IN THE SUPREME COURT OF NEW ZEALAND

SC 92/2008
[2010] NZSC 23

DERYCK JOSEPH MORGAN

v

THE QUEEN

Hearing:	16 July 2009
Court:	Elias CJ, Blanchard, Tipping, McGrath and Wilson JJ
Counsel:	K H Cook and A J Bailey for Appellant D B Collins QC, Solicitor-General, J Murdoch and L C Preston for Crown
Judgment:	16 March 2010

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS

	Para No
Elias CJ	[1]
Blanchard, Tipping, McGrath and Wilson JJ	[23]

ELIAS CJ

[1] The appeal concerns the admissibility of a previous statement made by a Crown witness held to be hostile. The witness refused to give oral evidence of the information provided in the statement when called at the trial of the appellant on a charge of aggravated robbery. The statement was admitted in evidence without hearing defence counsel on the question of admissibility. It disclosed the account by the Crown witness, Mark Anthony Roskam, of a confession by the appellant that he had committed the aggravated robbery. The confession was said to have been made while the two men were sharing a prison cell and to have been prompted by a television programme about the robbery. Evidence of the confession was important because the case against the appellant was otherwise circumstantial and not particularly strong. In acceding to the Crown request for the statement to be produced in evidence, the trial Judge did not refer in his ruling to the obligation to exclude evidence where there is a risk that it will have an unfairly prejudicial effect on the proceeding under s 8. He seems to have been of the opinion that the statement was admissible if relevant. I have come to the conclusion, in disagreement with the other members of the Court, that the statement should have been excluded under s 8 unless the Court could take the view that the circumstances of its making provided reasonable assurance of its reliability. I consider such standard to conform with the scheme of the Evidence Act 2006. It also means that the Crown should not call a witness known to be likely to prove hostile (as I consider this witness was known to be before he was called) in order to produce his previous statement unless it is able to demonstrate reasonable assurance of the statement's reliability. No such reasonable assurance was offered here or was in my view available.

Scheme of the Evidence Act 2006

[2] In substantial reform of the pre-existing law, s 4 of the Evidence Act excludes from the definition of hearsay out of court statements made by a witness, defined by s 4 as "a person who gives evidence and is able to be cross-examined in a proceeding". Such statements are not therefore subject to the safeguards contained in the Act for the admissibility of hearsay, particularly the general requirement in s 18 that "the circumstances relating to the statement provide reasonable assurance

that the statement is reliable". Although a previous statement made by a witness is not hearsay, it cannot without the consent of the other party be produced as the evidence in chief of a witness in criminal proceedings by asking the witness to confirm the statement unless such leading question is permitted as a matter of discretion by the judge under s 89(1)(c) of the Act.[1] In other cases, the basis of admissibility of the previous statement differs depending upon whether it is consistent or inconsistent with the evidence given by the witness. If a previous statement by a witness is *consistent* with the evidence he or she gives, it is admissible only if the conditions in s 35 of the Evidence Act are met: in order to respond to a challenge to veracity based on a previous inconsistent statement or claim of recent invention; or if the witness cannot recall the information in the statement and "the circumstances relating to the statement provide reasonable assurance that the statement is reliable". If the previous statement is *inconsistent* with the evidence of the witness, it can be admitted by a party cross-examining the witness if relevant to an issue in the proceedings. Parties are not generally permitted to cross-examine witnesses they have called unless a judge gives permission to do so under s 94 after determining that the witness is hostile. Even then, cross-examination is only to the extent permitted by the judge.[2] In all cases the admission of evidence is subject to the general obligation to exclude relevant evidence under s 8 of the Evidence Act where the risk that the evidence "will have an unfairly prejudicial effect on the proceeding" outweighs its probative value. The appeal arises at the intersections of these provisions of the Act.

Background

[3] The confession described in Mr Roskam's statement to the police had been confirmed by him in his earlier evidence both at depositions and at an earlier trial in which the jury had been discharged. At the trial which gave rise to the current appeal, before Judge Saunders and a jury, he refused however to give any evidence of substance on the matter of the confession.

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1 It is otherwise where, as in civil proceedings, Rules of Court permit that course: s 89(2).

2 Section 94.

[4] Roskam was called on the second day of the trial, after the Crown had opened on the confession said to have been made to him by the appellant. Before he was called, Crown counsel, in the absence of the jury and the appellant, had raised with the Judge information she had received from the prison officer escorting the witness that he had asked to speak to a lawyer. Given the fact that this witness was the only witness able to give direct evidence implicating the accused, counsel suggested the Judge might facilitate his consultation with his lawyer. The Judge, who seems initially to have thought that the witness might be concerned about self-incrimination, decided to make direct inquires of him. The witness stated flatly: "I've got nothing to say today. ... And won't be saying nothing."

[5] The Judge explained to Roskam that the Crown could take steps to declare him hostile. Roskam continued to say he "[wouldn't] be talking", refusing to give an explanation. After advising him he could be held in contempt of court, the Judge arranged for Roskham to see his own counsel. While he was doing so, the judge and trial counsel conferred further. The Judge indicated that if the witness refused to take the oath he would be held in contempt. Crown counsel pointed out that he might, alternatively, take the oath but prove hostile. In that case, she foreshadowed an application under s 94 to enable him to be cross-examined as hostile.

[6] The jury and the witness were brought back into court. Initially Roskam failed to answer when asked whether he would take the oath or affirm. When pressed by the Judge he said "I don't want to give evidence because I fear for my own safety". After having been advised that he would be held to be in contempt of court if he did not either swear or affirm, he eventually made the affirmation.

[7] In answers to Crown counsel the witness agreed that he had been an inmate in September 2006 in Paparua Prison, but said that he could not recall with whom he shared a cell at the time. He said that he could not recall watching a television programme in which the aggravated robbery featured (and which was said to have been the trigger for the confession by the appellant) and could not recall making a statement to the police some time after he was bailed. Roskam said that it would not help him to refresh his memory from the statement because he did not remember making it. Crown counsel then made an application under s 94 and the Judge ruled:

> Yes, I'm satisfied on the demeanour and the answers already given that this witness is hostile before the Court. You may cross-examine him about a previous document that you have.

[8] Once Roskam was held to be hostile, the Judge seems not to have considered whether limits should be set under the discretion conferred by s 94 to his cross-examination by the prosecution. For his part, Roskam continued to maintain in answer to cross-examination by Crown counsel that he could not remember sharing a cell with anyone and could not remember watching a television programme. Crown counsel put to him passages from the statement but he replied that he did not remember saying what was recorded. The transcript of the questions put by Crown counsel and the answers by the witness cover more than eight pages. Throughout it Roskam claimed not to remember being in a cell with the appellant and not to remember the information recorded by the police in the statement or telling the officer what was recorded. He claimed not to remember making the statement at all although he acknowledged that the signature at the foot of each page looked like his. The final passage of cross-examination by Crown counsel was:

> Q. Now when you talked to the police on that day, unlike today, you were prepared to talk about that incident weren't you.
>
> A. I can't remember.
>
> Q. Well it's not that you can't remember is it. It's that you don't want to today remember. Isn't that the case.
>
> Q. No. I just can't remember it.
>
> Q. Well anyone else if they didn't remember and were then shown a document that they had signed in that way would have their memories jogged and isn't it the case that you fully remember but you just don't want to acknowledge that today.
>
> A. No.
>
> Q. You remember those events.
>
> A. No.
>
> Q. So you are not going to help us any further.
>
> A. I don't know.
>
> Q. I will ask you one more time. Can you tell us why not.
>
> A. 'cos I can't remember.

Q. You gave evidence, Mr Roskam, under affirmation at the depositions hearing, the preliminary hearing of this case in the Christchurch District Court and you gave evidence on the 5th July last year didn't you.

A. It's a long time ago. I don't remember.

Q. And on that day in Court you were asked about the Tuesday evening, 5th September 2006, when you and D J Morgan watched the Police 10-7 programme together in the cell weren't you. That's what you were in Court to talk about that day.

A. Don't know.

Q. Again Mr Roskam Mr Registrar is showing you the Court record taken of your evidence in those proceedings and you can see there at the foot of every page of your evidence your signature, the middle signature there.

A. Yeah.

Q. And you were happy to answer questions on that occasion about what I've been asking you about today weren't you.

A. Yeah and answering questions today too.

Q. And on that occasion at the depositions hearing you told the Court in relation to what the accused was doing while you were watching that 10-7 programme you said he was yelling out, "Yeah, yeah" and getting all excited and stuff. Now I am going to put to you again. You said that because that was the truth wasn't it. That's what he did.

A. I don't remember it happening.

Q. And again you told the Court on that occasion that he had, the defendant as he was referred to, had said he was involved in the robbery and you agreed he had said that. That he just said it was him [Ref: page 3 depositions, line 17]. He admitted it to you didn't he.

A. Dunno.

Q. I fully appreciate it's very obviously today you don't want to talk about this event but on earlier occasions you have told the police or the Court the truth about the Books and More robbery being shown on the Police 10-7 programme haven't you.

A. I don't know.

Q. Well you didn't just make it up Mr Roskam. What you are saying today is not that you've told lies on those earlier occasions simply that you don't want to remember today, that's the effect of your evidence today isn't it.

A. Yep.

Q. And the position is different today, isn't it, because today you're fearful of your safety, is that what you said.

A. Yep.

[9] I am unable to take from the final questions and in particular the answer given to the second-last rolled up question and in the context of the examination as a whole any implicit confirmation of the statement or the evidence given on a previous occasion. The witness did not deviate throughout the cross-examination from the position that he did not remember. He had said nothing about lying on previous occasions; his position was that he did not remember making the statements and was not prepared to give evidence about them at all. In those circumstances his apparent agreement that he was not saying that he was lying in the previous statements could not be construed as confirming that he was telling the truth on those occasions. He was prepared to acknowledge that he did not want to remember and agreed with the suggested explanation that he was afraid. But that is not the same as implicitly acknowledging that his statements were truthful and accurate. Nor was there any change of position when the witness was cross-examined by counsel for the defence. Nothing of probative value was able to be obtained in the witness's evidence to add to whatever probative value the statement introduced as evidence had or to provide assurance of its reliability. The propositions put in cross-examination were not evidence because they were not adopted by the witness. We are not called upon to consider in the present case whether there was any unfairness in permitting the content of the statement to be put before the jury in this way. The discretion to control the cross-examination of a hostile witness may need to be exercised in some such cases to prevent unfair prejudice. But in the present case the putting of questions based on the previous statements was overtaken by its production.

[10] The statement was admitted in re-examination by the Crown. Counsel for the defence was not given an opportunity to be heard on the question of admissibility. Counsel had tried to intervene when Crown counsel sought to produce the statement but was cut short by the Judge apparently because of the view he took that the statement was admissible because relevant and, presumably, on the view that it was not hearsay. Defence counsel was not given notice of the proposal to offer the

statement as would be required by s 22 of the Evidence Act of hearsay. Even if the provision was not directly applicable (on the basis that the statement was not hearsay), it indicates a legislative policy which I consider to be of assistance in assessing questions of unfair prejudice.

[11] As evidence of the facts contained in it, the statement was effectively the witness's evidence in chief on the topic, able to be lead from him in this way only because he was treated as hostile. The statement seems to have been treated as an inconsistent previous statement since there was no attempt by the Judge to justify its admission under s 35(3) by reliability, as would have been required if it were treated as a previous consistent statement. Whether it was properly treated as an inconsistent statement so that s 35(3) and the requirement of reasonable assurance of reliability were not directly applicable need not be resolved here because of the view I take about the application of s 8 in any event. Similarly, no consideration seems to have been given to whether, in circumstances where the witness refused to answer questions about the statement and no effective cross-examination of him by the defence was possible to test it, the maker of the statement was indeed a "witness" within the definition in the Act ("a person who gives evidence and is able to be cross-examined in a proceeding") and for the purpose of the hearsay definition. This point too has not been developed in argument on the appeal and, again, it is unnecessary to consider it as a stand-alone question. But whether the legislative policy behind relaxation of the definition of hearsay was met in circumstances where effective cross-examination was not possible is highly relevant to the question of prejudice in the admission of the statement.

[12] What is important is that, in admitting the statement, the Judge did not consider his obligation to exclude evidence under s 8 in circumstances where some assessment of reliability would have been required for the admission of hearsay or for the admission of a previous consistent statement, despite the fact that the reliability of the statement could not effectively be tested by cross-examination of the witness. The Judge seems to have proceeded on the footing that, since the maker of the statement had been sworn as a witness, the statement was not hearsay and there was no basis on which to decline to admit it. There was no assessment of whether the statement should be excluded under s 8 of the Act because of the risk

that it would have an unfairly prejudicial effect on the proceeding which outweighed its probative value. As a result, reliability and unfair prejudice were not addressed in the decision to admit the statement.

The previous statement of a hostile witness

[13] Before enactment of the Evidence Act, the prosecution was not permitted to call a witness known to be hostile for the purpose of putting before the court the witness's previous statement. Such course was considered unfairly prejudicial even though the judge was bound to tell the jury that the statement so admitted was evidence from which it could conclude that the witness was not to be believed in the evidence given in court, but was not evidence of the truth of the facts stated itself because it was hearsay. The unfairness arose because the difference in the use to which such evidence could be put was a distinction not easily conveyed and applied. Reform of the law relating to hearsay in the Evidence Act was in part prompted by recognition that such distinctions were unworkable. Following the Evidence Act reforms, any relevant statement when admitted is evidence of the truth of the facts asserted in the statement.

[14] The view that the prosecution should not call a known hostile witness in order to produce a previous statement depended on the risk of impermissible use of the statement to prove the facts asserted in it, in breach of the rules as to hearsay. It is a rationale that is no longer valid since all statements admitted may now be used to prove the facts asserted in them. That does not mean that a previous statement is properly admitted where a known hostile witness is called to take the statement out of the definition of hearsay. It means however that any unfairness in such course has to be considered under s 8 of the Evidence Act which requires the judge to exclude relevant evidence if its probative value is outweighed by the risk that it will have an "unfairly prejudicial effect on [a criminal] proceeding".[3] In that determination, the judge "must take into account the right of the defendant to offer an effective defence".[4]

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3 Section 8(1)(a).
4 Section 8(2).

[15] What is an "unfairly prejudicial effect on [a criminal] proceeding" must be assessed in the context of the Evidence Act as a whole. I have summarised in paragraph [2] the provisions of the Act that seem to me to bear on the assessment. If hearsay is admissible under the general rule in s 18 only where "the circumstances relating to the statement provide reasonable assurance that the statement is reliable", then the reason why such protection is not made explicit in the case of the previous statement of a witness is clearly because the policy of the legislation is that the availability of the witness for the purposes of cross-examination is sufficient protection. "Circumstances", it should be noted, is defined widely for these purposes by s 16 to include the nature, content and manner in which the statement was made and also to include: "any circumstances that relate to the veracity of the person." As Roskam's veracity had been doubted by a Judge in other criminal proceedings[5] and the defence case was in part that he had an incentive to lie to the police about the present case to lessen the seriousness of a charge he was facing, questions of reliability and veracity were very much in issue.

[16] In addition to the weighing the judge is required to undertake under s 18 before admitting hearsay evidence, the Act makes provision in s 22 for notice of intention for such evidence to be given to the other party in criminal proceedings. Such notice provides opportunity to the other party to oppose the admission of the evidence and to obtain rebuttal evidence where the hearsay is admitted.

[17] The safeguards adopted by the Act for the admission of hearsay evidence do not apply to statements made on a previous occasion by a witness, because of the exclusion of such statements from the definition of hearsay. That is on the basis that the witness will give evidence and is able to be tested. In the case of a witness who is hostile, the protection may be illusory, as was demonstrated in the present case where Roskam refused to confirm or to answer questions about his previous statement. If the party calling a witness knows that he is likely to prove hostile in this way, mere formal proffering of the statement-maker as witness effectively

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5 It was an agreed fact in Mr Morgan's trial that on a previous occasion where Roskam gave evidence as a witness to a stabbing, a District Court Judge had found that his evidence in relation to two of the trial charges was unreliable, and a conviction based on that evidence would have been unsound.

evades the protections of notice and the weighing required for assessment of reasonable assurance of reliability.

[18] I consider that the Judge's questioning of Roskam in the absence of the jury, before he was prevailed upon to affirm,[6] provide ample indication that he was likely to prove hostile. Indeed, the prosecutor had foreshadowed that outcome and indicated that, in the event, she would seek leave to cross-examine on the terms of his previous statement. I do not think the prosecutor is to be criticised for calling the witness to see if, indeed, he would prove intractable. But it was clear very soon from his answers that he was not prepared to answer any questions relating to the confession. In those circumstances, it was I think wrong for the prosecutor to seek to introduce the statement as evidence and wrong for the Judge to accede to the request. The unfairness was exacerbated by the Judge's omission to hear counsel for the defence on the admission of the statement, but existed independently because it was obvious that the intractability of the witness meant that the statement could not be tested through cross-examination of its maker. My view is that the statement should not have been admitted unless some assurance of its reliability was available.

[19] It is contrary to the scheme and purpose of the Act for a prosecutor to put in evidence a statement which would otherwise be hearsay through a hostile witness, unless able to fulfil the general condition of admissibility in s 18 by providing reasonable assurance that the statement is reliable. The unfairness is no longer simply the risk of misapplication of the evidence, as it was under the pre-existing law discussed in cases such as *R v O'Brien.*[7] It is that an out of court statement in respect of which no assessment of reasonable assurance of reliability has been undertaken will be admitted without effective opportunity to test the maker of the statement. Where those conditions apply, I am of the view that the statement must be excluded in application of s 8. Its probative value has not been properly assessed and is outweighed by the unfair prejudice to the accused.

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6 Described in paragraphs [4] and [5].

7 *R v O'Brien* [2001] 2 NZLR 145 (CA).

Disposition

[20] For the reasons given, I have concluded that the statement should not have been admitted unless the Judge formed the view that the circumstances of its making provided reasonable assurance of its reliability. No basis for such a conclusion was made out here. Roskam's veracity was squarely in issue but unable to be adequately tested by the defence because of his unwillingness to answer questions. Cell confessions are notoriously unreliable. The circumstance that the confession was said to have been prompted by a television programme and so has the appearance of spontaneity might have had some force if the witness had been able to be cross-examined on that circumstance and the disclosure made. As it is, it does not provide assurance of reliability additional to the untested statement. No assurance is available in my view from the previous evidence given by Roskam on other occasions because they amount to other consistent statements from the same source. Late invention was not the issue. In those circumstances reliability was not improved by repetition.

[21] Nor am I able to accept the suggestion made by Wilson J that the witness can be inferred to have confirmed the truth of the statement in his oral evidence at the trial. I have set out in paragraph [8] above the cross-examination relied on. This passage does not in my view provide any assurance of reliability. The witness simply agreed with the wrap-up question that he was not saying anything about the earlier statement (either that it was truthful or that it was untruthful) and did not want to give evidence. That position was a literal answer to the question and wholly consistent with the answers he had given throughout. Although the Judge erred in his summing up in directing that the previous statement was relevant only if adopted and this error was favourable to the appellant, it does not overcome the unfairness in the introduction of evidence which was not able to be tested because of the hostility of the witness. The distinction drawn by the Judge is one difficult to apply, as the subsequent reforms acknowledge. And on the view I take the jury could not reasonably have concluded that the statement had been effectively adopted by the witness.

[22] As a result, I consider that the statement should have been excluded under s 8 of the Evidence Act. There can be no question of application of the proviso in circumstances where the evidence wrongly admitted was confessional and the remainder of the prosecution case was circumstantial and not overwhelming. Nor am I able to agree that the Judge's mistaken direction to the jury that they could rely upon the previous statement only to the extent that the witness had adopted it in evidence at the trial cures any prejudice. As the decision in *O'Brien* accepts, the distinction drawn by the previous law was difficult for a jury to apply and the risk of misapplication was such as to justify the rule that a witness known to be hostile should not be called in order to put a previous statement before the jury. I would allow the appeal, quash the conviction, and order a re-trial.

BLANCHARD, TIPPING, McGRATH and WILSON JJ

(Given by Wilson J)

Introduction

[23] Mr Morgan appeals against his conviction on a charge of aggravated robbery. He claims that a statement to the police of a hostile witness for the Crown, a Mr Roskam, should not have been admitted in evidence as an exhibit and, alternatively, that his trial counsel Mr Bailey should have been permitted to cross-examine Mr Roskam on matters arising out of the admission of the statement.

[24] In the context of a defence of identity and an otherwise circumstantial prosecution case, Mr Roskam's statement was of substantial importance. He alleged in the statement that, while he and Mr Morgan were sharing a prison cell, they saw a police television programme about the robbery which was the basis of the charge against Mr Morgan. This prompted Mr Morgan, according to Mr Roskam, to admit that he had committed the robbery.

[25] At depositions, Mr Roskam gave evidence on oath that Mr Morgan had admitted his part of the robbery. When giving evidence and being cross-examined at a first trial, before that trial was aborted for reasons unrelated to Mr Roskam's

evidence, Mr Roskam maintained the position that Mr Morgan had admitted his participation in the robbery.

Events at trial

[26] Events took a very different course at the second trial. Mr Roskam refused to give evidence about Mr Morgan's alleged admission, after indicating that he was concerned for his safety if he did so. He claimed that he was unable to remember what had occurred. At the request of Ms Preston, prosecuting counsel, Mr Roskam was then declared hostile by the trial Judge, Judge Saunders, under s 94 of the Evidence Act 2006 so as to permit cross-examination by the Crown. No challenge is made to this ruling.

[27] When Mr Roskam's statement to the police and his evidence at the depositions hearing were put to him by Ms Preston in cross-examination, he claimed that he could not remember what he had said on either occasion. Counsel concluded her cross-examination as follows, with questions which were telling but in no way unfair:

Question	Well you didn't just make it up Mr Roskam. What you are saying today is not that you've told lies on those earlier occasions simply that you don't want to remember today, that's the effect of your evidence today isn't it.
Answer	Yep.
Question	And the position is different today, isn't it, because today you're fearful of your safety, is that what you said.
Answer	Yep.

[28] Significantly, Mr Roskam accepted the proposition that he did not "want to remember", as opposed to not remembering, his previous evidence. The clear implication was that he could remember, but did not want to. It was open to the jury to conclude that Mr Roskam was implicitly acknowledging the correctness of that evidence, but was not prepared to do so explicitly because of concerns for his safety.

[29] Mr Bailey then cross-examined Mr Roskam at some length on matters relating to Mr Morgan's alleged admission. After a scheduled adjournment, the following discussion occurred:

> Ms Preston:
>
> With Your Honour's leave I'd just like to revisit a matter I should have dealt with in examination-in-chief …
>
> Mr Bailey:
>
> If Your Honour pleases.
>
> The Court:
>
> Just a minute Mr Bailey, just see what's happening …
>
> Ms Preston:
>
> … I'd like to ask Mr Roskam to produce the statement I was referring him to and that he spoke to in his evidence sir.
>
> The Court:
>
> Well it's become an issue in the trial. I'm prepared to allow that to be proved.

The Judge having so ruled, Ms Preston asked Mr Roskam to produce his statement to the police and he did so. Mr Bailey did not seek leave to cross-examine Mr Roskam on any matters arising out of the production of the statement. By agreement between counsel, passages were excised from the statement before the jury saw it.

[30] The transcript set out in the previous paragraph indicates that Mr Bailey attempted to state his position as to whether the statement should be produced, but was prevented by the Judge from doing so. Mr Bailey told us that this was indeed what occurred. He also told us that he was intending to oppose the introduction of the statement, but could not recall the grounds upon which he proposed to do so.

[31] In his directions to the jury, Judge Saunders explained his ruling that Mr Roskam was a hostile witness and said that:[8]

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[8] *R v Morgan* DC Christchurch CRI-2006-009-014943, 24 July 2008 at [31].

> The value of a witness's evidence when declared hostile has to be limited to what he, the witness, will now accept that what was said on those earlier occasions is true.

The Judge went on to suggest that the jury treat "with a good deal of caution" Mr Roskam's evidence "of a cell mate confession".[9] Towards the end of his directions, Judge Saunders returned to and reinforced that point by saying that he had already referred to the importance of the jury "exercising caution" about Mr Roskam.[10]

Court of Appeal

[32] Mr Morgan appealed against his conviction on a number of grounds. Among them was the contention that the trial Judge had wrongly allowed the statement by Mr Roskam to the police to be introduced in re-examination and had "compounded this error by failing to give an opportunity for further cross-examination by the defence".[11]

[33] In dismissing the appeal, the Court of Appeal could "see nothing"[12] in this ground of appeal. It said that the statement had been admitted "without apparent objection from defence counsel"[13] and noted that counsel did not seek to cross-examine further.[14] The Court considered that the legal position had changed with the enactment of the Evidence Act 2006. Previously, there was a principle that the prosecution should not call a witness known to be hostile in order to get otherwise inadmissible hearsay before the Court and a prior inconsistent statement was not evidence of the truth of the facts contained in it unless the witness adopted the statement as true when giving evidence.[15] With the passage of the Evidence Act, however, the rationale for that principle had gone and a previous inconsistent statement is generally now admissible to prove the truth of its contents.[16] In saying

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9 At [34].
10 At [65].
11 *R v Morgan* [2008] NZCA 537 at [29] per Arnold, Venning and Miller JJ.
12 At [33].
13 At [28] and [32].
14 At [32].
15 At [30]. See for example *R v Schriek* [1997] 2 NZLR 139 at 145 (CA); *R v O'Brien* [2001] 2 NZLR 145 (CA).
16 At [31].

this, the Court referred to the "helpful discussion" of Asher J in *R v Vagaia*.[17] The Court of Appeal has subsequently adopted the same approach in *R v Carnachan*[18] and *R v Mata*.[19]

Evidence Act

[34] Section 94 of the Act provides that:

> 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.

[35] "Hostile" is defined in s 4 as meaning, in relation to a witness, that the witness—

> (a) exhibits, or appears to exhibit, a lack of veracity when giving evidence unfavourable to the party who called the witness on a matter about which the witness may reasonably be supposed to have knowledge; or
>
> (b) gives evidence that is inconsistent with a statement made by that witness in a manner that exhibits, or appears to exhibit, an intention to be unhelpful to the party who called the witness; or
>
> (c) refuses to answer questions or deliberately withholds evidence.

[36] If a witness is declared to be hostile under s 94 and cross-examination is permitted, a previous statement of the witness may be put to that witness without offending the rule in s 17 that hearsay statements are generally inadmissible, or invoking s 18 which permits the introduction of hearsay statements in the circumstances there specified. That is because a "hearsay statement" is defined in s 4 as a statement that:

> (a) was made by a person other than a witness; and
>
> (b) is offered in evidence at the proceeding to prove the truth of its contents.

Because a previous statement of a hostile witness was made by that witness, it does not come within the definition.

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17 *R v Vagaia* [2008] 2 NZLR 516 (HC) at [11]–[17].
18 *R v Carnachan* [2009] NZCA 196.
19 *R v Mata* [2009] NZCA 254.

[37] Admissibility of the previous statement is however subject to the general exclusion in s 8 that:

> (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.

[38] We agree with the Court of Appeal that the inter-relationship between and the effect of these provisions was helpfully discussed by Asher J in *Vagaia*. Asher J first referred to the warning of the Court of Appeal in *R v O'Brien*[20] that "[t]he Crown should not call any witness if that witness is known to be intractably hostile"[21] and explained that the reason for that common law principle was:[22]

> ... the undesirability of the Crown calling a Crown witness known to be hostile with the intention of using him or her as a conduit through which to introduce a prior statement which would be otherwise inadmissible evidence [because it was hearsay].

[39] Asher J went on to explain that the Evidence Act had materially changed the law because a previous statement of a hostile witness is not hearsay. Such a statement is now admissible as proof of its content, unless s 8 applies. The Judge concluded that:[23]

> … the primary rationale for the principle set out in *R v O'Brien*, being the undesirability of calling a hostile witness to introduce a previous inconsistent statement that is not admissible as evidence of the truth of the facts stated, no longer exists. The effect of the new definition of hearsay is that such a statement can now be evidence of the truth of the facts stated. I would not, however, go so far as to say that *R v O'Brien* no longer has any application. There may still be circumstances where because of a witness' intractability or history of hostility or dishonesty, the Crown should not call that witness, providing that appropriate notice and details of the witness are given to the defence. To call such a witness might be to adduce blatantly unreliable

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20 *R v O'Brien* [2001] 2 NZLR 145 (CA) at [21] per Tipping, Williams and Goddard JJ.
21 *Vagaia* at [7].
22 At [9].
23 At [15].

evidence of little probative value but considerable prejudicial effect.

[40] We agree with this analysis and reinforce the point made in the last sentence. Trial Judges should be particularly vigilant in the case of a hostile witness to ensure that the evidence of the witness does not require exclusion under s 8. Now that a hostile witness's previous statement is evidence of the truth of the matters stated therein, even if it is not adopted by the witness, the Judge must be satisfied that leading evidence based on the statement, or its production, will not have an unfairly prejudicial effect on the proceeding.[24] Issues of fairness may arise when a witness is expected to be hostile and is called for the purpose of getting the unsworn statement before the jury. Unfairness may be present or exacerbated if the hostility of the witness results in the accused being unable sensibly to cross-examine on the statement.

[41] Parliament has legislated to make previous statements of a hostile witness admissible as proof of their contents without adoption, presumably on the basis that the witness will be subject to cross-examination. The reality of that premise may differ from case to case. Parliament's policy decision should not be undermined by too ready a resort to s 8. It certainly should not be undermined on any generic basis. The ultimate question will always be whether the evidence is unfairly prejudicial in all the particular circumstances of the case, of which opportunity for realistic cross-examination will always be important.

[42] In some cases it may be necessary for the Judge to hear what the witness says and how he or she reacts to cross-examination by counsel for the accused, in the absence of the jury. By this means Judges will be able to make rulings without the risk of prejudicing the trial as a result of postponing the ruling until after the evidence has been called in front of the jury. There is a discussion of this question in *O'Brien*,[25] directed particularly to hearing evidence in the absence of the jury on the question whether a witness should be declared hostile in the first place. The Court of Appeal there indicated that this practice could well be helpful. Similar issues will arise with reference to possible exclusion under s 8. Whereas previous practice, as

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[24] See the reasons of this Court in *R v Bain* [2009] NZSC 59.
[25] At [26] and [27].

discussed in *O'Brien*, demonstrated a reluctance to engage in hostility issues in the absence of the jury, the amendment to the law in this area, brought about by the Evidence Act 2006, reinforces the point that Judges should not hesitate to hear submissions and, if appropriate, evidence in the absence of the jury when dealing with hostility and related exclusion issues.

This case

[43] The present appeal does not involve the Crown calling a witness known to be hostile for the purpose of introducing a prior statement of that witness which supports the Crown's case. Although there was some doubt as to how Mr Roskam would respond, he was not known to be intractably hostile when called. It is significant that he implicitly confirmed his previous statement when giving evidence. Furthermore, the reliability of his statement was enhanced by his having given evidence to the same effect, both at depositions and at the first trial.

[44] The Judge, in his directions to the jury, gave a direction which was unduly favourable to the defence. He directed in terms of the old common law rule that a previous statement of a hostile witness was relevant only if, and to the extent, it was adopted by the witness in his trial evidence. The jury could well have taken the view that the previous statement was effectively adopted. In light of these matters and the need to reconcile the risk of unfairness as against the new policy evident from the Evidence Act, there is no sufficient basis for concluding that the production by Mr Roskam of his previous statement as evidence of its truth had an unfairly prejudicial effect on the proceeding. It is true that Mr Roskam's hostility made his cross-examination by counsel for Mr Morgan a somewhat difficult and unrewarding exercise, but that is by no means uncommon with hostile witnesses, even those who can be construed as having adopted their previous statement. We do not consider that this factor, when viewed against all the other relevant features, provided a sufficient basis for exclusion under s 8.

[45] One of the matters that will have significance in the s 8 assessment is the view that the Judge forms of the inherent reliability or otherwise of the statement in issue. In this case Mr Roskam's statement that Mr Morgan had confessed to him, in

an apparently spontaneous manner, his involvement in the robbery was substantially supported by a number of circumstantial features pointing to Mr Morgan's involvement, established elsewhere in the Crown's evidence.

[46] It was regrettable that at trial defence counsel was not afforded the opportunity to make submissions on the question of whether the written statement could belatedly be produced. It is however difficult to see how any prejudice resulted to the defence when Mr Roskam had already been cross-examined extensively, no application was made to cross-examine further following production of the statement and passages were excised from the statement by agreement of counsel.

Result

[47] Mr Roskam's written statement to the Police was correctly admitted as an exhibit and no prejudice has been shown to have resulted from defence counsel not having been permitted to cross-examine further following production of the statement.

[48] The appeal should therefore be dismissed.

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