ORDER UNDER S 140 OF THE CRIMINAL JUSTICE ACT 1985 PROHIBITING PUBLICATION OF THE COMPLAINANT'S NAME AND IDENTIFYING PARTICULARS.

IN THE SUPREME COURT OF NEW ZEALAND

SC 42/2010
[2010] NZSC 161

DUSHKAR KANCHAN SINGH

v

THE QUEEN

Hearing: 7 October 2010

Court: Elias CJ, Blanchard, Tipping, McGrath and William Young JJ

Counsel: B J Hart, G J King and A J Haskett for Appellant
N P Chisnall and B J Horsley for Crown

Judgment: 17 December 2010

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS

(Given by William Young J)

The appeal

[1] In November 2008, the appellant stood trial in the District Court at Auckland before Judge Perkins and a jury. He was charged with 19 crimes of violence against Ms D, wilfully attempting to pervert the course of justice and forgery. At the conclusion of the trial he was found guilty on five of the counts of violence against Ms D and of forgery and wilfully perverting the course of justice. He was subsequently sentenced to two years eight months' imprisonment.

[2] His appeal to the Court of Appeal was allowed only to the extent that his conviction for forgery (and a concurrent sentence imposed in relation to it) were quashed.[1]

Overview

[3] On a number of occasions during the criminal process, Ms D attempted to have the prosecution abandoned. On the Crown case, these attempts resulted from pressure and persuasion from the appellant. This alleged pressure and persuasion formed the basis of the count of wilfully attempting to defeat the course of justice. Importantly, however, Ms D gave evidence at the preliminary hearing in a way which supported the Crown case. In doing so, she referred to and adopted entries in her diary in which she had recorded a number of incidents of violence on the part of the appellant towards her.

[4] At trial Ms D was declared hostile under s 94 of the Evidence Act 2006 (after she had repudiated the relevant entries which she had made in her diary). The Judge rejected a claim by her to the privilege against self-incrimination[2] and she was extensively cross-examined by the prosecutor. In the course of this process a number of her earlier statements were produced as exhibits. Most of these supported the Crown case but some were associated with her attempts to have the prosecution abandoned. We will refer to the details of all of these later in these reasons. Late in the trial, when the appellant was being re-examined, his counsel sought to put in five

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1 *Singh v R* [2010] NZCA 144.

2 The privilege is provided for in s 60 of the Evidence Act 2006 and the procedural requirements for claiming the privilege in court proceedings are set out in s 62.

other written statements made by Ms D which arguably supported the defence case. The Judge ruled these documents inadmissible.

[5] We will address the case primarily by reference to the three principal contentions advanced on behalf of the appellant, namely that:

(a) the claim by Ms D to invoke the privilege against self-incrimination was wrongly rejected;

(b) the statements made by Ms D which the Judge rejected should have been admitted; and

(c) the trial was unfair.

Before we do so, however, we will address the facts in more detail.

The facts in more detail

[6] The appellant and Ms D met in early 2006 and became engaged. The appellant was a police officer and had many years experience as a policeman both in New Zealand and overseas. Ms D is not a New Zealand citizen. She moved to New Zealand a few months after she met the appellant and began living with him. She was on a visitor's permit and dependent on the appellant's sponsorship to remain in New Zealand.

[7] To provide a context for what later follows, we provide a brief chronology of events up to 16 April 2007 (which is the end of the period covered by the counts):

(a) 4 March 2006 – 16 September 2006. During this time the appellant and Ms D were living together and, on the Crown case, the appellant assaulted her on 17 occasions. This period ended with Ms D going to a refuge on 16 September 2006.

(b) 16 September – 29 September 2006. Between these dates, Ms D lived in the refuge.

(c) 29 September – 9 October 2006. Ms D returned to live with the appellant on 29 September. On the Crown case, the appellant assaulted Ms D twice during this period, on 4 and 8 October 2006. Ms D stayed with relatives of the appellant after the incident on 8 October and went to a hospital the next day for treatment for her injuries. She then returned to live with the appellant.

(d) 9 October – 26 October 2006. Ms D continued to live with the appellant until 26 October 2006 when the appellant was arrested and charged with various assaults.

(e) 26 October 2006 – 5 March 2007. Between these dates, Ms D sometimes stayed with the appellant and there was a good deal of other contact between them, including a short holiday in Rotorua in late February 2007. Although Ms D made a number of unsuccessful attempts to have the charges against the appellant withdrawn, she gave evidence against him at the preliminary hearing on 5 March 2007, substantially in terms of her statements to the police and her diary. This was despite the presiding Justice of the Peace indicating to Ms D that she did not need to give evidence if she did not wish to do so. This indication was presumably given on the basis of an incorrect assumption that she and the appellant were married. At that time (March 2007) the Evidence Act 2006 was not in force and the former rules as to spousal immunity applied.

(f) 5 March 2007 – 16 April 2007. Ms D returned to live with the appellant about ten days after the preliminary hearing. She continued to act inconsistently in relation to whether there should be a prosecution. On 16 April 2007 the appellant was arrested and charged with attempting to pervert the course of justice, a charge which (at least at trial) covered the period 26 October 2006 – 16 April 2007.

[8] The appellant's trial was scheduled for 4 February 2008. Between March 2007 and the end of January 2008 there were a number of indications from the complainant that she did not wish to give evidence. On 15 May 2007 she swore an affidavit seeking to be excused from giving evidence at trial. In that affidavit and a similar one dated 18 January 2008 she stated that she was living happily with the appellant. Just ahead of the scheduled trial, her lawyer told the police that she intended to leave New Zealand. This resulted in the police, on 25 January 2008, obtaining a warrant for her arrest. She had not been located when the trial was to commence with the result that it was adjourned. She attended the Court later that week and was bailed to the rescheduled trial date.

[9] As noted, the jury found the appellant guilty of wilfully attempting to defeat the course of justice. The jury appears to have discriminated between the counts alleging violence depending on whether or not there was evidence inculpatory of the appellant apart from what Ms D had said in her depositions evidence. They found the appellant guilty on the counts where there was such independent evidence and acquitted him on the other counts.

The contention that the claim by Ms D to invoke the privilege against self-incrimination was wrongly rejected

The claim to invoke the privilege against self-incrimination and how it was dealt with at trial

[10] Ms D first mentioned the possibility of invoking the privilege against self-incrimination when she was interviewed under caution by a police officer on 14 February 2008. This was in the context of her non-appearance when the case against the appellant was scheduled to be tried on 4 February 2008. The statement of 14 February 2008 was not admitted in evidence at trial by the Judge (and is one of the five documents which are the subject of the second ground of appeal). We discuss what she said in this statement when we deal with that aspect of the case and we mention it here simply by way of narrative.

[11] The claim first surfaced on the record in an affidavit sworn on 3 March 2008 which was lodged with the District Court. In this affidavit Ms D said:

> I want to exercise my right to claiming the privilege of self incrimination and do not want to give evidence because of inaccuracy and inconsistencies of statements and statements being inaccurate, therefore I request to you Sir to have all charges against my husband dismissed.

[12] When the trial commenced, Ms D sought to invoke the privilege in her evidence at a point when she was only being asked to provide background information and thus before any conceivable issue of self-incrimination had arisen. The Judge understandably deferred addressing the claim. He came back to it at a point in proceedings which:

(a) followed Ms D denying that she had made relevant entries in her diary; and

(b) just preceded what was obviously going to be her repudiation of her evidence at the preliminary hearing.

To this end, he adjourned just before 1.00pm on the first day of the trial to enable Ms D to obtain legal advice. She came back after the lunch break to say that she was not able to get legal advice. When he asked her why she claimed privilege, her response was that the evidence which she gave at the preliminary hearing was false and that if she repeated it, it would be untrue and that, in this way, she might then incriminate herself by committing perjury.

[13] In his ruling the Judge referred to the earlier documentation which had been filed with the Court as well as to what Ms D said to him directly. He then expressed himself in this way:

> [10] Having read [the Court] file, and having heard from [Ms D] today from the witness box, and she remains under oath, I am simply not satisfied that if she were forced to give evidence that she would incriminate herself. The corollary is, of course, if the evidence given at the preliminary hearing was false as she alleges, then there is already the basis for a prosecution against her.
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> [11] I consider I am in a position to assess this matter, and my assessment is that if evidence is given it is not reasonably likely that she will incriminate

> herself. I am accordingly not prepared to accept the basis upon, which she is apparently refusing to give evidence on the matters that were the subject of the preliminary hearing.

[14] Ms D's suggestion to the Judge that if she continued to give evidence she might commit perjury obviously did not provide an appropriate foundation for a claim of privilege. It was not suggested otherwise in this Court by Mr King who argued this appeal for the appellant (but did not appear for him at trial).

The approach of the Court of Appeal

[15] The approach of the Court of Appeal on this aspect of the case appears in the following passage from the judgment:

> [33] The purpose of immunity is to protect a witness against admitting past offending: here supposedly perjured evidence given at depositions. We observe that the privilege is claimable only by the witness, not by a party who is not that witness. But on the Judge's finding there had been no perjury at depositions. Ms D was asked to give evidence the Crown considered to be truthful so there would be no likelihood she would incriminate herself in terms of s 60(1)(b) by giving evidence consistent with her depositions and previous out of court statements. So to permit the Crown to elicit the depositions evidence and the production of the diary which her pre-trial evidence had confirmed did not infringe the immunity. The witness could not expect to avoid giving evidence because she had decided to deny the truth of her evidence at depositions. We do not accept the supplementary submission ... that it is immaterial which prior account was untrue. The Judge was entitled to act upon his own assessment when making his evidential ruling.
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> [34] Nor could the defence secure admission of previous affidavits by Ms D inconsistent with her evidence at depositions and rely on those as material protecting her, on grounds of self-incrimination, from exposure to cross-examination to contrary effect at trial. Such affidavits, which on the Judge's findings were false and contrived, were necessarily rejected as an abuse of the Court's procedures. No authority was cited to treat such materials as giving rise to risk of incrimination for giving evidence at odds with them. There was no risk of Ms D being prosecuted for perjury in giving oral evidence inconsistent with those affidavits if she gave truthful oral evidence for the Crown at trial. The risk was rather of prosecution for perjury for having sworn false documents as affidavits. Section 60 only applies when a person is required to provide information in a proceeding or to a person in authority such as a police officer.[3] It does not apply where a person volunteers evidence such as an affidavit which may later be found to be false.

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[3] Section 60(1)(a).

The argument for the appellant

[16] One way or another, the arguments for the appellant both in this Court and the Court of Appeal all turned on the contention that by the time Ms D came to give evidence, she had made statements which were not consistent. Some of these statements had been on oath (that is, her evidence at depositions and the affidavits she had volunteered) and others had been to the police. Any affirmative position she adopted at trial (that is, other than one of amnesia) would be likely to involve contradicting some of what she had previously said on other occasions. If she were to contradict what she had previously said on oath, there was a prospect that such contradiction might later be relied on in a prosecution against her for perjury. If she were to contradict what she had previously said to the police, such contradiction might, at least theoretically, have been relied on in a prosecution against her for wasting police time, or something similar.[4]

Preliminary observations

[17] Both Judge Perkins and the Court of Appeal recognised that there was at least a theoretical risk of prosecution for perjury in relation to prior statements on oath. Judge Perkins identified such a risk in respect of possible prosecution for perjury in relation to Ms D's evidence at the preliminary hearing. The risk of prosecution mentioned by the Court of Appeal was in respect of her exculpatory affidavits.

[18] Judge Perkins did not, at least explicitly, explain why the possibility of prosecution which he had identified did not engage the privilege against self-incrimination. He noted that if her depositions evidence had been false, there was already a "basis for a prosecution against her". But this plainly was not inconsistent with the privilege which she claimed.[5] As well, the Judge did not explain how he reached the view expressed in [11] and it is therefore unclear whether his conclusion in the first sentence of that paragraph is simply based on

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4 Summary Offences Act 1981, s 24.

5 Assume it was the case that the depositions evidence was false. Admissions by Ms D to this effect in her evidence at trial could be used against her in a trial for perjury in relation to that evidence. The comment made by the Judge thus does not explain why the risk that this might happen did not entitle Ms D to rely on the privilege against self-incrimination.

what was said in [10], or alternatively represented a conclusion that whatever the theoretical risk of incrimination, prosecution was insufficiently likely to justify invocation of the privilege.

[19] The last two sentences of [34] of the judgment of the Court of Appeal are beside the point. Where there is a risk of prosecution for perjury in relation to an affidavit, it does not matter whether the affidavit had earlier been volunteered or not.[6] We also have reservations about the assertion in the same paragraph that the affidavits were "necessarily rejected as an abuse of the Court's procedures". Reasoning to this effect does not appear in the ruling of Judge Perkins. In the event that Ms D were prosecuted for perjury in relation to the affidavits, we very much doubt that she could rely on the contention that the affidavits were an abuse of process as providing a defence.

[20] The Court of Appeal attributed a finding to Judge Perkins that Ms D's evidence at depositions was true (see [33]). This we take to be a reference to the first sentence of [10] (and possibly the first sentence of [11]) of the ruling. Although an unequivocal finding to that effect is not recorded in the ruling, we think that this was the view of the Judge. The Court of Appeal's adoption of this "finding" very much informed its approach. The reasoning was that all the Crown wanted of Ms D was that she give truthful evidence, and providing she did so, there was no realistic prospect of her being prosecuted. As well, it considered that:[7]

> The witness could not expect to avoid giving evidence because she had decided to deny the truth of her evidence at depositions.

A little legal history and some policy considerations

[21] At a very general level, what happened in this case is reasonably common in cases of domestic violence. In particular, it is far from unusual for someone who is alleged to have been the subject of domestic violence to reconcile with the alleged offender and to seek to terminate the criminal process.

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6 We emphasise that we are not addressing here a situation where that affidavit is in effect that person's evidence-in-chief and he or she is being cross-examined on it: see for instance *Siemer v Stiassny* [2007] NZCA 117, [2008] 1 NZLR 150.

7 At [33].

[22] In the past, such a complainant could effectively bring the prosecution to an end, at least where there was no independent evidence implicating the defendant. If married to the defendant, the complainant could assert spousal immunity. If not married to the defendant, a complainant might seek to be excused from giving evidence on the basis of an analogy with spousal privilege.[8] And where spousal immunity was not available, a complainant who was determined to stop a prosecution could do so by either repudiating in the witness box the truth of what she had previously said to the police or by claiming to have no recollection of the critical events. Where the complainant had acted in any of the ways just discussed, the prosecution would normally not be able to rely on the complainant's prior statements. This is because such statements were not usually admissible unless adopted in court by the complainant.[9] Indeed, given the decision of the Court of Appeal in *R v O'Brien*,[10] prosecutors would not call complainants to give evidence where they knew that they intended to repudiate the truth of what they had previously told the police. The courts were not prepared to extend the exceptions against hearsay to enable such statements to be directly admissible.[11] In these circumstances the result of a complainant not co-operating with the prosecution would usually be the acquittal of the defendant or the abandonment of the proceedings.

[23] Much has changed with the Evidence Act 2006. Spousal immunity has been abolished. Prior out-of-court statements by a witness now have independent evidential value. This means that the approach taken in *O'Brien* no longer applies,[12] except perhaps in much attenuated form.[13] The consequence is that a prosecutor in a domestic violence case is now far less dependent on the co-operation of the complainant. We are satisfied that this represents a conscious legislative policy decision based on the recommendations of the Law Commission.[14]

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8 Which is what had happened in *R v M-T* [2003] 1 NZLR 63 (CA).

9 See *R v Carrington* [1969] NZLR 790 (CA).

10 *R v O'Brien* [2001] 2 NZLR 145 (CA). See also *R v Schriek* [1997] 2 NZLR 139 (CA).

11 See *R v M-T*. But compare with *R v Olamoe* [2005] 3 NZLR 80 (CA) where a prior statement by a complainant was held to be admissible as part of the res gestae.

12 See *Morgan v R* [2010] NZSC 23, [2010] 2 NZLR 508.

13 Obviously the admissibility of a prior out-of-court statement is itself is subject to reliability and unfair prejudice assessments: see *R v Vagaia* [2008] 2 NZLR 516 (HC) at [15] and *Morgan* at [40].

14 Law Commission *Evidence: Reform of the Law* (NZLC R55(1), 1999) at [413] and Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55(2), 1999) at [C340].

[24] Ms D appears to have reconciled with the appellant in the course of the criminal process. She tried to persuade the courts and the police to abandon the prosecution. When she gave evidence, she repudiated – unconvincingly – her own diary entries, what she had told the police and her sworn evidence at the preliminary hearing. Victims of domestic violence – and for reasons which are readily understandable – sometimes act in this way. So in all these respects, this case was not out of the ordinary.

[25] What was out of the ordinary was Ms D's attempt to rely on the privilege against self-incrimination. Given the general policy considerations just referred to, this attempt warranted careful scrutiny. This is because the corollary of accepting the claim to privilege in this case is that any reluctant complainant could avoid giving evidence by:

(a) making a statement to the police, or volunteering an affidavit which is inconsistent with other statements made or evidence previously given;[15] or

(b) signalling an intention to repudiate prior statements inculpating the defendant.

To allow this would have the practical effect of undermining the policy changes implemented in the Evidence Act 2006.

The claim to the privilege in this case

[26] The particular circumstances of this case provided an inauspicious context for the claim of privilege:

(a) The Crown position was that throughout the police investigation and trial the appellant had put Ms D under considerable pressure to have the prosecution stopped. Although her first mention of the privilege

[15] The manufacturing of evidence was a real concern of the Law Commission in the report which was a precursor to the 2006 Act: see Law Commission *Evidence: Reform of the Law* at [139]-[142].

was after the time-frame of the attempting to defeat the course of justice count, her invoking of the privilege at trial was awkwardly (from the point of view of the appellant) congruent with the general Crown case on that count – a count on which the appellant was found guilty.

(b) What Ms D said to the Judge at trial as to why she was concerned about the possibility of self-incrimination was prospective, that is in terms of the risk that she might give perjured evidence at trial. Mr King sought to explain this as being a function of her confusion and lack of representation. As noted, it is true that in the affidavit of 3 March 2008, there was a general reference to inconsistencies in what she had said previously. It may be that she failed to mention this particular fear to the Judge because she was confused when she was in Court (which is what Mr King argued). But another possible explanation for not articulating this particular fear is that she had no such fear and had simply failed to record accurately in her memory and repeat a script which had been prepared for her by the appellant.

(c) Some support for the second of those explanations is provided by Ms D's conduct during cross-examination by counsel for the appellant, when she took every opportunity to say that the allegations she had made against him in her evidence at the preliminary hearing were not true. The transcript of this part of her evidence is devoid of any indication that she had the slightest concern that by doing so she might be incriminating herself.

All of this illustrates the risk that too ready an acceptance of a claim of privilege may encourage gaming behaviour by defendants and set the scene for more pressure to be placed on complainants in domestic violence cases.

Why the appellant's argument fails

[27] We reject the appellant's first ground of appeal for two reasons:

(a) the appellant does not have standing to complain of an erroneous decision to decline privilege; and

(b) the claim to privilege was rightly denied.

The appellant does not have standing to complain of an erroneous decision to decline privilege

[28] It is well established that the privilege against self-incrimination is that of the witness and cannot be asserted by a party to the case.

[29] If a prosecution witness waives privilege, it is not open to the defendant later to complain. This is because the privilege attaches to the witness, not the information. And it was established as long ago as 1870 in *R v Kinglake*[16] by the Court of Queen's Bench that the same position obtains if:

(a) the witness claims privilege against self-incrimination;

(b) the claim is wrongly rejected by the judge; and

(c) the witness gives evidence.

As far as we are aware, this decision has never been doubted.[17]

[30] The approach taken in *Kinglake* is entirely consistent with s 60(4) of the Evidence Act 2006 which states that s 60(2) (which provides for the privilege):

> [D]oes not enable a claim of privilege to be made –
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> ...
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> (b) on behalf of any person other than the person required to provide the information (except by a legal adviser on behalf of a client who is so required) ...

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16 *R v Kinglake* (1870) 11 Cox CC 499 (QB).

17 The High Court of Australia applied it in *Rochfort v Trade Practices Commission* (1982) 153 CLR 134. See also John Henry Wigmore *Wigmore on Evidence* (McNaughton revision, Aspen Law & Business, United States of America, 1961) vol 8 at §2270.

We are of the view that the appellant's argument is inconsistent with this section in that he is seeking to make a claim to privilege on behalf of Ms D.

The claim to privilege was rightly denied

[31] Under s 60(1)(b) of the Evidence Act 2006, the privilege against self-incrimination can only be invoked in relation to information which, if provided, would be "likely" to incriminate the person claiming the privilege. The use by the legislature of the word "likely" shows that it intended to confine the privilege to circumstances where the potential for incrimination is "real and appreciable" and not "merely imaginary and fanciful".[18] This means that the claim can only be invoked where later prosecution is itself likely. We also see the current test under the statute as being the same as that explained by Cockburn CJ in *R v Boyes*:[19]

> ... [T]he Court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. ... Further than this, we are of opinion that the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things – not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. We think that a merely remote and naked possibility, out of the ordinary course of the law and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice.

[32] The inconsistencies between the various statements made by Ms D before trial were:

(a) Often merely as to context or nuance, for instance as to why she had made particular allegations. Thus when seeking to have the prosecution stopped, she tended to assert that she had made allegations against the appellant while under stress or under the influence of others.

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[18] The words in quotation remarks come from the judgment of Cooke J in *Busby v Thorn EMI Video Programmes Ltd* [1984] 1 NZLR 461 (CA) at 469.

[19] *R v Boyes* (1861) 1 B & S 311 at 330, 121 ER 730 (KB) at 738 per Cockburn CJ.

(b) Never by way of detailed refutation of the allegations of violence. In one statement of disputed provenance, an unsigned letter of 7 January 2007 purported to be written by Ms D, there is a statement made in relation to the alleged assaults that "such things did not take place". As well, in the affidavit of 3 March 2008, Ms D referred in entirely general terms to inaccuracies in her statements.

(c) Most significant in relation to whether the appellant had pressured her to make the attempts she did to have the prosecution stopped. Sometimes she attributed these attempts to pressure from the appellant and on other occasions maintained that she had acted of her own free will. This was obviously material to the attempting to pervert the course of justice count.

[33] A complainant in a domestic violence case who defeats a prosecution by reneging on prior statements might, conceivably, be prosecuted. For instance if she acknowledges that her original complaint was false, she might be prosecuted for making a false complaint (but presumably only if the police are satisfied that the complaint was indeed false). Alternatively, she might be prosecuted for attempting to defeat the course of justice (if the police take the view that the alleged offending took place).[20] But such prosecutions (on either basis) must be rare. And, for the policy reasons already discussed, courts can be expected to adopt a realistic approach in evaluating whether the associated risk of prosecution justifies a complainant invoking the privilege against self-incrimination when required to give evidence in support of a prosecution.

[34] It is true that whatever Ms D said at trial (unless she claimed to remember nothing of what happened) was likely to be inconsistent with some of her previous statements. This is particularly the case in relation to the attempting to pervert the course of justice count in respect of which there was considerable inconsistency between the statements she had made before trial.

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[20] For a recent and controversial instance where there was such a prosecution, see *R v A (false retraction of allegation of rape)* [2010] All ER (D) 251 (Nov) (EWCA).

[35] What of the possibility that she might be prosecuted in relation to pre-trial exculpatory statements and particularly the affidavits? Given the Crown position that these statements were the result of illegitimate pressure from the appellant and the overall dynamic of the case, Ms D faced no realistic risk of prosecution by the police if she gave evidence at trial which was inculpatory of the appellant. In any event, however, because she intended to adopt the exculpatory statements in her evidence, nothing she was going to say in evidence carried the likelihood of self-incrimination in relation to the exculpatory statements.

[36] What then of the possibility that she might be prosecuted in relation to pre-trial inculpatory statements given that her intention was to repudiate them in her evidence? The critical point in relation to this particular risk is that the prosecution position at trial was that the inculpatory statements were true. It is thus inconceivable that the police would have commenced a prosecution against Ms D predicated on the basis that these statements were false. The possibility of such a prosecution at the instance of the police was so unlikely as not to engage the privilege against self-incrimination.

[37] We have also had regard to the possibility of there being a private prosecution of Ms D at the instance of the appellant, a possibility which was not the subject of argument at the hearing. We see this possibility and the associated risk of self-incrimination as also being too remote to engage the privilege. There would be nothing in such a process for the appellant had he been acquitted and, in the present context (that is, with the appellant having been found guilty on a number of counts), it is practically certain that such a prosecution would go nowhere.[21]

[38] All in all, we are satisfied the risk of incrimination was insufficiently likely to give rise to the privilege.

[39] We see the only substantial risk of prosecution which Ms D has ever faced as being in relation to the exculpatory evidence which she gave at trial. But as already

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[21] Because it would be collaterally impugning the convictions, such a prosecution would be probably seen as an abuse of process and would be a prime candidate to be taken over by the Solicitor-General and abandoned.

pointed out, Ms D could not justify her claim to privilege on the basis a prospective risk of prosecution for perjury should she give perjured evidence.

Whether the statements made by Ms D which the Judge rejected should have been admitted

Overview

[40] The statements in issue were, to some – in fact rather limited – extent, consistent with the oral exculpatory evidence which Ms D gave. The purpose of defence counsel in seeking to have them produced was presumably to provide support for that exculpatory evidence.

[41] The admissibility of the documents fell to be determined primarily under s 35(1) and (2) of the Evidence Act, which provide:

> **35 Previous consistent statements rule**
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> (1) A previous statement of a witness that is consistent with the witness's evidence is not admissible unless subsection (2) or subsection (3) applies to the statement.
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> (2) A previous statement of a witness that is consistent with the witness's evidence is admissible to the extent that the statement is necessary to respond to a challenge to the witness's veracity or accuracy, based on a previous inconsistent statement of the witness or on a claim of recent invention on the part of the witness.

[42] Complicating this aspect of the case is the unorthodox manner and timing of defence counsel's attempt to produce the documents. They were not put to Ms D when she gave evidence. Instead defence counsel sought to produce them in the course of re-examination of the appellant. This means that s 8 is relevant. This section provides:

> **8 General exclusion**
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> (1) In any proceeding, the Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will—
>
> (a) have an unfairly prejudicial effect on the proceeding; or
>
> (b) needlessly prolong the proceeding.

(2) In determining whether the probative value of evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect on a criminal proceeding, the Judge must take into account the right of the defendant to offer an effective defence.

The statements in issue

[43] The prior statements of (or in one instance attributed to) Ms D which were admitted included inculpatory material, most relevantly her evidence at depositions. But also admitted in evidence were some documents which at least ostensibly provided some assistance to the appellant:

(a) Her letter of 1 December 2006. This asserted that she had "decided to reconcile with my husband and do not want to pursue the case anymore".

(b) Her letter of 21 December 2006. This asserted that she had been "in a lot of tension and stress when I made the statement against my husband". She claimed that those "who came to support me had always had negative views only against my husband" and gave her wrong advice. Without saying that the complaints were false she sought to distance herself from them.

(c) Her police statement of 6 January 2007. In this she referred to the letter of 1 December 2006 in this way: "I wrote the letter of my own free will and I had not spoken to [the appellant] prior to writing the letter". She said that subsequently she had had a discussion about the letter with the appellant and that he had gone to his solicitor to seek advice. She concluded the statement, however, by saying that she thought that the case should still go on and that she was happy and willing to go to court in March to give evidence.

(d) A typed and unsigned letter of 7 January 2007 apparently from the complainant to the District Commander at Auckland by way of complaint about the actions of the police. Referring to the assault

allegations this letter said, "such things did not take place". And referring to the two letters of 1 and 21 December 2006, the letter claimed that she had written each of her own free will. This letter was not posted and sent but rather Ms D gave both the original and a copy to Detective Sergeant Bissett when he came to pick her up and take her to court for the depositions hearing. On the Crown case, this letter was written by the appellant. Ms D's position at trial was that she had typed it, albeit that on other occasions she claimed that it was written by the appellant.

(e) An undated draft affidavit in Mrs D's handwriting. In it she complains that she was not aware of her right not to give evidence at the depositions hearing. She also indicated that she wanted that evidence to be regarded as "null and void" and for the charges against the appellant to be dismissed.

There was much reference at trial to other statements which she made but which were not produced. All in all, it must have been obvious to the jury that she had not been a consistent supporter of the Crown case.

[44] It will be recalled that the attempt to produce the documents in question on this part of the case came when defence counsel was re-examining the appellant. The documents were:

(a) An affidavit of 15 May 2007. This was filed in the District Court accompanied by a document prepared by her solicitor in which she sought to be excused from giving evidence. The affidavit was drafted by reference to earlier documents signed by Ms D and to the extent to which it bears on the truth or otherwise of the allegations, it does not add anything to what she had previously said.

(b) An affidavit of 18 January 2008 in which she indicated that she did not intend to give evidence against the appellant and wished the Court to dismiss the charges.

(c) A statement made by Ms D under caution on 14 February 2008. In the course of this she was interviewed about an affidavit of 31 December 2007 (which no-one sought to produce) and how that affidavit came to be provided. She also discussed the affidavit of 18 January 2008, which she maintained she had personally arranged for. She claimed that she had paid the lawyers concerned and that she had the money to do so because she was working but she declined to identify her employer. She indicated that she did not want to give evidence and that she wished "to claim the privilege of self-incrimination". When asked what she was referring to when talking about self-incrimination, she responded, "I have my rights whether I want to give evidence or not, under the Bill of Rights". In response to a question about how she might incriminate herself, she said, "I do not wish to answer that". She was also asked if anything in her previous statements was untrue and replied, "I do not wish to comment on that".

(d) An affidavit of 3 March 2008 in which she stated that she was claiming the privilege against self-incrimination. In this affidavit, she said that she wished to exercise her privilege against self-incrimination "because of inaccuracy and inconsistencies of statements and statements being inaccurate". The affidavit is otherwise a repetition of what she had said in statements which were before the Court.

(e) A letter from Ms D of 17 March 2008 setting out her financial position and making assertions as to her health which were supported by a letter from a doctor of the same date which was attached.

The approach taken by Judge Perkins

[45] The Judge refused to admit these documents for the following reasons:

(a) If the documents were to be admitted, there should have been cross-examination of the relevant witnesses. None of the documents were put to Ms D in cross-examination. And Detective Sergeant Bissett who conducted the 14 February 2008 interview was not cross-examined as to it. The Judge made it clear that he would not adjourn the trial to allow the complainant to be recalled.

(b) Their admission late in the trial would have an unfairly prejudicial effect on the Crown.

(c) They were excluded by s 35 of the Evidence Act as prior consistent statements.

The judgment of the Court of Appeal

[46] The Court of Appeal held that the statements in question had been rightly rejected by the Judge as being inadmissible in terms of s 35.

Were the rejected documents subject to the exclusionary rule in s 35(1)?

[47] Counsel for the appellant maintained that the documents were not within s 35(1) on the basis that the expression "witness's evidence" encompassed, in the case of Ms D, the prior statements on which the Crown relied.

[48] We disagree. We think it self-evident that the expression "witness's evidence" includes only the evidence actually given in court. Ms D's evidence was that the offending alleged against the appellant had not occurred. Statements made by her on earlier occasions which were consistent with her denials in relation to the offending were within s 35(1). Such statements were thus admissible only to the extent that they were necessary to respond to a challenge to the veracity of Ms D based on previous statements made by her or a claim of recent invention.

Should the Judge have admitted the rejected documents under s 35(2)?

[49] There is no doubt that the Crown did challenge the veracity of Ms D. This challenge was supported by the production of earlier statements which were inconsistent with her evidence at trial. As well, in substance, the challenge involved what was relevantly a claim of recent invention.[22] It follows that the rejected statements were admissible if (and to the extent that they were) necessary to respond the challenge made to the veracity of Ms D.

[50] In *Hart v R*,[23] this Court addressed the application and operation of s 35(2). As Elias CJ explained:

> [11] A statement within the exception to the general rule of inadmissibility in s 35(1) must comply with the overarching requirement of relevance under s 7: the previous consistent statement must have "a tendency to prove or disprove anything that is of consequence to the determination of the proceeding",[24] namely here the veracity or accuracy of the complainant when attacked on one of the two bases specified by s 35(2).
>
> [12] To be relevant, the circumstances must invest the statement with greater probative value than is available from the mere fact of repetition. But more restriction than the text provides should not be read into the section. "[N]ecessary to respond" is a requirement of logical connection which, consistently with the fundamental principle contained in s 7 of the Act, permits admission if the statement "has a tendency to ... disprove" the suggestion of recent invention. If there is a challenge to the veracity of the witness on the basis of invention, a previous statement which is an answer to the challenge is made relevant and will be admitted to the extent necessary to meet it.

Broadly to the same effect was the judgment of the other judges (Blanchard, Tipping, McGrath and Wilson JJ):

> [36] ... [T]he first thing that must be shown by the party seeking to adduce a witness's previous consistent statement under subs (2) is that there has been a challenge to the witness's veracity or accuracy in a qualifying respect. It must have been suggested, on one or other of the bases referred to in the subsection, that the witness is being untruthful or inaccurate in their testimony. Next it must be shown that it is necessary to admit the witness's previous statement in order to respond to the challenge to the witness's veracity or accuracy. In recent invention cases the challenge is obviously to

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22 The prosecution position was that her denials in evidence of the offending were recent inventions, in the sense discussed in *Hart v R* [2010] NZSC 91, (2010) 24 CRNZ 924 and *Rongonui v R* [2010] NZSC 92, (2010) 24 CRNZ 946.

23 *Hart v R* [2010] NZSC 91, (2010) 24 CRNZ 924.

24 Evidence Act 2006, s 7(3).

> the witness's veracity. The concept of necessity in this context means that it is necessary to admit the prior statement to do justice to the witness's testimony in court in the light of the attack on that testimony.[25] A witness who is attacked for lack of veracity or accuracy on either of the statutory bases is entitled, to the extent necessary, to support their testimony in court by reference to a consistent statement made out of court on an earlier occasion. The touchstone is necessary extent of response, with relevance being implicit in the concept of necessity.
>
> [37] While the veracity or accuracy of evidence given in court is not necessarily enhanced because of repetition, the policy of the subsection is that in qualifying circumstances, of which the Judge is the gatekeeper, it is significant that a witness has said the same thing before. The trier of fact should be aware of that fact and assess its weight in the light of all the relevant circumstances.

[51] When defence counsel was cross-examining Ms D, there were general references to what he referred to as her attempts, after the depositions hearing, "to correct what had occurred". These attempts included the provision of the affidavits referred to in [44](a), (b) and (d) above. In the course of what followed, there was the following exchange between defence counsel and Ms D:

> Q Without going into all the details, did they [that is the solicitors she saw] provide various documents and affidavits to come forward effectively retracting what had been said earlier?
>
> A Oh yes. ...

[52] There were good reasons for defence counsel to leave it at that and not to seek then to have the relevant documents produced. The summary of their effect to which Ms D agreed was very favourable (from the point of view of the appellant) as it is an exaggeration of their contents to describe them as "effectively retracting what had been said earlier". As well, the documents were consistent with the Crown case that throughout the process, the appellant had been doing his best to induce Ms D to procure the withdrawal of the charges. If Ms D had been taken to the rejected documents when she was cross-examined by defence counsel, there would have been scope for pointed re-examination; for instance, as to how the affidavits had come to be produced, who had arranged for Ms D to see the solicitors, who had paid the associated fees and the like. Her answers on these issues as recorded in the statement of 14 February 2008 are unlikely to have impressed the jury.

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[25] See s 6(c) which states that a purpose of the Act is promoting fairness to parties and witnesses.

[53] In this context, it was unfair for the defence to seek to put these documents into evidence in the way proposed and it is unsurprising that the Judge was critical of the course which the defence took. This unfairness could only have been addressed if Ms D were recalled to produce the documents and be cross-examined on them. This may well have resulted in the Crown wishing to recall some of the police officers that Ms D had dealt with and perhaps seeking the production of other inculpatory statements made by Ms D which had not been produced earlier.

[54] Relevant to the question whether the rejected documents were relevantly "necessary" under s 35(2) is the reality that defence counsel had plainly not, when he was cross-examining Ms D, seen production of the rejected documents as necessary to respond to the Crown's challenge to her veracity. Furthermore, all the rejected documents post-dated Ms D's depositions evidence (which was the lynch-pin of the Crown case on the violence counts). Other evidence before the jury made it clear that from not long after the depositions hearing, Ms D was consistent in her attempts to have the prosecution stopped. The jury also knew that from the very beginning of her interactions with the police (in September 2006), Ms D had been ambivalent about whether she wished to proceed with the prosecution. The documents which were admitted showed that Ms D had, as early as December 2006, asserted that her original allegations had been made when she was subject to tension and stress and were influenced by those who had negative views about the appellant and gave her wrong advice. They also had her police statement of 6 January 2007 in which she asserted that the two December letters had been written of her own free will. Finally, there was the typed letter of 7 January 2007 which she claimed at trial to have written, which asserted that the alleged assaults had not taken place.

[55] Against this background, the rejected documents were, largely, more of the same. They did not add anything that was significantly material to the defence case. So they were not necessary to respond to the attack on Ms D's veracity. They certainly did not provide anything like "an answer" to that attack.[26] When the Judge rejected the attempt by the defence to adduce them in evidence, he was not preventing the appellant from making an effective defence to the allegations against him. To the very limited extent, if any, that the documents, at their face value, might

[26] *Hart* at [12].

have been of assistance to the appellant, their admission in evidence in the manner proposed by defence counsel would have been unfair to the Crown; this for the reasons already explained.[27] Avoiding that unfair prejudice would have required the taking of steps which would have prolonged the case in a way which would have been needless.

Did the refusal to admit the documents leave the jury with an inaccurate impression?

[56] Mr King contended that the documents ought to have been admitted to correct what he claimed were inaccuracies in the evidence given to the jury as to the pattern of Ms D's statements. This submission was based on two particular passages in the evidence:

(a) When Detective Sergeant Bissett was being re-examined he gave some reasonably general answers to the timing of Ms D's involvement with lawyers after the depositions hearing and he referred to specific affidavits of which he was aware.

(b) When the appellant was giving evidence there was the following question and answer sequence:

> Q You have been in Court, haven't you, where every single statement she has given to the police has been referred to in this Court, she has acknowledged writing this statement as true and correct to the best of my knowledge and belief, or words to that effect.
>
> A Mr Jones –
>
> Q. You have been here, haven't you?
>
> A Yes Mr Jones. ...

[57] Mr King said that the affidavits and documents referred to by Detective Sergeant Bissett were not complete. He also suggested that the question and answer sequence which occurred when the appellant was being cross-examined wrongly implied that all the statements made by Ms D had been produced.

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[27] At [52]-[53].

[58] In the context of the transcript, it is perfectly clear that the question asked of the appellant in cross–examination focussed on the usual verification which customarily appears on statements taken by police officers where the person making the statement confirms that its contents are true and correct. The question was addressed to the point that when Ms D made her statements to the police she, on each occasion, confirmed the truth of the contents. It could not sensibly be treated as an assertion that all statements which she had made had been produced in evidence; something which the jury knew was not the case. Nor could the evidence of Detective Sergeant Bissett to which we have referred be taken as in any way warranting that the jury had all the material which Ms D had generated. It must have been very obvious to the jury that there was a good deal of such material which had not been produced.

Was the trial was unfair?

[59] In the course of argument, Mr King for the appellant largely accepted that the self-incrimination argument could not succeed because the privilege, if it existed, was that of Ms D and not the appellant. He therefore sought to advance very much the same general concerns in a different way, under the rubric of unfairness. His major concern was that Ms D made such a bad fist of trying to exculpate the appellant that her attempt to do so only made things worse for him. Associated with this was a complaint that the Judge did not give the jury an explanation as to the claim to privilege which had been advanced by Ms D and his rejection of it. His argument was that Ms D's lamentable performance in the witness box may have been associated with her fear of prosecution and that that the Judge should have explained this to the jury.

[60] As is already apparent, we are satisfied that the material which the jury did receive provided the jury with an adequate basis for assessing the credibility of what Ms D had said both in her earlier statements and her evidence at trial. And, with our conclusion that the claim to privilege was rightly rejected, the unfairness argument largely falls away. We see no substance in the suggestion that Ms D's behaviour in the witness box was associated with a fear of self-incrimination. So it is of no

moment that the Judge did not explain to the jury the detail of what had happened over the rejected claim to self-incrimination.

[61] All in all we are left with the view that the adverse impact on the appellant of Ms D's attempts to exculpate him are simply the other side of the coin to the reality that on the counts on which he was convicted the case against the appellant was formidable and could not be explained away.

Disposition

[62] For those reasons the appeal should be dismissed.

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