IN THE SUPREME COURT OF NEW ZEALAND

SC 66/2009
[2010] NZSC 92

MAIA RONGONUI

v

THE QUEEN

Hearing:	19 November 2009
Court:	Elias CJ, Blanchard, Tipping, McGrath and Wilson JJ
Counsel:	N Levy for Appellant M D Downs and T Epati for Crown
Judgment:	27 November 2009 (appeal allowed)
Reasons:	23 July 2010

REASONS OF THE COURT

Para No

ELIAS CJ

[1] The appellant appeals his conviction on two counts of sexual violation in respect of the same complainant. He advances two principal grounds in support of

the appeal. The first is that evidence was wrongly admitted that the complainant spoke to her friends immediately after the claimed violation and "told them what had happened". It is argued that this evidence was a previous consistent statement which should have been excluded under s 35(1) of the Evidence Act 2006. The second ground is that the prosecutor was permitted to lead evidence from a prosecution witness of what she had said in a previous statement about inculpatory remarks made to her by the appellant, in breach of ss 89 and 90(5) of the Evidence Act.

[2] All members of the Court were in agreement at the hearing of the appeal that the appeal should be allowed on the second ground. The reasons for that conclusion are now given by Tipping J, with whom on this point I am in complete agreement. I write separately on the first ground of the appeal only.

[3] For the reasons that follow, I consider that the evidence that the complainant told her friends "what had happened" was properly admitted. It fell outside the rule of exclusion contained in s 35(1) because it was direct evidence of the facts in issue rather than merely repetitive of the evidence given by the complainant. Although in the circumstances it was overwhelmed by its direct relevance to the facts in issue, what was said was also properly admissible in its testimonial character (and therefore within the scope of s 35(1)) in order to meet a challenge to the complainant's veracity on the grounds of recent invention. It was within the exception provided by s 35(2).

[4] The purpose, interpretation and application of s 35 are the subject of consideration in the judgment of the Court in *Hart v R*,[1] delivered contemporaneously with the reasons in this appeal. I do not repeat the views I expressed in *Hart*, which I apply here. Two considerations are of particular importance to the conclusions I reach on application of s 35 in the present appeal. First, the policy of s 35(1) in excluding superfluous repetition of evidence does not apply to speech which is relevant to prove directly a fact in issue (here, non-consensual sexual assault). Secondly, as indicated in *Hart*, I consider that a defence

---

1 *Hart v R* [2010] NZSC 91.

challenge to a complainant's evidence, particularly on the question of consent, will generally amount to a claim of recent invention and therefore come within the exception provided by s 35(2). In some cases, the challenge to veracity on the grounds of recent invention may not emerge until the complainant is cross-examined. In the present case, however, the challenge to be made to the complainant's veracity was acknowledged through pre-trial confirmation that the defence was consent before the judge ruled on the admissibility of the evidence. The evidence as led went no further than was necessary to answer the claim of recent invention. On the view I take, it is not necessary to consider the application of the proviso to s 385(1) of the Crimes Act 1961, the basis on which the other members of the Court would dismiss the appeal on this ground.

Background

[5] The case for the prosecution was that the complainant, an Australian visitor to Christchurch, became separated from her friends when walking back to their backpackers' lodge at night and was sexually assaulted by the appellant, who had offered to show her the way to her accommodation. The Crown alleged that the appellant led the complainant into a secluded place where he sexually assaulted her after first knocking her to the ground and kicking her in the head. Defence counsel confirmed before the trial got underway that the defence was that the complainant consented to having sexual connection with the appellant. By agreement, the jury was advised of this defence by the Judge before the prosecution opened.

[6] The trial Judge had been asked before the trial began to rule on the admissibility of the evidence of complaint to be led from the complainant and her friends. The prosecution case was that the complainant managed to get away from the appellant and immediately called her friends, using her mobile phone. They came to meet her. Two friends had given statements saying that the complainant was distressed. She was crying and struggled to breathe and talk. They said that the group then went back to their accommodation where one of the friends called the police. The Judge ruled that evidence could be led from the complainant of the fact that she had made a complaint to her friends shortly after the incident, but that the

details of the conversation were not to be led either from the complainant herself or the friend called to give evidence on this point. By agreement, the prosecutor then asked leading questions both of the complainant and of the friend which established only the fact that the complainant had said "what had happened".

The exclusion of previous consistent statements under s 35(1)

[7] Section 35 provides:

> **35 Previous consistent statements rule**
>
> (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.
>
> (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.
>
> (3) A previous statement of a witness that is consistent with the witness's evidence is admissible if–
>
> (a) the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and
>
> (b) the statement provides the court with information that the witness is unable to recall.

[8] The policy behind s 35 was identified by the Law Commission as being to prevent proliferation of superfluous evidence.[2] Although the rule of exclusion of previous consistent statements at common law was sometimes justified on the view that such evidence is easily fabricated, the better view was that such consideration went only to weight.[3] Under the Evidence Act 2006 any such concerns may be more directly addressed through application of s 8. But the purpose of s 35(1), as is clear from the legislative history discussed in *Hart*, was to prevent mere repetition of the account given in testimony.

---

2 Law Commission *Evidence* (NZLC R55(2), 1999) at [C167].

3 Colin Tapper *Cross and Tapper on Evidence* (11th ed, Oxford University Press, Oxford, 2007) at 322.

[9] "Statement" is defined by s 4 of the Evidence Act as "a spoken or written assertion by a person of any matter". I am of the view that Simon France J in *R v Holtham*[4] was right to treat this definition as important to the interpretation of s 35. The language of "assertion" is reminiscent of the distinction drawn by Wigmore between testimony and events themselves for the purposes of the hearsay rule. He described the "essence of the hearsay rule" as:[5]

> [T]he distinction between the testimonial (or assertive) use of human utterances and their nontestimonial use.

Consistently with this, and also speaking of hearsay, Lord Wilberforce for the Privy Council said in *Ratten v The Queen*:[6]

> If the speaking of the words is a relevant fact, a witness may give evidence that they were spoken. A question of hearsay only arises when the words spoken are relied on "testimonially," i.e., as establishing some fact narrated by the words.

[10] I consider that the distinction suggested between "testimony" as to facts, and the facts themselves is valid in considering whether the words spoken are "consistent" with testimony (and therefore to be excluded as needlessly repetitious unless within the exceptions in ss 35(2) and (3)) or whether they are part of the events in issue and not subject to s 35(1) at all. Mr Downs, counsel for the Crown in the appeal, was in my view on sound ground when he emphasised that "consistency" in the context of s 35 is consistency with the testimony given in court. It is repetition of testimonial assertions that s 35(1) excludes, for the purpose of preventing surplus evidence which is irrelevant and of no probative value if simply repetitive. If however the fact of complaint is relevant because it tends to prove matters in issue, it is not merely testimonial and simply repetitive of the evidence given in court. That was the view taken by the Court of Appeal in *R v Turner*[7] and, in dismissing leave to appeal in the same case, by this Court.[8] As I discussed in *Hart* (disagreeing on this point with the decision of the Court of Appeal in *R v Barlien*[9]), speech itself relevant

---

4 *R v Holtham* [2008] 2 NZLR 758 (HC).
5 John Henry Wigmore *Wigmore on Evidence* (Chadbourn revision, Aspen Law & Business, United States, 1972) vol 6 at §1766.
6 *Ratten v The Queen* [1972] AC 378 (PC) at 387.
7 *R v Turner* [2007] NZCA 427.
8 *Turner v R* [2008] NZSC 11.
9 *R v Barlien* [2008] NZCA 180, [2009] 1 NZLR 170.

as tending to prove matters in issue is not within the policy of exclusion of repetitive evidence.

[11] The fact the complainant spoke to her friends in the circumstances described and the account given of it (that she told them "what had happened") was not "testimonial" (in the language of Wigmore), or an "assertion ... of any matter" (in the language of the statutory definition of "statement"). It was conduct directly relevant to the events in issue. Evidence of such speech does not offend the policy on which s 35(1) is based. It is not merely repetition of evidence. The speech was part of the events in issue, being conduct of the complainant bearing on the question of her consent. As such, its admission is not contrary to s 35(1) and it is not necessary to bring it within the exception in s 35(2).

[12] Whether testimonial and assertive (and therefore relevant only in responding to a challenge to veracity in evidence), or speech directly bearing on the facts (and therefore outside s 35(1)) may be a difficult line to draw in some cases.[10] This however was not a case of difficulty. The sequence of events would have been incomplete without evidence of how the complainant met up with her friends and the state she was in. It was important and direct evidence relevant to determination of whether the sexual contact had been consensual or non-consensual. It is wholly artificial to divide the complainant's observed behaviour at the time into speech and conduct so that the first is inadmissible as repetitive of her evidence and the second is admissible as direct evidence. If one is relevant, the other is relevant too.

[13] It is also artificial to take the view that there is a line to be drawn between allowing evidence that the complainant spoke to her friends, and disallowing evidence that she spoke to her friends and "told them what had happened". The jury may equally take the view that in the first case the complainant is likely to have told her friends "what had happened". Putting it into words adds very little, perhaps nothing. The law of evidence should not foster such distinctions.

---

[10] As is illustrated by the Privy Council case of *White v The Queen* [1999] 1 AC 210 (PC) at 218 where Lord Hoffmann, although taking the view that the jury should have been given better direction by the Judge as to the use to which the evidence of complaint could be put, took care not to say that the evidence was inadmissible.

Application of s 35(2)

[14] If a complainant's veracity in evidence is challenged on the basis of recent invention, what was said may also be admitted as relevant to veracity under s 35(2). Where, as here, there is overlap between speech as a directly relevant fact and speech as relevant to veracity because tending to answer claims of recent invention, the fact of what was said may be expected to overwhelm its secondary, rebuttal, relevance to veracity of the complainant in her evidence. But the testimonial use of the utterance was also admissible in my view under s 35(2) to meet the claim of invention of non-consensual sexual connection usually entailed in a defence of consent. In *Hart* I have expressed disagreement with the view in *Barlien* that the exception in s 35(2), which applies to repetition relevant to the veracity of a witness (a testimonial or assertive use otherwise within the scope of the s 35(1) exclusion), excludes evidence formerly described as "recent complaint" evidence. As explained in *Hart*, that was not the intention of the Law Commission nor of Parliament. Nor is it the result of the language used. Indeed, I am of the view that the changes made by s 35, which put the exclusion and the exceptions on the basis of a principle of general application to all witnesses, are unlikely in practice to exclude much former recent complaint evidence because, overwhelmingly, it *was* led to meet claims of recent invention. The sequence of evidence may require more consideration under s 35(2) than under the common law doctrine of recent complaint (a point I consider in *Hart* at [19]). But the important point is that evidence formerly admissible as recent complaint evidence will, in many cases, be equally admissible under s 35(2), as the Law Commission explicitly envisaged.[11]

[15] Given the pre-trial advice that the defence was consent and its confirmation to the jury by the Judge with the approval of defence counsel, I am of the view that the complainant's veracity was clearly put in issue on the basis that she had invented the story of non-consensual sexual connection, after the event. In those circumstances, I consider that the evidence that she had told her friends "what had happened" was

---

[11] Law Commission *Evidence* at [C168].

admissible under s 35(2). Such evidence "rationally tends to answer the attack".[12] And the evidence was no more (and perhaps was much less) than was permitted under s 35(2). Evidence as to the substance of what was said might well have been led consistently with s 35(2), subject to assessment of whether such information was necessary to answer the challenge and questions of fairness to the accused. The Judge's direction, limiting the evidence by the leading question in which the complainant confirmed that she had told her friends what had happened, may well have been favourable to the appellant.

Conclusion

[16] That the complainant spoke to her friends and "told them what had happened" was part of the events directly relevant to the alleged assault and her consent. The complainant's conduct at the time, including her contemporary speech, was important relevant information on the critical fact the jury had to decide, the allegation of non-consensual sexual connection. As such, it was not within the exclusionary rule contained in s 35(1). I am also of the view that what was said was relevant to whether the complainant was to be believed in her evidence on a challenge as to her veracity in the evidence she gave, based on recent invention. On that basis, it was within the exception contained in s 35(2). The evidence having been properly admitted, I would therefore dismiss the appeal on this ground.

BLANCHARD, TIPPING, McGRATH AND WILSON JJ

(Given by Tipping J)

Introduction

[17] Mr Rongonui was convicted on two counts of sexual violation. At his trial the prosecutor asked the complainant during her examination-in-chief whether very soon after the alleged offending she had spoken to friends and "told them what had

---

[12] *Nominal Defendant v Clements* (1960) 104 CLR 476 at 480 per Dixon CJ.

happened". The complainant replied "yes". The first issue in this appeal is whether that evidence was inadmissible by reason of the limitation on the use of prior consistent statements found in s 35 of the Evidence Act 2006.

[18] A second question arises from another prosecution witness being questioned about a conversation she had had with Mr Rongonui about a week later. She was permitted to refresh her memory from a written statement which she had made to the police some six weeks after that conversation. She was examined in some detail by the prosecutor by reference to that statement. The appellant contends that s 90(5) of the Act requires that the witness should have been asked, before the tendering to her of the statement, whether at the time it was made her memory of its subject-matter was fresh. It is also argued that improper use was made of the statement by the prosecutor in the questioning of the witness, contrary to ss 89 and 90.

[19] Shortly after the hearing the Court indicated that the appeal would be allowed and a retrial ordered. These are our reasons for adopting that course.

Background circumstances and evidence

[20] At the trial in the District Court at Christchurch the prosecution case was that the complainant, who was visiting from Australia, became acquainted with Mr Rongonui in the early hours of Sunday 8 April 2007 after there had been a rugby game at Jade Stadium earlier that evening. In a secluded area off Aberdeen Street he assaulted her and then sexually violated her by putting his penis into her mouth on two occasions. She was eventually able to run away. She made a cell phone call to friends in the course of which she appeared very distressed. They immediately came to meet her. Her evidence-in-chief contained the following question and answer:

> Q. Now when your friends arrived. I don't want you to tell us what you said but I, I take it that you told them what had happened and they took you back to the hostel.
>
> A. Yep.

Her friends then took her to the hostel where she had been staying. She showered and changed her clothes. One of the friends called the police. The complainant was

interviewed at the police station from 6am and examined by a doctor. The proceedings which led to Mr Rongonui's convictions then followed.

[21] The account of the incident in Aberdeen Street given by Mr Rongonui was quite different. He accepted there had been sexual activity between himself and the complainant but he maintained that it had been consensual.

[22] The Crown called a female witness whose name has been suppressed. She has been referred to as Ms X. She is related to Mr Rongonui. He was staying with the witness and her boyfriend. Mr Rongonui and the boyfriend went to the rugby game together. Ms X gave evidence that the next day she had asked Mr Rongonui what he and her boyfriend had got up to the previous night. Mr Rongonui said he had "hooked up" with "an Aussie chick". About a week later, Ms X spoke to him again about the Australian girl. She said to him that she had been told that he had raped the girl. The Crown prosecutor asked Ms X:

> Q. What did Maia [Rongonui] say.
>
> A. He was saying that, um, that she was drunk and 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 pissed off because I thought it was my boyfriend, well because that's what he told me that he, my boyfriend hooked up.
>
> Q. When you say, when you said those words about helping yourself what did Maia say.
>
> A. I can't remember but he looked pretty guilty.

[23] The prosecutor asked if it would assist Ms X "to have a look at a statement you made to the police about six or so weeks later about the conversation that you had with [Mr Rongonui]". Defence counsel objected but the Judge allowed the statement to be shown to the witness. She confirmed, in answer to a question, that it assisted her memory about what Mr Rongonui had said to her about helping himself.

[24] The evidence-in-chief continued:

Q. And what did he say.

A. Um, I just said to him that gives you no right to help yourself and he was like oh I know cuz and I said to him so you raped her and he goes don't be like that cuz and he said don't tell anyone but I did.

Q. Did he say anything to you about helping himself with the girl or not.

A. Can you say that again, what was that?

Q. Did Maia say anything to you about helping himself, you asked him that question did he say anything in response.

A. My mind's gone blank.

Q. Well let's go back a step when you just had a read of your statement then did that help job your memory or not.

A. A little bit.

Q. I didn't hear that sorry.

A. A little bit.

Q. Do you remember that part of the conversation that you had with Maia.

A. Yeah I do remember having a conversation in the room.

Q. But what, the exact words aren't so clear.

A. No they're not in my head.

Q. Okay. What you told the police on 29 May does that when you read it again now does that sound right.

A. Yep.

[25] There was evidently then some unrecorded discussion between the prosecutor and the Judge, after which the evidence-in-chief proceeded:

Q. In your statement Ms ["X"], you have told the Police that you said to Maia Rongonui, "You helped yourself" is that right.

A. Yep.

Q. That he replied, "But she was drunk" is that what happened.

A. Yes.

Q. And you said, "That gives you no right to help yourself."

A. Yes.

Q. Is that what happened.

A. Mhm.

Q. And then he replied, "Oh I know cuz I did help myself."

A. Yes.

Q. You said, "You raped her" and he said, "Don't be like that." Denied it and don't tell anyone.

A. Mhm

Q. So is that, what's in your statement, is that how you remember that conversation.

A. Yes.

The Court of Appeal

[26] The Court of Appeal dismissed Mr Rongonui's appeal against conviction.[13] In relation to the evidence that the complainant had told her friends "what had happened", the Court said that no evidence of what was actually said had been led. The evidence given was evidence of the complainant's contemporaneous demeanour, the fact she had told someone what had happened and about the telephone calls to her friends. (There had been more than one call before they could locate her.) It was both relevant and cogent. Section 35 dealt only with previous consistent statements. For the Court, Heath J said that logically any jury would realise, in a sexual abuse trial, that (at some stage) a complaint was made to the police. The complainant's statement about telling her friends what occurred "went to conduct rather than what was said". It was not recent complaint evidence. It put in context what happened afterwards. It was "direct evidence of something that happened that was relevant to the narrative of events".[14] Because evidence was not given of anything actually said, it did not fall within s 35. The Court's pre-Evidence Act decision in *Turner*[15] remained good law.

---

13 *R v Rongonui* [2009] NZCA 279, [2010] 1 NZLR 742 per William Young P, Chisholm and Heath JJ.

14 At [50].

15 *R v Turner* [2007] NZCA 427.

[27] As to the evidence of Ms X, the Court referred to s 90(5):

> **90 Use of documents in questioning witness or refreshing memory**
>
> ...
>
> (5) For the purposes of refreshing his or her memory while giving evidence, a witness may, with the prior leave of the Judge, consult a document made or adopted at a time when his or her memory was fresh.

The Court said the issue was whether the document from which Ms X refreshed her memory was made or adopted at a time when her memory was fresh. It had come into existence some six or seven weeks after the relevant event. Counsel had submitted that contemporaneity was the bedrock. But a document made at a later time might still have been made when the witness's memory of events was "fresh". In each case a factual inquiry needed to be made to determine whether the jurisdictional prerequisite to the use of s 90(5) had been met.

[28] No hearing on that question had taken place in this case. The Court looked at factors for and against freshness of memory and on balance considered that there was "sufficient evidence" for the Judge to allow the statement to be put to the witness for the purpose of refreshing her memory.

[29] The Court then considered the leading questions which had been put to Ms X to elicit from her the content of her previous statement. It referred to s 94:

> **94 Cross-examination by party of own witness**
>
> In any proceeding, the party who calls a witness may, if the Judge determines that the witness is hostile and gives permission, cross-examine the witness to the extent authorised by the Judge.

The evidence demonstrated that Ms X was "not only struggling to remember without an aid but also was reluctant to accept what she had clearly said in a written statement as being an accurate account of what she had told the Police earlier". It was open to the Judge to exercise her discretion to allow cross-examination on the grounds of hostility.[16] The Court referred to its decision in *Hira*[17] in which it had

---

16 At [73].
17 *R v Hira* [2009] NZCA 144.

said that the most straight-forward way of proceeding was for the Crown to produce the statement through a witness. Following that approach the statement, as a whole, could have been admitted. Therefore it did not matter whether the contents were elicited orally or not.

The section 35 issue - discussion

[30] Section 35 provides as follows.

> **35 Previous consistent statements rule**
>
> (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.
>
> (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.
>
> (3) A previous statement of a witness that is consistent with the witness's evidence is admissible if—
>
> (a) the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and
>
> (b) the statement provides the court with information that the witness is unable to recall.

[31] It will be recalled that this issue concerns the evidence given by the complainant that shortly after the events in question she told her friends "what had happened". Section 35 is analysed in our decision in *Hart*[18] which involved the question of recent invention. We will endeavour to avoid duplication of analysis. The first question which arises in the present case is whether evidence by a witness that she told others "what had happened" amounts to a previous consistent statement within the meaning of s 35. The following discussion is subject to consideration below of what the position would be if the evidence in issue amounted to a statement which formed part of the events in issue (the old res gestae rule).[19]

---

[18] *Hart v R* [2010] NZSC 91.
[19] See [45] and [46].

[32] The Act defines a statement as meaning:[20]

> (a) a spoken or written assertion by a person of any matter; or
>
> (b) non-verbal conduct of a person that is intended by that person as an assertion of any matter.

The question is whether the fact the complainant said in court that she had told her friends "what had happened" amounted, in context, to a spoken assertion of any matter. Was the complainant telling the jury that she had asserted any matter to her friends and, if so, what matter? In context, what the complainant said in court would undoubtedly have been understood by all who heard her as meaning she had asserted to her friends that she had been sexually assaulted by Mr Rongonui in the way the Crown was alleging. The evidence was given shortly after the Crown opening in which counsel would have outlined to the jury what was alleged against Mr Rongonui and immediately after the complainant's own evidence describing what he had done to her. We agree with Ms Levy's submissions in this respect. To say that the evidence in question was only part of the narrative, or should be regarded as amounting simply to conduct rather than being a previous statement on the part of the witness is to take an inappropriate view both of the definition of statement under the Act and the terms and purpose of s 35.

[33] We appreciate that in pre-Evidence Act days, the Court of Appeal ruled in *Turner* that for a complainant to say she told another party "what had happened" was not recent complaint evidence and the unsuccessful appellant was refused leave to appeal to this Court.[21] Whether that was the correct view of the common law position does not have to be addressed. We are satisfied, however, that it is not the correct view of the position under the Act. We are unable to accept the Crown's submissions in this respect, based, as they were, on a suggested difference between express and implied assertions. The evidence in question, on any realistic view of its meaning, goes beyond the mere fact of the complainant having spoken to her friends. In context the evidence was of a spoken assertion by the complainant to her friends that she had been sexually violated by Mr Rongonui. Whereas evidence simply to the effect that a complainant has spoken to someone can be regarded as amounting

---

[20] Evidence Act 2006, s 4.
[21] *Turner v R* [2008] NZSC 11.

only to evidence of conduct, rather than evidence of an assertion of some matter, and is admissible if the fact of her doing so is relevant to a matter in issue, the position changes when reference is made to the content of what is being said.[22] The difference is between the fact of speaking and making a spoken assertion of some matter.[23]

[34] The approach we would take to the evidence concerning the complainant's telling her friends "what had happened" gains substantial support from the judgment of the Privy Council in *White v The Queen*.[24] In that case the complainant claimed she had been raped. Evidence was given that shortly afterwards she told a friend and then several others "what had happened". The Privy Council held that this evidence amounted to evidence of previous consistent statements which were not admissible as recent complaint evidence because the recipients of the statements were not called to give evidence. Nor were they admissible at common law to rebut recent invention because the evidence was given in chief before any question of invention could be put to the complainant in cross-examination.

[35] In giving the judgment of their Lordships Lord Hoffmann recorded the Crown's submission as being that the complainant's evidence did not infringe the rule against previous consistent statements because she did not relate the actual terms of her complaints. She spoke merely of telling her friend and others "what had happened". This, of course, is exactly the position in the present case. To this submission the Board replied:[25]

> Their Lordships accept that when the complainant herself is giving evidence, it may be difficult for her to give a fair and coherent account of her behaviour after the incident without allowing her to mention that she spoke to other people who may not be available to give evidence (within the sexual complaints exception) of what she actually said. Their Lordships would not suggest that the mere mention that the witness spoke to someone after the incident was inadmissible. In most cases it will be very difficult to draw any rational distinction between consistent conduct, which is plainly admissible (e.g. that the witness wept) and the fact that she spoke to someone such as a

---

22 It could not sensibly be suggested, for example, that a complainant may give evidence of telling the Police "what had happened". From the point of view of previous consistent statements, it does not matter to whom the witness may have spoken in these terms.

23 As Lord Normand put it for the Privy Council in *Teper v The Queen* [1952] AC 480 (PC) at 486: "human utterance is both a fact and a means of communication".

24 *White v The Queen* [1999] 1 AC 210 (PC).

25 At 217.

> parent. On the other hand, it is important to avoid infringement of the spirit of the rule against previous self-consistent statements by conveying indirectly to the jury that she had given a previous account of the incident in similar terms with a view to inviting the jury to infer, not merely that her subsequent conduct was not inconsistent with her complaint but that her credibility was actually supported by the fact that she had told the same story soon after the incident.

[36] Lord Hoffmann went on to say that in the case at hand their Lordships considered that the prosecution probably went further than could be justified by the need to allow the complainant to give a fair account of her conduct after the incident. In the absence of a ruling by the judge that the question could be asked because of a claim of recent invention, the complainant should not have been allowed to say that she had told people "what had happened". As the Privy Council put it, and, with respect, we entirely agree, the inference which the jury were bound to draw was that she had made statements in terms substantially the same as her evidence to the Court. This was a kind of device which had been discouraged ever since the early case of *Lillyman*.[26]

[37] We acknowledge that their Lordships went on, perhaps a little inconsistently, to say that they did not go so far as to say that the statements in question were inadmissible at common law. The circumstances made it important, however, that the Judge dealt with them appropriately in his summing-up. But as the matter now turns in New Zealand, not on the common law, but on the terms of s 35, the reasoning of the Privy Council supports what we consider to be the correct interpretation and application of s 35 to this sort of evidence.

[38] This means that the complainant in the present case gave evidence of a previous consistent statement within the meaning of s 35(1) unless, as we have reserved for later consideration, the statement was part of the events in issue. If it was not, the evidence was inadmissible under s 35(1) unless it came within either subs (2) or subs (3). Clearly subs (3) does not apply, nor does the previous inconsistent statement limb of subs (2). Mr Downs did not suggest that this evidence was necessary in response to a claim of recent invention so as to qualify under that limb of subs (2). In traditional common law terms counsel was correct in this

---

[26] *R v Lillyman* [1896] 2 QB 167 at 178–179 per Hawkins J. And see footnote 27.

approach because, among other things, the evidence was given by the complainant in her evidence-in-chief. No challenge to her veracity or accuracy had been made at that stage, whether on the basis of recent invention or otherwise.

The section 35 issue - conclusion

[39] The Crown's ultimate submission on this aspect of the case was that evidence of an "immediate complaint without detail" is admissible because it is not evidence of a previous consistent statement but rather evidence of consistent conduct. There are problems with this submission. First, the very idea of a complaint, even without detail, carries with it, in this context, an assertion of misconduct by the accused. If it were not so the evidence would have no relevance as a complaint. The second problem lies in the idea of the complaint being without detail. The very fact that the complaint is without detail means that it is impossible to compare what was then said with what is now being said at trial by the complainant.[27] A third problem is that what amounts to "detail" in the Crown's suggested approach is inherently imprecise. How much more than the fact of complaint would be permissible on this approach would be difficult to determine. Finally, whether a complaint is immediate gives rise to potentially difficult matters of degree.

[40] We consider there is no satisfactory halfway house between a complainant being allowed, on the one hand, to say in evidence-in-chief, if it be relevant, only that she spoke to a third party and allowing her, on the other, to give what used to be the kind of recent complaint evidence admissible at common law. Clearly, however, both the legislative history and the way s 35 is framed demonstrate that it was not Parliament's purpose simply to carry the old recent complaint law in its traditional form into the new Act. Had that been the intention, recent complaint evidence would surely have been expressly mentioned as an exception to the prima facie inadmissibility rule established by s 35(1), as opposed to being left as a means of rebutting a claim of invention. Rather, Parliament modified the previous law by

---

[27] This is why this sort of approach, which was adopted in earlier times at common law, was ultimately not permitted because at best it showed potentially misleading consistency as it gave the accused no chance of demonstrating inconsistency between what was said earlier and was being said at trial: see for example DL Mathieson *Cross on Evidence* (1st ed, Butterworths, Wellington, 1963) at 230.

removing the need for the complaint to be recent in the sense of proximate to the events in question and by basing admissibility on the concept of rebutting a claim of invention.

[41] The Law Commission, which drafted the original text of the Bill, said that what became s 35 "replaced" the law on recent complaints in sexual cases.[28] The Select Committee tacitly accepted this replacement.[29] The Law Commission's draft, as introduced to Parliament, allowed a previous consistent statement to be admitted in response to a challenge to truthfulness (veracity) or accuracy.

[42] The Commission thereby meant to preserve the effect of the recent complaint doctrine but on the basis that the evidence was henceforth to be admissible only in response to a challenge to the complainant's veracity or accuracy. The Select Committee narrowed the scope of that challenge to challenges based on previous inconsistent statements and those based on recent invention, they being examples of particular types of challenge.[30] Thus, what used to be called recent complaint evidence is now admissible as a previous consistent statement if, as will usually be the case, it is necessary to admit it in response to a claim of recent invention. The previous statement no longer has to be "recent", that is proximate in time to the events concerned.

[43] A procedural consequence is that whereas recent complaint evidence was historically given by the complainant in evidence-in-chief, now, under the recent invention limb of s 35(2), the admissibility of responding evidence will normally depend, as at common law, on the nature of the defence and the cross-examination of the complainant. If permitted, the responding evidence will be given in re-examination. Most defences in sexual cases involve the proposition either that the alleged offending did not occur at all or that the conduct involved was consensual. The very nature of such defences must, at least implicitly, involve a challenge to the complainant's veracity, on the basis of invention; that is a contrivance later in time

---

28 Law Commission *Evidence* (NZLC R55(2), 1999) at [C168].
29 Evidence Bill 2005 (256-2) (select committee report) at 5.
30 At 5.

than the events in issue.[31] Thus in most cases of this kind it is likely that the evidence which the complainant would have been able to give in evidence-in-chief, as recent complaint evidence at common law, will now be admissible, in re-examination, as a previous consistent statement under s 35(2).

[44] There may be cases in which the required challenge to the complainant's veracity or accuracy has become apparent in a sufficiently clear way before trial or during counsel's opening addresses to enable the Judge to rule that the complainant may give responding evidence as part of her evidence-in-chief. Indeed this process may be fairer to the accused because, if the complainant's evidence is given in re-examination, the accused would require permission under s 97 to be able to cross-examine on it. While permission would likely be granted, the cross-examination could be followed by further re-examination; altogether a rather untidy process and one which may operate to the disadvantage of the accused by effectively splitting cross-examination. The practical implications of bringing "recent complaint" evidence within the law relating to previous consistent statement evidence do not appear to have been given much attention in the formulation of the change.

Statements which are part of events in issue

[45] We come now to the point deferred in [31]. We agree with Mr Downs that words uttered by complainants during the course of offending against them should not be regarded as coming within the previous consistent statement rule set out in s 35. We disagree with the contrary view expressed by the Court of Appeal in *Barlien.*[32] Evidence of the speaking of such words was admissible at common law as part of the res gestae.[33] That Latin expression meant that the words spoken were part of the events in issue. The rationale for excluding previous consistent

---

31 See *Hart* at [23] ff.

32 *R v Barlien* [2008] NZCA 180, [2009] 1 NZLR 170 at [35] and [37].

33 Furthermore, that kind of evidence was generally admissible to prove the truth of what was said and not just consistency. The res gestae principle goes back a long way. In *Thompson v Trevanion* (1693) Skin 402, a civil case of assault, Holt CJ said that what the complainant said "immediately upon the hurt received and before she had time to devise or contrive anything for her own advantage, might be given in evidence". See also *R v Foster* (1834) 6 C & P 325 and *The Schwalbe* (1861) 4 LT 160.

statements did not apply to evidence of that kind. The fact that words of this kind were spoken as part of the events in issue meant that they were not regarded as being simply repetitious of evidence given in Court.

[46] We do not consider the concept of a previous consistent statement, as used in s 35, can have been intended to apply to words spoken in the course of the events in issue. For the purposes of s 35 they are not to be regarded as "consistent" statements. There is nothing in the legislative history of the Act to suggest that Parliament meant to bring res gestae statements within the scope of s 35(1). The previous consistent statement rule, which the Law Commission indicated was being codified in s 35, was concerned with statements made after the events in issue. The rule was designed to prevent witnesses bolstering their testimony by reference to something they had said to the same effect on a previous occasion. Usually the statement was in the nature of a report on or a reference to an event which had already occurred. The statement was consistent because the witness's previous account of the events was to the same effect as the witness's evidence in court. The key present point is that a witness is not giving an account of relevant events when the words are spoken during those events. Such words are not an account of the event; they are part of it. Hence s 35(1) does not apply to this kind of evidence.

The position in this case

[47] But the complainant's statement in the present case cannot reasonably be regarded as being part of the events in issue, even if that concept is construed a little more liberally, as it has been in some situations in recent times.[34] The complainant's statement to her friends reported a past, albeit near past event, rather than accompanying and being an explanatory part of that event. The three principal categories of what used to be called res gestae evidence were (a) spontaneous utterances accompanying an event, (b) contemporaneous statements explanatory of relevant acts, and (c) statements concerning a present physical or mental condition.[35]

---

[34] See *Ratten v The Queen* [1972] AC 378 (PC) per Lord Wilberforce; and *R v Andrews* [1987] AC 281 (HL).

[35] See *Phipson on Evidence* (17th ed, Sweet & Maxwell, London, 2010) at [31–03] ff; Richard May and Steven Powles *Criminal Evidence* (5th ed, Sweet & Maxwell, London, 2004) at [8–50]; and *R v Barlien* at [37] ff.

The only one having any potential relevance to this case is the first. But the statement in issue cannot reasonably be regarded as a spontaneous utterance accompanying the event within the meaning of the relevant jurisprudence. There was a distinct, even if short, break between the assault on the complainant and her speaking to her friends. While s 35(1) does not exclude statements which are part of the events in issue, the policy behind the subsection is such that this concept cannot apply if there is an interval between the events constituting the offending and the making of the statement. As we said earlier, the statement in this case reported a past event rather than forming a spontaneous part of that event. Hence the statement was not admissible on that basis.

Application of proviso

[48] As the evidence in issue was inadmissible under s 35(1), it is necessary to consider the Crown's alternative argument. If the evidence was inadmissible, the Crown submitted, in reliance on *Matenga*,[36] that no miscarriage of justice arose from its admission. It was not capable of affecting the result. In this respect the proximity of the statement to the alleged offending and the immediate reporting by the complainant of the matter to the police are crucial factors.

[49] It is fair to summarise the sequence of events by saying that the complainant spoke to her friends very soon after being attacked and shortly after that she went to the police. After managing to get away from Mr Rongonui, the complainant called for help using her mobile phone. Her two friends came to her aid. They took her to the backpackers hostel where they were staying and one of the friends called the police from reception. The complainant spoke to a detective constable the same morning at 6am. No more than about four to five hours can have elapsed from the offending to the time the complainant spoke to the police. The jury would inevitably have inferred from this sequence that the complainant gave a consistent statement to the police within five hours of the attack on her. The fact that during the course of that very short period the complainant also told her friends "what had happened"

---

[36] *R v Matenga* [2009] NZSC 18, [2009] 3 NZLR 145.

would almost certainly have been inferred by the jury if it had not been expressly so stated. It was one of the friends who rang the police.

[50] The position concerning the capacity of that evidence to cause a miscarriage of justice may have been different had the timeframe not been so short. But in present circumstances we consider the wrongful admission of the evidence was not capable of affecting the result. No miscarriage of justice therefore arose from its admission.

Refreshing memory

[51] Section 90(5) has been set out earlier.[37] The essential first question concerns how the court establishes whether a witness's memory was fresh when he or she made or adopted the document which the witness wishes to consult. Ms Levy submitted, without reference to authority, that in order for leave to be given under the subsection, the witness must have stated in evidence that their memory was fresh at the time the document was made or adopted. That was not mandatory at common law, nor is it mandatory under the Act. While evidence to this effect may well be given, its absence is not fatal to the validity of the grant of leave. How the court determines whether a witness's memory is fresh is not dictated by the subsection. The question of sufficiency of proof cannot be constrained in the way counsel suggested. The court may determine the matter on the basis of such evidence as tends to establish freshness as the court finds sufficient for the purpose.

[52] In the present case the relevant document was adopted by the witness some six weeks after the events it recorded. The issue is the freshness of the witness's memory of the events in question at the time of the making or adoption of the document, not the contemporaneity of the document with those events. Of course, the closer in time to those events the document is made the more likely it is that the memory of the witness will then have been fresh. Freshness was, no doubt, adopted in the subsection as the touchstone for leave on the basis that freshness of memory can reasonably be equated with reliability of memory. In general terms that accords

---

[37] See [27].

with normal human experience. The fresher the memory at the time the document is made or adopted, the more reliable the memory of the witness is likely to have been. Despite its reference to freshness in absolute rather than comparative terms, Parliament's purpose must nevertheless have been to require judges to assess whether the memory of the witness was sufficiently fresh at the time the document was made or adopted to make it reasonable to conclude that their memory was then reliable enough to justify leave being granted to consult the document to refresh their memory.

[53] Whether that is so is likely to depend on a number of factors in combination. Probably the most important is the relative significance to the witness of the events described in the document. The more important the subject-matter to the witness and the more its inherent character is likely to etch itself into the witness's memory, the longer the witness's memory of the subject-matter is likely to remain fresh. Another factor will obviously be how long has elapsed between the events recorded and their recording. Relevant too will be such evidence as the witness may give concerning the freshness of their memory. A simple conclusory statement that the witness's memory was fresh may not carry much weight unless it is accompanied by convincing reasons for that statement. Of further moment may well be how detailed and lucid the recollection was as recorded in the document to which the witness wishes to resort. The foregoing is not intended as an exhaustive list, as other features may have significance in particular cases.

[54] In the present case the trial judge does not appear to have given any reasoned ruling on the objection raised by the defence to leave being granted. If she did, the ruling was not recorded. The Court of Appeal expressed itself as satisfied that the witness's evidence was fresh. We consider the circumstances were such that the Court of Appeal was justified in coming to that conclusion. The subject-matter of the document was of some substantial moment to the witness: a conversation with a relative in which he appeared to acknowledge sexually assaulting the complainant. This acknowledgement angered the witness. The length of time between the events and their being recorded was not great. The document was not made contemporaneously or in close proximity to the events, but that is not the ultimate question. The document records the events in a logical and clear manner and

includes a nearly verbatim account of the crucial conversation. The Court of Appeal made the assessment required of the trial judge because of the absence of any record of her having done so. We are not persuaded that the Court's assessment was erroneous.

[55] We move now into more difficult territory. As is apparent from the record earlier set out, the Crown prosecutor was allowed by the trial judge to do far more than have the witness consult the statement in order to refresh her memory. She was permitted to lead the witness almost line by line through the key part of the statement. Clearly leave under s 90(5) does not envisage a process such as that which occurred here. The prosecutor was leading her own witness on a vital issue – the claimed admission by Mr Rongonui that he had engaged in non consensual sexual activity with the complainant.

[56] This procedure would have been justified if the witness had been declared hostile under s 94. Mr Downs accepted, however, that the Crown had not even contended at trial that the witness was hostile.[38] Hence no determination was made to that effect by the trial judge. In that light it is strange that she did not intervene to stop the Crown leading its own witness on a highly material and controversial subject. The Court of Appeal held that at some point the witness became hostile so as to engage s 94 of the Act. But, as Mr Downs appropriately accepted, it is "awkward" to say the least to suggest that s 94 was correctly applied by the Court of Appeal. To have an appellate Court declaring a witness hostile when the trial Court has not done so, and has not even been asked to do so, would be most unusual. Section 94 gives the power to determine a witness to be hostile to the trial judge. The Court of Appeal is able to review a ruling on that subject but we are unaware of any other case in which an original order to that effect has been made on appeal. Furthermore, in this case, we do not consider that, simply on the written record, which is all that was available to the Court of Appeal, a case for ruling the witness to be hostile was made out. The matter was, at the very least, far from clear cut. Hostility rulings depend significantly on matters in respect of which trial judges have

[38] From a perusal of the transcript, as set out earlier at [24] above, the Crown's position at trial was entirely understandable.

a much better feel than appellate judges can have simply from the record. They include matters such as demeanour, intonation and impression.

[57] Accepting its difficulties on the hostility front, the Crown relied on s 89(1)(c)[39] and argued that the better view of the facts in this case was that the trial Court permitted the prosecutor to ask a series of leading questions in relation to the witness's statement to the police in order to "jog" her memory. That is certainly one way of putting what happened, albeit the jogging was very substantial; but this way of putting the matter does not assist the Crown's argument that these leading questions were justified in terms of s 89(1)(c). That provision states that leading questions must not be put to a witness in examination-in-chief or re-examination unless the judge, in the exercise of the judge's discretion, allows that to be done.

[58] There is nothing in the record to suggest that the judge was exercising such a discretion and, despite Mr Downs' valiant submissions to the contrary, we do not consider it could possibly have been regarded as an appropriate exercise of the s 89(1)(c) discretion to allow what happened here. Mr Downs emphasised the witness's apparent confusion and her vulnerability, but this evidence was directed to the central issue in the case – consent or not – and the general discretion in s 89(1)(c) cannot have been intended to allow leading questions of the comprehensive kind asked here on such a central issue. This was such a major and prejudicial departure from proper practice that we are of the view that what occurred represented a miscarriage of justice to which it would not be appropriate to apply the proviso to s 385(1) of the Crimes Act 1961. For this reason the appeal was allowed shortly after the hearing.

Solicitors:
Crown Law Office, Wellington

---

[39] Understandably the Crown did not rely on s 35(3). Section 89(1)(c) says that:

> (1) In any proceeding, a leading question must not be put to a witness in examination in chief or re-examination unless—
>
> ...
>
> (c) the Judge, in exercise of the Judge's discretion, allows the question.