IN THE SUPREME COURT OF NEW ZEALAND SC 66/2009

MAIA RONGONUI

Appellant

v

THE QUEEN

Respondent

Hearing:	19 November 2009
Coram:	Elias CJ Blanchard J Tipping J McGrath J Wilson J
Appearances:	N Levy for the Appellant M Downs with T Epati for the Respondent

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CRIMINAL APPEAL

MS LEVY:

May it please the Court, Ms Levy for the appellant.

ELIAS CJ:

Yes, Ms Levy.

MR DOWNS:

May it please the Court, Downs and Epati for the Crown.

ELIAS CJ:

Yes, thank you, Ms Downs, Ms Epati. Yes, Ms Levy.

MS LEVY:

May it please Your Honours. I say the section 35 appeal is on a very simple point. It is an assertion of what the jury has just been told, to say, "I told 'X' what had happened," and the Crown recognised the power of this in their closing in this case. There are four problems with the Crown arguments, which I'll go through one at a time but, in summary, the Crown argument, the Crown's first argument, relies on relevance when, in my submission, the issue for this Court is simply whether the words spoken are excluded by the plain words of section 35. Secondly, the Crown says that a summary or an abbreviated form of what was said is not an assertion. In my submission, that ignores the reality of the evidence and, in this case, how it was used and why it was led. The Crown conduct and narrative arguments sound very forceful if one is arguing about relevant, but they are unrelated to the words of the Act. If the Crown argument that to say, "I told my friend what had happened," is not excluded by section 35, if that argument is correct, then the complainant that Your Honours were concerned with yesterday in the *Hart* case could have been asked, "Who was the first person you told what had happened?" "Oh, I told Mr Loos." "Do you know when that was?" "No." Call Mr Loos. "Did you have a conversation with the complainant about Mr Hart?" "Yes." "Can you describe when that conversation was?" and Mr Loos could have explained how the date was referable to the mother's suicide attempt. And the very evidence that the Crown relied upon in *Hart*, that Mr Loos was aware of the complaint in, I think it was May 2006, that very evidence could have been before the jury without any need to refer to section 35(2). Because what was important in *Hart* was that the complainant had spoken to Mr Loos on this topic in May 2006. Not the detail of what she'd said, but that she'd spoken on that topic. And, if the Crown is right in this case, *Hart* was an unnecessary argument.

To summarise what I will say on the refreshing memory point, the submission for the appellant is that only a witness wishing to refresh his or her memory can say whether his or her memory was fresh when that statement was made. Nobody else knows, only the witness knows. It is the witness' memory.

TIPPING J:

Are you saying in effect that there has to be an assertion, which forms the basis of the finding; whether that assertion is accepted is another matter?

MS LEVY:

Yes.

TIPPING J:

There must be an assertion by the witness that their memory was fresh?

MS LEVY:

Yes. I accept that in some circumstances it will be so obvious, as for example a police officer who was writing it in his notebook at the time that the conversation was taking place. It's not a hurdle that will need to be jumped over pointlessly every time. But where, as here, there is an objection, it is a matter that must be addressed by evidence.

ELIAS CJ:

How can the witness answer that question, "Was your memory fresh when you gave this?" How would they know that? Isn't the fact that memory is refreshed and in the only safe evidence, or, the only point really, when the witness say, "Oh, now I remember?"

MS LEVY:

No, with respect Your Honour, Your Honour is addressing the second part of what happens under section 90 subsection (5), which is when the witness is permitted to look at the document. The issue that I am making submissions on is whether the witness can be permitted to look at the document without

first asserting that that document was prepared when the witness' memory was fresh.

ELIAS CJ:

But what I'm querying is how realistically does a witness answer that? Is the witness being invited to give an opinion as to the state of her memory at the time she gave the first statement?

MS LEVY:

Yes, absolutely, Your Honour. Because we have a witness who by – we're only referring to section 90(5) because the witness has said, "I can't now remember, I've forgotten now." So the question becomes, "Well, a document was prepared earlier, in which you spoke about this incident. Was your memory fresh when that was prepared?" And if the witness or other circumstances can't answer that, "Yes," and the witness must be the person who knows, then you can't proceed further.

BLANCHARD J:

Well, the best the witness can say probably is, "I suppose it was."

TIPPING J:

Or, "Fresher than it is now."

ELIAS CJ:

Yes. I mean, yes, does "fresh" mean "fresher"?

MS LEVY:

Well, no, with respect, it doesn't mean "fresher", it means "fresh". The witness must be able to say, "At the time I made that statement I could recall this incident."

McGRATH J:

Does this really arise because of the five weeks' lapse? Is that why you –

MS LEVY:

Yes.

McGRATH J:

That's really why you think the evidence has to be direct on the matter.

MS LEVY:

Yes.

McGRATH J:

It wouldn't matter if it was 24 or 48 hours later.

MS LEVY:

It's much –

McGRATH J:

The inference could then be drawn from the proximity.

MS LEVY:

Much more readily, that's correct, and –

ELIAS CJ:

Depends on the memory, of course.

TIPPING J:

And the age and the…

MS LEVY:

It also depends, with respect, on the defence. The defence in this case is that there was no conversation, that this witness has invented a conversation. So, in my submission, a witness in such a position has to be tested as to what she says about why it was fresh five weeks after she says it happened. And that leads into the second point that I wish to make on this topic, and that is that

whether an incident such as this conversation was significant for a witness can only be explained by that witness.

TIPPING J:

Well, that's a bit extreme isn't it, Ms Levy? I mean, the very nature of the events purportedly recalled must surely inform that question, as well as the witness' own assertion.

MS LEVY:

I finished my sentence –

TIPPING J:

Sorry.

MS LEVY:

– without reading the last two words which I had written down. Whether an incident was significant for a witness must be explained by that witness, or obvious.

TIPPING J:

Sorry, I probably jumped in far too quickly.

MS LEVY:

No, no, I finished and I'd crossed some words out and I didn't read the last two. Now, witnessing a murder, even seeing a car crash, for some people, but this witness in this case, now she is, on other evidence I think we can see, comes from a family with gang affiliations, her cousin refers in the evidence to having been in prison and his uncle having been in prison, this witness is related to Mr Rongonui, she says, "On both sides." It's not explored in evidence in this case, but it's apparent from the discovery material that the reason the witness spoke to Mr Rongonui was because some street workers who were visiting told her that Mr Rongonui was involved in an incident. So that's her evidence. So, while, with respect to the Court of Appeal, a conversation in which a young man admits rape might be significant in their

experience, in my submission it needed to be explored with this witness as to the types of conversations that she was accustomed to having with people and whether this was truly a significant one for her, so that her memory five weeks after the event can be relied on simply on that basis.

In respect of the hostility point, it appears that the Crown, despite saying in submissions in opposition to the application for leave that the witness was clearly hostile, it appears that the Crown now resile from that and accept that hostility cannot have been a basis on which this witness' evidence could have been led from her in the way that it was. And instead the Crown refer the Court to, and it's rule 29(2) of the Supreme Court Rules, and suggest that that allows section 89(1)(c) of the Evidence Act to be introduced. Now, rule 29(2) only relates to matters that may be argued in support of an appeal and doesn't, I regretfully submit, prevent the Crown from raising it as an alternative basis on which this evidence could have been before the Court. The authorities on section 89(1)(c), which gives the Judge discretion to allow leading witnesses, make it clear that such a discretion is not to be exercised often or lightly, and the most relevant authority of very few is *R v Henderson* – I have copies for the Court, Madam Registrar. If I can take Your Honours straight to paragraph 20. Now, in my submission, that is the sort of approach that should be taken to the evidence in this case, if it is thought that section 89(1) was appropriately invoked. My primary submission, of course, is that the Judge, simply feeling that it would be safer to lead the evidence, is not sufficient to allow, or to sustain, the exercise of the discretion under section 89(1)(c).

TIPPING J:

Well, he wasn't really purporting to exercise that discretion, was he?

WILSON J:

She, she.

MS LEVY:

She.

TIPPING J:

Oh, she, sorry, I beg your pardon.

MS LEVY:

No, she wasn't. Exactly, Sir.

TIPPING J:

What Judge was it?

ELIAS CJ:

Farish.

MS LEVY:

She was simply saying it might be safer to do it that way, which – I suppose the whole exercise is significant for the lack of reference to any basis on which any of these matters may be done. But I accept that the Court could say, well, the discretion under section 89 would allow the Judge, if the circumstances were appropriate, to –

TIPPING J:

You mean it's possible that it could be retrospectively justified, if you like, under that section, even though it wasn't invoked at the time?

MS LEVY:

Well, if the Judge had said, I think it would be safer to do it that way because this witness is obviously confused and very vulnerable and scared, and I can see that she knows the answers, but she's just reluctant to give them. The Judge could have expressed matters in a way that met the section 89 definition. She did not. She fell well short of doing so, in my submission, in simply saying, "It might be safer" to do it that way.

ELIAS CJ:

Well, that was safer, to avoid impermissible evidence popping out.

MS LEVY:

Well, no, with respect, Your Honour, the impermissible evidence was already out. It's not –

TIPPING J:

I thought, with the Chief Justice, that the concept of safer was to avoid things going even more awry, shall we say.

MS LEVY:

Well, with respect, things weren't going anywhere. The awry-ness had occurred, and I haven't made a feature of this in my submissions, but it was well thrashed out between counsel before this trial, that this witness would not say, "He looked guilty. In my opinion, he looked guilty". That was really all she did say, unprompted.

TIPPING J:

Well, the Judge may have been concerned that something more like that would pop out. That seems to me to be the context, rather than the idea that this witness needed to be led for permissible reasons.

MS LEVY:

Well, with respect, Your Honour, if –

TIPPING J:

I'm with you. I'm trying to help you. Don't get too respectful about it.

MS LEVY:

Well, if that was a reason, which I must confess I hadn't gleaned from the transcript, but again, if that was a reason –

TIPPING J:

I'm not suggesting it would have been a good reason. I'm just saying that seems, if anything, to have been the reason.

MS LEVY:

That was no better a reason than the safer interpretation – the interpretation which I placed on safer was that we're going to get this evidence out, let's just get on with it, it's going to be quicker, easier, less painful.

ELIAS CJ:

But that doesn't really sound like safe. It does happen, often, of course, in trials. Usually the Judge will say to counsel, it may be better to take this led, because it will be safer to stop impermissible evidence coming out. That, really, often comes out, would be within section 89(1)(b). But I would have thought the use of the word "safer" indicated that the Judge thought that impermissible evidence might come out.

MS LEVY:

I accept that that is what the word "safer" might be thought to mean. I confess I can't see what further impermissible evidence this witness may have given.

TIPPING J:

But the Judge doesn't know that. But look, anyway, I don't think it matters much. It's not against you.

MS LEVY:

No. It might – we do, in the case on appeal, the exchanges between counsel and Her Honour, and that's referred to in my submissions. Well, that completes my introductory comments. I'll turn now to the section 35 point. Have Your Honours had an opportunity to immerse yourselves in the facts of this case, as set out?

ELIAS CJ:

We've read the submissions.

MS LEVY:

Thank you. I do stress, in response to the Crown's submissions, that there was a factual basis for saying in this case, from the defendant's point of view, that the complainant looked distressed and was upset. On his evidence, there was a scuffle. There were injuries. There was this argument about the keys. It's a very different case from that referred to by the Crown as an example of the Courts receiving demeanour evidence, and I think the case is *R v Owen SC25/2007 NZSC 102*, where the complainant, who said she's been raped, ran naked from the motel room, looked terrified, and was seen running down the street, naked, looking terrified, before she ran into anybody. And the defence in that case was simply consensual sexual intercourse. In this case, the reason why the complainant appeared distressed fits with the accused' version of events.

TIPPING J:

Well, what is the linkage between this point and the section 35 point?

MS LEVY:

Because the Crown's submission is that it's really all there, this is simply another, an obvious link in the chain.

TIPPING J:

Surely it either qualifies under section 35 or it doesn't.

MS LEVY:

That's my first point. Yes. I just make the point that, I suppose, I suppose really that I make in response to the Crown's argument, is that this is not a situation where, even if the evidence was wrongly admitted, there was a miscarriage. I just note, too, in response to the Crown's submissions, that if section 35 works as the Crown says it does, or it's not confined to sexual cases, it would allow what I say is recent complaint evidence to be called in any case. And in my submission, the Crown argument in this case is simply a return to recent case evidence, which Parliament plainly intended to get rid of.

ELIAS CJ:

Why do you say that?

MS LEVY:

I say that because of the commentary around the introduction of section 35. Probably the place where that is most succinctly set out is in the *R v Barlien CA505/07 [2008] NZCA 180* decision, beginning at paragraph 28, so that's tab 3 of the appellant's authorities. Now, I accept that the Court of Appeal is summarising the position which led to section 35, but in my submission it does so accurately, and does demonstrate that recent complaint evidence was removed, or believed to be removed, by section 35.

ELIAS CJ:

But to the extent that it falls within section 35, you're not saying that recent complaint evidence was intended to be excluded?

MS LEVY:

I'm sorry, Your Honour, I don't understand the question.

ELIAS CJ:

Well, to the extent that recent complaint evidence falls within section 35.

MS LEVY:

Yes.

ELIAS CJ:

You're not saying that it gets excluded?

MS LEVY:

Well, yes, with respect, Your Honour, I am.

TIPPING J:

It's excluded by subsection (1), but potentially brought back in again by subsections (2) and (3)?

ELIAS CJ:

Yes, yes, that's the point I'm –

MS LEVY:

Yes, and then it's not necessarily – it may be recent complaint evidence, or it may be a different version of recent invention evidence.

TIPPING J:

It may be what would have been called recent complaint evidence. But it comes in under a different justification.

MS LEVY:

Yes, one of two different justifications.

ELIAS CJ:

Well, one of the justifications, or the justification in section 35(2) is one of the justifications that was put forward formerly for recent complaint evidence, also.

MS LEVY:

Yes, I accept that. But I do say that section 35(1) changes the law from what it was previously. The Crown can no longer led recent complaint evidence, as was the previous position.

ELIAS CJ:

Well, it couldn't ever led recent complaint evidence without – just because it has – it had to qualify as recent complaint evidence, which arguably arises from the response envisaged by section 35(2).

MS LEVY:

Yes, but with respect, Your Honour, previously the Crown didn't have to wait for any response. It could led evidence of the complaint made at the first reasonable opportunity, and a requirement was that it lead evidence of the

details of the complaint and call evidence from the person who received the complaint. Now –

ELIAS CJ:

A traverse of the complainant's account is, however, necessarily a challenge to the complainant's veracity.

MS LEVY:

I'm sorry, Your Honour, could you put that another way?

ELIAS CJ:

Well, the denial of the complainant's account, non-consensual sexual activity, is always a challenge to the complainant's veracity.

MS LEVY:

Well, with respect, Your Honour, you're moving into the territory covered yesterday, which would leave section 35(1) of no effect.

ELIAS CJ:

No, it just stops collateral evidence coming in to bolster cases impermissibly.

MS LEVY:

Well, with respect, Your Honour, if any challenge to the witness' veracity, if any defence was raised, then the position that Your Honour has suggested would mean that recent complaint evidence could be given.

TIPPING J:

The very plea of not guilty.

MS LEVY:

Yes, yes.

ELIAS CJ:

Well, I need to be persuaded that that is not an intentional result. In other words that, as I said in the case yesterday, I asked the question whether it isn't the fact that Parliament has compressed the law relating to inconsistent statements but not with the intent of excluding what was formally called recent complaint evidence. I would want to be shown where Parliament had said – where the legislative history indicated that that was the result Parliament intended.

MS LEVY:

Well Your Honour I can do that by referring Your Honour to the Law Commission report and the select committee reports which I don't have at my fingertips now. It certainly is the position of the text writers –

ELIAS CJ:

Yes I'm querying the position adopted by the text writers and I would like to see – it maybe that Mr Downs accepts that the position has altered to that extent, I'm not sure, but I would otherwise want to be taken to what was said in the legislative history.

MS LEVY:

Well I, without speaking for Mr Downs, if his argument, if the argument for the Crown is that we can still do recent complaint, as in I told my friends what had happened, this is what I said to them, X, Y, Z, if that's the Crown primary position then I would have expected it to be quite a feature of their submissions. Instead the Crown position is that they are now confined to, I told my friends what had happened, and cannot lead the detail that they previously could and –

TIPPING J:

And need not, perhaps should not call the counter-party.

MS LEVY:

Yes, exactly. And so I say thereby greatly improve their position on what it was previously to which the Crown respond, well, that might be a result but that's no basis for not interpreting the section the way we say it can be interpreted.

BLANCHARD J:

The words "based on a previous inconsistent statement" or on a claim of recent invention I would have thought naturally refer to the challenge rather than to the response?

MS LEVY:

Yes I agree Sir.

TIPPING J:

Isn't the history that originally it was limited to – it was just to respond to a challenge but then it was added, wasn't it, based on a – or am I misleading myself? Perhaps I am. But I had in mind from yesterday's case that the history was that the select committee considerably refined and narrowed what the original proposal was, thinking that the original proposal was unworkable, too wide and so forth which, with respect, would tend to suggest that they didn't have it in mind that simply putting the complainant's veracity or accuracy in issue would per se allow recent complaint in the other, ordinary sense of the term.

MS LEVY:

In the old way.

TIPPING J:

In the old way.

MS LEVY:

Yes. Well certainly I understand Your Honour's question and I can provide an answer to that later if Mr Downs –

ELIAS CJ:

Well it maybe that it doesn't emerge from the Crown position but I am troubled by the assumptions that are being made about this section and we need to be concerned, not only for this case, but for others.

MS LEVY:

Yes. well certainly I think as Mr Downs says in his submissions the Crown up and down the country are not now leading recent complaint.

TIPPING J:

They're just confining themselves to what had happened.

MS LEVY:

If they can get away with it yes, yes.

ELIAS CJ:

See the Crown does have an additional hurdle under this legislation. It has to convince the Court that it's relevant, that it's probative, and in many cases that won't be so but in cases where it is closely associated with the event, that hurdle maybe overcome.

MS LEVY:

I don't suggest that that's not the case Your Honour.

ELIAS CJ:

No, no.

MS LEVY:

I'm not, it's not a ground of my appeal that this evidence couldn't come in anyway because it wasn't relevant.

ELIAS CJ:

No but your, your appeal is really based on the assumption that recent complaint evidence, the former recent complaint evidence, can't be called and that therefore what the Crown is doing is undermining that prohibition. I don't want to proceed on that assumption unless it is absolutely accurate.

MS LEVY:

Well I wonder Your Honour whether – I'm sure Mr Downs will clarify –

ELIAS CJ:

Yes.

MS LEVY:

– the Crown position when he makes his submissions.

ELIAS CJ:

Yes, perhaps you should just carry on with the argument that you were prepared to put.

BLANCHARD J:

Did the select committee refer to this point?

MS LEVY:

No. The point about what had happened?

BLANCHARD J:

No.

MS LEVY:

No?

BLANCHARD J:

To the point that the Chief Justice is raising.

ELIAS CJ:

Recent complaint.

MS LEVY:

Well certainly recent complaint was a feature of the discussions. Again I – I'm sorry Your Honour I wasn't anticipating the question and I don't have that material here.

ELIAS CJ:

That's fair enough.

MS LEVY:

But I can make that available.

BLANCHARD J:

We probably got it from yesterday.

MS LEVY:

I think you probably have.

BLANCHARD J:

But we don't have it on the bench.

MS LEVY:

Mr Downs points out helpfully it's in his submissions at paragraphs 34 and 35.

ELIAS CJ:

Well perhaps you should just carry on Ms Levy with your submissions and we may need to come back to the point.

MS LEVY:

Well Mr Downs does say, "It is accepted the section makes no specific provision for complaint evidence and that, in light of the legislative history, this change was deliberate."

ELIAS CJ:

I'm not sure how far that goes because clearly the law is changed. It's whether it prevents recent complaint evidence which is probative.

MS LEVY:

Well Mr Downs goes on to say, the Commission recognised its proposed code replaced the law on recent complaints in sexual cases. Such complaints will now be admissible under this section but only to meet a challenge to truthfulness –

ELIAS CJ:

Yes.

MS LEVY:

But of course that was the clause that didn't find favour, too unworkable and too broad.

ELIAS CJ:

But the committee thought that it was maintaining the present law. Is that right?

MS LEVY:

No, with respect Your Honour.

ELIAS CJ:

It wasn't in respect of that that the –

MS LEVY:

No.

ELIAS CJ:

– select committee said it –

MS LEVY:

No. They intended to make it, if you like, even clearer that it wasn't in, in my submission.

TIPPING J:

The present law, that they were intending to continue, was the law of recent invention.

ELIAS CJ:

Yes.

MS LEVY:

Yes. Yes.

ELIAS CJ:

Which arguably recent complaint is out of. Sorry.

TIPPING J:

It's a rebuttal type –

ELIAS CJ:

Yes it's a rebuttal point. You carry on Ms Levy.

MS LEVY:

My submissions are based on evidence that the Crown sought to lead and was allowed to lead. I'm sorry to sidetrack again but the Crown suggests that in the end the accused's counsel allowed this evidence to come in. He said he was concerned that the words weren't led and this was in answer to an exchange with the Bench when the Crown application to lead the evidence was made. It's another example, as in the *Hart* case of counsel making an objection and the Judge, the trial Judge entering into dialogue with counsel, trying to find a compromise which will result in there being no need to rule on the objection and the *Hart* case is perhaps a better example of it than this case but in my submission the approach that trial Judges should take is to

hear argument on the objection and then rule on it because all to often in this court, and in the Court of Appeal, there's a minute examination of the dialogue that went on to see whether in fact counsel abandoned this point or conceded it in some way. Now often what happens is that trial counsel, sometimes in front of the jury but not always, is anxious to ensure that the trial proceeds without trial counsel being seen to directly contradict the Judge, directly disagree with the Judge's ruling, so the wish to find a common ground is present with both sides of the argument. The Judge, who's trying to persuade counsel, possibly, well in my submission the Judge out of role is trying to persuade counsel and comments are made and counsel say things like, oh well, I suppose you could see it that way and oh, well if it's done this way. But at the end of the day there has been an objection to the evidence and the evidence has come in and in my submission the Court should look at whether instead the objection should have been upheld rather than whether counsel allowed himself to be persuaded that there was a way to do it. So I'm sorry that was another diversion.

So I turn to section 35(1) and my paragraph 14. "'Previous statement' is defined in section 4 as a statement made by a witness at any time other than at the hearing at which the witness is giving evidence. 'Statement' is defined as a spoken or written assertion by a person of any matter; or non-verbal conduct," with which we're not concerned in this case.

WILSON J:

Can I just go back to the point that you just made about the objection of counsel?

MS LEVY:

Yes.

WILSON J:

As I read the transcript at page 129 of the case, first line in 129, trial counsel didn't abandon the point but more stated his position in terms of degrees of objection.

MS LEVY:

Yes. I accept that but if Your Honour reads on crown counsel says, "Well perhaps I can assist. I'm leading the complainant. With the complainant I just intended, I can do it in a leading way which would perhaps make it safer and just say, 'did you tell your friend what happened to you?'" Answer, "Yes." Now there's no response to that.

ELIAS CJ:

Is this the right page, 129?

MS LEVY:

Page 129 of the Court of Appeal, it's tab 11.

ELIAS CJ:

I see. I've got another 129.

MS LEVY:

Yes I'm sorry Your Honours. Something went wrong with the numbering.

WILSON J:

Page 7 in the original transcript I think.

ELIAS CJ:

Well Ms Beaton suggests it would be safer to do it in a leading way –

MS LEVY:

Yes.

ELIAS CJ:

– which does suggest that it was to stop something popping out.

MS LEVY:

Yes, and of course…

ELIAS CJ:

Oh dear, I don't know that this helps very much at all.

TIPPING J:

Well if it was inadmissible I wouldn't have thought there was enough here for the Crown to be able to say, well look it was clearly agreed on –

BLANCHARD J:

Exactly.

MS LEVY:

No.

TIPPING J:

As a tactical move or something like that.

MS LEVY:

I accept that I just make the point that it comes up so often in these cases –

ELIAS CJ:

Yes.

MS LEVY:

And Mr Shamy yesterday was in the unenviable position of receiving the transcript very late at the Court of Appeal stage which suggested that trial counsel had in fact conceded the point. The submission that I'm making is that this Court needs to be aware of the dynamic between counsel and the Judge, and rather than what is supposed to happen in the adversarial system, where the counsel makes an objection, the Judge hears argument and rules, in fact dialogue takes place, the Judge looks for common ground. But there's no need for common ground. What there's a need for is a ruling on the objection.

WILSON J:

Ms Levy, it seems to me it's not unhelpful to your argument here that, certainly as I read the trial counsel's position, he wouldn't have as strong as an objection to the leading of the fact of the complaint as opposed to its content. That seems to me to be an entirely explicable position for him to take.

TIPPING J:

But he's still objecting.

WILSON J:

Yes.

TIPPING J:

But not as strongly.

WILSON J:

Strong, yes.

TIPPING J:

Is it that the one's awful, the other's not too good?

BLANCHARD J:

I think we have to allow for the fact, too, that we're in a bedding-down position –

MS LEVY:

Yes.

BLANCHARD J:

– in relation to this Act, so I wouldn't be inclined to be too critical of counsel.

MS LEVY:

Well, that's helpful, Sir, and –

ELIAS CJ:

But your point is well made anyway, that this Court and Appellate Courts need to be realistic about the dynamics of trial.

MS LEVY:

Yes, and if the watered-down objection is still accepted as an objection –

WILSON J:

It's still an objection question.

MS LEVY:

– then I don't need to take that point any further.

ELIAS CJ:

No, no.

MS LEVY:

So, the crux of my submissions then begins at paragraph 16, where I set out exactly what the evidence was.

TIPPING J:

Is the point this, that you're saying you can't say, "I told them what had happened," because that's tantamount to saying, "I told them that I was raped?"

MS LEVY:

Yes.

TIPPING J:

What you could say was, "I spoke to them" –

MS LEVY:

Yes.

TIPPING J:

– and, whatever. In other words, the simple fact of speaking to them is part of the narrative, it's not an assertion of anything.

MS LEVY:

Exactly.

TIPPING J:

There may be an inference –

MS LEVY:

Yes.

TIPPING J:

– from speaking to them, that, "You spoke to them about this," which is obvious, but there's a line between inferring that and actually directly stating it.

MS LEVY:

Exactly Sir, and the difference that that –

BLANCHARD J:

A bit difficult to draw a sensible line, though.

TIPPING J:

It is a difficult one.

BLANCHARD J:

In relation to the impact on the jury.

TIPPING J:

It's very subtle.

MS LEVY:

Well, with respect, Your Honour, the damage that it can do can be seen by looking at what the Crown said about it in closing.

BLANCHARD J:

Well, that may be a different question, but I think it's unrealistic to think that the jury will not infer that she told them what had happened.

TIPPING J:

But surely it's either all or nothing. Once you start saying, "I spoke to my friend," you hardly need to go on and say, "and told them what had happened."

MS LEVY:

Well, with respect, she could have spoken to her friends and said, "I want to go home." She could have spoken to her friends and said, "Let's get back to the backpackers, I need to call the police" –

ELIAS CJ:

But doesn't that itself carry the baggage that you say is objectionable, that she wants to speak to the police about the incident that she has described?

MS LEVY:

But, with respect, it's obvious that she wants to, because she does, several hours later –

ELIAS CJ:

But is that –

MS LEVY:

I can't accept that.

ELIAS CJ:

No, that's all going to come out though. Doesn't it show the lack of reality in investing this with so much significance?

MS LEVY:

No, with respect, Your Honour, it doesn't, because in respect of – if the evidence – first of all, she doesn't need to say, "I spoke to my friends." No jury is going to believe that having telephoned her friends at three in the morning and met them in central Christchurch they went in complete silence back to the backpackers, from where the police were rung.

ELIAS CJ:

So then where's the harm? If the jury knows that she will have spoken to them –

MS LEVY:

Yes.

ELIAS CJ:

– where's the harm in her say, "I spoke to them?"

MS LEVY:

Well, my submission is that, contrary to what Your Honour Justice Blanchard suggested, it's not a blurred line. There is a significant difference between, "I spoke to my friends," and "I told them what had happened."

BLANCHARD J:

Well, which might experience –

McGRATH J:

Because, "I told them what had happened," has got the necessary link to her other evidence –

MS LEVY:

Yes.

McGRATH J:

– which the mere indication of a conversation does not have.

MS LEVY:

Yes. So, in my submission, "I spoke to my friends," is evidence of conduct, it's evidence relevant to the narrative. The Crown seem somewhat obsessed with there being a large gap in the evidence if they're not allowed to give it, not allowed to mention that there was conversation –

BLANCHARD J:

Well, I suggest that if it is done the way that Justice McGrath's just described, the jury will assume that she said the same thing to the friends that she's given in evidence.

MS LEVY:

Well –

BLANCHARD J:

It'd be a natural assumption.

MS LEVY:

With respect, that's something they could be warned about, "The complainant spoke to her friends, we don't know what she said."

McGRATH J:

And it's not going to give the Crown much of a basis to close on, in the way you complain of.

MS LEVY:

The Crown could not say, "Then why did she immediately make up this fantasy about being attacked?" Because that's what the accused is saying,

that for whatever reason, he doesn't know, that immediately, within moments, she's fabricated this story. "It's a matter for you, members of the jury, but you might think that it would take quite a calculating and an angry young woman to make up such a false complaint to tell her friends." That's what the Crown told the jury, "She has said this before, she said it straightaway."

TIPPING J:

The very old law was that you could mention the fact of complaint but not its contents. Now, that sounds awfully neat and tidy but the fact of complaint, depending on the context, –

MS LEVY:

Yes.

TIPPING J:

– is almost inevitably going to involve some content –

MS LEVY:

It must, or it's meaningless.

TIPPING J:

It must, it is, I agree with you. But we're really on the sharp end here of some really, if I may respectfully say so, some dodging around that that law has been engaged in for centuries.

MS LEVY:

Yes. We've got section 35, and I say we have to apply it. It –

ELIAS CJ:

Well, I think that is the question, but it's really why I take you back to the prior point. But on the assumption that recent complaint is out –

MS LEVY:

Yes.

ELIAS CJ:

– you say that this was a recent complaint because it inevitably would have been taken to refer to her account of the events?

MS LEVY:

Well, not only would it inevitably have been taken to, but it was, that's what it was meant to do, that was the purpose of it.

TIPPING J:

Well, that's the way it was used, and that may be one of the key factors in this case.

BLANCHARD J:

Yes, it seemed to me that the problem from the Crown's point of view is that the prosecutor in closing has treated the situation as if section 35(2) had applied.

MS LEVY:

Yes.

BLANCHARD J:

But I have a difficulty with the prior point that you were making that there's in reality any distinction between what was said here and what might be otherwise said to try to water it down. Because the jury will always, I think, jump to the conclusion that what was said to the friends was what was said in the witness box. And of course if it wasn't, then no doubt the defence would be seeking to make use of that fact.

MS LEVY:

Well, with respect, that's really giving with one part of section 35 and taking away with the other.

TIPPING J:

The problem with it, from the accused's point of view perhaps, is that under the law as it's now said to be you can get away with, "I told them what had happened," without any capacity for consistency being examined.

MS LEVY:

Yes, yes.

ELIAS CJ:

Yes, I agree.

TIPPING J:

Now that's really a very difficult dimension.

MS LEVY:

Yes.

ELIAS CJ:

It may, however, be again a different point. It may be that that evidence is objectionable in any event, wrapping it up in that form.

TIPPING J:

Because what has happened, I think, necessarily implies that, "I told my friends what I've just told you."

MS LEVY:

Exactly, that's my submission, yes.

TIPPING J:

And I would have, I would need some persuasion that that's not what the jury – and it's less stark if it's, "I just spoke to my friends," but I'm inclined to agree too that that natural inference from that is that, "I spoke and told them what I've just told you."

MS LEVY:

Yes.

TIPPING J:

That's –

BLANCHARD J:

We don't want to be formulaic about this.

TIPPING J:

Otherwise it's going to all turn on sort of precise –

MS LEVY:

I suppose the reason that I'm not so opposed to saying, "I spoke to my friends," is that she must have said something to them, they didn't walk in silence to the Backpackers. Even if she said, "I've just had a bit of an adventure," she –

McGRATH J:

You think absolutely silence to the jury on that matter might be more dangerous than otherwise, do you?

MS LEVY:

Well, I think, with respect, that whether you say, "I spoke to them," or whether you don't, I don't think it really matters, because the jury can imagine the meeting. The complainant is distressed, she might be a bit dishevelled, she's, "Gasping for air," I think one of them said. There's going to be conversation, there's going to be something said, whether you tell the jury that there was or not, and nobody is going to think, "I wonder why nothing was said, I wonder why it was all done in silence, why didn't she speak to her friends?" In my submission, to say, "I spoke to my friends," it's just a brushstroke on the picture that is going to be put there by the jury in their minds anyway. Whereas to say, "I told them what happened," is to have come out of the

mouth of the complainant the express words of the complaint that the jury has just heard about, exactly the same complaint, it perfects it.

TIPPING J:

Of course, if the circumstances of the matter were slightly different, in other words, that there wasn't a sort of continuum –

MS LEVY:

Yes.

TIPPING J:

– you might not want evidence of speaking to someone at all. Because, say, "The day later I spoke to my mother."

MS LEVY:

Yes.

TIPPING J:

Now, if you led that evidence, then surely, if it came as it were as a sort of separate transaction almost –

BLANCHARD J:

It wouldn't have any relevance, just by itself.

TIPPING J:

Well it wouldn't have – well, it would carry the implication, I would have thought, that you spoke to your mother about the events. Because otherwise why is it being led? It may be that in this particular case, "I spoke to my friends," is anodyne, because of the –

MS LEVY:

Yes.

TIPPING J:

But could we say that it's always going to be anodyne? No.

MS LEVY:

No, and I think that the answer to that is because it's not relevant unless it's got that res gestae type aspect to it.

BLANCHARD J:

Yes.

TIPPING J:

Yes.

MS LEVY:

And in, perhaps the *Shepherd* case is a good example of what's been done with this sort of evidence. It's the District Court decision referred to at tab 2 of my casebook, and I apologise for that being late. If Your Honours turn to paragraph 103.

ELIAS CJ:

Sorry, is this a Crown bundle?

MS LEVY:

No, it's the appellant bundle.

ELIAS CJ:

I've lost it – sorry, I'm looking at the wrong bundle, don't worry.

MS LEVY:

It's tab 2, paragraph 103. Now, in this trial there was offending over a number of years before, well before 1996.

BLANCHARD J:

What was the relevance of the fact of complaint in this case?

MS LEVY:

It was to, it was a pre-emptive strike against recent invention and reality.

TIPPING J:

It wasn't rebuttal?

MS LEVY:

No.

TIPPING J:

It was an attempt to get in first?

MS LEVY:

They sought to get in first. So that –

BLANCHARD J:

So it was not probative of any part of the Crown case, as such, it was merely relevant to a possible line of defence?

MS LEVY:

It was relevant to the Crown wanting to make the submission that she had consistently complained about this event, first in 1996 then in 1999 and then in 2003. So it was to rebut recent invention.

BLANCHARD J:

Right. In advance?

MS LEVY:

Yes, I'm sorry, yes. And the Crown argument in that case is consistent with how Mr Downs has advised the Crown.

TIPPING J:

The judgment of this Court refusing leave seemed to me, on reading it, to be premised on the basis that there had been no conversation, whereas in actual fact it now seems to have emerged that there was a conversation which may have represented some slight dissonance, if you like, with the particular facts. I don't have it immediately in front of me but I've got it –

MS LEVY:

It's tab 1 of the Crown bundle Your Honour. In paragraphs 3 and 4.

TIPPING J:

Yes paragraph 3.

MS LEVY:

Yes.

TIPPING J:

"Including contacting a friend and her mother she was not asked to and did not give evidence of anything she had said to any party during that time." Whereas actually, as I understand it now, there was evidence that she said to one of them –

MS LEVY:

Yes.

TIPPING J:

– what had happened.

MS LEVY:

That's correct.

TIPPING J:

I told them what had happened so –

MS LEVY:

That's correct.

TIPPING J:

– that decision perhaps was premised on an understanding of the facts that wasn't entirely correct.

BLANCHARD J:

Wasn't that case a pre-Evidence Act case?

MS LEVY:

It was pre-Evidence Act. And in my submission that is simply the best way to look at it.

BLANCHARD J:

It followed the practice that was pretty well established before the Evidence Act.

TIPPING J:

Well particularly if there was suggestion that there was nothing said.

MS LEVY:

If Your Honour turns to tab 1 of the appellant authorities in this case, it's the Court of Appeal decision in *Turner*.

TIPPING J:

Well I don't think I'm troubled to pursue it any further unless you think it's necessary from your point of view?

MS LEVY:

No. No it just does confirm that she'd told her friend what had happened.

TIPPING J:

Yes, yes.

MS LEVY:

So in my submission *Turner* was in reality a conduct res gestae type case. It's not reasoning which in my submission helps now we have the new Evidence Act but the language in it and the conduct narrative idea is what the Crown and the lower Courts have been using in cases such as *Shepherd*. Now in fairness I should probably tell you what happened with that *Shepherd* decision. An application for leave to appeal was lodged to the Court of Appeal asking for that to be dealt with ahead of trial and the Crown elected, once that had happened, not to pursue the leading of that evidence at trial and it wasn't led. It didn't make its way in through section 35(2) and Mr Shepherd was found not guilty. So I don't suggest any link between those events but I just give you the full story of what happened with the *Shepherd* decision. But that's how it's being used. And of course I began that submission referring to *Shepherd* because of the discussion about the difference between I spoke to somebody and I told them what had happened and of course in the *Shepherd* case it was no help at all to the Crown to say, "Did you, what did you do in 2006, I spoke to my husband." Well, so what? So that reinforces really that the speaking to –

TIPPING J:

Well the speaking to won't potentially contain any assertion.

MS LEVY:

No.

TIPPING J:

Unless that derives from the context of –

MS LEVY:

Yes.

TIPPING J:

The timing, if you like, of the speaker.

MS LEVY:

Yes, yes.

TIPPING J:

But when it does, from context or timing, carry within it an assertion maybe implied –

MS LEVY:

Yes.

TIPPING J:

– that the offending took place.

MS LEVY:

Yes.

TIPPING J:

What's your position in relation to that?

MS LEVY:

My submission would be that that, if it's relevant, if it can come in because it's relevant, then it needs to be dealt with my direction. You have heard that the complainant spoke to her friend. You should not speculate about what was said. But with respect it's hard to see a case in which it could become relevant to say you spoke to another person when that was not already apparent from the context.

McGRATH J:

The direction could, could it not in some circumstances, actually highlight a matter that was really only, to use your words, a small brushstroke in the picture in passing.

MS LEVY:

Yes.

McGRATH J:

I mean that's really the main thrust of your suggested approach I think, isn't it, to keep this down to the minimal significance it should have and which it obvious, will be obvious anyway?

MS LEVY:

Yes, yes.

McGRATH J:

And to keep the Crown in line as to what it can say?

MS LEVY:

Yes, yes. So I suppose my answer is that it's only going to be relevant if it's obvious anyway. If the complainant says, let's say this complainant lived in Christchurch, let's say she said, "I went home. I saw my mother. At 5 o'clock in the morning I spoke to the – I was examined by the doctor." It's obvious that she's been talking but it's not obvious that she said exactly what she just told the jury.

TIPPING J:

If it's limited in that way, and I'm not expressing a view one way or the other, the use of it by the Crown would probably, the Crown could never use it as probative of anything unless there was some suggestion of lack of link or –

MS LEVY:

Yes.

TIPPING J:

– something like that from the accused side.

MS LEVY:

Yes.

TIPPING J:

Would that be a fair – in other words, it wouldn't have any force unless the accused had raised something that logically made it a legitimate matter to be referred to.

MS LEVY:

That's correct in my submission. I've referred you to the *Shepherd* case as an example of how this type of reasoning has been used under section 35. I should also refer you to the Court of Appeal decision in *R v Bradley* and it's in my briefcase, I'll make copies available, but that's a case where narrative was given by complainants that they wrote letters about events. I wrote a letter to my mother about it. And that's also been allowed in as narrative and is not infringing section 35 because it's conduct and there's no detail given. That's why I've given the examples in my submissions of, "I wrote it in my diary." In my submission it's the same. It's an assertion of a prior consistent statement. That you've condensed it to what happened doesn't change that.

Working through my submissions we've covered the type of language and I don't think I need to repeat the examples that I've set out in there where it is a prior consistent statement. At paragraph 27 my submission is that, simply because you can describe the evidence as evidence of conduct, doesn't change what occurs. The witness still gives evidence that on a prior occasion she made or spoke an assertion of the matter she's told the jury. There's no proviso that section 35 doesn't apply if it's just conduct or anything like that.

The Crown makes the submission that the Canadian approach in *R v Ay* where evidence is given about the fact of a complaint without the detail being given. That's the Crown submissions at page 47 and onwards. It's a 1994 case and the Crown make the submission that this Canadian approach sits comfortably with the absence of any specific legislative recognition in the Evidence Act for recent complaint evidence and my answer to that is that if

there was an intention to let recent complaint in, in this way, in this limited but all encompassing way, then there's nothing new about the Canadian reasoning and the Law Commission or the select committee might have been expected to refer to this being the approach that they envisaged applying in New Zealand because of the way in which section 35 was worded.

McGRATH J:

That was a British Columbia case. Has it been applied generally in Canada do you know?

MS LEVY:

I don't know I'm sorry Sir.

TIPPING J:

One of the difficulties we've got in this case is that the Law Commission's approach was not wholly adopted by the select committee, was it, and so we've really got a composite here of Law Commission and select committee and the two may not be terribly easy to weave together. I'm not saying that's antithetical to anything you're saying –

MS LEVY:

No.

TIPPING J:

– I'm just saying that we can't rely entirely on the Law Commission because they were, as it were, amended by the select committee.

MS LEVY:

Yes but with respect Sir the approach that the Crown suggests, this narrative approach, is completely outside the way recent complaint had been done before. There'd never been any suggestion of it in New Zealand. It seems, with respect, a remarkable concept for the select committee to come up with by itself and insert inferentially in one of the most discussed sections of the Act, with no comment. No suggestion of we've looked at section 35 and

there's all these problems with how it's been done here and how it's been done there and we think we'll take the British Columbia approach and use these words. The difference is between, well, the differences, with respect, are mostly to the latter part of the section. And I haven't got the two versions right in front of me, but there's no change between the Law Commission proposed section 35(1) and the way it turned up in the statute books that would justify inferring that such reasoning took place in the minds of the select committee. It would be such a massive change, such an improvement to the Crown position, that it simply couldn't have been intended.

WILSON J:

What do you say was intended by Parliament in including, in 35(2), the words "the claim of recent invention?"

MS LEVY:

I say what Mr Shamy said yesterday. With respect, Sir, that's not a question I was expecting to answer.

WILSON J:

Well, the words have got to be given some significance, don't they?

MS LEVY:

Well, in my submission, not in this appeal, which is not concerned with answering anything, or responding to any challenge. It's concerned with evidence that was led by the Crown.

ELIAS CJ:

But it is directed at a challenge. It's directed at the traverse by the plea of the account given by the complainant.

MS LEVY:

Yes. But as the discussion yesterday, and the authorities looked at yesterday establish, it's not simply the not guilty plea that gets you into subsection (2).

There has to be the series of questions which can be heard to contain the question, “When did you first invent this story?”

ELIAS CJ:

Well, I’m still not –

WILSON J:

I have concerns about this proposition.

ELIAS CJ:

Yes.

MS LEVY:

Does that answer your question, Sir?

WILSON J:

No.

ELIAS CJ:

Your point is that this case has not been set up on the wider basis.

TIPPING J:

You’re not here to answer a suggestion of recent invention.

MS LEVY:

No, I’m not.

ELIAS CJ:

I’m just not sure that we can evade it.

TIPPING J:

It’s necessarily inherent in yesterday, and what we say about yesterday have to be the same about this case.

ELIAS CJ:

Not necessarily.

TIPPING J:

On recent invention, I think. But this isn't a case of recent invention, this present case. Not on any normal understanding of that term.

MS LEVY:

No, absolutely not.

ELIAS CJ:

Well, again, I am not sure. But that isn't something that we're directly confronted with here.

WILSON J:

Which is why, in order to give you the opportunity to respond on that, but I understand what you're saying.

ELIAS CJ:

If we came to the view that the substratum of your appeal was missing, the assumed substratum, we would have to give you an opportunity to be heard on that. It may not arise. But we would have to do that, I think.

MS LEVY:

I do make the submission in response to Your Honour Justice Wilson's question that, as I said in opening, the *Hart v R SC74/2009 [2009] NZSC 104* question would never arise. If the Crown can lead at x point, "I told somebody what had happened."

TIPPING J:

Yes, the subtleties of *Hart* would be subsumed by that evidence.

MS LEVY:

Yes, absolutely. And the fact that what she said to Mr Hart was, "He raped me," and what she said to the jury was something different would be lost, as well. It would be a matter for counsel whether they cross-examined on those inconsistencies. But assuming this witness was –

ELIAS CJ:

Well, there wouldn't be any need to call Mr Loos on the Crown approach in this case. So the inconsistency might not emerged, unless, I suppose, defence counsel would have access to the statements taken by Mr Loos, and would have to calculate whether or not to call him to set up an inconsistency.

MS LEVY:

But with respect, as I've said in my submissions, who would want to talk to Mr Loos? Why would the police want to interview him? If the complainant can give evidence, and let's just say that the complainant was a bit more au fait with the dates of events than she happened to be. If she can say, "The night my mother tried to commit suicide, I was staying at Mr Loos' house, and all this came flooding back, and I told him what had happened." Well, why would anyone go and talk to Mr Loos about that? Why would anyone call him?

WILSON J:

It would have given credibility to what she was saying, surely.

MS LEVY:

Well, defence counsel might, well, if it was suggested, "You didn't talk to Mr Loos," then that might happen.

TIPPING J:

You'd have him on standby, wouldn't you, depending on how the complainant was cross-examined? The Crown would, I don't mean you personally, I mean the Crown would have him on standby, just to see how the complainant was cross-examined.

MS LEVY:

But if it was accepted that she spoke to Mr Loos, and that the general subject of the conversation was sexual abuse by her of Mr Hart, which is what she's telling the jury, then you probably wouldn't get into the inconsistencies.

ELIAS CJ:

And you could make same submission in closing that was made by counsel for the Crown here.

MS LEVY:

And in Hart. I haven't read what counsel for the Crown said in Hart. But you could certainly make the submission that there was no, couldn't be a suggestion of recent invention. Because we know that she told Mr Loos in May 2006.

TIPPING J:

And there's no control on anything in the nature of first reasonable opportunity on that basis, either. Because a pre-statement can be given at any time before the giving of evidence.

MS LEVY:

That's correct.

ELIAS CJ:

Subject to section 7 considerations.

TIPPING J:

Oh, relevance, yes, but this was – you could hardly say that this was not relevant.

MS LEVY:

No.

TIPPING J:

The day her mother tried to commit suicide, she spoke to this chap and told him what had happened. It's obviously relevant. It's just very non-proximate, if you like.

ELIAS CJ:

But in some cases, lack of proximity will affect relevance, because it will simply be saying on another occasion what was said in Court, with nothing additional.

MS LEVY:

And the Crown yesterday made something of spontaneity, and the circumstances in which the complaint was given. But that could occur on a number of occasions throughout a complainant's life. Have you ever told anybody about what your stepfather did to you 20 years ago, yes, on this significant occasion, when I met the man who was to become my husband, I thought that it was important, so I told him about it then. And then later, I was in a counselling group where everyone was being open, and people were talking about things that were sensitive, and I told them what had happened. A complainant could set up a whole series of relevant, spontaneous-type situations in which she's allowed to say, I told these people what had happened.

ELIAS CJ:

What do you still want to cover with us, Ms Levy?

MS LEVY:

I do want to say that I am puzzled as to why the Crown conceded in the *Hart* case that the *Matenga* decision meant that if this evidence wrongly admitted in *Hart* then there should be a retrial, but is not so generous in this case. Because, in my submission, this is a more compelling case than *Matenga*. The credibilities are much, much closer together, and certainly, while it's not clear while the Crown said in closing in *Matenga*, in this case, the Crown in closing made a lot out of the recent complaint, which, in my submission, was

inadmissible. And without referring in detail, I submit that the reasoning in *Matenga* applies with force in this case. It's a credibility issue. Credibility has been seriously attacked by the Crown, with considerably reliance upon inadmissible evidence. And I make that submission for both sets of evidence that this appeal is about.

ELIAS CJ:

Is that a convenient time to take the morning adjournment? What else do you want to cover in terms of your written submissions when we resume?

MS LEVY:

I've only covered very briefly the refreshing memory point.

ELIAS CJ:

Yes, and I think perhaps you need to enlarge on that.

MS LEVY:

And I probably don't need to say more on the section 89 point. So I've got one or two submissions in response to the Crown's submissions, and then the refreshing memory point.

COURT ADJOURNS: 11.27 AM

COURT RESUMES: 11.50 AM

ELIAS CJ:

Thank you.

MS LEVY:

Your Honours, just to wrap up the section 35 ground, I just want to refer briefly to the Bradley case that I mentioned earlier. *R v Bradley*, judgment of the Court of Appeal dated 23 September 2009. I've got copies available but you probably don't need to refer to them now. That's the case where complainants had written letters to people saying what had happened and

they referred to writing those letters some years after the offending. I wrote to my parents and obviously the relevance of it was that the letters contained what the complainant had said in evidence in chief to the jury. Now the Court of Appeal decision in that case doesn't remark on the leading of that evidence but concludes that there was a section 35(2) attack in any event so that the evidence would have been in. But with respect that begs the question as to whether, under section 35, you can say in evidence, four and a half years after the events I've just told you about, "I was talking to a friend. I told her what happened and as a result of our discussion I wrote a letter to my parents telling them what had happened." In my submission that sort of sequence can't be admissible either but that's an example of the way in which the Crown reasoning has been used. Those are my submissions in respect of the section 35 point.

ELIAS CJ:

Are you going to give us the *Bradley* case?

MS LEVY:

I do have copies here, I'll hand them up now.

ELIAS CJ:

Yes, thank you.

BLANCHARD J:

It's really just an illustrative case.

MS LEVY:

It is, yes.

ELIAS CJ:

Thank you.

MS LEVY:

Now turning to my submissions on section 90(5) I haven't set that section out in the submissions so I'd ask you to turn to the Court of Appeal decision.

ELIAS CJ:

What's the section sorry?

MS LEVY:

Section 90, subsection (5). I'm sorry, turn to the Court of Appeal, tab 1, page 17. And I'm just asking you to turn to that for the section. And my submission is that that section does require, when challenged, a witness to give evidence that her memory was fresh when that document was made.

ELIAS CJ:

Well you're asking us to impose a procedural requirement or to read a procedural requirement into subsection (5) which seems to simply make a matter for the Judge to decide.

MS LEVY:

Yes, that's correct, but with respect in my submission the Judge cannot decide without evidence from a witness or some undisputed basis, nobody's arguing that the statement was not fresh or that the witness should not be allowed to refer to it but whereas here there's an objection, then the section must be followed and the witness must say, "My memory was fresh when I made this document," and be cross-examined on that.

TIPPING J:

Freshness is obviously designed to give some sort of assurance of reliability, one would assume.

MS LEVY:

Yes.

TIPPING J:

In other words the document consulted has sufficient reliability to be used as a memory jogging thing. Does fresh therefore have connotations not only of time but reliability? Implicitly reliability?

MS LEVY:

Implicitly I think. The witness, by saying that her memory is fresh the witness is, well she's sworn an oath to tell the truth and she's saying, my memory was fresh when I made this document. It is implicit that she's saying that what's in the document is correct.

ELIAS CJ:

This is arguably quite a restriction on the common law because it seems to be concerned, or it may not be limited to documents made or adopted by the witness, although that would seem to follow from when his or her memory were fresh. But under the pre-existing law you could put to a witness a letter received by them to see whether it jogged their memory? Maybe it does. Maybe it's still permitted. I don't, I'm not sure.

MS LEVY:

Well with respect in my submission you couldn't put a letter not written by that witness.

ELIAS CJ:

It's a huge change then because as Wigmore said, anything can jog a memory. A smell, a song.

WILSON J:

In that situation the witness could be said possibly to have adopted the letter as an accurate record of its contents.

ELIAS CJ:

Yes, perhaps, yes.

BLANCHARD J:

Or it could be put so that the witness remembers what the witness did as a reaction to the document. I wouldn't have thought that it was intended that section 90(5) be read narrowly.

ELIAS CJ:

No.

BLANCHARD J:

I'd be very resistant to the idea that there's some formula that has to be gone through. It seems to me it's a matter for the Judge to determine and if counsel wants to challenge on the issue of freshness, counsel can do so.

MS LEVY:

Well with respect counsel did do so. Counsel objected to the witness being permitted –

BLANCHARD J:

Yes I'm aware of that.

MS LEVY:

Yes. And the Judge's response –

BLANCHARD J:

But was it on the basis of freshness or just an objection to the witness having the ability to look at the document?

MS LEVY:

I think I've set the exchange out in my submission, 36.5, "The objection was 'there hasn't been a foundation laid, Your Honour, about memory yet' to which the judge replied 'She just said I can't remember Mr Shamy.'"

BLANCHARD J:

No enquiry as to whether her memory was fresh?

MS LEVY:

Yes.

TIPPING J:

Was it actually not quite understanding counsel, that response either I think, but never mind.

MS LEVY:

No.

TIPPING J:

Are you saying that the section carries within it the implication that when his or her memory of the contents was fresh? You're not asking us to read it down if you like in that sense are you? That's the obvious position in this case because it was the witness' own document.

MS LEVY:

Yes. I'm not making any submissions that apply to cases other than the witness' own documents.

TIPPING J:

Own document, yes. Because the common law might apply, actually if you read it like that, the common law might continue to apply in relation to documents that are not the witnesses own document.

MS LEVY:

My approach is on the –

TIPPING J:

I'm just thinking aloud –

MS LEVY:

Is limited –

TIPPING J:

– Ms Levy, you don't need to go there. Because it does seem to carry that implication which of course is this case.

MS LEVY:

Yes. So in my submission there was an evidential gap.

TIPPING J:

Is it really your point that a Judge can't inevitably infer after five, six weeks, or whatever it was, that this person's memory remained fresh –

MS LEVY:

Yes.

TIPPING J:

– therefore the Judge needs some factual basis for coming to that conclusion. There may be circumstances where the inference is inevitable, but when it's not so the point needs evidence. Is that the essence of the argument?

MS LEVY:

I would add to it that – the essence of the argument is that when an objection is made there hasn't been a foundation laid about memory yet, Your Honour. Then the Judge is required to go to the words of section 90(5) and have the witness questioned about the document.

TIPPING J:

I understand what you're saying in that respect, but there will be two different types of cases I would suspect. One, where it's pretty obvious that the memory is still fresh –

MS LEVY:

Yes.

TIPPING J:

– and one's where it's not so obvious.

MS LEVY:

Yes.

TIPPING J:

And you're saying this was in the latter category?

MS LEVY:

Yes.

TIPPING J:

And therefore evidence rather than intuition was required, never mind what evidence for the moment?

MS LEVY:

Yes.

WILSON J:

Really, to put that proposition slightly differently, there's an evidential onus of establishing freshness.

MS LEVY:

Yes, and I say there always is, it's just often, 99 percent of the time, not, the point is not taken. It's clear that – well, nobody's objecting to it.

WILSON J:

And then the onus can be satisfied by obviousness, particularly in the absence of the challenge.

MS LEVY:

And, in a case like this, by lack of objection.

WILSON J:

Yes.

ELIAS CJ:

But, in this case, why was it not obvious that the witness' memory would have been fresh at the time the statement was made? It really went without saying, didn't it?

MS LEVY:

Well, no, in my submission, it didn't go without saying.

ELIAS CJ:

Why not?

MS LEVY:

It was a conversation she had with her cousin.

ELIAS CJ:

Oh, yes, I'm sorry, I'm sort of reverting to the –

MS LEVY:

Yes.

ELIAS CJ:

Yes.

MS LEVY:

It might be fresh in her memory that she made a statement to the police about it, because I don't infer that she made too many of those, but the conversation in her house with her cousin, in circumstances where other people had been mingling around, other people had been adding things at different times, and it's –

McGRATH J:

Is it permissible to refer to the statement itself, to decide whether it's an obvious case?

MS LEVY:

Does Your Honour mean for the witness to refer to the statement?

McGRATH J:

For the Judge to take, to have regard to the content of the statement.

MS LEVY:

The answer to that question is difficult, because I accept what Your Honour is saying, by implication, that a very detailed statement, "I parked the car and then I went to the shop and I paid for the milk using Eftpos and when I got back to the car this had happened," that the detail in itself can give an impression of freshness which, I accept, could allow a Judge to infer that from the statement. The difficulty that arises in this case is that the defence is that five weeks after nothing the witness invented this conversation. So, the answer to Your Honour's question is, yes, a Judge could infer that, but where objection is taken, in my submission, there needs to be a voir dire with the witness questioned and counsel able to put to her that her memory – she has no memory because she's made this up. And it's taken her five weeks to decide exactly what she's going to say to the police to get her boyfriend out of any potential trouble and make sure that her cousin wears anything that's attached to this incident.

BLANCHARD J:

Well, this is a reasonably detailed statement, and she has signed directly under her statement, "I have read this statement and it is true and correct." I know that's a police formula, but on the face of the document it would be quite surprising if her memory wasn't fresh when it's in this sort of detail and it's only five weeks later. I mean, she's actually ascribing words in quotation marks to herself and to the accused.

MS LEVY:

Well, with respect, Your Honour, we wouldn't be speculating about this and all these questions would have been answered by the Judge hearing the objection and questioning witness, “Was your memory fresh when you made this statement?”

TIPPING J:

Your point seems to be that there ought to be an opportunity to the accused to challenge –

MS LEVY:

Yes.

TIPPING J:

– an assertion of freshness.

MS LEVY:

Yes.

TIPPING J:

Because the witness is almost bound to say, “Yes, it was,” because if he says, “No, it wasn’t,” then that would be the end of that.

MS LEVY:

Yes.

TIPPING J:

So, your point really is that it’s necessary to have a procedure –

MS LEVY:

Yes.

TIPPING J:

– to enable the accused to challenge if objection is taken.

MS LEVY:

Yes.

TIPPING J:

That's really what it comes down to, isn't it?

MS LEVY:

And I can't point Your Honour to the section, but there'll be something in the Evidence Act that says that where a witness given evidence, "My memory was fresh," the other party has the chance to cross-examination. And I –

TIPPING J:

Do you mean there is something there, but – surely there isn't anything there to that effect, otherwise we wouldn't be debating?

MS LEVY:

Well, no, not in respect of this section, I'm sorry, just a general –

TIPPING J:

Oh, a general right.

MS LEVY:

A general provision.

TIPPING J:

Oh, I see.

MS LEVY:

A general right to cross-examine on a matter on which evidence is being given.

BLANCHARD J:

Do we know anything about the circumstances in which this statement was taken?

MS LEVY:

We –

BLANCHARD J:

Did she go to the police or did they go to her?

MS LEVY:

They came to her and there was some cross-examination – if you turn, Sir, to tab 7, page 99 to 100, that's the cross-examination.

BLANCHARD J:

It says, “Seven weeks,” here. Is that wrong?

MS LEVY:

I think on the detail – I think it was five.

TIPPING J:

If the witness is allowed to make use of the statement for refreshing of memory, the statement must be made available to counsel for the accused, must it?

MS LEVY:

Yes.

TIPPING J:

Or am I speaking in old-fashioned terms – it will be have been there by way of discovery anyway.

MS LEVY:

Yes, yes.

TIPPING J:

But then cannot counsel for the accused attack the witness' memory in front of the jury, to raise – the fact that the Judge has ruled it in doesn't prevent the accused from challenging its accuracy or the reliability of her then memory et cetera, does it?

MS LEVY:

No, not at all, Sir, and that of course is done. But remember, the defence in this case is that there wasn't such a conversation.

TIPPING J:

Oh, I know. Well, that's – but it can still be put, "Look, you know, you claim to have remembered this, isn't the fact that you've made it up." I'm just wanting to feel the force of your argument that the accused is prejudiced by not being able to be cross-examined on the first step.

MS LEVY:

Well, perhaps – in my submission you can look at what happened later, in assessing my submission on this, because this witness proved later on –

TIPPING J:

I'm not speaking about this case, I'm speaking in general terms, because quite honestly it's quite a long step to read in something that's not here, and you'd only read it in, I would have thought, in order to protect the rights of the accused. And aren't they sufficiently protected by being able to cross-examine –

MS LEVY:

Yes.

TIPPING J:

– after the witness has purported to refresh her memory.

MS LEVY:

In my submission, no. Because if the witness' memory was not fresh when the statement was made, then the witness should never have been permitted to refer to that statement and give evidence refreshed by a statement made when her memory wasn't fresh.

TIPPING J:

So you're saying it's a qualification point?

MS LEVY:

Yes.

TIPPING J:

Yes.

MS LEVY:

And this witness' memory is shown, by events after she is permitted to refer to the statement, to be poor.

TIPPING J:

To be poor now.

MS LEVY:

Yes.

TIPPING J:

But not necessarily poor then.

MS LEVY:

Well, it's rather ironic, perhaps, that Mr Shamy puts to her, "And you're saying you recall word for word what Maia had said to you?" and she says, "Yes," because of course she hadn't recalled anything, really, it was all put to her by the Crown. So, in my submission –

McGRATH J:

But this is after she's read the statement again?

MS LEVY:

Yes. Even after she'd read the statement she couldn't recall.

TIPPING J:

Well, it's only to refresh memory. She, presumably when she gives her evidence she has put the statement back or put it aside. You don't just read from the statement, do you, from this refreshing of memory point of view? Or is that what people –

MS LEVY:

No, that's –

TIPPING J:

– are allowed to do now?

MS LEVY:

Well, she, it appears that she's holding on to the statement, because if Your Honour turns to, still under tab 7, page 98, if you turn to the second page you'll see I've marked with an orange sticky, "And just read, don't read it out loud, just read it to yourself." And then it appears from the answer at line 9 –

TIPPING J:

"Don't read it out loud, just read it to yourself."

MS LEVY:

Yes.

TIPPING J:

Yes.

MS LEVY:

And then if you go to the answer at line 9, "Um, I just said to him," and then you compare it to the statement which is tab 13, page 2, and the third paragraph from the bottom, "It's very close to a reading of what's in the statement."

ELIAS CJ:

Sorry, are you saying it coincides with what's in the statement?

MS LEVY:

Yes, well it's all –

ELIAS CJ:

It doesn't say here that the statement was taken away from her after she'd looked at it.

MS LEVY:

No, that's correct, but it certainly appears that she's put it to one side, because then she's asked, "Did Maia say anything to you about helping himself?" "My mind's gone blank." "Well, let's go back a step. When you just had a read of your statement did that help jog your memory or not?" "A little bit," and then, "The exact words aren't in my head." So it certainly seems as if she's put the statement to one side. And then there's the exchange between counsel and the Judge, and I can – I know we've looked at that before, but if I take you back to tab 11, page 1 –

ELIAS CJ:

That's not a proper question, just at 26, surely?

MS LEVY:

No. And that, I think, if you turn to page 152 at tab 11 –

TIPPING J:

So, she's being led from the statement.

ELIAS CJ:

Mmm. Oh, well, I mean, this is – yes, I mean, this isn't a refreshing memory thing at all.

TIPPING J:

This is Crown's examination, isn't?

ELIAS CJ:

Yes.

TIPPING J:

I thought it must have been cross-examination to start with but, no, it's, the Crown's examining.

MS LEVY:

So –

TIPPING J:

Heaven help us, it's just, Crown counsel's just going through the statement putting –

MS LEVY:

Yes.

TIPPING J:

– propositions out of the statement to her and she's saying, "Yes."

MS LEVY:

Yes.

TIPPING J:

Well, that's, I would have thought that was at least as good a point as the one about memory being fresh. It's just quite improper use of the statement.

MS LEVY:

Yes, well, that…

ELIAS CJ:

Why did counsel need anything more than what was said after the refreshing memory at 10?

MS LEVY:

Well, that's the question the Crown can answer. And the Crown – that's where you need to turn to page 152 and you'll see the very limited exchange where she spent some time explaining to the jury what a deposition statement was, letting them know that Ms Martin had made at least two –

ELIAS CJ:

Sorry what page?

MS LEVY:

Page 152.

ELIAS CJ:

Who's this?

MS LEVY:

Tab 11.

ELIAS CJ:

No, who's this?

MS LEVY:

This is the Judge – this is the – this is what happens –

TIPPING J:

Don't worry. I'm sorry, that was just an aside of mine to the Chief Justice which obviously came through. I'm not really too troubled to be taken to what the Judge did. It's clear the Judge wasn't intervening at the time when this extraordinary examination-in-chief was going on.

MS LEVY:

So –

WILSON J:

This seems to me to be a very important point that's emerged particularly if one looks at the opening words of subsection (5) of section 90 for the purposes of refreshing his or her memory while giving evidence.

MS LEVY:

Yes.

WILSON J:

What we have here seems to have gone far beyond that.

MS LEVY:

Yes. That's why the Crown have suggested the section 89 point as being the answer for why the Crown were permitted to lead evidence from this witness. Because as Your Honour's identified she – the refreshing trick, if you like, just didn't work.

ELIAS CJ:

But there was no exercise of discretion under section 89, it seems to me, and Mr Downs is going to have to try to convince us that there was but I would think that you don't need to address that at this stage.

TIPPING J:

Do we – sorry I may have been a bit too pre-emptory. Ms Beaton addresses Her Honour, this is at the bottom of 98, the Court addresses the jury, were you going to take us to that exchange which we can find somewhere else?

MS LEVY:

It's tab 11, page 152, but there's not much to it. It's not what you expect.

ELIAS CJ:

Well I think we should look at it.

MS LEVY:

Yes. Tab 11, page 152.

ELIAS CJ:

So there was a suggestion of leading?

MS LEVY:

Yes but –

ELIAS CJ:

This is the – this must be about leading from that statement?

MS LEVY:

Yes, the transcript doesn't quite make sense because we don't, we can't see what Ms Beaton has suggested.

TIPPING J:

This is where the safer comes in?

MS LEVY:

Yes.

ELIAS CJ:

No we don't have a transcript of what –

BLANCHARD J:

The leading mostly is actually a repetition of what she said after, at 9 through to 11 on the previous page. There's an addition about but she was drunk. The gist of the rest of it I think appears on the previous page.

TIPPING J:

But the point seems to be here that the witness, even after purporting to refresh her memory, could not recall –

MS LEVY:

Could not or would not.

TIPPING J:

Well yes, did not recall.

MS LEVY:

Yes.

TIPPING J:

And the Judge has allowed the prosecutor to put the words expressly to her which is quite a different purpose from the leading discretion, I would have thought, that is now retrospectively invoked. In other words, the purpose of this was to enable the Crown to get over the witness' inability to remember.

MS LEVY:

Yes. And –

ELIAS CJ:

The witness had said the critical –

TIPPING J:

Yes, he's remembered enough –

ELIAS CJ:

And this is really all icing on the cake stuff. And if this course were permissible, in any case where a witness really didn't come up entirely to brief, or had left out colour, or some details, it had all come in. A course that would be inconsistent with section 35, in fact, wouldn't it?

TIPPING J:

Yes, because he'd been asking to endorse a previous consistent statement.

MS LEVY:

In answer to Your Honour Justice Blanchard's observation that the passages on page 99 appear to repeat what's being said previously, there's an inference from the transcript that that answer beginning at line 9 on page 98, is the witness obviously reading out what is in the statement, rather than being refreshed, and saying it in her own words.

BLANCHARD J:

Well, I don't think I agree with that, because when you compare it to the statement, it is different.

MS LEVY:

But with respect, Sir, what I was coming to was, "Did Maia say anything to you about himself, you asked him that question, did he say anything in response?" "My mind's gone blank". "Well, let's go back a step. When you just had a read of your statement, then did that help jog your memory or not?" "A little bit". "Do you remember that part of the conversation?" "Yeah, I do remember having a conversation". "But, what, the exact words aren't so clear?" "No, they're not, in my head". So if she had just given fluent evidence and not read from the statement, then, clearly there were some words in her head, and in my submission, what follows suggests that she has shown to be reading, albeit imperfectly, from the statement when she gives that first, long answer.

ELIAS CJ:

Well, I'm not sure that you could draw that inference. But it is odd that the transcript doesn't record something like the Judge saying right, now, put aside that statement or something to that effect, because that would normally happen. Take a look at it, now give it back.

MS LEVY:

Well, my submission is that the questions following that substantial answer indicate that the witness read it, rather than recalled it, and the reason for the later leading, putting every line, is so that it's clear to the jury what this witness' evidence is, rather than what this witness has read from a piece of paper. Unless I can assist Your Honours further, those are my submissions.

ELIAS CJ:

Yes, thank you, Ms Levy. Thank you, Mr Downs.

MR DOWNS:

May it please the Court, the Court is once again drawn into the provision that section 35 of the Evidence Act and related matters arising from a criminal trial in the Christchurch District Court. The section 35 Act presents, in one sense, a problem that has confronted Courts for centuries now, namely, how do we distinguish previous consistent statements that are admissible from those which are inadmissible, and what's the proper conceptual basis for so doing? We acknowledge, as we must, that the answer to this question must now be answered by virtue of the Evidence Act and, in particular, section 35, but we do respectfully observe that simply because of the statute doesn't mean to say that those difficult problems encountered by the common law have necessarily gone away.

And this case isolates perhaps the most difficult situation of all, a complainant engages in conduct that is undoubtedly overall inconsistent with consensual sexual encounter, and much of which, with respect, was captured by admissible testimony induced in the Criminal Court. The Court heard that the

complainant ran from the immediate scene, she made a call on her mobile phone to her male friend, who had a mobile phone that operated with an international roaming connection, there's a discussion of some sort, her female friend at the other end hears the complainant's distress, picks the phone off her friend and then describes that the complainant was struggling to breath, very distress, hyperventilating and so on, they attempt to verify her location, as a consequence of that the parties meet, only minutes have passed at this stage from the time period of the alleged offence. It is in the immediate wake of those events, then, that the prosecutor, by a leading question and, we acknowledge, as over objection by the appellant adduces, the fact that it was relayed what had happened and thereby, we acknowledge, creating an inference or a nexus to what had obviously just occurred.

But the admissible sequence then carried on, the Court will have observed, the complainant and her friends returned to the hostel, she was still, as the record reveals, distraught, the friend, that is the female friend, then called the police from reception, the police arrive and so forth, and the jury learns undoubted from admissible, relevant and admissible testimony, that there has been in effect an immediate complaint both to a friend or friends and also to the relevant authorities entrusted with investigating such matters. And so the very difficult, with respect, question presented today is, does the jury learning of the complainant saying what had happened, the exact phrase employed in the case, mean that section 35 was thereby violated?

And we have identified two submissions in relation to this particular aspect, and it may be worthwhile to just adumbrate them, in the event that the written material doesn't perhaps represent them as well as it might have. The first is a broad or broader argument, that the definition of "statement" in section 4 of the Evidence Act is direct at spoken or written assertions, in particular at situations where there is an express assertion contained within the statement itself of what has happened. Or put perhaps a little less awkwardly, that a statement for the purposes of section 4 and, more specifically, for the purposes of section 35 of the Evidence Act, does not capture an implied assertion, which, we acknowledge, this must be, and that therefore the fact of

a complaint falls outside the previous consistent statement rule encapsulated in section 35 with relevant judicial control, and we accept that's obviously critical in all these cases, existing by virtue of section 7 and 8.

TIPPING J:

But the section itself doesn't make any distinction between express or implied assertions, does it?

MR DOWNS:

We say that's the effect of it but, yes, Your Honour's quite right, it doesn't use the phraseology that I have used, or I should say that –

TIPPING J:

Isn't it really a question of meaning? What is the meaning of the words, "what had happened", in their context?

MR DOWNS:

Well, we can't escape from the fact, particularly in light of the prosecutor's use of this material, that the Crown by that reference was seeking to demonstrate that there had been an immediate complaint of a non-consensual sexual encounter, of a sexual assault.

TIPPING J:

Well, when I make reference to meaning, if any normal person would understand the words as carrying that meaning, does it matter whether that is express or implied?

MR DOWNS:

I appreciate that this is a somewhat circular answer to a question from the Bench, but we say that it does in terms of the section, and that the section appears –

TIPPING J:

Why should it Mr Downs, as a matter of principle? I mean, if what is being said carries a meaning, why should the law in this context be concerned with whether it's expressly stated or implicitly stated?

MR DOWNS:

The answer to that, or at least an answer, is probably twofold. The first is that this use of the term "statement" applies also to obviously the hearsay rule and its operation, and so we say that by excluding implied assertions from both the operation of section 35 and the hearsay rule, that this is a way of interpreting the Act in a consistent fashion. But we also say that there are other ways of trimming material that is essentially of limited worth. I appreciate it's not a particularly precise evidential phrase but, in other words, trimming material that's of borderline or peripheral relevant and limited probative value. And, furthermore, that section 35 is really directed at the content of a previous statement so as to avoid, as the Law Commission was concerned with avoiding, to use its phrase, "The voluminous amounts of repetitive material being introduced in Courts, seized of cases," and that comes from it –

TIPPING J:

This is not a voluminous issue, it's a question of how these words would be understood by the jury, surely.

MR DOWNS:

We accept that they would be understood in the way in which Your Honour, quite rightly, points out, and in the way in which the prosecutor closed upon them, and we can't escape from that, it's a feature of the record. But what we say is that there is a difference at law between adducing all or the often lurid detail in a statement of complaint, as opposed to the jury, when it is surrounded by relevant and admissible conduct, learning of the mere fact of a complaint. And that's our second and narrower, and I must say more modest, submission to the Court, that at least in a case like this, where it is an expression of conduct or at least surrounded by conduct inconsistent with consent, that section 35 doesn't operate. Or, to put it better in terms of the

statute, as we must, that for a jury to learn that there was the fact of a complaint embedded with surrounding conduct on the part of a complainant such as this – distress, going to the police and so forth – that that is not captured and wasn't intended to be captured by section 35. Otherwise relevant and admissible material would thereby be removed from the purview of the jury and, in these cases, it must be said, a trial would become very difficult to administer.

ELIAS CJ:

Can I – sorry, I've just been thinking about what you say about consistency and the Evidence Act and implications causing difficulty in application of the hearsay rule.

MR DOWNS:

Yes.

ELIAS CJ:

But I'm not sure that that's so. Can you just expand on that?

MR DOWNS:

Yes, I should, I was just seeking to –

ELIAS CJ:

Oh, you were just – give the outline, then develop when you –

MR DOWNS:

Signalling, signalling the case.

ELIAS CJ:

Yes.

MR DOWNS:

But, yes, Your Honour's quite right. The thesis that we advance in relation to the broader argument, the definitional argument, is that essentially expressed

by His Honour Justice Simon France in the *Holtham* decision, and we find that, or at least I hope that we find that at tab 8 of our casebook. And I should signal that the relevant paragraphs begin at page – sorry, begin at paragraph 41, page 765 of the case. It may be worthwhile to introduce, perhaps, while we find our way with the materials, *Holtham*, we acknowledge, has nothing to do with what we might loosely call "recent complaint evidence" or "evidence of complaint." It's a case about hearsay, where the Crown was wanting to adduce text messages to support its case that people were dealing in controlled drugs. His Honour in that case was confronted with a hearsay argument on behalf of the defendants. The texts, as the Court is so familiar with, didn't expressly ask for drugs, they said, "May we have a cabbage?" or, you know, "May we buy some car parts?" and so on, all the usual talk that one often hears. And so the question in that case was, "Was this reliable hearsay?" His Honour said, "No, it wasn't," so the question then became, "Was it in fact hearsay at all?" and Justice Simon France said, "Well, it's not," because in fact all of this talk, although it was an implied assertion that the person wanted to buy drugs, didn't constitute a statement for the purposes of section 4 of the Evidence Act and therefore the operation of the hearsay statement rule. And His Honour placed considerable reliance, one will see, at paragraphs –

ELIAS CJ:

Sorry, just from your explanation, wasn't it just a case, as Justice Tipping would say, about the meaning of the words used?

MR DOWNS:

Save that in the particular instance everyone agreed that what the Crown was really wanting to do was, from the utterance, "May I buy a cabbage?" really meant, "May I buy methamphetamine?" or whatever drug it was.

TIPPING J:

Well, that depends on what "cabbage" means in the context.

ELIAS CJ:

Yes.

MR DOWNS:

Yes, I've used a bad example.

ELIAS CJ:

But where does hearsay come into it?

MR DOWNS:

The point that was in issue there was, if this was an implied assertion, "What I'm really wanting to buy is drugs," then the question became, well, was this captured by the hearsay rule?

TIPPING J:

It's nothing to do with hearsay, it's a statement that's not elicited for truth, it's just the fact that it was made.

MR DOWNS:

Well, His Honour had a slightly different analysis and took the view that whilst it was arguable that it was hearsay, the better view was that in fact because of the definitions of assertion, which required, as His Honour thought, an express assertion, that therefore there wasn't a statement.

TIPPING J:

This is nothing to do with previous consistent statements, is it? This is just part of the evidence –

MR DOWNS:

No.

TIPPING J:

– that suggested that this man was trying to buy drugs?

MR DOWNS:

No, we acknowledge, as I've sought to do, *Holtham* isn't a case about –

ELIAS CJ:

No, but you're using it because of the light it sheds –

MR DOWNS:

Yes.

ELIAS CJ:

– on statement –

MR DOWNS:

Yes.

ELIAS CJ:

– and because of your submission that the provisions in the Act have to be interpreted consistently. So you say that statements for the purposes of hearsay, Justice Simon France says, are not –

MR DOWNS:

"Do not include an implied assertion –

ELIAS CJ:

Yes, yes.

MR DOWNS:

We use that as a springboard for the section 35 argument. Whether it's a good one, of course remains to be seen.

ELIAS CJ:

No, it may be a dud.

TIPPING J:

It's paragraph 45, really, of the Judge's –

MR DOWNS:

Yes, it is.

TIPPING J:

Is it?

MR DOWNS:

It is. And His Honour goes on to note that if we employ this particular definition, this limited definition of statement for the purposes of the Act doesn't pose any problems. And so despite the seemingly different subject matter, this does provide a means, we respectfully submit, of drawing a distinction between Courts receiving the content of a complaint and the Courts learning only of the fact of a complaint, the latter not being a statement for the purposes of section 4.

ELIAS CJ:

Well, I find that very hard to follow.

MR DOWNS:

Well, I haven't, I probably haven't done the argument justice, I'm conscious of that, but –

TIPPING J:

I think you're doing it justice, –

ELIAS CJ:

Yes.

TIPPING J:

– you're trying to put a square peg in a round hole.

MR DOWNS:

It is proper to observe that if we can find a definition that can be used consistently for the operation of various rules in the Act, then that might be thought preferable.

ELIAS CJ:

But isn't it very significant that the definition in section 4 is – if we just look at "spoken". "A spoken assertion by a person of any matter," well, then, then you're only into meaning really, aren't you?

MR DOWNS:

Yes, we –

TIPPING J:

Is it a spoken assertion?

ELIAS CJ:

Yes, is it a spoken assertion and what's the assertion? For subsequent purposes, like hearsay and so on. But I'm not sure that there's any exclusion of implied meaning, because it's what the assertion amounts to.

MR DOWNS:

Yes, well, if that's the view then the argument, with respect, has to fail. But it does highlight the difficulty in this particular area in that Parliament does seem to have been concerned with the concept of an assertion, that it is carried through to both limbs of the provision. So that when one looks at paragraph B of the definition of "statement", "non-verbal conduct of a person that's intended by that person as an assertion of any matter" –

ELIAS CJ:

Yes.

MR DOWNS:

– there does seem to be a commonality that the person is actually asserting a particular fact or making some sort of declaration. And so we say that it doesn't really capture the situation of an implied assertion, such as the jury learning or a trial Court learning that, "I merely told the person what had happened."

ELIAS CJ:

Or that cabbages are drugs.

MR DOWNS:

Indeed.

ELIAS CJ:

Well, that can't be right, Mr Downs. It must be, if someone asks to buy cabbages –

MR DOWNS:

Yes.

ELIAS CJ:

– then that is an assertion, and then the only question is, "What's the meaning?" It's a bit like a translation, it is a translation in fact.

MR DOWNS:

Well, I don't wish to ventilate a proposition that's considered to be without merit, I simply advance it as an illustration of how a High Court has attempted to make sense of this phrase, "a statement", and suggest that it is one way of providing –

ELIAS CJ:

But it's an expansive definition, I think, isn't "statement" – Parliament's trying to get away from the concept of a written document by defining "statement" expansively as an assertion.

MR DOWNS:

Yes, well, if that's the Court's view then the argument, we accept, would have to fit.

ELIAS CJ:

Is there any other authority that supports the difficult point you're making?

MR DOWNS:

Regrettably, none, notwithstanding our best efforts. But with that question, I wonder whether we turn then to our more modest case in relation to section 35, and that is that in certain circumstances the fact of a complaint would be better seen as conduct rather than a statement. Now, we'll use as an illustration only the situation in *Turner* which, we acknowledge, was a pre – we accept it's a pre-Evidence Act case. But in *Turner* the complainant did a number of things after the event, including driving throughout the night back home, and when she got back home telling, and the Court of Appeal judgment is quite clear, she relayed to her mother and at least one other person "what had happened", that was the phrase that was employed by her and given in evidence. And the Court of Appeal held that this was conduct rather than a statement that was captured by the then prior consistent statement rule at common law and it didn't fall within the doctrine of recent complaint. And this Court, again we accept in a pre-Evidence Act guise, saw no reason to intervene, concluding that the prior consistent statement rule wasn't engaged.

TIPPING J:

Wouldn't this argument be stronger if the evidence was confined to, "I spoke to my friend," and didn't go on and say, "I told her what had happened"? Because it's then, "Told her what had happened," that carries the assertion, much more directly than the simple speaking?

MR DOWNS:

Yes, Your Honour's view, as you know, finds support in the decision of *White*, the Privy Council's decision, given by Lord Hoffman, but the difficulty in this

area then becomes a question of degree, and this case illustrates the problems because the jury hears admissible evidence of conduct, distress, immediate flight from the scene, calling the police, or at least vis-à-vis her friend calling the police, and she can't say what had happened as a basis for linking those particular things, it does mean that it's a rather artificial situation.

ELIAS CJ:

Well, I don't know, I mean, I think you probably are right that there's, evidence can be called for different purposes, and some evidence in this area will be evidence of the conduct of the complainant, and if it's relevant and probative and meets the other tests then it comes in. But if it's being put forward in terms of what is said, then it has to fit with section 35.

MR DOWNS:

Yes, if it's a previous consistent statement we accept that we have to meet section 35, and there's no way round that, but what we had sought to suggest was that there may be situations where when the complainant is immediate, captured by the old common law concept of the res gestae, so probably would have gone beyond evidence of mere consistency, but perhaps actually been proof of the truth of its contents, even at common law, by virtue of being within the res gestae. But those sorts of situations may form a useful means of delimitation from previous consistent statements which are ultimately, well, may very well in may cases lack probative value and be of peripheral relevance, as opposed to those which are given immediately and which the common law had hitherto recognised as having probative value, for different reasons.

ELIAS CJ:

And is the difference in terms of the use of the evidence that, if one was telling the jury, if one had to tell the jury, what you say could make of it, that in the res gestae conduct case it's evidence from which the jury may directly infer – or that the conduct of the complainant at the time is entirely consistent.

MR DOWNS:

Yes.

ELIAS CJ:

But the previous consistent statement is simply to rebut the suggestion of invention.

MR DOWNS:

Well, we now get into the, again, difficult area as to how section 35(2) is to be understood. I should observe that we hadn't seen fit and don't think that we can invite the Court or press as an argument that the appellant in this case engaged, as it was understood at common law, the idea of recent invention, because our argument, and I think I'm right to say consistent with yesterday's appearance was that the essence of recent invention at common law was the suggestion of a contrivance subsequent to the events in issue and, as I read the record in this case, the appellant was really saying, "Always a lie and a lie from its very point of inception." Now, it may be that there's just a material misapprehension on the Crown's part as to how the record should be read, but we think it improper to seek to suggest a different argument today from that which we did yesterday in terms of the interpretation of the concept of recent invention. And so we say that the trigger on that phrase would be as it was at common law, but with the response, the all-important point perhaps being that the response is then not limited by the temporal limitations of the common law.

TIPPING J:

Like yesterday.

MR DOWNS:

Yes, like yesterday. So, it was more just a signal that we hope we weren't speaking with two tongues in the course of two days.

ELIAS CJ:

But you're saying they're different cases?

MR DOWNS:

Oh, yes, undoubtedly, we're saying yesterday's case very much, very much involved recent invention.

ELIAS CJ:

Yes.

MR DOWNS:

I think we said it resonated from the record was –

ELIAS CJ:

And section 35, whereas you say this case –

MR DOWNS:

Yes.

ELIAS CJ:

– entails conduct.

MR DOWNS:

We're seeking to distance ourselves from section 35 in this case and say that because of everything that went around what happened, because of the immediacy of the complainant. But perhaps I can illustrate it in this way, the appellant really threw down the gauntlet by saying, "Well, if we are right we could have done have done in *Hart,* we could have got it all in by the back door." But the difficulty with that argument is that we couldn't have, the fact was that the complaint in *Hart* came months, if not years, after the relevant events. Its only probative force arose by virtue of the contention that there was a recent invention, that was its critical feature we respectfully suggest, so it's not a case where there are the problems, we submit, as the appellant would invite the Court to conclude that there are.

ELIAS CJ:

So what do you say that this evidence comes in under? I'm getting quite confused. This evidence comes in, what, just as relevant evidence?

MR DOWNS:

Just as relevant evidence, governed by –

TIPPING J:

Relevant conduct, in the form of speech.

MR DOWNS:

Well, yes, obviously there is –

TIPPING J:

That's what you have to say.

MR DOWNS:

Obviously there is speech, yes. But we say that, so surrounded by admissible conduct, and –

ELIAS CJ:

It's the fact of complaint.

MR DOWNS:

The fact of an immediate com – perhaps I can put it best this way, and I haven't put it well thus far, the force of the evidence in this case didn't depend on any terms used by the complainant, it didn't depend on the use of any particular words such as "rape" or anything, but rather that to her friends and to the police she was immediately making a complainant that there had been a crime committed. And so in that sense it doesn't have all of the difficulties with previous consistent statements of the dangers of them being self-serving and hence why the common law sought to carefully guard against their receipt. And so we do maintain, with respect, that section 35 doesn't exclude

the fact of a complainant. But of course there are other sections that may prevent it being admitted –

ELIAS CJ:

Well, it doesn't preclude a complaint made in these circumstances –

MR DOWNS:

Yes.

ELIAS CJ:

– which is immediate, or –

MR DOWNS:

Yes, or to capture Your Honour's point, that sections 7, 8 and 35 together do not preclude reference to an immediate complaint, where it is surrounded by other features of consistent conduct, when I say consistent conduct, conduct inconsistent with consensual –

TIPPING J:

And are you arguing that the point that it should be limited, as Ms Levy suggested, to simply, "I spoke to so and so," as opposed to, "I spoke to and told what happened," is really too fine to be satisfactorily administered on the ground?

MR DOWNS:

We do, and the other difficulty is that the jury, we respectfully suggest, are probably going to infer that anyway. We have a very unusual situation, "Did you speak to your friend?" Pause. "What then happened?" I mean, I think –

TIPPING J:

"We decided to go to the police."

MR DOWNS:

Yes, "We then went to the police," I mean –

BLANCHARD J:

Who was it went to the police? Was it the friend?

MR DOWNS:

The friend, Sir, the friend called the police, Ms Garlick called the police from reception.

BLANCHARD J:

Well, yes, it's inevitable the jury would figure out what had happened.

MR DOWNS:

It makes the whole thing very awkward and very cumbersome.

TIPPING J:

It's certainly the immediacy of it, I think, that gives it the platform for being considered conduct, as opposed to speech.

MR DOWNS:

Yes. So, we're not – I know that the appellant has quite properly tended to the Court examples of what's happening in Courts around the country, where much, much later things come in on the basis that the fact of a complaint somehow adds to the Crown case, with respect. We don't commend those instances as being ones that we had envisaged. We see this very much as a case in which the immediacy of the complaint and the surrounding circumstances there –

ELIAS CJ:

Is it helpful though to talk about speech and conduct in a case where the definition of statement is an assertion written, spoken or by conduct?

MR DOWNS:

Yes. I mean I'm sorry there's sort of a Wittgenstein component to this argument but we're trying to make the best of a –

ELIAS CJ:

Bad job?

MR DOWNS:

A legislative framework where, with respect, the architects seem to have been somewhat at odds as to what the final result was to be. The Law Commission on the one hand thought that recent complaints, as we had understood them at common law, shouldn't go in except in rebuttal when there was a challenge to accuracy or veracity. The select committee then thought, no that's broad an unworkable, I think was its view. It should be limited to recent invention in the position at common law. But it's far from clear from the text as to quite how, in a case such as this, section 35 is best administered.

ELIAS CJ:

Is, this is probably ridiculous, but I was just wondering whether there's something in the consistency with the witness' evidence in section 35. Is there a distinction between consistency with evidence given by a witness and consistency with the allegation which is direct evidence of the allegation? In other words, section 35 is really directed at whether the evidence of the witness is to be believed. The complaint, in circumstances such as you've described, is direct evidence of the charge.

MR DOWNS:

Yes. we have seen the distinction, I appreciate this is probably just repetition of my submission rather than a direct answer, we have seen the relevant distinction as being the immediacy of the complaint coupled with everything that surrounded it, was such that it was better seen as conduct rather than a statement for the reason that at least at common law one key concern of the Courts was the self-serving nature by which these statements could be made. So that where there are indicia of reliability and immediacy that it's better captured as conduct.

BLANCHARD J:

You're saying it was part of the event?

MR DOWNS:

Yes. In essence that's what we're saying.

ELIAS CJ:

I think that's the distinction I was trying to draw but without using the words conduct and statement because statement is defined to include assertions made by conduct but it seems to me that you're not talking about assertions in the sense they're employed in section 35 to bolster evidence.

MR DOWNS:

Well put another way the event in a sense is still going so the timeframe for the previous consistent statement hasn't actually commenced. It's still very much part of the transaction and so the Court is only receiving evidence of the transaction and it's immediate.

TIPPING J:

So is your thesis that evidence of immediate complaint, without detail, is admissible as not being previous consistent statement but as relevant, I hesitate to say, conduct.

MR DOWNS:

Yes.

TIPPING J:

But pace that distinction. Is that the essential premise?

MR DOWNS:

As part of the event –

TIPPING J:

As part of the –

MR DOWNS:

– which otherwise could not be understood by a jury or trier of fact.

TIPPING J:

And would the lower Courts be assisted by some analogy with res gestae, although that itself has had its problems over the years?

MR DOWNS:

Yes. I appreciate that it's had no shortage of critics but it does, it does capture the sort of concept that we're seeking.

TIPPING J:

The broad idea.

MR DOWNS:

Yes, very poorly I must confess to convey that.

TIPPING J:

No, no you're putting it very well.

MR DOWNS:

Something are so closely connected to the event that to regard them as a previous consistent statement is very artificial, with respect.

BLANCHARD J:

Isn't that what res gestae means?

TIPPING J:

Yes it does. But the trouble is that some of the jurisprudence on res gestae has, as it were, muddied the waters.

ELIAS CJ:

You've got a clean slate however.

TIPPING J:

Yes, we have a clean slate.

MR DOWNS:

Yes.

TIPPING J:

And I think the idea that it's not, can't rationally be regarded as previous, because well it's previous to the giving of evidence in court –

MR DOWNS:

Yes, it's outside the court but –

TIPPING J:

But it's, as it were, bound up in the event that constitutes the crime.

MR DOWNS:

Yes that's precisely, with respect, the point we're trying to touch upon and stumbling a little that it's artificial by reference to both section 7 in any sensible continuum to say that the event isn't still ongoing when minutes later the complainant is running from the scene, calling for help and doing all the things that, admittedly stereotypically, one would expect a victim of a sexual crime to do, and in those circumstances wrong to say those sorts of immediate complaints constitute a previous statement for the purposes of section 35.

WILSON J:

It's very, it's a res gestae concept, isn't it?

BLANCHARD J:

There will be some real difficulties at the borderline.

MR DOWNS:

Yes –

ELIAS CJ:

And that's really what the case law was about before. On your argument it wouldn't be, it wouldn't matter if the complainant said, "I spoke to 'X' or I complained to 'X'"?

MR DOWNS:

No. Providing it is within this –

TIPPING J:

Or, "I told 'X' what had happened."

ELIAS CJ:

Or, "I told 'X' what had happened."

MR DOWNS:

Yes, yes.

ELIAS CJ:

Yes exactly, sorry, yes I should have put that in the mix.

MR DOWNS:

Yes, but it must, we must –

ELIAS CJ:

So there's no formula?

MR DOWNS:

No, no, which again avoids the difficulty with that very artificial situation, I told my friend. I stopped there.

ELIAS CJ:

We'd better take the adjournment now but when we came back are you able to take us to any, really what you're describing is that if one is thinking about

the old law of recent complaint, it now has to be fitted within the, the framework of the Act but really section 35 is not exhaustive of the old recent complaint evidence, is that right?

MR DOWNS:

Yes. My submission is that section 35 will operate in many cases but it won't catch those cases where the compliant formed what at common law would have been part of the res gestae and not merely a complaint made at the first reasonable opportunity. So that the true meaning or common law concept is res gestae rather than recent complaint for the purposes of avoiding the operation of section 35.

ELIAS CJ:

Thank you.

COURT ADJOURNS: 1.03 PM

COURT RESUMES: 2.22 PM

ELIAS CJ:

Yes, Mr Downs.

MR DOWNS:

Yes, may it please the Court. Just prior to the luncheon adjournment we were discussing the respective boundaries, really, between section 7 and section 35 and, with the benefit of luncheon reflection, we submit that that's perhaps a useful way of discussing a little more and, hopefully, cementing the submission advanced to the Court, namely that –

ELIAS CJ:

Sorry.

MR DOWNS:

Sorry.

ELIAS CJ:

The problem with it is that – I was just looking at the Law Commission's report over lunchtime, and they certainly envisaged that the whole law of recent complaint would be dealt with under section, what is now section 35.

MR DOWNS:

Yes, that's undoubtedly true. What we would say is that where a transaction is ongoing and a complaint is made before it has come to an end, so very much the idea of res gestae at common law, that that is the relevant, that is the relevant touchstone. Or, put differently and hopefully better, section 35's reach or catch is only to those things that are said once the transaction has come to an end. And perhaps if I can just illustrate it by reference to some factual examples. Imagine, if we would for the moment, that the complainant as she was running away from the appellant or the scene or both had called the police at that point in time and made a complainant and sought assistance, it would seem an unfortunate conclusion that this was a previous consistent statement in terms of section 35.

Or, alternatively, if we think of an even more extreme example, but one that wouldn't be out of place in a criminal case: a complainant cries for help and, as an offence is committed, says, "Help, help, I'm being raped." Now, on a very literal interpretation of section 35 that would, on a literal interpretation and, we respectfully submit, an artificial interpretation, be an out of Court statement potentially caught by its reach. But we suggest that it couldn't have really been intended that section 35 was going to operate in that way, to suppress otherwise relevant and, it might be thought, highly probative if not persuasive material, so that its reach is limited to the situation in which the transaction has come to an end and in which, because the events have cooled, a Court would not be assisted by what was in essence simply a previous self-serving albeit consistent statement.

TIPPING J:

But you have support at common law, I think, Mr Downs, by the fact that the common law of previous resistance statements did not apply to res gestae, I don't think.

MR DOWNS:

The res gestae, as I understood it, would capture immediate complaints, so that they could also be admissible for proof of the truth of their contents, but that the doctrine of recent complaint went further but for a more qualified purpose, so that a complaint, for example a week later, if there was a child, say –

TIPPING J:

But I don't think the common law suggested that a statement made as part of the res gestae was excluded under the prior consistent statement rule.

MR DOWNS:

No, indeed, no –

TIPPING J:

Which is really what you're contending –

MR DOWNS:

Yes.

TIPPING J:

– for, as against section 35.

MR DOWNS:

Yes, and to use the Evidence Act, as we must, as the start and end point, we say that a statement during the transaction under review by the Court is admissible material pursuant to section 7, but when the transaction has come to end it's simply a prior consistent statement caught by section 35 that may or may not be admissible according to the way in which the case is conducted

and, more particularly, section 35(2). Now, we acknowledge that gives rise to the obvious question, when does the transaction end? Is it a porous situation, is the boundary clear or is it concrete? And I confess I don't have the wit to venture an all-embracing answer. But what I would respectfully contend is that the alternative is to say that otherwise relevant probative material will be excluded by section 35's reach, even though it wouldn't have been at common law, and is or might be thought to be high probative. So, put most starkly, we respectfully contend it cannot have been the intent of the legislature to exclude from a jury's consideration the fact of a complaint more or less made contemporaneous with the event and essentially part of the transaction.

TIPPING J:

I suppose, "Help, help, I am being raped," and saying something as you're running away is only a matter of degree.

MR DOWNS:

Yes.

TIPPING J:

The line has to be drawn somewhere, but you can't have a formula that's going to draw that line.

MR DOWNS:

No, unfortunately, if the argument were thought to be respectable it would mean that Courts are going to have to struggle with drawing that line on a case by case basis, but we suspect that it's just the contextual exercise that was probably envisaged, given the otherwise extreme reach of section 35. The overriding criterium, with respect, we suggest is a temporal one. Is it truly part of the transaction or does it come later?

ELIAS CJ:

Section 25 is really dealing with assertions consistent with evidence. So they are assertions about an event, rather than being part of the event.

MR DOWNS:

Yes, yes. I think we're expressing the same idea, but we probably can't ventilate it any more, or more perfectly. And I wondered then if that was a convenient point to turn to the memory refreshing point. As to that, I should acknowledge an error in the written submission. I've said six weeks after – sorry, I had said five weeks, in fact it is six weeks, that was my mistake. But section 90(5), in our submission, is directed at the proposition that the document must have been made or adopted by the witness at the time when the witness' memory was fresh, so the statute's focus is not on the timing of the statement itself, but rather freshness of memory.

WILSON J:

Before you get to that point, Mr Downs, on the face, was this a situation of the document being used for the purposes of refreshment of memory?

MR DOWNS:

Certainly originally, I mean, I have to acknowledge that as things went on, they were, for want of a better word, a bit dicky. But I would respectfully submit that at least initially, there was a basis for the witness being allowed to consult the document, and we would say that even though the Judge didn't make a determination as a Judge should, that a statement made six weeks after the event, about an event that, at least to the witness, was significant, in circumstances where the content of the statement itself appeared to exhibit indicia of freshness of memory. Then it was not wrong for the witness to consult that document, albeit that there was a process error, we accept. The problems, and we acknowledge they are problems, for the Crown, commence thereafter by virtue of what appears to have been a series of leading questions in which the witness was invited to effectively conclude various propositions were true. I should foreshadow my ultimate submission on this point, and that is that ultimately, little was obtained by virtue of this exercise beyond that which hadn't already been given.

BLANCHARD J:

Well, are you able to identify in the transcript the portions that you say are legitimate, and the portions you say are not?

MR DOWNS:

Yes. Page 99 of the notes of evidence behind tab 7 of the case. The top of that page coincides, really, with this series of leading questions.

BLANCHARD J:

So everything on page 98 you say is okay?

MR DOWNS:

Well, 98 didn't lead to anything in the sense that the prosecutor – well, the witness was allowed to refresh her memory from a statement that we say was fresh, but in actual fact, it would seem that the witness' memory wasn't refreshed, and so nothing actually came of it. And the witness herself said that things weren't in her head, I think was her expression, at page 98 line 25. The problems for us, we acknowledge, really commence on page 99.

BLANCHARD J:

Well, they're particular problems for you if what is said in section 98 did not refresh the witness' memory. Sorry, page 98. But the problems that you've indentified on page 99 become more acute, it seems to me, if the witness' memory was not refreshed on page 98.

WILSON J:

The last question on page 98 is classic leading, too, isn't it?

MR DOWNS:

Yes, I accept that. I should explain where I'm going, I'm being too elliptical. I think there's a difficulty. If we go back to page 97, to the point of the appellant's trial counsel objection, the witness had given orthodox and admissible answers, save for the fact that she inadvertently talked about the appellant looking guilty, which everyone had agreed wouldn't be adduced.

But that popped out. On page 98, the prosecutor then tried to refresh memory, but in terms of page 99, those matters that were introduced that can't be found on page 97 –

BLANCHARD J:

Ah.

MR DOWNS:

Are the following, if it pleases the Court. Line 11 –

BLANCHARD J:

Are you going to take us to the relevant passage on page 97, because we haven't been referred to that yet?

MR DOWNS:

Yes I shall do, I just thought it may be of assistance to the Court if I identified those bits that we can't marry up and so must have come out as a consequence of the '99 exercise but I can do it a different way if the Court would prefer it done a different way?

ELIAS CJ:

Sorry, where are you going now? Do it whatever way you want Mr Downs, sorry.

MR DOWNS:

Yes page 99, line 11, the answer, "Oh I know cuz, I did help myself." That had not been given by the witness previously and we won't find that on page 97 before there's any problem.

TIPPING J:

Well that's really the admission of lack of consent. That's the crucial point really.

MR DOWNS:

It's the perfection of the witness' brief and similarly lines 13 and 14 where the witness said, "He denied it and don't tell anyone." Those are the two aspects. I believe I'm correct to submit hadn't previously been elicited by virtue of orthodox questioning at page 97. So to go back and address Justice Blanchard's enquiry, if we look at page 97, beginning line 16, he, that is he the appellant, was saying that she, this is obviously the complainant, was drunk. "I just said there was no need to help yourself and yeah and I said to him so you raped her and he was like, no don't be like that cuz and I was annoyed with him because I thought it was my boyfriend," and so on. And then she –

TIPPING J:

It's relatively tame, this language, compared with some.

BLANCHARD J:

Just annoyance was it?

MR DOWNS:

Well I was just being old fashioned I must confess. But in terms of trying to marry that with page 99 I think I've correctly identified those passages that weren't given by way of orthodox examination of the witness.

TIPPING J:

I think that, I'm sorry to be repetitive, but I think what you've really got to address for me is that they got out of her, the witness, the statement of the accused that he did help himself and that hasn't appeared, in those clear terms, anywhere else.

MR DOWNS:

No it hasn't.

TIPPING J:

And that, for a jury presumably, I don't know quite how counsel addressed, but that would surely be a clear admission?

MR DOWNS:

Yes, I accept that. What I would say is that there was a form of admission, albeit less clear, by virtue of page 97, lines 13 through 16, "I just hit him up. Asked him that the girl he hooked up with he raped." Question, "What did Maia say?" "He was just saying, um, but she was drunk. I said there was no need to help yourself." Answer – sorry the witness is saying, "I just, there was no need to help yourself. His answer, yeah."

WILSON J:

Well the prosecutor presumably thought that the additional material that emerged at page 99 was significant or else there would have been no reason to introduce the statement?

MR DOWNS:

I can't quarrel with that, with respect.

TIPPING J:

Well I have to say from the trial dynamics point of view, 97 is a bit equivocal.

MR DOWNS:

Yes.

TIPPING J:

Whereas 99 is wholly unequivocal.

MR DOWNS:

99 has material I think any responsible prosecutor would want to ventilate in closing and indeed it was so ventilated.

TIPPING J:

Well it was manna from heaven. Apparently it was a clear admission.

MR DOWNS:

And the question then for the Court is whether as a consequence of the history, that's given rise to a miscarriage in the *Matenga* sense.

TIPPING J:

Well it must be capable of affecting the result.

MR DOWNS:

Yes, yes.

TIPPING J:

The question is, is the man so inevitably guilty that we should proviso it. On our assessment of the whole case.

MR DOWNS:

Yes, yes.

TIPPING J:

Bearing in mind all the cautions in *Matenga*.

BLANCHARD J:

But if what's on page 99 should not have been before the jury because it was a result of leading questions, and really a second attempt or even a third attempt by the Crown, 97 being the first, 98 being the second and 99 being the third, it's an admission of guilt. It would be a big call for us to say that it didn't affect the result.

MR DOWNS:

I can't, in good conscience, say this wasn't material that wouldn't have been seen as significant but I can responsibly submit that the remainder of the Crown case was a powerful one. It had, although this is also an issue –

BLANCHARD J:

So it was in *Matenga*.

MR DOWNS:

True.

TIPPING J:

You have to say it was sufficiently powerful that this aberration shouldn't be regarded as damnifying the verdict.

MR DOWNS:

Yes.

TIPPING J:

That's really the nub of it, isn't it?

BLANCHARD J:

We have that in combination with what the prosecutor said on the other point in closing.

MR DOWNS:

If it assists the Court I don't enjoin the Court to apply the proviso. Obviously, as you will have appreciated, I have been considering my position as we go, hopefully not improperly but conscious of all the relevant considerations that the Crown is required to make. But we don't seek to enjoin the application of the proviso pursuant to section 35. May it please the Court, those are the submissions unless there are other questions, on behalf of the Crown.

ELIAS CJ:

No thank you Mr Downs. Yes Ms Levy?

MS LEVY:

Thank you Your Honour. I apologise if one or two of these factors appear rather minor but my learned friend made something of the speed with which things were happening and the friend of the complainant ringing the police from reception, the inference being that she knew all about it, exactly what had happened, and as soon as they got back to the backpackers, that's what happened. The evidence at page 46 of the notes of evidence, tab 7, is not to that effect. What happened when you got back to the accommodation. Once we got back, because she was still so distressed and upset, I suggested that she have a shower so we went and got her clothes. We put those in the shower for her and then, um, she was – then she broke down again and that's when one of the other girls that was already back at the accommodation, she came down, and that's when I said to her, she can stay with Stacy and I'll go and call the police from reception." "And that's what you did?" "Yes." So it wasn't a case of everybody sweeping into the backpackers and calling the police from reception.

BLANCHARD J:

I'm sorry I'm having difficulty finding the page?

MS LEVY:

Tab 7, page 45. I'm sorry 44 to 45. The line I missed begins, "After that we started walking back slowly to the accommodation."

TIPPING J:

Are you saying that even if Mr Downs test was applied, this was after the transaction was over –

MS LEVY:

Yes.

TIPPING J:

Is that the effect of the submission?

MS LEVY:

I do say that.

BLANCHARD J:

I'm sorry, I'm still unable to find this. Is it 45 as numbered at the top of the page?

MS LEVY:

Yes.

BLANCHARD J:

What line?

McGRATH J:

44.

BLANCHARD J:

It's 44?

MS LEVY:

The last line on page 44 –

BLANCHARD J:

I see, it's on 44.

MS LEVY:

It begins page 44, "After that we started walking back slowly," and then across the page we've got the shower event. It's not a major point but –

BLANCHARD J:

No.

TIPPING J:

But it could be a crucial point as far as whether the transaction was over. If we're saying –

MS LEVY:

Yes.

TIPPING J:

Assuming we adopt Mr Downs' argument on the law then, or am I misleading myself Ms Levy?

MS LEVY:

Well the – I accept that the conversation, the I told them, I told her what happened was before they went back to the backpackers –

ELIAS CJ:

Yes.

TIPPING J:

Okay so –

MS LEVY:

But Mr Downs' submission was that because of the way things unfolded with this urgent and immediate phoning of the police, it was very apparent what the complaint must have consisted of.

TIPPING J:

Oh I see. I follow you.

MS LEVY:

And my –

TIPPING J:

That's a peripheral issue really.

MS LEVY:

It's very peripheral but it's – the details that I wanted to correct.

ELIAS CJ:

It doesn't look as if there was further conversation that she'd already made up her mind in terms of what she'd been told to call the police so I think you're right. It's not a major point and I'm not sure that it really assists very much because it's the, "I told them what happened."

MS LEVY:

Exactly Your Honour.

ELIAS CJ:

Yes.

MS LEVY:

I simply wanted to correct the impression that everything happened very quickly and the inference was irresistible that the friends were told the whole story, simply by virtue of the fact of having been spoken to. My learned friend made the submission in respect of the *Hart* case that the complainant's complaint to Mr Loos couldn't come in by the back door in that case because it was only probative because of the recent invention suggestion. But with respect the history about recent complaint demonstrates that recent complaint evidence is thought to be relevant and the Crown, if it's not a statement, could have introduced it as recent complaint evidence, irrespective of any recent invention argument by the defence. Now that's perhaps picking up on Mr Downs' argument about statement which I'm not sure he finished up with but I don't accept his submission that on that argument it wouldn't have been admissible in *Hart*. For an example of how the Crown could have argued it in *Hart* I refer you again to the District Court decision S*hepherd*, paragraph 132. This is the Judge, "In my view there would be a significant, a legitimate prejudice to the Crown case were this evidence to be excluded. It would leave the very unreal picture of a complainant first complaining only after

10 years when in fact she has complained on two prior occasions. If the timing of her complaint to the police is relevant to the jury's assessment of her credibility then they should be aware of those two prior complaints."

Now Mr Downs made the comment that he didn't commend the examples I provided the Court with as being ones he had envisaged. The *Shepherd* decision and the *Bradley* decision both come out of the Auckland District Court and, as I understand it were, the evidence in those cases was led pursuant to the Crown policy that they could lead evidence of the fact of complaint. So the retreat, if you like, to res gestae, which Mr Downs addressed in the latter part of his submissions, is a recent development.

TIPPING J:

Well what do you say about it. Is it sound or is it not?

MS LEVY:

It's, I can't pretend it's not relevant but it's still a prior consistent statement and for better or for worse that's what the statute prohibits.

McGRATH J:

Common law's been modified in this area by the statute?

MS LEVY:

Yes, yes.

TIPPING J:

Are you saying, in effect, that it doesn't matter that it's part of the res gestae or could be so characterised, if it's still a prior consistent statement, it's out?

MS LEVY:

Yes.

TIPPING J:

Subject to subsections (2) and (3)?

MS LEVY:

Yes. And I wrote, I wrote in my margin whether, "Help, help I'm being raped," was a different form of statement to, "Help, help I was raped," in that the –

BLANCHARD J:

What about, "Help, help I've just been raped?"

MS LEVY:

And then I return to the –

BLANCHARD J:

Which attracts the attention of the passing policeman? It's going to be awfully difficult if we don't allow virtually contemporaneous statements to go in because they're part of the event.

MS LEVY:

Well, in my submission and, with respect, you're in perhaps the same position as the Court of Appeal in *Barlien*, who were very alive to these issues also, and the latter part of the judgment urges reform and that the judgment be shown to the people responsible for that.

TIPPING J:

Am I right in thinking that at common law res gestae statements were admissible, A, for their truth and, B, irrespective of the general rule that you cannot rely on a previous consistent statement. That's a bit of a fast ball to ask you off the cuff, but I suspect that was the rule at common law, because I was always brought up to believe that res gestae trumped everything.

MS LEVY:

Yes, it's only the recent complaint type evidence that needs the special direction about use.

ELIAS CJ:

But, isn't there a – I may be totally wrong in this, but it's not the hearsay application, it's simply the, it is recent, it is consistent evidence to the same effect as the witness's evidence to the Court.

MS LEVY:

Yes.

ELIAS CJ:

So it's never an immediate thing, it's always a statement or assertion about what happened that is caught by the previous consistent statement exclusion.

MS LEVY:

Well, that's what I was wondering, Your Honour, when I wrote down the words, "I am being raped." But when you return to section 35, "I am being raped," or, "I said at that time, 'I am being raped'," is still evidence that is consistent with the witness's evidence at trial, that –

ELIAS CJ:

Well, it is, it's consistency with the evidence rather than consistency more generally. I don't know, I'm getting more and more confused.

MS LEVY:

Well, it's consistency with the evidence, consistency with the witness's evidence that is, that's the test.

TIPPING J:

But the statement about what is happening is not a statement about what has happened –

ELIAS CJ:

Yes.

TIPPING J:

– and that the line between the present and the past tenses is traditionally drawn by the doctrine of res gestae.

ELIAS CJ:

Yes, yes, entirely.

MS LEVY:

I accept that, Your Honour, and I wondered as I wrote it whether that was the answer. But when you come back to section 35(1), "A previous statement of a witness that is consistent with the witness's evidence," so, to say at the time, "I am being raped," and then to say later, "I said at the time, 'I am being raped'," or, "I was raped then and I said at the time, 'I am being raped'," it's consistent.

ELIAS CJ:

Well, yes, well, it can't have that meaning.

TIPPING J:

But you're very unlikely to be complaining to a third party at the time you're being raped, other than crying out in a general way. Now, I don't think the law, provided there is sufficient contemporaneity, I don't think the law she exclude transaction like that, by transactions I mean statements, that have the traditional rationale of res gestae. And that was really what Mr Downs was suggesting to us.

MS LEVY:

Yes.

TIPPING J:

Now, as a matter of policy, never mind precise linguistics of the section, can you argue against that?

MS LEVY:

No. I do say that this is not res gestae, I do say it's just outside it.

TIPPING J:

Yes, understood.

MS LEVY:

Because she has, of course, spoken to her friends on the phone, arranged to meet them, then met them, then told them what had happened. So, I say this is a recent complaint scenario rather than –

TIPPING J:

Very recent.

MS LEVY:

Well, very recent, but there's got to be a line.

TIPPING J:

But not res gestae, yes.

MS LEVY:

No, but there must be a point at which it becomes recent complaint and ceases to be res gestae –

TIPPING J:

Yes, of course.

MS LEVY:

– and I say that it's over that. But as a matter of policy, it's – you only have to say, "'Help, I'm being raped,' that's what I said what it was happening and three people heard me," I mean, obviously it's relevant. I'm not saying that it's good law, but I'm saying that it is the law.

TIPPING J:

Well, it's a question of how we construe the rather difficult, in some respects, language of section 35, isn't it, as to whether it was intended to cover res gestae type statements.

MS LEVY:

Well, in my submission, this is not the case that requires the Court to do that. This is the case that requires the Court to focus on recent complaint, because the side of the line on which this evidence falls.

TIPPING J:

Well, if it falls on the recent complaint side of the line, even on Mr Downs' formulation, you'll be home.

MS LEVY:

Yes, well, Mr Downs' latest formulation.

TIPPING J:

Oh, well, that's unfair, too hard on him.

MS LEVY:

We've got to take our opportunities. I'll just, if it gives you any comfort, refer you to what the Court of Appeal said in *Barlien*. "There appears to have been a mistake in not including in the exceptions to section 35(1) the res gestae exception."

TIPPING J:

What paragraph is that said at?

MS LEVY:

It's paragraph 69.

TIPPING J:

I didn't realise it actually referred to res gestae in it.

MS LEVY:

Yes, they do, and there's also a discussion – I'm just flicking to it – they refer to paragraphs 37 to 39. "There has been no, there's no explanation as to why the res gestae exception was not included."

TIPPING J:

Is res gestae actually referred to in the Evidence Act at all?

MS LEVY:

No.

ELIAS CJ:

But it's quite clear from the Law Commission that their interpretation of previous consistent statements were. They say, "That is, statements that repeat a witness's evidence." Now, it's not actually repetition, because sequentially it's usually, well, it's always before. But it is that, that would exclude statements made in the course of the res gestae.

MS LEVY:

But the difficulty, with respect, Your Honour, that that argument runs into, is the use of the word "consistent" in section 35. If section 35 said, "You can't say what you've said before," –

ELIAS CJ:

Well, then you'd never be able to give evidence.

MS LEVY:

Well, no –

TIPPING J:

"You can't say now what you've said before."

MS LEVY:

"You can't tell us now –

ELIAS CJ:

Yes.

MS LEVY:

– exactly what you told us before."

ELIAS CJ:

Yes.

MS LEVY:

Then you could use the conceptual difference between, "I'm being raped now," and, "I told my mother the next day that I'd been raped the night before." You could say, well, they are two different things, but the difficulty, the reason you can't use that argument, is that the term used in section 35 is "consistent with", you can't give evidence that is consistent – I'm sorry, I need the section – of a statement that is consistent with –

ELIAS CJ:

The witness' evidence.

MS LEVY:

– the witness' evidence. And the use of the word "consistent" simply blurs away, in my submission, any distinction between, "I am being raped," and, "I told my mother I had been raped," and, "I've just told the jury that I was raped." So, I refer you to what the Court of Appeal in *Barlien* said on res gestae, for comfort I suppose.

ELIAS CJ:

Well, it's a counsel of despair, really, isn't it? It's not very comfortable.

MS LEVY:

It does highlight, in my submission, that the remedy is with Parliament and not with a tortured interpretation of very plain words.

TIPPING J:

They say in 37, in support of the idea that it was just overlooked, "This is perhaps not surprising as it was often considered an exception to the hearsay rule, which of course no longer was required, rather than to the rule excluding previous consistent statements, but it was regarded as an exception to both." Now, the question is, did they intend to do away with that latter exception? Well, literally they have, by this consistency.

MS LEVY:

Well, that's, yes, with respect, Your Honour, the answer is that whether they did or they didn't intend it, they have.

TIPPING J:

Yes quite –

MS LEVY:

And if they –

TIPPING J:

– because of this consistency point.

MS LEVY:

Yes, yes, and if they didn't intend it, well, that's been pointed out to them by the Court of Appeal, this Court can do the same.

TIPPING J:

So the result of your argument is that unless what used to be called "recent complaint", and this would apply to contemporaneous complaints too –

MS LEVY:

Yes.

TIPPING J:

– cannot be led in any shape or form unless subsection (2) or subsection (3) applies.

MS LEVY:

Yes, yes.

ELIAS CJ:

That is not what the Law Commission thought it was doing. I know, it was, the form of the legislation has changed –

MS LEVY:

Yes.

ELIAS CJ:

– but I'm not sure that it changed that much.

MS LEVY:

Well, whether it intended to change or it didn't, that's what it's done, in my submission.

TIPPING J:

Well, the changes though, weren't really material to this point, were they?

MS LEVY:

I don't believe so.

TIPPING J:

Because your argument really depends on the width of subsection (1) –

MS LEVY:

Yes.

TIPPING J:

– which has remained the same.

MS LEVY:

That's correct, Your Honour, yes.

BLANCHARD J:

Did the Law Commission think that there was no need for any res gestae exceptions any more, because they were covering the field?

MS LEVY:

Your Honour, I can only refer to what the Court of Appeal has said on that point in *Barlien*, I don't have any other assistance to offer.

ELIAS CJ:

Well, the Law Commission thought it was actually doing away with the restriction that said recent complaint evidence had to be made at the first available opportunity. I'll just check what they said about res gestae. Nothing, at least it's not in the index.

MS LEVY:

No.

TIPPING J:

But apparently they expressly preserved the res gestae in England, under the – so, according to the Court of Appeal, under the Criminal Justice Act in the United Kingdom.

MS LEVY:

Yes, yes. Now, I confess I haven't explored this history, it's…

TIPPING J:

No, no.

WILSON J:

If res gestae are to be excluded, would that in itself be an argument for giving a broader interpretation to section 35(2) and, in particular, the reference to recent invention in that subsection?

MS LEVY:

Well, my immediate – I realise it's not immediate – my first response to that, Your Honour, is that such an interpretation would be to endeavour to obtain the res gestae relief, if you like, by distorting what was intended by section 35(2).

WILSON J:

It begs the question of what was intended, though, and certainly what was intended in terms of res gestae, doesn't it?

ELIAS CJ:

I don't suppose in the debates they got into this.

MS LEVY:

I can't really answer your question further than that, Sir, I think that that's yesterday's pickings.

WILSON J:

Yes, quite.

MS LEVY:

Just very briefly now, on the refreshing memory point, or 'Witness X', I didn't refer to page 97 in the early evidence of Ms X, and probably I should have, but I do that. I say now that the language used by that witness on page 97 supports my earlier submission that this was not an event of momentous significance for her. And finally Your Honours suggested that the Crown

would have made something of the important evidence obtained, wrongly obtained through leading questions in closing and the references that I can find to that in the summing up are at pages 84 – I'm sorry, I should do it sequentially, page 75 the Crown in closing said, "The fourth factor is the conflict between his version now and what the Crown says is the more candid admission tat he made to his cousin a week or so afterwards. Remember her evidence. She bailed him up about taking advantage of the Aussie girl. His answers to his accusations that she was drunk. He did help himself. Please don't tell anyone. And there's more about the paragraph suggesting you might think that Ms Martin in particular was a genuine and honest witness and was telling you the best way she could about what he had said to her.

And then in the final paragraph the "helping himself" phrase is employed. The Crown says he was helping himself by force because she wouldn't agree and that when he punched and kicked her he was fully intending to have sexual connection with her, et cetera. So the phrasing relevant to consent has been employed by the Crown on two occasions in closing. Unless I can assist the Court further, those are my submissions.

ELIAS CJ:

Thank you Ms Levy. Thank you counsel. We will reserve our decision in this matter.

COURT ADJOURNS: 3.07 PM