to 25, page 31. But that she had been only working there for about six months, that was the first Easter Saturday that she had worked and not surprisingly, it was busier than normal, a lot busier, so in my submission, it's not unusual, her asking to leave earlier.

ELIAS CJ:

This is all very collateral stuff, isn't it?

MR BAILEY:

Yes.

ELIAS CJ:

I mean, really, it just doesn't go much further than saying that there were indications that they didn't know very much about what to expect to find.

MR BAILEY:

Yes.

ELIAS CJ:

And that the reliance on her having left early was a bit far fetched or something, was it? Surely, the point is, she wasn't there.

MR BAILEY:

Yes, and she wouldn't have normally been there anyway. I think, in my submission, it would have been unusual if she always did ask to leave early, and on that occasion, didn't because she wouldn't be taking the risk that the robbers are going to be coming and they might say you've got to stay until the close of store.

ELIAS CJ:

She might be making everyone note that she was actually not going to be there. I don't know. It all seems very speculative.

MR BAILEY:

Yes. The other matter, and I'll just tidy these up quickly, is the combination to the door was known by a number of people, as you'd expect. There's all the courier drivers that dropped of material coming through that door, they included their relief drivers that they had to give the code to, lines 4 to 7, page 92. The combination hadn't been changed for at least two years, page 93, line 15 to page 94, line 2. Plus, also importantly in my submission, Danielle Morgan was someone who still doesn't have any previous convictions, or at least at that time, and the only connection between her and the appellant was that they were cousins. There'd been no evidence that he'd been into the store or sussed things out or anything of that nature.

Secondly, the descriptions of the offenders, the Crown have listed that as supporting the circumstantial case, they were the most, as you'd expect, and I'm not sure if you've got the photograph booklet, both offenders were very well covered, the descriptions didn't get any more detailed than either Māori or Samoan or Māori or Polynesian, quite small, Ms Gray describes the offender that didn't have the gun, line 2 page 16, and both, I think, were put at, their height, between 5 foot 6 and 5 foot 9, so you've got Polynesian and between 5 foot 6 and 5 foot 9, and that's it as far as I'm aware. Which, in my submission, obviously doesn't narrow things down much at all.

There's the evidence of the car, which, the Crown weren't necessarily saying this, the inference that could be drawn is the one that Constable Mooney saw after he'd been called out to the robbery, and this car was leaving, going away from the direction of the robbery, was similar to the car driven by the appellant. And as he said, there were three people in the car, one contained a person who had their hood up, a white hoodie, and it's not disputed that one of the offenders had a white hoodie, the one that was carrying the gun. Even if, and, of course, the evidence, I don't think, establishes that, was the car that

came from the scene. And just to quote it, the evidence was a grey or silver vehicle, similar to a Nissan Cefiro.

ELIAS CJ:

We have read all of this, so what is your submission? Your submission is that it was very weak evidence, is it?

MR BAILEY:

Yes. It didn't link in. The defendant, the appellant had driven a Nissan Cefiro, a green, I think it was green or silvery green, similar colour, on one occasion. That was three and a half weeks after this robbery. But the car wasn't his, and there's no evidence that he'd used it more than on that day. And, as Constable Mooney himself said, these cars are quite common.

The other link that the Crown are using was the firearms evidence. Only one in the store described a firearm. Now, this is an aspect, I should note at the start, was that the Court of Appeal did have some concerns, because there was no warning given. Even though it wasn't strictly an identification, but they said they would have preferred if a warning was given, but it hadn't caused a miscarriage of justice. She described it, the one that could describe the gun after this incident, as, I think, roundy and light in colour. Then she was shown some time later a montage of four firearms. All other three firearms in the montage were significantly different in colour. This is the only light one. And they were a different sort of shotgun to the ones she was shown. She was a person who didn't have any, or much, experience in firearms, and she specifically confirmed in evidence she chose that one of the four has being exactly the same or similar to the one she saw, based on the shape and colour, that was it. There was no other identifying features.

The last circumstantial piece of evidence the Crown have listed was at Harris Crescent. That was where they finally arrested Mr Morgan. That was an address, again, not his address, and just before, I should return to the firearm, that firearm wasn't discovered at Mr Morgan's address either. It was at one of his associate's, and he was there at the time. Moving on to when

they arrested him. Four and a half months later, they found him, did a search. The evidence didn't establish that he'd been staying there at all. Located in the garage was a sweatshirt similar to the one worn by, as is shown in the pictures, one of the offenders. Firstly, it seems that, based on the evidence of Elizabeth Cross, the appellant certainly wasn't staying there, and if he had been there, he hadn't been there long. That jersey wasn't found where the appellant was at the time, which was a sleepout. It was found next to that, in the garage. And it was wrapped away in a plastic bag, like it hadn't been used for some time. It was a jersey that was taken to be ESR tested. No hits came back, so to speak.

The only other thing that the Crown have listed in the submissions in supporting Mr Morgan's guilt when he was arrested was at that sleepout where he was were coin bags that were similar to the ones used at Books & More. All they were, and the Court will be well familiar with, were typical bag, bank bags that all banks use. And the evidence from one of the witnesses at the store is that they're from "any old banks". That's at lines 3 to 5 of page 22. And if you look at all the bags from the photographs of where the appellant was found in the sleepout, I think there were seven, in total. There all seemed to be, or at least the ones shown in the photograph, Westpac coin bags, with the Westpac logo at the front. The only one that you can see in the photograph booklet at Books & More, where the robbery took place, is not Westpac. You can't see what bank it is, or what organisation but it's different.

ELIAS CJ:

I don't know what you're inviting us to take from the photograph?

MR BAILEY:

There's a very little link between saying that Mr Morgan is found in a place where they've got coin bags, and saying, well, these are similar to the ones –

ELIAS CJ:

Well, that's almost certainly correct, if it was only one. But this is a case built on circumstantial evidence, and it's the combination, it's the number of coincidences that's the problem, isn't it?

MR BAILEY:

Yes, yes. And obviously they have got to be gone through individually, like the Crown have listed them and I'm just trying to do that.

ELIAS CJ:

Yes.

MR BAILEY:

But they were really built around, in my submission, Mr Roskam's evidence, and they far – would not have left the jury. I think the jury were out for about six hours.

TIPPING J:

Is it a fair summary of your submission that whereas the circumstantial evidence might probably have led to a conviction without the admission, it can't be said inevitably to have led?

MR BAILEY:

Yes, certainly.

TIPPING J:

Is that really what you're suggesting?

MR BAILEY:

Yes.

TIPPING J:

It's not strong enough to lead to inevitability?

MR BAILEY:

No. Unless the Court has any further questions?

ELIAS CJ:

No, thank you very much, Mr Bailey. We'll take the luncheon adjournment now and resume at 2.15. Thank you very much.

COURT ADJOURNS: 12.53 PM

COURT RESUMES: 2.17 PM

ELIAS CJ:

Yes, Mr Solicitor.

SOLICITOR-GENERAL:

Thank you very much, Your Honours. I did prepare a one page synopsis, but I will try and get by without presenting it to Your Honours today. I wanted to start by emphasising that this case does invite this Court, for the first time, to give guidance on the interrelationship between section 7 and 8 of the Evidence Act, and it also invites guidance on the applications of section 94 and 96, to some extent, possibly also section 37.

ELIAS CJ:

Do you mean section 7?

SOLICITOR-GENERAL:

Very peripherally.

ELIAS CJ:

You're right, yes. On section 8?

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

We thought we'd done that in *Bain*.

SOLICITOR-GENERAL:

Yes, of course you did. The effect of section 7 is to create a presumption that once evidence is relevant, then it is admissible, unless there is a provision in either the Evidence Act or in another statute which prohibits its production, or unless it is otherwise excluded, pursuant to the general exclusionary provisions set out in section 8. The safeguards to the production of evidence that is relevant in the circumstances of a case such as this, where the evidence which is produced is a prior inconsistent statement produced through a hostile witness, as set out in sections 94, 96 and 122. So in section 94, we have the discretion to permit the cross-examination of a hostile witness. And then in section 96, we have certain minimum criteria that must be satisfied during the course of cross-examination of a hostile witness on a previous statement. Ultimately, there is also the requirement in section 122 which applies to a case such as this, that when the Judge gives directions, they must give very careful warnings to the jury about what weight they place on the evidence, and whether or not, in fact, to accept the evidence at all.

TIPPING J:

Interestingly, Mr Solicitor, in 122, there is no specific reference to hostile witnesses. But, of course, there is in subsection 6, the reservation that you can, it doesn't affect any other path for the Judge to warn or inform the jury.

SOLICITOR-GENERAL:

Yes.

TIPPING J:

So it might have been actually more helpful to have hostile witness situation expressly listed in subsection 2, because it normally, I won't say always, normally invokes the need, at least consideration of the need.

SOLICITOR-GENERAL:

Yes.

TIPPING J:

But be that as it may.

SOLICITOR-GENERAL:

Yes. And in any event, the section 122 warning had to be given, in this case, and was given.

TIPPING J:

Quite.

SOLICITOR-GENERAL:

So the primary focus of enquiry in this instance is upon the application of the general exclusionary provisions in section 8. And I want to commence by focussing upon the issue of the reliability of the statement, by looking at the circumstances upon which it was produced. And that necessitates a very brief examination of the other evidence that was available, why it was that the police came to get this statement when it was volunteered to them by Roskam, how Roskam had reacted previously, and then we need to have a very careful examination of exactly what happened during the course of the trial. And just dealing with those factors. There are, in fact, eight separate pieces of evidence that the jury were entitled to rely upon when convicting Roskam. I won't labour them.

BLANCHARD J:

Convicting Morgan.

SOLICITOR-GENERAL:

Sorry. I meant Morgan, Sir. The first is that the entry to the shop which the Crown says the offenders entered was controlled by a security code. Only

five people actually knew the security code number: two employees, the manager, and two courier company drivers. The evidence as to the exact number is to be found on page 81 on the case on appeal, line 24, where the identity of the five people who knew the security code number is set out.

The second piece of evidence was that it was unusual for Ms Morgan to ask for permission to leave work early, and she did so on this particular occasion. The third piece of evidence concerns the gun that was used in the aggravated robbery, and you'll know from having read through the transcript that one of the offenders had a sawn-off shotgun. It was placed in the back, or the at the back of the head of one of the women who were working in the shop.

Now, that gun was located approximately three weeks after this incident at an address in Tuam Street in Christchurch. The circumstances under which that gun was found were actually made available to the jury in the form of the interview that the police had with Morgan in relation to that particular incident. Now, that transcript is not part of the case on appeal. But what the jury learned was that Morgan was at an address in Tuam Street. Some people started to come through the front door of that address after a verbal exchange between Morgan and those people. Morgan went straight into a bedroom in that house, and went and found the sawn-off shotgun, which was in a bag, hidden under or behind a chest of drawers. He then pulled that gun out, and presented it to two people who had apparently come through the door, and discharged the weapon, and thankfully avoided hitting anyone, even though there were two people in the corridor at that stage. Now, that was the very weapon that one of the persons who was held up said was the gun, or very similar to the gun, that was used by one of the assailants, one of the robbers, on the night of the evening that Books & More shop was robbed on Easter Saturday 2006. And Morgan, when questioned, said he knew about the gun, where it was, he even knew how it had been obtained, and I think the Judge, in his summing-up, even goes so far as to say that Morgan's evidence in the interview meant that he knew of the existence of the gun at the time of the robbery of the Books & More shop. I'll just take you to that point. It's at

page 235 in the case on appeal at paragraph 55. Actually, you need to read paragraphs 54 and 55 to get the context.

The fourth piece of evidence concerned the Nissan Cefiro, described as a very light-coloured one, which the police saw a few minutes after the reporting of the robbery at the Books & More shop, travelling in a direction opposite from where the New Brighton mall is. It was being driven moderately fast, and was observed because there was little or no other traffic on the road at the particular time.

The fifth piece of evidence is that one of the persons in that car was observed by the police to be dressed in a way in which was similar to one of the persons whose identity could be seen on the security video footage, taken at the time of the robbery.

The sixth piece of evidence is that four months after the incident, a property belonging, well, a property at which the appellant's girlfriend lived was searched. She occupied a separate unit at the back of the house. The appellant often stayed there, and located in that address was an item of clothing was very similar to an item of clothing worn by one of the offenders.

The seventh piece of evidence is that the appellant matched, in very general terms, the description of one of the offenders given by the shop employees, and also matched, in general terms, the images from the security video footage that has been described.

And then the final piece of evidence, the eighth piece, is that the witness Roskam, who had shared a prison cell with the appellant, volunteered a statement to the police that the appellant had seen a television programme featuring the robbery, and had said words that made it clear that he'd been involved in the robbery. So there were, in the Crown's submissions, eight pieces of evidence, one of which was the Roskam statement to the police.

It's now necessary to just very briefly consider the circumstances in which Roskam's statement came to be made, and then what happened thereafter. Roskam made his statement to the police on the 24th of October 2006. That's approximately six months after the robbery, and approximately seven weeks after the robbery had featured, for the second time, on a Crimewatch television programme called Police Ten 7. Roskam made his statement to a police officer, who was unconnected with the investigation into the aggravated robbery. Roskam volunteered that he was sharing a cell with the appellant on the 5th of September when the programme was screened. He said that the appellant got excited, and started yelling out to another inmate in a different cell words to the effect, "Did you see that programme?" Or, "Did you see it?"

Now, it's important to note that, because it was suggested this morning that Roskam had said that Morgan had made a statement that was incriminatory of him in circumstances where others would have heard it, possibly even a prison guard. Well, there was nothing incriminatory said at that stage. All he yelled out was, "Did you see that programme?" The incriminatory statement occurred a few days later, on the following weekend, when Roskam and Morgan got into a conversation with each other, and the topic of the Police Ten 7 programme came up and during the course of that conversation Morgan said to Roskam, "that was me". Roskam asked who the others were and said words to the effect, "we have a crew, there's about eight or nine of us in it" and Roskam said that Morgan told him he was one of the two people that could be seen in the video footage. He was the person who was standing back during the course of the robbery. One of the offenders scrambled over the counter in between security wires and proceeded to then play his part in the robbery and the second person, the one with the gun, was standing back whilst that was happening.

Roskam was called to give evidence at the depositions hearing. He did that on the 5th of July 2007. He affirmed to tell the truth and his deposition statement, which I've made available to the Court, is in all material respects consistent with the statement that he had made to the police on the 24th of October 2006. He was actually cross-examined at that time and one of the

topics that was addressed in cross-examination was whether or not it was correct that the appellant had said he had a crew and I'll come back to that point a little later. Roskam said then that the appellant had told him that.

Roskam was then called to give evidence at Morgan's first trial in April 2008. He presented without any difficulties whatsoever. His evidence was again entirely consistent with the statement that he had made to the police and it was entirely consistent with his deposition statement. He was again cross-examined but on that occasion the topic of Morgan having said to Roskam that he had a crew was not touched at all. That trial was aborted. The reasons for the aborting of the trial had nothing to do with Roskam's evidence.

At the retrial we see that Roskam was called to give evidence on the 23rd of July. Prior to giving evidence the Court was alerted to the fact that Roskam wanted to confer with a lawyer. The reasons for that were not immediately apparent. Roskam was then seen by the Judge in the absence of the jury and in the absence of the accused and he said that he didn't want to give evidence that day. Enquiries then revealed that Roskam's reluctance to give evidence apparently related to a suggestion that he had been threatened. The trial Judge told Roskam that he was a compellable witness and that if he did not agree to be sworn or take the oath he could be held in contempt. Crown counsel then indicated that if Roskam was sworn and refused to answer questions she would apply to have Roskam declared hostile. Roskam was called into court. He immediately said that he didn't want to give evidence because he feared for his own safety. Roskam's lawyer advised the Court that he had informed Roskam of the consequences which would follow if he did not give evidence. Roskam was affirmed. Roskam answered preliminary questions and then followed approximately one page of the transcript of questions and non co-operative answers before the Crown applied to have Roskam declared hostile and that application was appropriately granted.

Roskam was then questioned as a hostile witness during which he accepted the following. He accepted that his statement to the police contained a reference to the Police Ten 7 programme. It might be helpful if we have that available. It's at page 167, line 16, of the case on appeal. So the first point he accepted was that his statement contained a reference to the Police Ten 7 programme. Then he accepted that he remembered saying to the interviewing officer that he, Morgan, got excited during the screening of the Police Ten 7 programme. That's at line 33.

He later accepted that the signature on the statement could be his, that's at page 170, line 16. He said, "It looks like mine." He admitted that he had signed the foot of each page of the statement, that's on the same page at line 19. He admitted that he'd given a deposition's statement, that's at page 171, line 15. And that he had signed the foot of each page of that statement. And then ultimately he accepted that what he had said on previous occasions was not, were not lies and that the reason why he wasn't wanting to say anything that day, the day he was giving evidence, was because he was fearful.

He was then cross-examined where again he accepted that he'd made a statement to the police on the 21st of October, that's on page 174, line 22. He denied when it was put to him quite firmly that his statement was made as part of a deal with the police, that's page 175, line 24. Then he was, I say this is the next most significant part of the transcript, it was then put to him that he was perjuring himself when giving evidence. That he told lies when he had an obligation to tell the truth under oath or affirmation and then he denied that he'd told any lies, and that's at page 176. The –

TIPPING J:

The reference to "in that trial" is to the first trial is it?

SOLICITOR-GENERAL:

I understand that's to another trial.

TIPPING J:

Oh another trial?

SOLICITOR-GENERAL:

Where he gave evidence against –

TIPPING J:

Sorry.

SOLICITOR-GENERAL:

Against another person who was in prison but it was put to him that on that occasion and on this occasion he was perjuring himself and he asked what perjury meant. And Roskam was then re-examined and at the outset the Crown prosecutor said she wished to address a matter that should have been dealt with in evidence in chief, that's at page 179, line 5. Counsel for the appellant then said, "If Your Honour pleases." And the Court's response is, "Just a minute Mr Bailey, let's see what's happening." Ms Preston then applied for permission to produce the police statement as an exhibit and the Court granted that application.

WILSON J:

Do you accept the defence should have been given an opportunity to make submissions as to the admissibility of the statement?

SOLICITOR-GENERAL:

I doubt if the defence counsel had got to his feet and said, "Your Honour I wish to address you on the question of the admissibility of that statement", he should have been given the opportunity to do so.

TIPPING J:

Well he never had a chance really, did he, because the Judge immediately made the ruling?

WILSON J:

Isn't it implicit, just following on from Justice Tipping's observation, that when counsel is recorded as saying, "If Your Honour pleases," and the Court, "Just a minute Mr Bailey," it certainly would convey to me that counsel had been prevented from making a submission that he wished to make.

SOLICITOR-GENERAL:

At that moment because the Court didn't know what was happening, didn't know what the application was and Ms Preston had referred to the transcript, the page of the transcript that was most relevant to the production of the statement and the Judge then makes reference to that page himself in the statement that he makes to Mr Bailey. Now undoubtedly had Mr Bailey sought the opportunity to make submissions on the appropriateness of the production of that statement, then he should have been given that opportunity.

TIPPING J:

But hasn't the Judge overlooked, for the moment, the fact that counsel wanted to be heard and he makes the ruling before counsel could be heard.

SOLICITOR-GENERAL:

He makes the ruling before counsel is able to advance their objection.

TIPPING J:

Well it's quite a big ask in the dynamics that I suspect were going on here for counsel then to stand up and say, "I'd like Your Honour to reconsider that ruling in the light of what I'm about to ask leave to say".

SOLICITOR-GENERAL:

I don't know that that is really such a big ask and even in the dynamics of a trial, if counsel believes that making a submission on such a matter might be seen unfavourably by the jury then counsel can ask the Judge to deal with the matter in the absence of the jury and if the Judge has been too quick in producing the statement, the Judge can hear submissions and if he accepts

the submission then he can simply say that exhibit will no longer be placed before the jury and that's the end of the matter. The jury of course had –

TIPPING J:

I accept all that you say. I just think this is a highly unsatisfactory and unfortunate sequence. Whether it's going to lead us anywhere is a totally different matter. The Judge has an obligation to see that the accused has a fair trial. It's not necessarily he doesn't just respond to counsel. He should have addressed this matter himself.

SOLICITOR-GENERAL:

I accept that.

TIPPING J:

And sought counsel's assistance if he had any difficulty with it.

SOLICITOR-GENERAL:

Counsel also has duties Sir and that is to make sure that the Court is aware of the issues so as to ensure that an error does not occur.

TIPPING J:

Well happily I doubt that it's going to matter.

SOLICITOR-GENERAL:

Yes, thank you Sir. I have gone through in some detail the facts that are relevant to this case, the circumstances under which the statement was volunteered by Roskam to the police and the circumstances prior to Roskam actually giving evidence and the circumstances as they applied when he did give evidence, to demonstrate that that statement, when looked at holistically as part of the totality of this case, was reliable and that there was therefore absolutely no reason why as a matter of law it should not be produced at all. Indeed it would be now highly unusual for a statement not to be produced.

It was suggested this morning that there was a presumption against the production of a statement in circumstances such as this. I refute that submission. To the contrary the presumption is that such a statement should be presented and produced as an exhibit so that the jury have the opportunity to examine the totality of the evidence.

WILSON J:

What do you say is the authority for that proposition?

SOLICITOR-GENERAL:

It started off with section 7, we say there was a presumption in favour of the presentation of all relevant evidence unless there is a provision in the Evidence Act or in another statute which precludes the production of the statement. Then section 94 and 96 logically lead to the point where if the evidence of the statement is admissible then the statement itself must be admissible and to that extent Your Honour I align myself entirely with what the president of the Court of Appeal said in *Hira* where he said that in the normal course of events the most sensible course of action is for the statement to be produced right from the beginning by the prosecutor.

TIPPING J:

It has always intrigued me that I doubt there was a presumption against. I think it was previously seen as a discretion and now I think there is a good case for saying that the discretion should be exercised in favour unless there is something in the case that dictates otherwise.

SOLICITOR-GENERAL:

Yes, yes.

TIPPING J:

Because it's the best evidence.

SOLICITOR-GENERAL:

Precisely, yes. I just made reference to *Hira* and an extract from what the learned president said in that case. That's tab 12 of respondent's authorities at paragraph 30 from memory, yes paragraph 30.

ELIAS CJ:

Tab?

SOLICITOR-GENERAL:

That's tab 12 Your Honour, paragraph 30.

ELIAS CJ:

I'm sorry I haven't read this case. Does that mean at the time – was this a hostile witness case?

SOLICITOR-GENERAL:

Yes. All of the Crown cases do refer to -

ELIAS CJ:

So it would have been at the time the witness was declared hostile?

SOLICITOR-GENERAL:

Yes. So rather –

ELIAS CJ:

I agree with that. It does seem to me the more sensible way to proceed.

TIPPING J:

And I think it was just an oversight in this case and it was remedied by being put in, in re-examination.

SOLICITOR-GENERAL:

Precisely Sir. So if I could urge the Court when preparing its judgment to endorse what the president said in *Hira* at paragraph 30, that would provide strong guidance for –

ELIAS CJ:

After giving an opportunity for any submission to be made that might be appropriate.

SOLICITOR-GENERAL:

Yes, of course.

ELIAS CJ:

While we're just thinking about your written submissions, I did put a question mark around your paragraph 30 and the suggestion that witnesses can be cross-examined about documents that are inadmissible. I mean I don't think we're into this area at all but it doesn't strike me as a very attractive argument, particularly as one of the sections I think talks about oppression and improperly obtaining and so on. A statement, for example, obtained by oppression one wouldn't have thought could be introduced, or cross-examined on?

SOLICITOR-GENERAL:

I think Your Honour is, yes, correct in that. But as you also note I don't think we need to go that far in this case.

ELIAS CJ:

No.

SOLICITOR-GENERAL:

In ascertaining and focusing upon what mischief –

ELIAS CJ:

The other point about that is this wasn't a case really where it was necessary for the Crown to cross-examine to discredit the witness because the witness wasn't giving any evidence that was relevant. It was only necessary to put the statement in.

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

And cross-examine on the basis of the statement and see if they could get the statement adopted.

SOLICITOR-GENERAL:

Yes and indeed the Crown didn't attempt to discredit Roskam.

ELIAS CJ:

Well I think they did quite well actually.

SOLICITOR-GENERAL:

I'm pleased to hear Your Honour say that because I actually quite marvelled at the transcript that I read and thought gosh I wish I could have got away with that. But there was a challenge to Roskam's veracity and it was a very, very firm and direct challenge to his veracity. He was told that he was perjuring himself. Now when a witness is being told that they are perjuring themselves, that in itself provides another opportunity for a statement that is consistent with the evidence that they're giving to have that statement produced and that comes in under section 37.

ELIAS CJ:

But that didn't apply here?

SOLICITOR-GENERAL:

No, no. But it's worth remembering that section 7 provides another –

ELIAS CJ:

Yes, yes. Permits consistent statement, yes. That's always been the case, though.

SOLICITOR-GENERAL:

It has, it has, yes. Section 37 simply codifies the previous law. The interesting focus in this case, as least from my perspective, has been to try and ascertain, well, what mischief was really done in this particular case? And I accept that it was unfortunate that the correct procedure wasn't followed. But then from that, one has to ascertain precisely what wrong was actually done. And when one actually carefully examines the questioning of Roskam in his evidence in chief, and the cross-examination of Roskam by Mr Bailey, one gets down to one point that there is a difference on. And that is, did Morgan say to Roskam, "That was me", or did Morgan say to Roskam, "The police think that was me". And Roskam was questioned on that very point in cross-examination. So when it is suggested that Morgan was denied the opportunity –

ELIAS CJ:

Sorry, whose cross-examination are you talking about here?

SOLICITOR-GENERAL:

Mr Bailey's.

ELIAS CJ:

Oh yes.

SOLICITOR-GENERAL:

So when it is suggested that the appellant was denied the opportunity, or was denied any effective cross-examination, it is true that Roskam didn't give the answers that Morgan's counsel was hoping for, but the actual only matter that was relevant was put to him, and an answer was given. The answer may not have been all that helpful, but the question was, nevertheless, able to be put. Now, after the statement was produced, during the course of re-examination, had Morgan's counsel really wanted to cross-examine on that statement again, then he had a duty to inform the Court of that. He needed to say to His Honour the trial Judge, "Your Honour, this statement has now been produced. There are matters contained in that statement that I need to have

the opportunity to cross-examine this witness on". And had that application been made, it undoubtedly would have been granted. It would have had to have been granted. But it wasn't. And when one looks at the evidence that was adduced through Roskam, the only topic that is contained in his statement that was not the subject of a question in examination in chief, or in cross-examination, was this reference to Morgan saying to Roskam words to the effect, "We have a crew".

Now, I don't know how that topic could have assisted Morgan in any way if it had been pursued by way of cross-examination after the statement had been put in. Certainly the Court of Appeal was very, very interested to try and ascertain from Mr Bailey what further questions could he have put, and he said that this was the subject that he would have wanted to pursue, but the Court wasn't able to ascertain why. And no explanation has been provided to this Court. So we are left with the situation where there was a procedural irregularity, but no true mischief occurred. And indeed, although it's mentioned in the Crown's submissions, the way in which this exhibit was dealt with also needed to be borne in mind. After it was produced as exhibit 11, it was altered slightly, it was edited, because apparently the original statement contained some references that should not have been able to go to the jury. And I'm informed that it was Ms Preston and Mr Bailey who conferred with each other over the way in which that statement would be edited, so that it would go to the jury in an appropriate form, and it was unnecessary to even trouble the trial Judge over that matter. So if you go to the statement, you'll see that one part has been edited out. It's page 188, about two-thirds of the way down the page. The first three or four lines to an answer have been deleted.

WILSON J:

At what point do you know that that editing occurred?

SOLICITOR-GENERAL:

As I understand it, after Roskam had given his evidence. Whether it occurred before the final witness, Bettridge, or after Bettridge had given his evidence, I

don't know, Sir. That was very close to the end of the day, and the jury were sent away for the evening at about ten to five that day. It may have happened after that, but it was definitely after –

WILSON J:

After Roskam's evidence?

SOLICITOR-GENERAL:

After Roskam's evidence, as I understand it, Sir. But because it was being dealt with by consent, there is no record in the Court file as to exactly, precisely, when that happened. So there was yet another opportunity, if Mr Bailey was genuinely concerned about the production of that statement, it hadn't gone to the jury at this stage. They didn't have it in their physical possession. There was yet another opportunity for him to reflect on the matter and say, "Your Honour, you've allowed this exhibit to be produced, I really do have some concerns, now that I've had the opportunity to reflect on it, would you hear me on that, please?" And it would be inconceivable for a Judge not to have heard submissions on that. So we are left with –

TIPPING J:

Of course, the need for editing was a very good reason why the Judge shouldn't have pre-emptively ordered it to be admitted. But I'm just probably putting a bit of salt into the wound, there, Mr Solicitor.

SOLICITOR-GENERAL:

It's not my wound, Sir. Pour away. So I think I can very briefly summarise what the Crown's position is. We have a relevant piece of evidence. The presumption is that it is admissible. There is no provision in the Evidence Act, or in any other statute, which says that this exhibit cannot be produced. There are safeguards in sections 94, 96 and 122 that relate specifically to the circumstances of this case, where a hostile witness is cross-examined on a prior, inconsistent statement, and that statement is produced. Then there is the ultimate safeguard of section 8, which permits the exclusion of otherwise

admissible evidence. In this particular case, it is quite obvious that the statement was reliable, and that its probative value outweighed any prejudicial effect that it may have had. And its reliability can be gleaned from assessing that statement against the background of the other seven pieces of evidence that were before the jury, the circumstances under which it was volunteered, the circumstances upon which Roskam gave evidence on two prior occasions in a way that was totally consistent with his evidence and totally consistent with his statement to the police. And at the end of the day, when one carefully examines what occurred and looks for harm that was done, one can't find it.

TIPPING J:

Mr Solicitor, what you've just said sparked a thought. If the essence of the unfair prejudice alleged is insufficient reliability, one would have thought that before you took that away from the jury, whose ultimate task it is to assess reliability, it has to be at quite a significant level of insufficiently reliable. I didn't put that very well –

SOLICITOR-GENERAL:

I understand what Your Honour is saying. Yes I know, I would agree entirely –

TIPPING J:

I mean there are a variety of reasons why things can be unfairly prejudicial but this one seems to be the proposition that it wasn't sufficiently reliable –

SOLICITOR-GENERAL:

Yes.

TIPPING J:

– in essence –

SOLICITOR-GENERAL:

That's what I understand –

TIPPING J:

To go.

SOLICITOR-GENERAL:

– it to be.

TIPPING J:

You've got to be careful not to usurp the jury function by a Judge's call, I would have thought, and it has to be at quite a high level of unreliability if you like before the Judge will simply say we're not going to let the jury even assess this.

SOLICITOR-GENERAL:

Yes, yes.

TIPPING J:

I mean it seems to me to be possibly relevant to the balance that needs to be struck in these sort of cases.

SOLICITOR-GENERAL:

Yes and then when, although I was wrapping up, it's probably appropriate to finish by examining again what the trial Judge actually told the jury. You have been taken to the most detailed parts of his direction on the need for them to be extremely cautious over what weight and reliance they place on Roskam's statement but there are more sections as well in the judgment. It commences on page 230, paragraph 29. Paragraph 31 he actually went so far as to give a direction which was quite contrary to the law and to the Crown's interest. Paragraph 34 His Honour gave a direction which was consistent with his obligations under section 122 of the Evidence Act and the Court hasn't been previously referred to His Honour returning to this topic again just before he finished his summing up at page 237, paragraphs 65 and 66 where again His Honour emphasises to the jury the need for caution before they accept anything that Roskam has to say. I think it can be fairly said that this was a

situation in which the trial Judge was going to quite considerable lengths to try and make sure that this jury was very, very circumspect before placing reliance on what Roskam had told them. Now can I just confer with my friends and see if there's anything else?

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

Unless I can assist the Court further those are my submissions.

ELIAS CJ:

Thank you Mr Solicitor. Yes Mr Cook do you want to be heard in reply?

MR COOK:

Yes just very briefly. The Evidence Act is useful in another way as well because you've got section 18 which sets out circumstances in which hearsay can be admissible and that maybe relevant to the Court's consideration. The next point is in the supplementary case on appeal you have Mr Roskam's evidence from the first trial that was aborted. I encourage the Court to have a look at that. It rewards reading because the full aspect of his demeanour is put before the finder of fact particularly beginning at page 237, it's tab 2 of the supplementary case, line 28. For obvious reasons I won't read it out.

ELIAS CJ:

I'm just not sure I've got the supplementary case.

BLANCHARD J:

What was the page?

MR COOK:

It's 237 of the – tab 2.

ELIAS CJ:

Yes, yes we have got it.

MR COOK:

It's 237, line 28 and he just continues on in that vein. Four more brief points in reply. Regarding the strength of the case the central strand, and the Judge confirmed this, was Mr Roskam's evidence and the Crown prosecutor said it's the last nail in the coffin, that's how central it was to their case.

Regarding the factors outside Mr Roskam's statement that made it not reliable, it should be remembered that this is a witness who has, and participating in the way he did in the trial, he's misleading the jury. He's saying I don't know, lying by omission, to the jury on things that he should know about.

Secondly, Mr Solicitor referred to the conversation that Mr Roskam puts forward that happened between the appellant and another inmate. Why wasn't that other inmate called or was there any investigation to see where he was which would be an independent corroborating factor of that statement increasing its reliability? The depositions, just because you confirm something more than once, doesn't make it true and the cross-examination at the depositions wasn't before the jury.

Now just regarding the exhibiting of the statement. In my submission it ignores the realities of the situation. Mr Bailey stood up, started to say something, the ruling happens, have a look at it, I'm prepared to allow it in, that indicates that the Judge knows what it's about, he knows that counsel wants to disagree with it.

Now the editing, something was made of that. I understand that there was a discussion where it was said to the Judge, I appreciate your ruling but there are some matters that need to be dealt with and then that's dealt with between counsel. Nothing really turns on that but it's just the way the Judge handled it is, in my submission, unsatisfactory.

The final point is regarding the production of the statement as an exhibit. In the three scenarios I gave earlier, the first one the witness coming up to brief, that's going to be ruled by section 35 prior consistent statements. The second scenario, the saying "black" in the statement and then "white" at the trial, there's going to be a discretion to allow that in. The third, the forgetful scenario, again there's going to be a discretion but it's going to be much more difficult, in my submission, to establish that it should go in because there is more prejudice there. And if it does go in, in the two scenarios that I've outlined, then there would need to be firm directions along the lines of when a trial Judge refers the jury to parts of the transcript. You've got to look at the evidence in chief, the cross-examination and any re-examination on the point so you can't just look at the statement but look at the cross-examination on it. Those are really the only points thank you.

ELIAS CJ:

Yes, thank you. Thank you counsel for your submissions. We will reserve our decision in this matter.

COURT ADJOURNS: 3.09 PM