IN THE SUPREME COURT OF NEW ZEALAND SC 20/2012

[2012] NZSC Trans 13

SHANE DANIEL HANNIGAN

Appellant

v

THE QUEEN

Respondent

Hearing:	2 October 2012
Court:	Elias CJ McGrath J William Young J Chambers J Glazebrook J
Appearances:	J M Ablett-Kerr QC for the Appellant C L Mander and L C Preston for the Respondent

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CRIMINAL APPEAL

MRS ABLETT-KERR QC:

May it please the Court, I appear for Mr Hannigan this morning, together with my learned friend, Mr Matthews.

ELIAS CJ:

Thank you Mrs Ablett-Kerr, Mr Matthews.

MR MANDER:

May it please the Court, I appear with my learned friend, Ms Preston.

ELIAS CJ:

Thank you, Mr Mander and Ms Preston. Yes, Mrs Ablett-Kerr?

MRS ABLETT-KERR QC:

If it pleases your Honours, I hope you can see me over the podium.

ELIAS CJ:

Is this the first time you've been there, Mrs Ablett-Kerr?

MRS ABLETT-KERR QC:

Yes it is.

ELIAS CJ:

Oh, well, you're very visible.

MRS ABLETT-KERR QC:

I'm obliged to you, Ma'am. I always felt that the Court wasn't built with me in mind, however, we will do our best to pursue on.

ELIAS CJ:

No, it works well.

MRS ABLETT-KERR QC:

I'm obliged.

The issue, of course, in this case, the Court will readily see is the way in which Mrs Hannigan, who is referred to during the course of the trial in the transcript as Ms White but she was Mrs Hannigan. She had married Mr Hannigan after the incident in June of 2009, and it's the way in which she was re-examined by Crown counsel during the trial.

I propose just to give you a brief introduction as to how the issue comes to be such a significant one. The trial was about arson. Mr Hannigan was accused of setting fire, as you see, to his home kitchen for the purposes of getting insurance money, and the Crown had chosen to pursue the case against Mr Hannigan with propensity evidence to the fore. It wasn't disclosed as such. It was described as a general background but it was, according to the Court of Appeal, and my submission just

looking at the way the case was presented by the Crown. They relied on three incidents in order to establish their case. There being no one incident that would, in fact, take the case against Mr Hannigan over the bar, in my submission.

During her evidence-in-chief she heard Mrs Hannigan, who had made a statement to the police at the time of the incident, which was in June of 2009, the trial not actually taking place until March of 2011 and, indeed, Mr Hannigan not having been arrested until either January or February of 2010.

She had made a statement on the 26th of June, some five days after the incident, in which she said that Mr Hannigan had gone alone into the house on the 20th of June of 2009. She remained in the car outside. The Crown case, obviously, was that that was the opportunity for him to have set half of the fire that then took place. The allegation was that there was a fire that took place on the 20th, and when that didn't consume the kitchen, he went back on the 21st, prior to an open home, and put a blanket – it was a dog's blanket from out of the shed that was outside and unlocked – into the cupboard in the kitchen and then set fire to that.

But the statement of the 26th of June assumed, obviously, great importance to the Crown case in my submission, and when Mrs Hannigan gave evidence for the Crown, she was asked about who had gone into the property, and she replied that Mr Hannigan had gone into the property. She'd stayed in the car. She wasn't asked whether, who had gone into the house, but into the property. So it was an equivocal answer and Crown counsel didn't follow it up and tie it down as to what you mean by "enter the property" but left it at that stage.

In cross-examination, defence counsel had gone into that issue and had elicited from the witness that, in fact, what she meant was into the grounds of the property but not into the house and that, in fact, he hadn't gone into the house because she was sat in the car with the keys of the house in her control.

That, then, resulted in a discussion between Crown counsel, his Honour and defence counsel on the day of the cross-examination over this significant point because, obviously, that was a significant point. In fact, the Judge described it as the crucial issue in the trial and I think that Crown counsel also described it as the most –

ELIAS CJ:

But where did the Judge describe it as the crucial issue?

MRS ABLETT-KERR QC:

In the transcript of what took place on the in chambers discussion, tab 6, page 34 of volume 2.

CHAMBERS J:

Haven't you omitted one vital thing in the chronology which is, I think, before this discussion takes place, there's a question from the jury?

MRS ABLETT-KERR QC:

Yes. I haven't omitted it and I was going to come to it but that certainly is correct. Yes, undoubtedly.

CHAMBERS J:

Well, that's a crucial part to it because that, then, gave rise to section 101 Evidence Act considerations.

MRS ABLETT-KERR QC:

Well, it certainly was crucial because it shows that in the jury's mind, too, this was a significant point and I certainly was going to come to that because, yes, I just wanted to check the –

CHAMBERS J:

Well, why that's –

MRS ABLETT-KERR QC:

– that's what it –

CHAMBERS J:

Yes, but why that is significant is that the crucial section of the Evidence Act that the Judge had to engage with was, therefore, section 101, not section 89.

MRS ABLETT-KERR QC:

Well, he had to engage with – he didn't engage with, in my submission, with 89. That wasn't what it was about at all really. It was about 37 and 94 but I –

CHAMBERS J:

Did I say 89 when I meant 94?

MRS ABLETT-KERR QC:

Yes, you did, Sir.

CHAMBERS J:

No, no, I did mean 89, but wasn't section 101 the crucial section? The Judge had to work out how the jury's question was to be put to the witness and he had a considerable discretion as to how that was to be done?

MRS ABLETT-KERR QC:

Well, the jury question was: "On Friday she said X and on Monday she said Y, could you please clarify?"

ELIAS CJ:

It was an ambiguity that they raised.

MRS ABLETT-KERR QC:

Yes, they did. And there was nothing improper in them asking that question. Sometimes a Judge can answer a question and sometimes he can't or she can't answer a question. In this case the ambiguity related to those two matters, that is Monday versus Friday and it wasn't to do with the previous inconsistent statement.

WILLIAM YOUNG J:

But the previous statements were to do with the ambiguity.

MRS ABLETT-KERR QC:

The jury didn't know that though.

WILLIAM YOUNG J:

I know, of course they didn't. But to explore the issue the jury raised, raised a line of inquiry to which the previous statements were material.

MRS ABLETT-KERR QC:

I don't accept that the previous inconsistent statement is involved in this at all. The question is a simple question that comes from the jury. The jury ask for clarification –

ELIAS CJ:

She's asked to clarify and she gets, and she gives an answer you say?

MRS ABLETT-KERR QC:

Yes, yes she does and that –

ELIAS CJ:

And your concern is what happens after that?

MRS ABLETT-KERR QC:

Absolutely, yes. And the –

CHAMBERS J:

So you don't have any concern about the re-examination so far as it simply sorted out which of the two versions she'd given was correct?

MRS ABLETT-KERR QC:

Well, no, that's gone a step further than I was prepared to go. It seemed to me that it was open to Crown counsel or the Judge but having raised the issue with counsel it was, one would expect Crown counsel to take up the issue and to ask well, "On – you have previously told me something on Friday, you've now told Mrs Stevens this on – today, can you explain, can you clarify what you mean?" I see no issue with that, that – I'm content with that, whether I'm right or whether I'm wrong and that shouldn't have happened I don't know but I can't see that that does any great damage and she actually provided the answer.

ELIAS CJ:

But your point is that what she was being asked to do was to clarify an ambiguity in the Friday statement –

MRS ABLETT-KERR QC:

Yes.

ELIAS CJ:

– about the reference to going into the property?

MRS ABLETT-KERR QC:

They weren't, absolutely, Ma'am.

ELIAS CJ:

There's no necessary inconsistency on your argument between what she said on Friday and what she said on Monday?

MRS ABLETT-KERR QC:

No, no. There isn't.

WILLIAM YOUNG J:

But there was an inconsistency between what she said on Monday and what she'd previously said?

MRS ABLETT-KERR QC:

Oh yes, absolutely.

WILLIAM YOUNG J:

And at that point why didn't the statement just become admissible generally –

MRS ABLETT-KERR QC:

Well, how could it become –

WILLIAM YOUNG J:

– because it's not hearsay.

MRS ABLETT-KERR QC:

Because it's a previous inconsistent statement –

WILLIAM YOUNG J:

But what stops it, a previous inconsistent statement being admissible?

MRS ABLETT-KERR QC:

Well, you've got to look at how on earth you get it, get into the – how does it come before –

WILLIAM YOUNG J:

Ask her to prove it –

MRS ABLETT-KERR QC:

– the Court.

WILLIAM YOUNG J:

Just listen to me, listen to me please. She is a person giving evidence. Her statement is therefore not hearsay, do you accept that?

MRS ABLETT-KERR QC:

Yes, I accept that.

WILLIAM YOUNG J:

Right, it is therefore admissible.

ELIAS CJ:

Subject to –

WILLIAM YOUNG J:

It could be proved by either calling the constable to whom she made it, would you agree with that?

MRS ABLETT-KERR QC:

No.

WILLIAM YOUNG J:

Why not?

MRS ABLETT-KERR QC:

Because I think you've got to go back a step and I think you've got to ask, well, how does a previous inconsistent statement get before the Court?

WILLIAM YOUNG J:

The person whom it's made gives evidence. Option A, what's wrong with that?

MRS ABLETT-KERR QC:

Could you just repeat that to me?

WILLIAM YOUNG J:

Well, there are two obvious ways –

ELIAS CJ:

It's not directed at the hearsay evidence on the argument –

WILLIAM YOUNG J:

Yes, it's not, there's no objection to it being called –

MRS ABLETT-KERR QC:

No, no.

ELIAS CJ:

No.

WILLIAM YOUNG J:

– it's not inadmissible under section 35. It isn't hearsay. It is, therefore ,on the face of it, admissible.

MRS ABLETT-KERR QC:

Well, no.

ELIAS CJ:

Unless it constitutes leading evidence –

WILLIAM YOUNG J:

No, no it's not in any question.

ELIAS CJ:

– or cross-examination.

WILLIAM YOUNG J:

It's not cross-examination.

ELIAS CJ:

It is leading if you –

WILLIAM YOUNG J:

Well, it's not a leading question if the officer in, if the officer to whom it's made produces it.

MRS ABLETT-KERR QC:

Well, can we take this step by step?

WILLIAM YOUNG J:

Yes.

MRS ABLETT-KERR QC:

If, and I don't accept that the provisions in the Evidence Act allow the officer to give the evidence. I think that the provisions in the Evidence Act relate to somebody else giving evidence and I think that's what Professor Mahoney has indicated in an article that he wrote.

McGRATH J:

So do you say the old common law rule applies?

MRS ABLETT-KERR QC:

It will if there is a lacuna. Yes, it must but in this event I think that we're jumping just a little bit ahead of ourselves here in as much as if it was that she could say "why but in a previous statement she'd said something else" and you would then call the officer. There would be a duty of course to put it to her.

McGRATH J:

Yes, well, not necessarily but it would be good practice and fair to put it –

MRS ABLETT-KERR QC:

Well, in 92 isn't that – I think it's 92 – no sorry –

CHAMBERS J:

Could we just, as you say, Mrs Ablett-Kerr, take it step by step? I still haven't really heard the answer to the proposition Justice Young has put to you that the normal

way of proving a previous inconsistent statement, which her statement became after she confirmed the version she'd given to Mrs Stevens, that the normal method of proving that would be to call the person to whom the statement had been made. Do you agree with that or not?

MRS ABLETT-KERR QC:

No, I don't agree with that unless she was disputing that she had made it or she that she had not been recorded accurately.

CHAMBERS J:

So well –

WILLIAM YOUNG J:

Well, that presupposes that she's asked about it then?

MRS ABLETT-KERR QC:

Yes, it does and the whole, that's why that line of questioning actually jumps too far ahead, because we don't get, in my submission, any further than asking for clarification but that's in relation not to the 26th of June statement but only to the evidence that she gave on Monday and Friday.

CHAMBERS J:

I realise that but once we've got her clarifying –

MRS ABLETT-KERR QC:

Yes.

CHAMBERS J:

– and she says the answer is B –

MRS ABLETT-KERR QC:

Yes.

CHAMBERS J:

– and we know, although the jury don't, that she has previously said the answer is A, can you put to her the statement in which she previously said A?

MRS ABLETT-KERR QC:

No, you can't do that because that is cross-examining your own witness because it's a previous inconsistent statement. And so in order to do –

CHAMBERS J:

So is there no way on your submission the Crown could ever get in A?

MRS ABLETT-KERR QC:

Well, they could if they found that she was, if there had been leave given to treat her as hostile.

WILLIAM YOUNG J:

You say it can only be done through cross-examination with a leave declaration of hostility?

MRS ABLETT-KERR QC:

Yes.

WILLIAM YOUNG J:

Okay well I understand that argument.

GLAZEBROOK J:

And do you say that you can only have a cross-examination in that way if there is – because in this case the Judge did give leave to put the inconsistent statement without making –

MRS ABLETT-KERR QC:

Yes he did.

GLAZEBROOK J:

– a declaration of hostilities. So you say do you, that – I can't remember is it section 92 – sorry I –

ELIAS CJ:

Ninety four is it?

GLAZEBROOK J:

Well at any event, that the prohibition on giving leading questions is unless the Judge allows it and do you say –

MRS ABLETT-KERR QC:

Yes.

GLAZEBROOK J:

– that unless the Judge allows it there's something extra that has to be done before the Judge can allow it?

MRS ABLETT-KERR QC:

Oh yes I do say that very clearly.

GLAZEBROOK J:

So you say there has to be a declaration of hostility and why do you say that?

MRS ABLETT-KERR QC:

Because of section 37(4) and because of section 94.

WILLIAM YOUNG J:

But her statement can be inconsistent for reasons other than a desire by the witness to tell a lie. The witness basically has mis-remembered.

MRS ABLETT-KERR QC:

Well that may indeed be possible and I think Professor Mahoney posited the possibility of situations whereby that situation might arise but this wasn't one of them of course.

GLAZEBROOK J:

But why is that, because why doesn't somebody over a two-year period possibly forget that in fact the partner had gone into the house and mis-remembered that she had the key in her pocket?

MRS ABLETT-KERR QC:

Well that might be so and in which case you explore the memory aspect, but of course the Judge is fairly clear, whilst there is some confusion about it seems, respectfully, about how far he was giving permission to do things, he was very clear

that this was not a refreshing memory issue, he had found that the, that Mrs Hannigan had a good memory and that she wasn't hostile and he was, he found her an impressive, I think that's the word he used, "an impressive witness". But I agree –

GLAZEBROOK J:

But impressive witnesses we all know from the studies on memory, that impressive witnesses, sure witnesses are witnesses who are doing their absolute best –

MRS ABLETT-KERR QC:

Yes.

GLAZEBROOK J:

– can nevertheless be tainted by time periods, tainted by discussions, tainted by a number of things.

MRS ABLETT-KERR QC:

Of course, of course they can.

GLAZEBROOK J:

And that the more reliable, usually, memory is something that happens immediately afterwards before it's had time to get tainted.

MRS ABLETT-KERR QC:

Well it can be certainly –

GLAZEBROOK J:

Not necessarily.

MRS ABLETT-KERR QC:

Yes, it certainly can be but there is a path to go down. If you're going to be hoping that your witness has merely mis-remembered and that she is not hostile and Mr Smith seemed to be quite keen to say at one stage that, on behalf of the Crown that he didn't want to cross-examine and he didn't want to treat the witness as hostile, this was after the Judge that he hadn't seen her as hostile at that stage, but there was a path that he could go down to ask for her to refresh her memory, that was a difficult position because the Judge had already indicated that she didn't seem to him to have a problem of memory. The path that he had to go down at this case was asking a

few more questions, asking for a voir dire to see if he could get termed hostile and then he could cross-examine about all the matters but he didn't do that.

CHAMBERS J:

Yes but that's because he didn't see this as a memory issue necessarily. He didn't know about that but she could, she gave the evidence. It seems to be your submission is in those circumstances where it wasn't really anything that the witness was saying to indicate she couldn't remember –

MRS ABLETT-KERR QC:

Yes.

CHAMBERS J:

– it seems to be your submission that the prosecutor could not in any way get in the prior inconsistent statement?

MRS ABLETT-KERR QC:

Unless he was able to take her to the point where she was hostile –

ELIAS CJ:

Or where she acknowledged that she couldn't remember.

MRS ABLETT-KERR QC:

– or where he could make an application, or she couldn't remember. Either option was open to him –

WILLIAM YOUNG J:

But why couldn't you infer, well I suppose he didn't declare hostility but normally if someone says A in statement, B at trial and B is helpful to their partner, she can say it with the nicest smile on her face but it doesn't stop her being hostile.

MRS ABLETT-KERR QC:

No in the same way that you can say I want to be fair to you but really what you're doing is cutting the feet from underneath the witness, adding the words "being fair" doesn't add anything.

ELIAS CJ:

That actually touches on the point that I wanted to raise with you which is that I wonder whether the fair way to look at what the Judge said was to indicate that, it was to take from what he said that he had indicated he would allow her to be treated as hostile. Because what was the point of saying, "Depending on the answer to the question you may be able to go on," and then he allows it to go on?

MRS ABLETT-KERR QC:
Yes but he can't delegate that –

ELIAS CJ:
Well he doesn't have to simply recite an incantation surely?

MRS ABLETT-KERR QC:
Your Honour I think it's such an important –

ELIAS CJ:
Because there aren't any consequences now are there. You don't have to say the witness' evidence is discredited, so it's simply a gate-keeping role that the Judge is fulfilling.

MRS ABLETT-KERR QC:
It's a very important gate-keeping role.

ELIAS CJ:
I'm not disputing that.

MRS ABLETT-KERR QC:
And both parties are entitled to know what is happening. It maybe irrelevant to the jury because they are not told that this witness is now hostile and all that changes is the tone and the content of the questions that are being asked but in my submission that is not what – His Honour was stopping short of it here because in his, in the transcript page 45 –

ELIAS CJ:
Sorry 45?

MRS ABLETT-KERR QC:

Yes it's 44. At one point he says at page 42 of – that's volume 2 Your Honour. He says, this is of course after the afternoon adjournment and he's – after the morning tea and he's come back and he said, "Okay, well I rule that you can re-examine her on the contents of her statement to the police on 26 June to provide a fair and complete picture." Not because he sees –

ELIAS CJ:

So it's – whereabouts are we?

MRS ABLETT-KERR QC:

Half way down the page, page 42.

ELIAS CJ:

Forty-two thank you.

MRS ABLETT-KERR QC:

Yes, "The Court," it says –

CHAMBERS J:

Yes got that.

MRS ABLETT-KERR QC:

Okay, "All right well I rule that you can re-examine her on the contents of her statement to the police of 26 June to provide a fair and complete picture." Well in my submission that is completely the wrong approach –

ELIAS CJ:

Unless he's really saying that I'm giving you permission to put the previous inconsistent statement to her which he could only have done on the basis that he'd found her to be hostile.

MRS ABLETT-KERR QC:

Well if we look further up that page –

ELIAS CJ:

And there is discussion about, "And that now she's being untruthful"?

MRS ABLETT-KERR QC:

Yes if we look at the top of page 42 we'll see that the previous discussion actually relates to –

GLAZEBROOK J:

Well isn't the possibility if you put a statement to her she might say, "Oh I've obviously mis-remembered and that must have been true at the time," or she could say, "I don't believe that's what I said to the police officer, I think I would have just said what I've said now," or she could say, "No, the police made that up and wrote it down and now my," – which would obviously give a foundation for a hostility but there are a number of different. I mean in many cases when you put a prior inconsistent statement the witness will say, "Oh, well if I said that at the time, that must actually have been right, I now have remembered it differently," –

MRS ABLETT-KERR QC:

Yes.

GLAZEBROOK J:

– so you don't know that until you've put the statement but my understanding from what you were saying is there should have been a voir dire you say –

MRS ABLETT-KERR QC:

Yes.

GLAZEBROOK J:

– so you could see what she actually said before – and then make a decision on hostility if in fact it was hostility as against one of the others in terms of –

MRS ABLETT-KERR QC:

That is an avenue that I suggest he could have gone down and should've. If he wanted to pursue this further, in my submission Ma'am he wasn't being given permission to treat her as hostile. It was, I think he got caught up in the concept that perhaps Justice Young is putting to me and that is –

ELIAS CJ:

Probably because of –

McGRATH J:

Mrs Ablett-Kerr just at the top of page 42 the Judge's first intervention, isn't he making it plain then that he doesn't think that the Crown is wanting the statement to be put to her for purposes of challenging her veracity at all?

MRS ABLETT-KERR QC:

That's right. That is right.

McGRATH J:

So the Judge is making this decision further down the page when he talks about providing a fair and complete picture and having what she said on the 21st of June in there as well, isn't the Judge, right up to this point certainly and in fact beyond it, thinking about this matter in a context in which there is no challenge to truthfulness of the witness. Indeed he says some very complimentary things about the witness', the standard, the quality of the witness' evidence?

MRS ABLETT-KERR QC:

I agree Sir that that is how he seems to perceive the witness, as a truthful witness, that seems to be what he's saying. The question is could he then allow Mr Smith for the Crown to then re-examine her on the contents of this statement.

ELIAS CJ:

Well it was leading wasn't it, the way he did was leading –

MRS ABLETT-KERR QC:

Abs – yes –

ELIAS CJ:

– so it offends against another provision of the Act but should we really be accepting what is said here about no, no, this isn't, doesn't go to truthfulness because what else could it go to? If the witness has given a statement inconsistent with the evidence she has given in Court, there are plenty of provisions in the Act which indicate that that is an attack on veracity.

MRS ABLETT-KERR QC:

And if –

ELIAS CJ:

Well, in the previous consistent statement rule in section 35 makes that clear.

MRS ABLETT-KERR QC:

Yes it does, Ma'am, and I rely on that. And if we look at the closing, despite what was said at 42 and 44, throughout the whole of that discussion with the Judge, the closing confirms, this is without the actual, what I say is cross-examination of the witness in the re-examination, at pages 62, 63, 66, 67, he clearly attacks her veracity

CHAMBERS J:

But that's a separate issue isn't it? -

MRS ABLETT-KERR QC:

Well, no –

CHAMBERS J:

What we're really looking at the moment is the admissibility of the evidence that was called, not how the prosecutor may have used it in his final address.

MRS ABLETT-KERR QC:

Well, I'm quite happy to go back and do that and treat it on that way. I was hoping that that might shed some light because we were talking about well, should we accept, I think, the – I was asked the question about should we accept that statement about, "We're not talking about truthfulness," that His Honour might not have been talking about truthfulness but, at the end of the day, quite clearly what the Crown counsel was doing was attacking the veracity of the witness. He didn't just clarify the statement. He just accused her in the closings, his closing speech, of bias, of collusion –

WILLIAM YOUNG J:

But that's a response to her answers. It's not necessarily the key to why the questions were asked. The prosecutor would have been quite happy if she said, "Crikey, I'm sorry, I mis-remembered. He did go into the house."

MRS ABLETT-KERR QC:

Yes.

WILLIAM YOUNG J:

I mean, the question has left it open to that.

MRS ABLETT-KERR QC:

Well, the questions didn't. The questions were leading questions, in my submission –

WILLIAM YOUNG J:

Well just pause there. Can I just pause there? Say I'm leading a plaintiff to give evidence, I would be perfectly entitled to say, "And following that discussion, did you write a letter to the defendant?" "Yes." "And is this a copy of the letter you wrote?" "Yes." Those aren't leading questions are they?

MRS ABLETT-KERR QC:

Well, talking about plaintiffs, that's in the civil context.

WILLIAM YOUNG J:

No but it's the same principle. One can normally ask a non-controversial question such as, "Did you write a document?"

MRS ABLETT-KERR QC:

Well section 89 allows leading questions of matters that are not in dispute.

GLAZEBROOK J:

Can we take a look at the transcript to see what you say are leading questions because that might just enable us to put it in context? I think at 215.

MRS ABLETT-KERR QC:

Two 14 it starts.

ELIAS CJ:

Have you got the transcript there?

WILLIAM YOUNG J:

Two 14, line 22.

MRS ABLETT-KERR QC:

I'm obliged, Your Honour. I think that's where it starts.

WILLIAM YOUNG J:

Is that first question a leading question? "Do you recall making a statement?"

MRS ABLETT-KERR QC:

Yes, I put it at 21, "Why was this visit any different?" It's innocuous but –

WILLIAM YOUNG J:

Okay, but that's an open-ended question.

MRS ABLETT-KERR QC:

Yes, but that's where it starts because that's a leading question.

WILLIAM YOUNG J:

All right. Question, "Do you recall making a statement?" That's not leading, that's merely orientating her to the subject matter of the –

MRS ABLETT-KERR QC:

Yes it does because that – I object to that because that's the starting of the questioning about –

WILLIAM YOUNG J:

But it doesn't mean it's leading.

MRS ABLETT-KERR QC:

– a previous inconsistent statement.

GLAZEBROOK J:

I'm just trying to get which are the leading questions, that's all.

WILLIAM YOUNG J:

What I'm saying is that I don't see that as leading. A counsel is entitled to orientate the witness to the subject matter of the questions which follow.

MRS ABLETT-KERR QC:

Well, in my submission, that's an improper question because I say that the previous statement was not admissible.

WILLIAM YOUNG J:

I know. You're crossing – like ships passing in the night. We're not talking about that. We're talking about identify a leading question.

ELIAS CJ:

Well it's probably a little later on, isn't it? It's probably 110 or 216.

GLAZEBROOK J:

Well I just wondered whether you say it because if you look down at line 26, 27, 28, line 28. It actually says, "Do you recall making this statement?"

WILLIAM YOUNG J:

All right, the question could have been done and more sophisticated counsel to have said, "Look at this statement. Is this a statement you made?" "Yes." "Would you read out the bit I've highlighted?"

ELIAS CJ:

Well that really would be leading.

WILLIAM YOUNG J:

No, no, well, not necessarily. If you as – that's her document. She's been orientated to the subject matter of what the question is going to be and that is, "How do you reconcile that? How do you reconcile that with what you've just said?" which is an open question.

MRS ABLETT-KERR QC:

Well, but that's cross-examination isn't it? But that is not what the clarification was about. The clarification was about –

GLAZEBROOK J:

No, no, no –

MRS ABLETT-KERR QC:

– Monday and Friday, not between –

GLAZEBROOK J:

– if we just look at what is a leading question?

MRS ABLETT-KERR QC:

Well, Ma'am, I think that you've actually –

GLAZEBROOK J:

Do you say that's a leading question?

MRS ABLETT-KERR QC:

Yes, of course it's a leading question –

GLAZEBROOK J:

All right.

MRS ABLETT-KERR QC:

"Do you recall that statement?"

GLAZEBROOK J:

And we probably don't need to go further through because there were other state – I think I was looking at.

CHAMBERS J:

Can I put this to you perhaps, Mrs Ablett-Kerr? The answer to this may hinge on whether the Crown could have called Detective Karl to give evidence. If he could have given evidence, he would have read out her statement. In fairness, she would have had to be asked, given a chance to explain the statement. So, in that event, the statement would be in and she could, perhaps, then, have been asked, "Well, you heard the statement that Detective Karl has read out. What do you say about that in so far as it differs from what you're now saying?" Now, all of that – you could have done all that without a single leading question. Now this may be leading questions here but isn't it just a shortcut method that's being used, rather than calling Detective Karl to read out the evidence.

MRS ABLETT-KERR QC:

Well, I don't accept, of course, that they could have called Detective Karl to do that.

ELIAS CJ:

Well section 37 would be –

WILLIAM YOUNG J:

But it's just different.

ELIAS CJ:

But they're overlapping surely.

CHAMBERS J:

Well, of course, I accept, if you're right that Detective Karl couldn't have given this evidence, then I would accept you're almost certainly right on your objection to it.

MRS ABLETT-KERR QC:

Well, in my submission, can I refer Your Honours to –

CHAMBERS J:

At the moment I can't see why Detective Karl couldn't have been asked to give this evidence but –

ELIAS CJ:

Well it turns on whether it's a challenge to veracity.

WILLIAM YOUNG J:

But there is section 37(4)(b) does permit a party to call, offer evidence into facts and issues contrary to the evidence that –

ELIAS CJ:

Yes, yes, yes but –

MRS ABLETT-KERR QC:

But that is from another person and it's about the fact in issue, not about the statement that she made.

WILLIAM YOUNG J:

Say someone else was watching what happened on the 20th of June or 21st of June and saw –

ELIAS CJ:

They can give evidence.

MRS ABLETT-KERR QC:

Yes.

WILLIAM YOUNG J:

Sorry?

MRS ABLETT-KERR QC:

Yes.

WILLIAM YOUNG J:

That would someone else who could give it?

MRS ABLETT-KERR QC:

Yes that could be given –

ELIAS CJ:

She's been co –

MRS ABLETT-KERR QC:

If the man next door had watched Hannigan go in –

WILLIAM YOUNG J:

The fact that she had previously said something, you say is –

MRS ABLETT-KERR QC:

Is different.

WILLIAM YOUNG J:

– as it were, ruled out.

ELIAS CJ:

Well it goes only to her veracity in the evidence she's given.

WILLIAM YOUNG J:

Or memory.

ELIAS CJ:

Well, except that that foundation wasn't established. I mean that's the issue really, isn't it?

MRS ABLETT-KERR QC:

Yes, of course it is. That's the crux of it really, but if I could refer you –

GLAZEBROOK J:

Well, she does say she's not sure when she's asked about it. She says she can't explain that she's not sure –

MRS ABLETT-KERR QC:

Yes.

GLAZEBROOK J:

– afterwards then.

MRS ABLETT-KERR QC:

But that is not. That's after the event anyway and in my submission you don't, you can't consider what is after the even that this has taken place.

GLAZEBROOK J:

No, no, but I think the point is, what you've got is an inconsistent statement. What you don't know is whether the witness is going to say, "Oh, boy, if I said that after the time. Now I think it's different but I think that was the right statement." You don't know whether that's the case. You don't know whether they're going to say, "Well, look, I don't know. It might have been written down wrongly. I was in a fluster, a total fluster when I was being interviewed by the police. It was a long statement. I don't recall everything I saw but this is the truth now," which doesn't mean hostility. It could be she's totally telling the truth now and has explained it totally.

WILLIAM YOUNG J:

Yes.

MRS ABLETT-KERR QC:

Yes absolutely and –

GLAZEBROOK J:

So, but that you don't know beforehand what a witness is going to do. So there's no point in saying, "Well, I've got to have a declaration of hostility before I can even put the statement," because you've no idea when you put the statement whether – and there's probably a whole pile of other things the witness could do. Deny making the statement altogether and say it's been made up altogether, who knows? But the issue is, before you put the statement you don't know what the actual answer of the witness is going to be. So I would suggest to you that, therefore, your submission has to be that you would have to have a voir dire to see what the answer was before you actually, then, decided on what the basis the statement could be put. Is that the submission or...

MRS ABLETT-KERR QC:

I accept that as being, because I am saying – if the Crown wanted to pursue this matter further which clearly it did, it had to have more questions asked which really had to be done within a voir dire, couldn't have been done in the jury because the jury becomes contaminated. So it had to be done within a voir dire. We can only speculate what might have happened because the answer that she gave about not being sure, again, is an equivocal answer that the, neither the Court nor the Crown followed up on to ask her what she wasn't sure about. Was she not sure about what she told Detective Karl because after all this was a woman who was due to give birth 11 days after this interview. The interview was described, I think that she said that it was, Crown counsel said it was a lengthy one, she said it was over an hour. It was actually four hours and 14 minutes long the interview of that woman, 11 days before birth, she was due to give birth and I would have thought that that could well have been explored in a voir dire and then we can only speculate what the answers could have been. It's not for us, in my submission, not for this Court to provide the answers when it just doesn't know. But the reliability of a statement made under those circumstances by a woman who has, who gave evidence that she had never given a statement to the police before.

McGRATH J:

So you're really pointing out to us that such statements often can and you say, in these particular circumstances, were made under pressure, the prior inconsistent statement?

MRS ABLETT-KERR QC:

Well they can be.

McGRATH J:

And – yes.

MRS ABLETT-KERR QC:

They can be. That's why you have to explore further than the Crown counsel went here and the Judge comes in because he has got, takes the view and I think His Honour Justice Chambers really has got the point here, he has taken the view that you can produce this because it's not hearsay and it's only to prove the content of the statement. Well how you prove the content of a previous consistent statement is crucial of course.

McGRATH J:

What do you – in relation to this pressure aspect you say she could have been under, the particular personal circumstances when she was making the statement, what is it you say that Crown counsel, having been given permission by the Judge to lead on this, what should he have put to her leading, leading her?

MRS ABLETT-KERR QC:

Well he shouldn't have led her at all. He shouldn't have lead her at all because if he concedes that this is –

McGRATH J:

I'm sorry I thought you were – just suggested to us that he should have, he, the prosecutor, should have directed her to the pressure she was under when she was making the statement.

MRS ABLETT-KERR QC:

No, no sorry I was just answering Justice Glazebrook that she was under pressure, that she was a woman who is acknowledged in the evidence was 11 days from giving birth and she was in the, that particular part of the statement comes about half way through a four hour, a four and a quarter hour interview by a police officer.

McGRATH J:

What I'm really wondering is if it wasn't defence's counsels job to address those matters if they were seen as pertinent?

MRS ABLETT-KERR QC:

Well of course defence counsel was in a very difficult position here because the, if we look at the start of the cross-examination, which I say was cross-examination –

McGRATH J:

Yes.

MRS ABLETT-KERR QC:

– and it has to be because it's leading, but it's more than just leading questions, it's an attack –

McGRATH J:

So where are we, we're looking at?

MRS ABLETT-KERR QC:

We're on page 214 onwards for the –

ELIAS CJ:

Two 15 in particular.

MRS ABLETT-KERR QC:

– next, up until 220 in particular.

ELIAS CJ:

Because the substance is put to her, she's not asked to look at her statement and say whether it jogs her memory, she's given an unequivocal statement on page 214 of what her evidence is and then the propositions in the statement are put to her. And you rely on the – I mean I'm not sure why it's necessary to get into "she might have been under pressure" or anything like that. If it's a challenge to her veracity then you've got the statute to fall back on.

MRS ABLETT-KERR QC:

Yes I was only rely – I was just answering a question that was asked of me.

ELIAS CJ:

I see.

MRS ABLETT-KERR QC:

I don't think I need to rely on the pressure at all because the fact is you cannot lead your own witness over controversial issues and section 89, I seem my friend relies on section 89, but at 89 it's clear that it can't be about controversial issues because if, indeed, 89(1)(c) were to allow cross-examination, what amounted in *Rongonui v R (2010) 24 CRNZ 946* to cross-examination of a, of a witness, why do we bother to have 94, why do we bother to have 37 –

GLAZEBROOK J:

Can I – I think, I wonder if we're mixing up cross-examination –

McGRATH J:

We've moved away from my question to you Mrs Ablett-Kerr, can I just come back. I think you were about to refer to page 215, can you just tell me which particular passage you were focusing on, I think the Chief Justice was directing you to a particular part, I'd just like to hear what it is that you're taking –

MRS ABLETT-KERR QC:

Yes, well I'm quite happy to take you to 215 and if we look at it, it's a classic cross-examination, it's the sort of thing that any defence counsel would do if they were going to. "And after the detective wrote your statement out you remember getting the opportunity to read it?" "Yes." "And checking it?" "Yes." "And signing it that you'd read it and it was correct and true?" "Yes." "Well can you explain why it says et cetera et cetera et cetera," that's classic cross-examination, classic.

McGRATH J:

Yes.

MRS ABLETT-KERR QC:

And it, he clearly was cross-examining and he was using the procedure or relying on the procedure in 96 of the Evidence Act. Until the Evidence Act in the bulk of my

career you had to put the statement to the person but of course you don't have to put the statement to a person now, a previous inconsistent statement, 96 says, "A party who cross-examines may question the witness about a previous statement made by that witness without showing it or disclosing its contents to the witness if the time, place and other circumstances, et cetera et cetera." And that clearly was what he was relying on here and he was adopting a cross-examination of Mrs Hannigan, be it by leading questions or challenges to her veracity and that is the whole tone of it and we can see that it's confirmed in his closing speech when Crown counsel says, "Well this change in her evidence only came about after the weekend when she had been at home with her husband and they had had some discussion." And so there he's not got only bias but he's alleging collusion and that's at the closings at 67 I think. Pages –

CHAMBERS J:

Can we just clarify one thing Mrs Ablett-Kerr, you didn't actually seek leave with regard to prosecutorial misconduct in the final address nor was leave granted on that –

MRS ABLETT-KERR QC:

No.

CHAMBERS J:

– now it maybe in some way this informs the question of admissibility but we are here on the admissibility of the statement not what the prosecutor might have said in his final address, do you accept that?

MRS ABLETT-KERR QC:

No, leave was given to argue the way in which he was dealt with, that was –

CHAMBERS J:

No.

WILLIAM YOUNG J:

No, it was the way she was re-examined.

MRS ABLETT-KERR QC:

Where did I get that from?

CHAMBERS J:

You didn't seek that. Leave has only been granted in respect of the manner in which the re-examination took place –

MRS ABLETT-KERR QC:

Yes.

CHAMBERS J:

– was the way in which she was re-examined, did it lead to a substantial miscarriage of justice?

MRS ABLETT-KERR QC:

Yes, the way in which she was re-examined.

ELIAS CJ:

Well it's treated as an evidential foundation of her lack of veracity so it does tie back into the grounds of admission and if there is doubt as to whether this evidence was led for veracity it maybe useful. You can't really take –

MRS ABLETT-KERR QC:

I think that was the point that I was trying to make really.

ELIAS CJ:

You can't take it much further than that.

MRS ABLETT-KERR QC:

No, no. And I don't want to, this was a young prosecutor and they all – my –

WILLIAM YOUNG J:

Well you don't need to take – I mean it's a legitimate point –

MRS ABLETT-KERR QC:

No I don't want to go down that –

WILLIAM YOUNG J:

– as the Chief Justice put to you, to look at what happened later in terms of what was the challenge –

GLAZEBROOK J:
Meaningful.

WILLIAM YOUNG J:
But that's the end of it.

MRS ABLETT-KERR QC:
Yes, and the purpose of what I want to –

GLAZEBROOK J:
Can I also just – I do want to clarify the difference between cross-examination and leading questions because, for myself, I don't see that question about, "Do you recall making a statement..." as being a leading question in the sense that if you were, if you had somebody that you wanted to lead on having written a letter, you would say, "Did you write a letter?" well, either do it how Justice Young indicated or you would say, "Did you write a letter and did the letter say," so and so and the person would say, "Yes." "Well, would you produce the letter?" and that would be not a leading question and perfectly legitimate for a prosecutor or anybody to do in examination-in-chief wouldn't it?

MRS ABLETT-KERR QC:
Well doesn't it depend what's in the letter?

GLAZEBROOK J:
So aren't you looking rather not at the leading questions but at the issue of whether it's a cross-examination of their own witness?

MRS ABLETT-KERR QC:
Doesn't it really depend on what is in the letter because what –

GLAZEBROOK J:
Well I can't see why it does because it's either a leading question or it's not.

MRS ABLETT-KERR QC:

No, no, no because it would be a section 89 issue, the right to ask leading questions without troublesome consequences when it's non-contentious, but here we're talking about this letter saying something completely different.

WILLIAM YOUNG J:

But that's the question. I think what Justice Glazebrook is saying is where there's a challenge is at 215 to address a witness to the topic of the examination has never been regarded, as I understand it, as leading.

ELIAS CJ:

Also 214 at the bottom, "Do you recall in the statement," - and then puts to her what was said. That's also –

WILLIAM YOUNG J:

Well, that's setting the scene for –

ELIAS CJ:

– I suppose that's 215.

WILLIAM YOUNG J:

– the question that follows.

ELIAS CJ:

No, no. He reads out, "I waited in the car."

WILLIAM YOUNG J:

Yes.

GLAZEBROOK J:

But what I'm suggesting is it isn't a leading question. It might be cross-examination but it's not a leading question because say, for instance, you were putting to her a letter that she'd written that was relevant to the case, wouldn't you say exactly the same sort of thing –

MRS ABLETT-KERR QC:

Yes.

GLAZEBROOK J:

– and then produce the letter?

MRS ABLETT-KERR QC:

Well you might do, providing it's –

GLAZEBROOK J:

But that wouldn't be leading –

MRS ABLETT-KERR QC:

– a non-cont – yes it is a leading question.

GLAZEBROOK J:

Well, no, but even if it's controversial does it matter?

MRS ABLETT-KERR QC:

Yes it is a leading question.

GLAZEBROOK J:

Say for instance –

MRS ABLETT-KERR QC:

Well in my submission it does because if it – it's a leading question because it's a question that suggests the answer –

WILLIAM YOUNG J:

But here it's non-controversial that she wrote a statement. There may be controversy to whether it's admissible but the fact of the – the subject matter of the question is entirely non-controversial.

ELIAS CJ:

But he's read into the record –

WILLIAM YOUNG J:

Yes.

ELIAS CJ:

– what's in the statement. That's the mischief.

GLAZEBROOK J:

Well, I can understand it in a cross-examination sense. What I can't understand is why it's leading because say, for instance, it was a letter that she'd received. "Did you receive a letter from your husband saying that the lean-to kitchen is somehow difficult?" and she says, "Yes I did." And, "Will you produce the letter?" That would just be a relatively normal way of doing it wouldn't it, without it being leading. It's just I'm trying to get the difference between leading and cross-examination.

MRS ABLETT-KERR QC:

Ma'am, respectfully, I disagree because I think it is a leading question whenever you put a question that has, that suggests the answer. It is a leading question, but it is a leading question, you're quite right, that is asked quite regularly, but it's when it's non-contentious. It doesn't deal with a contentious issue and 89 covers that situation where the question relates to introductory or undisputed matters. Now it might be that the writing of the letter was a low moment or certainly not disputed but, in fact, we were talking an introduction to an issue that was the crucial issue according to the Judge, and certainly the most contentious issue according to the Crown counsel. So it most definitely, in my submission, was leading and could not be permitted save, and except, if there had been a declaration of hostility.

GLAZEBROOK J:

So you say section 89(1)(c) is qualified by section 94?

MRS ABLETT-KERR QC:

Well it must be –

GLAZEBROOK J:

All right.

MRS ABLETT-KERR QC:

You can't have section 89 usurping 94, otherwise 94 would be otiose wouldn't it? You can't have that.

GLAZEBROOK J:

All right.

MRS ABLETT-KERR QC:

In the same way you can't have 89 usurping 37. You have to recognise that Parliament intended section 37 to be effective and 94 to be effective. Eighty-nine has to be read in the light of those.

I wonder if I might come back to Justice Young and the point he raises under, Justice Chambers as well, and refer you to tab 12 in my bundle of authorities for the appellant. Now I accept that this is a paper that was written for New Zealand Law Society Criminal Law Symposium and it's Professor Mahoney's view here and you'll see, "Hurdles in the way of the Crown offering evidence of previous inconsistent statements."

WILLIAM YOUNG J:

Now that I've got all of this, I've got page 7 and page 98. Is there something in between?

MRS ABLETT-KERR QC:

The bundle of authorities, Sir, you've got there. Bundle of authorities.

GLAZEBROOK J:

I've got page 6 and 7.

ELIAS CJ:

I've got six and seven too.

McGRATH J:

I have six and seven also.

WILLIAM YOUNG J:

I've got – I haven't got 6. I've got 7 and I've got 98.

ELIAS CJ:

What do you want to take us to? What page?

MRS ABLETT-KERR QC:

Tab 12, second page –

McGRATH J:

Which is numbered?

MRS ABLETT-KERR QC:

Tab 12, and there's no numbering on that page.

ELIAS CJ:

At the bottom?

MRS ABLETT-KERR QC:

At the bottom of the page it says 6.

ELIAS CJ:

Six, okay, you've got 6 I think.

WILLIAM YOUNG J:

Yes, okay.

ELIAS CJ:

I think he's got 6 but he hasn't got 7.

WILLIAM YOUNG J:

Yes, but that's all right.

MRS ABLETT-KERR QC:

And here, the learned author says, is dealing with the hurdles in the way of Crown offering evidence of previous inconsistent statements. Optican and Sankoff make the point that, "In contrast to 37(4)(a), which requires a declaration of hostility before a party challenges the veracity of one of the parties' witnesses, 37(4)(b) allows a party with no declaration of hostility to offer evidence, which contradicts the evidence given by the party's own witness. Thus, the argument is that the Crown may rely on 37(4)(b) and without having to go through any hoops, offer evidence of their witness' previous inconsistent statement on the simple basis that it contradicts the witness' testimony at trial. If all else fails, I predict that a Court will turn to section 10(1)(c) and

declare that a gap in the Act has been discovered and rule that in accordance with the common law, section 37(4)(b) is limited to contradictory evidence from a source other than the same witness, whose evidence is being contradicted."

ELIAS CJ:

Well, you don't really need to go to the common law. It's the structure of section 37(4). (a) and (b) are – if (a) is made out, (b) can't trump it.

MRS ABLETT-KERR QC:

Yes, I would have thought it was more – as straight forward as that but, certainly this, of course, was – in 2000 and, November of 2010.

McGRATH J:

(a) is expressed in terms that qualify it, though, with the word "but".

WILLIAM YOUNG J:

I note at page 98 that Professor Mahoney seems to have thought that the statement could have been admitted.

McGRATH J:

And Your Honour is reading from...

WILLIAM YOUNG J:

Page 98, "However, this does not mean the prior statements are inadmissible, according to section 4, except it does qualify as hearsay." We know that. "Moreover, section 37(4)(b) permits a party to offer evidence if the facts in issue contradict the evidence of the witness. As a result, while the party calling the witness is forbidden from cross-examining the witness about prior inconsistent statement, the statement can be adduced independently as proof of what it asserts." Well, it's another view on section 37(4).

ELIAS CJ:

Well, it, yes.

WILLIAM YOUNG J:

It depends on how you read (a) and (b).

ELIAS CJ:

It depends what you mean by veracity I suspect.

WILLIAM YOUNG J:

Yes.

ELIAS CJ:

It depends what you mean by "veracity".

MRS ABLETT-KERR QC:

Well I think that that is the key to it and really that is what Professor Mahoney is advancing that veracity, once you get into veracity you are ruled by 37 and there is.

WILLIAM YOUNG J:

Just leaving aside for the moment what the statute says because it is capable of being read in different ways, what's the problem with this being before the jury? We've seen that we could construe the statute as capable as being construed so as to permit it to be admitted, we can see that the statute can be construed so as to exclude it all, what's the better construction or what's unfair about it? We can see what's good about it because the jury gets to make a decision based all apparently relevant information, so what's bad?

MRS ABLETT-KERR QC:

Well what's unfair about it is that it undermines completely two major sections of the Evidence Act.

WILLIAM YOUNG J:

Well no, let's assume for a moment that the Evidence Act can be construed either way.

MRS ABLETT-KERR QC:

But 94 can't.

WILLIAM YOUNG J:

No, no, well – let's put that argument on one side, I expect it can be actually but we've dealt with that. If there's a choice, what's the problem with it, what's the problem with letting your evidence in –

ELIAS CJ:

The statute –

WILLIAM YOUNG J:

Why isn't it, no, no but let's –

ELIAS CJ:

Yes I know but it's rather difficult for the –

WILLIAM YOUNG J:

I mean the truth is, is there a rational reason why it shouldn't be admitted?

ELIAS CJ:

Has the legislature achieved some balances in this Act which aren't terribly easy to understand but they are balances, I mean that must be the only –

WILLIAM YOUNG J:

What, well can you go beyond what you say the statute means, I mean can you invoke any sort of higher principle?

MRS ABLETT-KERR QC:

Well I think I can in as much as we have an adversarial situation, that's our system of justice at the moment and we've chosen to codify the level –

WILLIAM YOUNG J:

But that's going back to the statute.

MRS ABLETT-KERR QC:

Well we can't avoid the statute.

WILLIAM YOUNG J:

No I know we can't, all I'm – I'm just asking you a separate question.

MRS ABLETT-KERR QC:

Well if we had an inquisitorial system then everything might come in but we don't have an inquisitorial system so it what a, each party – I think the Judge said it, "You must decide this on what each party decides to put before you," now if you're going to say that the set of rules that governs how parties, what parties may put in front of you and how they may put it, if we undermine that then we are undermining our present system of justice.

WILLIAM YOUNG J:

All right thank you.

GLAZEBROOK J:

Can I just check because I come back to the fact that many witnesses when a previous inconsistent statement's put in front of them will say, "Oh if I said that at the time, that must be the case but it's not my current recollection," it is in that sense, is your real concern the way this was put was clearly confrontational in a cross-examination way that the person did not say something, "Would you like to – now you made a statement on the 21st this is what you said, you made a statement on the," I've forgotten the dates exactly, "And this is what's said, would you like to just read this statement and then just explain what you said there," so there could have been a different way of putting this. The way that you would suggest you put it on a voir dire. Now in fact the witness actually doesn't say, "Oh no my previous, my current statement is absolutely true and the police were lying," or actually manifest hostility, she quite fairly says, "Well look I can't explain it, I'm not entirely sure but I'm pretty sure I had the keys and this is what I'm sure happened," doesn't she –

MRS ABLETT-KERR QC:

Yes.

GLAZEBROOK J:

– so in fact she's not really manifesting hostility therefore the real complaint might be the prosecutor's interpretation of that?

MRS ABLETT-KERR QC:

Well that might be so, that the – clearly what he in fact did was over five pages from 214 onwards, he attacked her in a classical cross-examination manner.

GLAZEBROOK J:

And you say contrary to section 94 because he hadn't been given permission to do that –

MRS ABLETT-KERR QC:

Absolutely, and 37.

GLAZEBROOK J:

– he may have been – given permission to put the inconsistent statement –

MRS ABLETT-KERR QC:

Yes.

GLAZEBROOK J:

– in terms of what the Judge said but he hadn't been given permission to cross-examine, is that the – and wouldn't have been without a declaration of hostility?

MRS ABLETT-KERR QC:

Well he couldn't have legitimately in my submission been given permission to do that.

GLAZEBROOK J:

And then you would say, even if you look at her answers there's not a foundation there for a declaration of hostility because she quite fairly said she's not sure, she can't explain?

MRS ABLETT-KERR QC:

Well I don't need to go that far, I don't need to do that because there was no application for hostility –

GLAZEBROOK J:

No, no I understand that but you say, but that it reinforces the point though that in fact there probably wouldn't have been in that, an application probably wouldn't have been granted is what I think you say?

MRS ABLETT-KERR QC:

I would think we'd have to speculate as to whether it would or wouldn't.

ELIAS CJ:

But Crown counsel would not have been able to close on it because there wouldn't have been an evidential foundation –

MRS ABLETT-KERR QC:

No.

ELIAS CJ:

– that's what admitting the evidence permitted.

MRS ABLETT-KERR QC:

It's the consequences of what occurred between 214 and 220 and how then it was able to be used. You see and if there had been a declaration of hostility then defence counsel would have been able to come out all guns firing –

ELIAS CJ:

There's no concept of a declaration and the Judge has to make a determination, that's the threshold. It's just I still am concerned that the Judge really set the whole thing up. He said, "Show her the document, if she doesn't change her evidence you might have to ask further questions." What could that be but a reference to her being hostile and the Judge indicating by omitting the questions to be put that he was treating her so?

MRS ABLETT-KERR QC:

But it was still the Judge's decision wasn't it, even if that is correct?

ELIAS CJ:

Well I just think the Judge really was so close to saying that, because I don't understand what he means otherwise by, "We may have to go further depending on the answer she gives."

MRS ABLETT-KERR QC:

Well it really was quite a conundrum reading those two, there are just two pages difference between 42 where – and the lead up to 42 where it's quite clear that he doesn't see her as hostile, he doesn't see her, this as an attack on her veracity and he gets an assurance from the Crown counsel that it isn't an attack on her veracity, that's not what was wanted –

ELIAS CJ:

Yes.

MRS ABLETT-KERR QC:

– and so he then rules at 42, "Okay well I rule you can re-examine her on the contents to provide a fair and complete picture." This idea of a "fair and complete picture" –

WILLIAM YOUNG J:

Is an anathema I take it?

MRS ABLETT-KERR QC:

Sorry Sir, I'm sorry Sir?

WILLIAM YOUNG J:

Is it anathema, a "fair and complete picture"?

ELIAS CJ:

Well if the legislature hasn't provided for it I suppose.

MRS ABLETT-KERR QC:

I think it maybe for the current system, it may well be that the argument that it should be different would have a great deal of support in the country but hat is not the situation. What we're, our system of justice depends on the set of rules that people are entitled to expect followed and this idea of admitting it to provide a "fair and complete picture" doesn't fit easily, in my submission, within those rules.

ELIAS CJ:

Well though I suppose it can be said that the Judge has some huge discretion under the Act to allow evidence in, which I suppose is not contrary to your submission, it's

just that he just has to actually address his mind to the basis on what, on which he's letting in.

MRS ABLETT-KERR QC:

Yes and he has to be. Any exercise of a discretion has to be made within the parameters of the rules that Parliament has set down and 37(4) provides when you're going to be challenging your own witness' veracity, you cannot do so unless the Judge declares that person to be hostile. And 94, of course, provides that you cannot cross-examine your own witness. Now discretion – no Judge, in my submission, has a discretion to ignore those two very important sections or to interpret them in way that would circumvent the meaning that those sections have. They're gateway sections that are very important gateways, in my submission, and that can't be – in the same way, the Court of Appeal the Court said that well, you needed to do this to produce a fair, fair picture, they'd adopted that process and that the, if the Crown counsel hadn't done it the Judge would have to do it. Well my submission, that is totally inconsistent with an adversarial system of justice. It's – if it were inquisitorial then that's a different matter altogether but we haven't got that system of justice.

ELIAS CJ:

Well actually the Judge was asked to let the jury have the statement wasn't he and these haven't been put in by the parties.

GLAZEBROOK J:

Whereabouts is that sorry?

MRS ABLETT-KERR QC:

Well the Judge, the Judge was asked for clarification, is there a second question, a second question?

ELIAS CJ:

Yes during the course, there's another question from the jury –

MRS ABLETT-KERR QC:

Oh yes, could we have it. Well quite often judges just have to say no to juries when they ask for things, that's not an unusual thing to happen in jury trials.

ELIAS CJ:

Is –

MRS ABLETT-KERR QC:

Judge and jury are neutral, Ma'am, in –

ELIAS CJ:

I don't know whether – is there anything more you want to develop, I wasn't sure whether you wanted to make any comment about the distinction drawn by the Court of Appeal between accuracy and reliability?

MRS ABLETT-KERR QC:

Perhaps I just should say –

ELIAS CJ:

It maybe –

MRS ABLETT-KERR QC:

– reliability and veracity are overlapping concepts aren't they and that's what I would say. In this case we were clearly well over the line of reliability and I suppose that's why I had, not only in the cross-examination but then the use that it was put to, I don't know if I need to go through that again, I've highlighted where it is in the closing and the allegation of speaking to a husband and that was what has caused her, effectively, to change her view by the time Monday morning comes around. And also there's just one other one too where there is the, or at page 68 –

ELIAS CJ:

Sorry, of what?

MRS ABLETT-KERR QC:

This is 68 in the closing. That will be volume 1, is that volume 1? Yes, closing. It's volume 1, volume 2, sorry my apologies for that. Volume 2, tab 10, at tab 9 the closing of Mr Smith at page 68.

ELIAS CJ:

Ours starts at 76.

MRS ABLETT-KERR QC:

Your volume 2, volume 2?

ELIAS CJ:

Sorry I was looking at tab 10.

MRS ABLETT-KERR QC:

That was my fault, I led you to that, I'm sorry about that. Sixty eight and prior to that of course there'd been a whole page on 67 that I'm not going to go through which was an attack on her veracity in that. But in 68 Crown counsel says, "I suggest the reality is that it was my learned friend, Mrs Stevens, who was giving Mrs Hannigan account of what happened and all that she had to do was agree. My learned friend was giving the account most favourable to Mr Hannigan and Mrs Hannigan's evidence in large parts is simply her repeating the word 'yes'". I don't – Ma'am seek to advance any further argument unless you have questions that you wish to ask.

ELIAS CJ:

No thank you, Mrs Ablett-Kerr. Yes thank you, Mr Mander.

MR MANDER:

If I just have a moment Ma'am.

ELIAS CJ:

Yes of course.

MR MANDER:

Yes may it please the Court. The ground of appeal upon which leave has been granted is whether the way in which Kirsty Hannigan was re-examined led to a substantial miscarriage of justice. Answering that issue directly the Crown says it did not for three fundamental reasons.

Firstly, the evidence inconsistent with the witness' evidence at trial contained in her earlier statement of 26 June 2009 was admissible as part of the Crown's case in its own right. Section 7 of the Evidence Act provides that all relevant evidence is admissible in a proceeding except evidence that is inadmissible under the Act or any other Act or excluded under this Act or any other Act. Ms Hannigan's previous inconsistent statement was not hearsay in terms of the definition of hearsay contained in the section 4. There clearly was a conflict in her evidence, between her oral evidence at trial and the statement that she had previously made. It therefore

followed under the Evidence Act that her statement, or at least why is that portion of the statement that was inconsistent with her oral evidence, was admissible is evidence in its own right at the trial. In my submission in the absence of any indication of unreliability in relation to the statement taken on the 26th of June or any application of section 8, and in my submission there is none, there is no reason why the Crown would not have been entitled to adduce the evidence of the previous inconsistent statement.

GLAZEBROOK J:

What about the duty to put it to the witness and therefore the difficulty in respect of cross-examination because if you couldn't put it to the witness because you couldn't cross-examine, then there might be some difficulties, I suggest, in terms of section 8?

MR MANDER:

In my submission Ma'am and that's the third point that I seek to make, I've got a second point but the third point in my submission as to why no unfairness arises in the process that was adopted and certainly no substantial miscarriage of justice, is that providing the witness with the opportunity to comment upon the inconsistency in her earlier statement, was if not a necessary step, it was certainly a preferable course to adopt as a matter of fairness to the witness and indeed to ensure that if independence evidence was called later in the trial relating to the inconsistent statement, the jury had the benefit of the witness' view of the reliability of that earlier statement. Indeed –

CHAMBERS J:

Can I just go back to your first proposition that the statement, itself, was admissible unless excluded. How would it be produced by the person to whom it was made or by simply putting it to the person who made the statement, namely Mrs Hannigan here, and getting her to confirm it or either?

MR MANDER:

Either. I've attempted in terms of the submission that I've made to just move away from the detail of what actually happened in this case.

ELIAS CJ:

In the first case, though, why don't you then run fowl of the hearsay rule?

CHAMBERS J:

It's not hearsay.

WILLIAM YOUNG J:

It's not hearsay because she's giving evidence.

CHAMBERS J:

Because Mrs Hannigan –

ELIAS CJ:

No, because she's giving evidence. That's the point that I'm making.

GLAZEBROOK J:

Well in the sense that you – it seems to me that you – it's more than just fairness putting it to her because if you don't put it to her, then the ju – the whole point of her giving evidence is, and it not being hearsay, is that she's able to comment on it. Now the question is, how is it going to be put to her without cross-examining or, I'm still not sure about the leading question I must say but, in any event, it was treated as a leading question in this case, and the Judge actually gave consent. But it seems to me you can't just put it in and then say, well, you know, you work it out jury because the only way it can go in that way is because it's inconsistent, because it couldn't go in as a prior consistent statement because there would be a prohibition on it.

WILLIAM YOUNG J:

Well, the practicality would be, must be that the witness – if the statement is independently admissible, the witness must be given an opportunity to comment on it one way or another. Now, whether you treat that as cross-examination or not is, that's open to question because often a witness in evidence-in-chief is required, in evidence-in-chief, to comment on an apparent contradiction between the evidence given and some other evidence, perhaps because the counsel leading the evidence wants to defang a problem that's going to arise in cross-examination.

MR MANDER:

Indeed.

WILLIAM YOUNG J:

So to be asked to explain why one document says something and a witness' evidence says another, may perhaps not be cross-examination.

MR MANDER:

Well, in my submission, it's an exercise that's very difficult to be carried out without some degree of leading.

GLAZEBROOK J:

But this was a classic cross-examination, though, you have to accept.

MR MANDER:

I don't accept that, Ma'am. I don't accept this was a classic cross-examination at all.

WILLIAM YOUNG J:

I mean, the guts of it is a request for an explanation –

MR MANDER:

In my submission –

WILLIAM YOUNG J:

– there's a bit of palaver beforehand in, "Was the statement taken?" and, "Did you sign it as true and correct?" and everything else, which is, I suppose, the jargon of the prosecutor, but the guts of it is that 215 is –

MR MANDER:

And further, the Judge, in his ruling, invites counsel to canvass the circumstances in which the two statements were taken.

CHAMBERS J:

The palaver, as Justice Young calls it, was really just authenticating the document wasn't it?

MR MANDER:

In my submission, yes, and, again, the one passage which my learned friend has referred to is the, what she described as "the hallmark of cross-examination" which is

the reference to, “Have you had a chance to read it back?” et cetera, et cetera, which I think comprises three or four questions.

Now, going back to my earlier submission, for instance, if she declared that she hadn’t made the statement or she had declared that she hadn’t read it back, the Crown, independent of the witness’ answers, would have been entitled to have called Detective Karl to give that evidence that, indeed, she had read the statement and signed the statement. So –

WILLIAM YOUNG J:

Well, it’s actually been given – called as a witness for the defence and, Mrs Stevens had said, “Well, we’re going to get evidence out of you that he didn’t go into the house that day but I know jolly well there’s going to be cross-examination about the statement,” she might well have said, “Do you recall making a statement to the police?” “Yes,” and, “Just look at it,” and, “This is what you did?” “Yes,” and, “Read it out.” “Yes,” and, “Now how do you explain the difference between what you said there and what you’re saying now.” And she’ll say, “Well, I was 11 days away from having a baby and I was very upset about the fire in the house and the police were,” - whatever, but exactly the same questions may well have been asked mightn’t they?

MR MANDER:

Indeed, Sir, in my submission.

And just to finish on that point, page 44 relating to the invitation to address the circumstances, tab 6, volume 2 of the case on appeal, page 44.

WILLIAM YOUNG J:

Sorry, page 24?

MR MANDER:

Sorry, page 44. Sorry, page 44, Sir, of the paginated casebook. After the exchange, after the ruling, the Court says, “And you might well, in fairness, head off cross-examination by asking her about the circumstances in which the statements were made.” That is a reference back to an earlier discussion at page 40, where defence counsel refers to wanting to cross-examine about the circumstances of making the statement, and there’s a discussion about that, and the Court says, at page 41, “That’s exactly right and on that basis, then the substantial helpfulness test is not engaged.” That’s a reference to – we’re not going, it isn’t a matter of veracity.

"But I agree that you would then be quite entitled to further cross-examination as to the circumstances in which that second statement was made. In any event that, I think, would arise necessarily under section 97. It relates to re-examination."

ELIAS CJ:

Sorry, where are you?

MR MANDER:

Sorry, that's at page 41, the paragraph under "The Court". And, of course, if defence counsel was given the opportunity to cross-examine again, after the re-examination –

CHAMBERS J:

It seemed to me, in this particular case, because of the way this matter developed, the prosecutor was entitled to go fully into all the circumstances necessary in order to authenticate the statement because there was n guarantee that the prosecutor was going to get a chance to re-examine on this because the Judge had said, "I'm going to allow Mrs Stevens to cross-examine again on this." There was no absolute guarantee of a re-examination and the prosecutor didn't know what her explanation would be as to whether she accepted the statement and the like, so –

MR MANDER:

That's correct, Sir.

CHAMBERS J:

That seems to me all that he was doing.

MR MANDER:

Indeed. Under the Evidence Act, given that it was a new topic in re-examination of which an entitlement was given to defence counsel to cross-examine, the second cross-examination on the new topic, under the Evidence Act, the prosecutor would have been entitled to re-examine again. It's provided for –

CHAMBERS J:

Is it?

MR MANDER:

Section 97, although it's discretionary, subsection 2.

ELIAS CJ:

What does the Judge mean by that? Saying that he could only allow her to read it, or have her read the relevant passages out loud with Mrs Stevens consent because there's otherwise no basis on which you could do.

CHAMBERS J:

Which page are you on, sorry?

ELIAS CJ:

Page 43. I mean that seems to be the Judge's understanding that this cannot be led from the witness and that it depends on her answer as to whether she could explain the difference, whether you can put to her, her prior statement that wasn't consistent. I mean, that does look like setting up a hostile witness line but the Judge certainly is saying, you can't simply read into the evidence what was in the earlier statement without more because there's no basis on which you could do so.

MR MANDER:

Well, Mr Smith, at page 43, is looking for guidance from the Judge as to how he should deal with it. "I wonder whether in re-examination it might be best for me to simply allow her to read it, or have her read the relevant passages aloud as an alternative." The Court then says further down - it's not a refreshing memory situation. She's not saying she can't remember, and the Court says, "I mean, I think, in fairness, if there has been any reference or absence of relevant reference to going into the house in either statement, then it should be put to her." So the Judge is actually saying to counsel, "You should put the passage to her," and, indeed, further over at page 44, when His Honour maps out the way in which the re-examination should unfold by first of all referring to her difference between her examination-in-chief and her cross-examination, he then says, "It may be depending upon her answer that you can put to her, her prior statement."

ELIAS CJ:

Well, what was the, "Depending upon her answer," that he was feeling for?

MR MANDER:

That would be depending on whether she stuck to what she said in cross-examination and, therefore, there was definitely, on the record, an inconsistency with what – with her previous statement. In the absence of an inconsistency in her evidence, which basically the re-examination, the first part of the re-examination it's attempting to confirm or not, then there could be no reference to the earlier statement.

ELIAS CJ:

Yes.

CHAMBERS J:

Yes.

MR MANDER:

So that's what, in my submission, was the reference there.

CHAMBERS J:

I think it's a bit unfair on the Judge to look at anything much before the bottom of page 43 because he's clearly feeling his way through, but he then does determine how it should be done. First of all put the two different versions to her, get her to say which is her evidence and then, depending on that answer, this is then what follows, page 44.

MR MANDER:

Indeed.

CHAMBERS J:

And as you say, had she confirmed what was in the previous statement, then there would have been no reference to it.

MR MANDER:

That's correct, Sir.

CHAMBERS J:

Yes.

MR MANDER:

And the Judge, at page 42, has already ruled that the prosecutor can re-examine her on the contents of her statement, so this is an enlargement on that ruling as to mapping out how matters should unfold because, as Your Honour has said, there's no way the previous statement could be referred to in the absence of confirmation of inconsistency.

But just finishing the point, at page 44, again, the Judge states, "You should put to her also that she made the statement to police just shortly." So the prosecutor did have a clear, in my submission, permission on the Judge to read and put the previous statement to the witness, who accepts that she did say those things and, therefore, it becomes evidence. Obviously in the absence of her accepting that that is what she said on that day, Detective Karl would have to be called.

COURT ADJOURNS: 11.33 AM

COURT RESUMES: 11.48 AM

ELIAS CJ:

Yes Mr Mander.

MR MANDER:

So we'll just finish off with the three propositions that I put or that I do put in terms of the fundamental ground of appeal. The Crown did seek and did obtain the trial Judge's permission to proceed in the way that it did –

GLAZEBROOK J:

I think I missed out on your second proposition actually so do want to just go through your proposition just briefly so we know what they are?

MR MANDER:

Sorry Ma'am. The first proposition is that the previous inconsistent statement was admissible in its own right. Section 7 provides that all relevant evidence is admissible –

GLAZEBROOK J:

Yes I think I got that one, it was the second I missed.

MR MANDER:

The second one was that failing to provide the witness with an opportunity to comment on the evidence that otherwise could be elicited, that being of the inconsistent statement, could affect the admissibility of evidence called through another witness it is proper that the witness be given that opportunity, as was done in this case, to comment on her previous statement and the third proposition that I put is that the Crown did seek and did obtain a ruling from the Judge to proceed in the way that it did.

McGRATH J:

And that there was no unfairness I think was part of it?

MR MANDER:

And that there was no unfairness.

GLAZEBROOK J:

And I understand that third proposition but you actually say that you didn't actually need that permission do you or do you accept that because of the difficulties with section 94 et cetera that either it was prudent or obligatory to seek the permission – sorry I just want to get the proposition – I'm not – because you could say, well if we do those first two things then that's fine –

MR MANDER:

Yes.

GLAZEBROOK J:

– but if you slide over which you could easily do into an attack on veracity, I mean depending upon what her answer was, in this case I think in fact what happened was it was effectively the answers showed that perhaps her statement in Court was unreliable and you weren't quite sure which was right because she was unsure. But if she'd said, "No absolutely, the police officer wrote it down wrongly or..." –

MR MANDER:

Well that would be –

GLAZEBROOK J:

I'm trying to get the proposition so do you, what do you say you should –

MR MANDER:

Well the appellant's complaint is that the witness was cross-examined without a declaration of hostility and in my submission in terms of the ground of appeal as to whether or not that, that complaint on the part of the appellant led in this case to a substantial miscarriage of justice, it's my submission that even if we accept the appellant's criticism it has not led to a substantial miscarriage of justice because of the three points that I've set out. But perhaps I should move to that issue which –

GLAZEBROOK J:

So you're avoiding – I'm getting into really general statements, you're just looking at it specifically in respect of this case is it. It's probably just to, just to indicate that I see that there's a continuum here in respect of inconsistent statements. You could have a situation where the person says, "Oh well now you put it to," I think I've said this before, "But now you put it to me, the previous statement must have been correct because I said it at the time and I must have been mistaken," that the second continuum is that the person could say, "Well now you put that to me I actually don't know what the situation is," which seems to be what happened here. Or alternatively they could stick to their story they've given in Court in which case it becomes probably a veracity issue between which was the correct statement, but there is a continuum and the issue of what does the Act say in respect of that continuum?

MR MANDER:

I agree there is a continuum, that the point that I would seek to make is that before we know what the witness' answers are, a decision has to be made as to whether or the witness is to be declared hostile. And Your Honour has pointed out that you could conduct a voir dire and find that out and that is indeed the case.

GLAZEBROOK J:

Do you – I think the question was to Mrs Ablett-Kerr, do you say that you have to conduct a voir dire before you can proceed down that path or can you proceed down that path and then see what happens?

MR MANDER:

A voir dire, if I can couch it in this terms, a voir dire may be of assistance in some cases and appropriate but in other cases clearly the witness is demonstrating animus, clearly the statutory test is made out, there is no need for a voir dire.

CHAMBERS J:

But that doesn't arise here does it?

MR MANDER:

No because it was the opposite situation in my submission.

CHAMBERS J:

Weren't you actually trying to elicit evidence as to a fact in issue, namely did he go into the house? Now this piece of evidence, as you say, as admissible in terms of section 7. As it turns out it was not excluded by the prior consistent statement rule so therefore it simply gets led in that way and section 37 in terms of admissibility of evidence, doesn't get engaged at all in those circumstances, does it? What you can later do with it by way of submission is a completely different question it seems to me. Am I right or not on that?

MR MANDER:

With respect Your Honour is right, so long as the prosecutor or the party seeking to introduce the earlier statement is not seeking to impeach the credibility or challenge the veracity of the witness by seeking to elicit the previous statement. Section 37 has no application.

GLAZEBROOK J:

But you don't know whether you're going to be seeking to challenge the veracity until you've put the statement do you? I mean that's the difficulty isn't it that occurs because you don't know what the answer is going to be before you put the statement?

CHAMBERS J:

And improbably the prosecutor hoped she was going to say, "The statement is correct"?

MR MANDER:

Well it, ideally for a prosecutor yes. Where they have no reason to believe that the witness is trying to be deliberately obstructive or untruthful.

WILLIAM YOUNG J:

Or is perhaps being a little obstructive. I mean this situation's pretty common where the Crown witness has some sympathy or empathy to the defendant, is probably a reasonably respectable person, doesn't want to commit perjury but where there's a doubt, tends to come down on the defendant's side but when confronted with a statement may say and often does say, in my experience, "Okay sorry that's what I said." And here, I mean as soon as she said, "He didn't go in," there's an inconsistency but there's no challenge to veracity until she, as it were, unless she were to stick to her guns when confronted with the inconsistent statement. So a sort of a way of approaching it in terms of time is as soon as she said, "He didn't go in," there's an inconsistency, statement's admissible, depending on a response there will be a challenge to her veracity?

MR MANDER:

Yes. But in this case she didn't stick to her guns –

WILLIAM YOUNG J:

No.

ELIAS CJ:

Eventually, after the statement she'd earlier made was read out.

WILLIAM YOUNG J:

Yes.

MR MANDER:

But she had no independent recollection of what she had said.

ELIAS CJ:

Well she does give unequivocal evidence first that he didn't go into the house when asked so...

McGRATH J:

In terms of hostility, these are borderline cases often aren't they?

MR MANDER:

They are and this is –

McGRATH J:

So what does that tell us about –

MR MANDER:

Well it maybe useful to look at the test for hostility as defined in the Act.

GLAZEBROOK J:

Which I must say I didn't find terribly useful because – but...

MR MANDER:

Which is section 4, "Hostile," in the Act?

ELIAS CJ:

Sorry which tab is it again?

MR MANDER:

I'm sorry Ma'am it hasn't been included –

ELIAS CJ:

No, no I've got the statute yes.

MR MANDER:

Paragraph (a), "Exhibits or appears to exhibit a lack of veracity when giving evidence unfavourable to the party who called the witness on the matter, about which the witness may reasonably be supposed to have knowledge." Now in this situation all parties, including the Judge, seem to be of the view, clear view that this witness was not demonstrating a lack of veracity, so –

GLAZEBROOK J:

Well it would have to be (b) wouldn't it –

ELIAS CJ:

(b).

MR MANDER:

It would have to be (b) –

GLAZEBROOK J:

It would have to be the inconsistent statement.

MR MANDER:

"That is inconsistent with a statement made by that witness in a manner that exhibits or appears to exhibit an intention to be unhelpful," so that, those are the key words. Was she giving evidence inconsistent with this statement with an intention to be unhelpful to the party who called her? And again the Judge does not seem to be of the view that she was trying to be unhelpful.

GLAZEBROOK J:

But isn't the point that you're not going to know whether she does that until she starts, until she – despite she has –

WILLIAM YOUNG J:

Until she responds.

GLAZEBROOK J:

– despite the previous statement, says, "No absolutely that's wrong and the police officer made it up or wrote it down wrongly," and at that stage a declaration one – well I don't think we should be saying a declaration of hostility –

McGRATH J:

But it might not be so clear cut and it still might be within the parameters with which a Judge could say, "In all of the circumstances of this case, my judgment is you're hostile," which, I think, was the way *R v Greene* [2009] EWCA Crim 2282, was treated by the Court of Appeal.

MR MANDER:

It was. *Greene* has some parallels.

ELIAS CJ:

I'm not familiar with that case, so if you want to take us to it.

CHAMBERS J:

Well just before we do that, don't we have to proceed on the assumption she was not determined hostile? We can't now be speculating that she might have been hostile. I mean that was the error this Court said the Court of Appeal had fallen into in *Rongonui* in trying to revisit that. So, aren't we just stuck with the fact that nobody at the time declared her hostile, nor was she determined to be hostile. So –

MR MANDER:

That's the situation.

McGRATH J:

Do we go with that and looking at the record that seems a reasonable decision for the Judge to have made.

MR MANDER:

Indeed.

McGRATH J:

There is – we are in an area in which judicial judgment is important and it can be exercised in a much better situation than we're in.

ELIAS CJ:

But there is a statutory framework and there are hoops to be passed through, and there's no indication that the Judge turned his mind to but, in fact, it seems to be the opposite, an intention to be unhelpful. Maybe, if anything, he's saying he's not accepting that.

CHAMBERS J:

Well the top of page 42 it's rather clear that the prosecutor says, "I'm not asking for her to be declared hostile," and the Judge – no one disputes that.

MR MANDER:

Page 33, now this was the discussion between counsel and the bench before the break when the Judge seems to be labouring under a view that the Crown was trying to get in a consistent statement, but he made this observation as to his assessment

of the witness. Page 33, volume 2 of the case on appeal, the middle of the page, "In the absence of any attack upon her veracity or any unhelpfulness, neither of which exists. She's certainly not appearing to be unhelpful. She can recall. I have to say, she's actually quite an impressive witness I suppose and, of course –

ELIAS CJ:

Sorry, which page is that?

MR MANDER:

I'm sorry, Ma'am.

ELIAS CJ:

No, no, my fault.

MR MANDER:

Page 33, that passage in the middle of the page.

ELIAS CJ:

Well, he says it's a hypothetical situation at the moment.

MR MANDER:

Yes, and that's in reference to the –

ELIAS CJ:

Clarification of her evidence.

MR MANDER:

Yes, and the Judge, as I submitted previously, was – seemed to be labouring under the apprehension that section 35 was in play in relation to a previous consistent statement as opposed to a previous inconsistent statement. But that was his assessment that she was neither, certainly her evidence was not being attacked, or her veracity was not being put in issue, nor did she seem to be unhelpful.

Now in terms of the section, the definition of hostile –

McGRATH J:

Can I just say, the Judge is still of that mind, isn't he, at page 42, because he agrees with the prosecutor's statement that you've just read to us.

MR MANDER:
Yes.

McGRATH J:
That's right?

MR MANDER:
That's correct, Sir, yes.

GLAZEBROOK J:
Well, I suppose the question then comes was this a cross-examination, because if it was then she had to have been declared hostile and she wasn't?

MR MANDER:
Well that, then, requires an examination of whether or not, if I can put it in neutral terms, the questioning was illegitimate in the situation and, of course, I rely upon section 87, sorry, 89 –

CHAMBERS J:
89(1)(c).

MR MANDER:
– (1)(c) that it was implicit in the Judge's ruling to allow the prosecutor to question the witness in the way that he did and he followed, or attempted to follow, the outline of how the re-examination should unfold in the Judge's ruling.

Perhaps before I just turn to that, in my submission, this case, I suspect, throws up that the issue as to whether in the absence in an attack on veracity, in the absence of the application of the veracity rules and, therefore, a requirement to declare a witness hostile, and in the absence of a witness apparently having no difficulty with their recollection and, therefore, a statement not being able to put to a witness for the purposes of refreshing their memory, whether there is a gap between those two situations in which it is legitimate for a party to adduce evidence of a previous statement and, in my submission, there is a common scenario whereby a witness will

say something different in the witness box, be firm that that is their view, which is inconsistent with a previous statement but which they are not being hostile towards the Crown, in which, in accordance with section 7 and, indeed, the purpose of the Evidence Act, evidence of what they said previously should be allowed to be adduced, which then takes one back to the issue which Justice Chambers raised is, what's the appropriate way of doing that. Do you call - just forget about it when the witness is in the witness box and call the person that took the statement. That has the difficulties because – as to what's been traversed because you don't give the witness a chance to explain why that inconsistency might have arisen or, do you adopt what, in my submission, was the appropriate course, as adopted in this case, and you question the witness about the previous inconsistent statement, affording them an opportunity to explain why there is a difference?

ELIAS CJ:

Mr Mander when, on your argument, would a previous inconsistent statement ever be excluded under section 37(4)(a)?

MR MANDER:

Ever be excluded?

ELIAS CJ:

Yes.

MR MANDER:

Well that presupposes that there has been a – you could only refer to the previous statement if there's been a declaration of hostility.

ELIAS CJ:

Yes but there wasn't here.

MR MANDER:

No, but in my submission 4(b) applies.

ELIAS CJ:

But if you say 4(b) applies, then you're saying that statements can always come in.

WILLIAM YOUNG J:

No, it may conceivably be that the only purpose of tendering the statement is to show that the witness is a liar.

ELIAS CJ:

Well what –

WILLIAM YOUNG J:

– as opposed to being wrong.

ELIAS CJ:

Yes but, here, a statement is tendered because it is inconsistent with the evidence that the witness has given. So, in those circumstances, are you saying that section 37(4)(b) always allows the evidence to come in?

MR MANDER:

Subject to – well perhaps if I can – subject to reliability issues relating to the previous statement.

ELIAS CJ:

Well what's the point in having the 37(4)(a)?

MR MANDER:

Because section 37(4)(a) provides – it covers a situation where the counsel, the prosecutor wishes to attack the veracity of his own witness.

GLAZEBROOK J:

But how do you know?

WILLIAM YOUNG J:

Well, let us say – think of it as an unlikely event. Someone gives evidence and the prosecutor wants to cross-examine the witness on the basis that the witness has previously said to someone else, "I'm going to tell lies because I want to get the defendant off." Now that wouldn't be a prior inconsistent statement. That would be related solely to veracity and conceivably the Judge may not permit that but why I'm not sure, but it is possible to receive a statement that would be directed only to veracity and not to inaccuracy, although it's not that easy.

CHAMBERS J:

It seems to me, in this case, we have – are potentially mixing two different, completely different ideas. One is as to the admissibility of the evidence that came in. The second is the use to which the prosecutor put the evidence when it came in, in his final address to the jury, which is not an evidential question, that's a question as to whether the prosecutor misused evidence that was in, in some way. Now on that second issue and I must confess I have some concerns about the way the prosecutor then addressed the jury but is that open to us to look at in this appeal do you say? You haven't actually given any submissions on and that isn't, at least strictly, within the terms of the leave question but what do you say about whether we can look at that? Because it's undoubtedly the case that later, to my mind, the prosecutor did use the evidence to some extent to challenge her credibility, her veracity.

MR MANDER:

Well I will take the Court through the closing address indirectly at a later stage if I may. But to answer your question, if the closing address is a discrete issue, is a discrete problem, is a discrete error on the part of the prosecutor and is viewed as a discrete error then it's not covered by the question. The question or the ground of appeal is whether the way in which the witness was re-examined led to a substantial miscarriage of justice. So if there is nothing wrong with the re-examination per se, then in terms of the ground that has been framed and if the Court reaches the conclusion that the way in which the witness was re-examined did not lead to a substantial miscarriage of justice, then that's the end of the issue and the prosecutor's closing address does not bear on the ground.

ELIAS CJ:

But really I'm still stuck on the point as to what else could it have been but an attack on the veracity, on her veracity in the evidence she gave. It contradicts it.

MR MANDER:

The re-examination Ma'am?

ELIAS CJ:

Yes. So that way they are inextricably intertwined and I think the prosecutor was right to see that it went to her veracity and the Judge certainly didn't say anything to say, "Hang on, hang on," it did come into that. Which suggests to me that they really did see that it was directed at veracity and I think the way he set it up by saying,

"Depending on what answers you get, you may need to go further," must be a reference to having the witness determined to be hostile to enable the evidence flatly contradicting her to be put in evidence.

MR MANDER:

Well what took place, in any event, amounted to the same thing.

ELIAS CJ:

Yes. Yes.

MR MANDER:

In my submission.

GLAZEBROOK J:

And it must be said that prosecutors will often make the submission, even in the absence of inconsistent evidence in respect of helpful evidence to the defence, to remember the relationship and that the person may mis-remember because now I never particularly liked that submission and there could be a question of whether there's an evidential foundation but it is obviously is something that you take into account when assessing witnesses, whether they have a link to the party who's calling them in some way or a link to the accused if it's in a criminal case.

MR MANDER:

Indeed Ma'am, there may be –

GLAZEBROOK J:

And legitimately so.

MR MANDER:

There may be. But of course the difficult is that the witness, or not the difficulty, the fact of the matter is that the witness must be demonstrating that in the witness box, the fact that there is a connection, as in this case, between witness and accused obviously won't of itself give grounds for hostility unless it's manifesting itself in the witness box.

WILLIAM YOUNG J:

But in the old days and this isn't really picked up in general terms under section 122, Judges were expected to give a direction in relation to a witness who had an interest

of their to serve, which tended to encompass interest by reason of an effectual relationship. Not meant to be given in respect of evidence favourable to a defendant but nothing to stop him, but anyway and this is a slightly different issue anyway isn't it from what we, which is the admissibility point.

MR MANDER:

Yes well the difficulty of course in the old law you – once the Crown got to the stage of cross-examining its own witness it had really given away that witness as a – of any use in terms of proving anything. That isn't the case under the Evidence Act be now the reference to the statement, it comes in as evidence whether or not –

WILLIAM YOUNG J:

Direct evidence, whether or not adopted.

MR MANDER:

– it's adopted. Perhaps if I can just go back to the issue that was raised about the interconnection between section 37(4)(a) and (b) and I've already made the submission that in any event what occurred here, could well be interpreted as a proper application of the hostility rules and that the Judge made a ruling and that in any event what actually happened is no different from what would've happened had a hostility ruling been made but in my submission the rule obviously is that a party cannot cross-examine its own witness to impeach their credit or to challenge their veracity. That's prohibited. And, clearly, (a) sets that rule out, that in the absence of a hostility ruling that prohibition applies. But what this case throws up as an example is the situation of where when you've got a previous inconsistent statement, which is otherwise admissible, and the prosecutor is not seeking to challenge the witness' veracity, which on the record the prosecutor disavows that intent –

GLAZEBROOK J:

Well I mean yes, but is that really the case because –

MR MANDER:

Well can I use a very –

GLAZEBROOK J:

– why would they have been putting a previous – they were putting a previous inconsistent statement – they would – with the hope one that they'd say the previous

inconsistent statement was true but otherwise if they didn't say that weren't they going to challenge veracity?

MR MANDER:

Well can I – sorry Ma'am, can I just use a very simple example. If you get a witness, an eye witness to a robbery that says, "This car that I saw speeding away from the bank was green," in the witness box the witness says, "It was blue." There's a previous statement that says it's green, as it happens the car that the police actually find the robbers in was green. The Crown needs to illicit and get before the jury the earlier statement by the same witness that was consistent with the other evidence. The witness is clearly mist – has diverted from their earlier statement. There's no question the witness is being hostile or that the witness is trying to on purpose be difficult or unhelpful but they're very firm –

GLAZEBROOK J:

But how do you know until you put the statement whether that's the case because it may well be the witness has been paid off to say that it was blue and absolutely was.

MR MANDER:

Well in the absence of –

WILLIAM YOUNG J:

You're talking about on the whole, in the ordinary run of cases, the phenomenon you're talking about sometimes happens and where it's been put without the prosecutor thinking that the witness is a liar but really just trying to get the current contemporaneous statement and there is somewhere the prosecutor is entirely satisfied the witness is lying, tends to promote that argument throughout and then there are cases in the middle which perhaps this one is.

MR MANDER:

Indeed.

WILLIAM YOUNG J:

Because they, presumably the Crown was really relying on Mrs Hannigan's narrative, the whole narrative but they weren't saying, you know abandon her, she's got a veracity problem and she tells lies –

ELIAS CJ:

But you don't have to do that anymore –

WILLIAM YOUNG J:

No.

ELIAS CJ:

– and they were relying on her statement, her written statement on this crucial point.

MR MANDER:

They were, ultimately they were. The submission that was made was that basically the witness was all over the place at the end, was unsure –

WILLIAM YOUNG J:

On this point.

MR MANDER:

On this point, and the preferable evidence was what was in the earlier statement when the matter was fresh in her mind. But in my submission, 37(4)(b) covers that the colour of the car example and there is. There should be no objective upon application to the Court in the absence of a declaration of hostility which couldn't possibly be made out in the example to the Crown seeking to put in front of the witness their previous inconsistent statement and ask them to comment. "Well you said to the police officer eight months ago that the car was blue, but you've said in evidence that it's green, why is there a difference?" And the witness might say, "Well actually I've thought about it a lot longer, it was more green than blue," or they might say, "Yes you're right, I will accept that it was blue if that's what I said at the time of the day of the robbery." There's nothing unobjectionable in my submission to that –

WILLIAM YOUNG J:

Nothing objectionable.

MR MANDER:

Sorry, nothing objectionable.

ELIAS CJ:

Now what's wrong in simply saying, "Well look do you remember giving a previous statement, now have a look at it. Having read that do you want to stick to the evidence that you've given," as we always used to do, what's wrong with that? And then if he says, "No it was definitely black or blue or whatever," and there is an

inconsistency, then you make your application for a determination that they're hostile or if it's unreliability that's an issue that you – or not unreliability, in accuracy that is in issue, you do something else – what do you do – in that case.

WILLIAM YOUNG J:

You're still cross-examining –

MR MANDER:

Yes hopefully.

WILLIAM YOUNG J:

You're still cross-examining of course.

MR MANDER:

In my submission in that situation the Crown would still be entitled because it's evidence in its own right to adduce the previous, that part of the previous inconsistent statement –

ELIAS CJ:

Yes.

MR MANDER:

– for the jury to hear and consider.

WILLIAM YOUNG J:

I think we're at risk of completely mis-categorising Mrs Hannigan. In actual fact if you read all her evidence, she gave heaps of evidence that was helpful and essential to the Crown case which the Crown wasn't in any way challenging. There was just this one aspect which has been made to seem extremely important for the purposes of the appellant process but it was just one statement on which the Crown prosecutor, arguably, thought that she may simply be mistaken. I mean the rest of her evidence was unimpeached by the Crown.

MR MANDER:

It was a very narrow issue – described, it's been variously described as important and crucial and what have you but it was a very small discrete piece of evidence and

the Crown did not make or certainly no one was criticising the rest of her evidence in terms of a narrative.

GLAZEBROOK J:

It was a fairly crucial point though because the idea was that the fire had actually been set then wasn't it and then fanned the following day?

MR MANDER:

It was an important piece of evidence in terms of opportunity that the appellant had gone inside the house on the day before. But of course where the evidence ended up was the Crown having to rely upon a witness who had said a whole lot of different things about that issue so quite how important it ultimately came to the jury's verdict is questionable, given the state of the evidence as it finally ended up.

The appellant relies upon the decision of *Rongonui.* In my submission the case of *Rongonui* is distinguishable from this situation and some of the reasons for that are set out at paragraph 49 of the Crown's submissions. But in essence, in my submission, *Rongonui* is not dealing with the situation of a previous inconsistent statement, that was a situation where the prosecutor was having difficulty getting evidence out of the witness in an organised and lucid way and resorted simply to reading out the previous statement of the witness. Her oral evidence was not, or that witness' evidence in *Rongonui* was not in conflict with or inconsistent with the previous statement, in fact to the opposite, it was actually if anything, her oral evidence was almost embellishing her previous statement or going further than her previous statement.

CHAMBERS J:

Well *Rongonui* was really a case where the appropriate way of refreshing memory in terms of section 90, subsection 5 wasn't it and this Court said the prosecutor's method of doing that was an inappropriate one.

MR MANDER:

In essence it appears to have been a refreshing memory case –

CHAMBERS J:

Yes.

MR MANDER:

– not an inconsistent statement case.

CHAMBERS J:

Not an inconsistent case.

MR MANDER:

And secondly there doesn't appear to have been any ruling by the Judge as to what the prosecutor did in that case could be allowed. Whereas here we have a clear judicial ruling and quite extensive judicial consideration of the process to be adopted.

I've already made the submission that as a general proposition is well accepted that a witness cannot be cross-examined by the party calling that witness for the purposes of impeaching the witness' credit or for the purposes of challenging the witness' veracity. My submission is that the question in this case was not designed to show that the witness lacked credibility or that the witness was unworthy of belief, but rather the questioning was designed to illicit the previous inconsistent statement and was designed to show the circumstances in which the two previous statements were made. Of course the second statement was required to be introduced by the prosecutor as a result of the ruling by the Judge as a matter of fairness and completeness.

A question arises as to the distinction between cross-examination on the one point and the deployment of leading questions on another. And in my submission it does not necessarily follow that the use of leading questions means that the questioning amounts to a cross-examination. Certainly the use of leading questions, if there were any leading questions in this case, were not for the purposes of impeaching the witness' veracity or credit. As a rule of thumb, the distinction between evidence-in-chief and re-examination is often by a contrast of cross-examination which allows leading questions. And a leading question under the Evidence Act is, of course, a question that directly or indirectly suggests a particular answer to the question. In my submission the questioning by the prosecutor in this case was not attempting to direct the witness to a particular answer.

ELIAS CJ:

Well what do you say about the provision in the Act that says if you, I've forgotten which one it is, that nothing prevents you putting in evidence in the manner provided

by rules of Court in order to allow evidence to be adduced, and I think there's a reference in it to statements as well as to briefs or something, sorry do you –

CHAMBERS J:

That's only in civil proceedings.

ELIAS CJ:

Is it? Thank you.

MR MANDER:

So in my –

ELIAS CJ:

Well that's probably because it's unthinkable in criminal proceedings. But what I mean by that is that there is a legislative indication, a contextual indication that putting statements to people is leading?

MR MANDER:

Certainly Ma'am I think that follows from the nature of the Act.

ELIAS CJ:

Yes.

MR MANDER:

But if it's couched in terms of is this the truth or not, or you've said this on one occasion, you've said this on the earlier occasion in your statement, which is it? It's difficult to see, which is the purpose of the questioning in this case, how you would do it in any other way, in my submission.

GLAZEBROOK J:

Well in any event you had the permission of the Judge, you say.

MR MANDER:

In my submission, indeed.

ELIAS CJ:

You do it in a way that doesn't put the evidence before the jury.

MR MANDER:

But here, Ma'am, the evidence was always going to go before the jury because the Crown was entitled to put –

ELIAS CJ:

Well that's the issue.

MR MANDER:

– the previous inconsistent –

WILLIAM YOUNG J:

That's the question.

ELIAS CJ:

That's the question really, yes.

MR MANDER:

In my submission, the question that took place is nothing comparable to a cross-examination of a witness that's been declared hostile in terms of intent to impeach their credit or their veracity.

ELIAS CJ:

In the proceeding?

MR MANDER:

Just generally, Ma'am.

ELIAS CJ:

Well, it doesn't have to be general.

MR MANDER:

Well, if one is trying to examine the nature of the questioning and the purpose of the questioning relatively, in my submission, it was a benign question and, in my submission, it did not amount to an attack on the witness' veracity at all,

in my submission. And it may be worthwhile taking the Court through the re-examination, commencing at page 213, which is in volume 3 of the case on appeal.

ELIAS CJ:

Mr Mander, I should indicate that I'm going to have to adjourn at 10 to today. I hope that's okay. I've managed to get an appointment with the doctor so I don't make everyone ill.

MR MANDER:

You'd like to finish, Ma'am.

ELIAS CJ:

No, no, no. I'm just telling you that we will have to take the adjournment at 10 to.

MR MANDER:

Of course.

The cross-examination commences at page 213, sorry the re-examination – a bit of a Freudian slip, and the counsel recaps on the evidence thus far, the evidence in examination-in-chief and cross-examination which, of course, covers the question that's been asked by the jury as to the difference in the two pieces of evidence given by the witness.

CHAMBERS J:

Everything up to page 214, line 22, you'd agree is really sanctioned by section 101?

MR MANDER:

Yes.

CHAMBERS J:

Yes.

MR MANDER:

It's just normal re-examination in my submission.

CHAMBERS J:

Well, it's also the method the Judge said to deal with the jury question.

MR MANDER:

It is. It accords with that.

McGRATH J:

You're putting that more generally. You'd say that it was permissible even if the jury hadn't asked a question.

MR MANDER:

In my submission, yes, because you've got –

GLAZEBROOK J:

You're clarifying an ambiguity though.

MR MANDER:

Yes, indeed.

WILLIAM YOUNG J:

Well, the point, I mean it starts at 214, line 19. The crux of the matter is first put at 215, line 9. It's put again at page 216, line 9 down to 25 or 28.

MR MANDER:

That's correct. "Can you explain, can you explain?"

WILLIAM YOUNG J:

"Can you explain can you explain?"

MR MANDER:

Explanation given. No follow up questioning. No challenging of the explanation what so ever. No arguing the point. No suggestion –

WILLIAM YOUNG J:

No suggestion.

MR MANDER:

– "Your mind would have been fresher at the time, than it is now, today. You would accept you'd have a better, " – nothing like that, in my submission, and the other question, including in my submission as I've already canvassed earlier this morning, the reference to checking the statement and that type of thing, all goes to the circumstances in which the two statements were made, the length of time at the police station, that type of thing. The fact that the first statement on the 21st was taken at the scene, all within the compass of the trial Judge's ruling, in my submission.

So, in my submission, this re-examination accorded with the ruling in the first place and, secondly, was not a cro – was not, did not amount to a cross-examination which sought to impeach the witness' credit or veracity.

Then there is cross-examination by defence counsel commencing at page 113, which seeks to –

McGRATH J:

Sorry, at page...

MR MANDER:

Sorry, at page 1 –

WILLIAM YOUNG J:

Two 19.

MR MANDER:

At 219. There's further cross-examination in which defence counsel canvasses the making of the two statements and, in particular, in terms of balance and fairness, at page 220, turning to the 26th of June, and there is a series of leading question, understandably, it's cross-examination as to how the witness was feeling. She was very dis – very stressful. Line 5, page 221, "And would you agree, the very best situation to be 100% accurate?"

"Yes."

"Is it possible that you just genuinely made a mistake when you said you waited in the car and Shane went outside the house?"

"Yes."

"And you think about things more calmly and I appreciate this is stressful as well. Given that you've said all along you were in the car, do you agree that your original

account about checking the doors and windows in your evidence is, in fact, the correct position?"

Answer, "Yeah."

Final question, "And you certainly didn't see him, from your position, do anything other than check the outside?"

Answer, "That's right."

So in the context, it's very difficult to see, given the way in which the witness was ultimately cross-examined, how there was any unfairness, or any impropriety, in the way in which the prosecutor went about questioning the witness for the purposes of re-examination on the previous statement and, certainly, as I repeat, the risk of repeating myself, in my submission, it did not amount to an attack on the witness' veracity.

It's perhaps opportune to also deal now with the closing address, as I indicated I would, which is in volume 2 of the case on appeal under tab 9. The appellant is critical of the Crown's closing on the point. In my submission, the Court of Appeal's assessment of the cross-examination is correct and, in my submission, the prosecutor's closing, while at times perhaps clumsy, was not designed to impugn the witness' veracity. At page 67 of the closing address –

ELIAS CJ:

Well, sorry, do you want to say, because it could be important, it was not designed to or did not?

MR MANDER:

Well, I take Your Honour's point. In my submission it was not designed to. If it did have that effect in some way, in my submission, it did not result in any miscarriage of justice, particularly having regard to the –

ELIAS CJ:

It did have that effect or –

McGRATH J:

If it had that effect?

ELIAS CJ:

Yes.

MR MANDER:

If it had that effect, Ma'am.

ELIAS CJ:

Yes.

McGRATH J:

Could you complete that? You're giving a further reason for that. You said, "Particularly having regard to." What are you having regard to?

MR MANDER:

To defence counsel's closing, which is also included, starting at page 82, in which defence counsel addresses what could be potential interpretations of the Crown's closing on that point.

McGRATH J:

Sorry, not at the moment quite clear why it is that you're saying there was no miscarriage, having regard to what defence counsel said.

MR MANDER:

Sorry, I don't limit that submission in terms of just what defence counsel said. Defence counsel had the opportunity to balance –

McGRATH J:

Yes.

MR MANDER:

– and criticise and comment on what, how Mr Smith had approached his assessment of the witness, Ms Hannigan, which is something which needs to be taken into account but, my primary submission is that, again, not withstanding what impression may have been left by the prosecutor's closing on this point, it did not and, could not, in my submission, lead to a substantial miscarriage of justice.

McGRATH J:

Because if it had that effect, its balance was achieved, having regard to what was said by defence counsel in her address.

MR MANDER:

Indeed. Now at page 67 of the case on appeal, page 6 of the closing address, the prosecutor disavows that he's suggesting Mrs Hannigan is a dishonest person. He questioned the accuracy and the reliability of the witness' evidence, having regard to inconsistencies between what she said in examination-in-chief and cross-examination, and compounded by further inconsistency exhibited in the two previous statements.

CHAMBERS J:

It must be permissible for a prosecutor, where a witness is given two versions, to submit to the jury that one version is preferable to the other I would have thought.

MR MANDER:

Indeed and, in my submission, the cases do anticipate, or do provided for that, and that may be a useful point to refer the Court to the case of *R v Clarke* [2011] EWCA Crim 407, which is contained in my learned friend's –

WILLIAM YOUNG J:

I mean, it's elementary, isn't it?

MR MANDER:

– bundle – well, it is, in my submission, elementary that, of course, given the state of the evidence at the end of the evidence, counsel is allowed to assess and comment upon the state of that evidence and when one considers the normal directions as were, indeed, given by the trial Judge, that it's for the jury to assess the reliability and credibility of witnesses. It's for the jury to accept, if they so do, parts of a witness' evidence and reject other parts, it must follow that the Crown is entitled to make submissions about the very stuff of which the jury is about.

The danger is, however, that closing in a particular way one may overstep the mark and impugn the veracity, or the truthfulness of your own witness.

WILLIAM YOUNG J:

Here there was the added factor that Mr Hannigan, in evidence, had said that he'd discussed Mrs Hannigan's evidence with her over the weekend.

MR MANDER:

That is, that's the highest point in my submission –

WILLIAM YOUNG J:

Yes.

MR MANDER:

– in terms of the appellant's criticism of the Crown's closing.

WILLIAM YOUNG J:

But he was in – he must have been entitled to make that criticism because it was a very fair criticism to make, given what Mr Hannigan had said. I mean, it's no doubt a counsel of perfection but he shouldn't have been discussing, with a witness who was giving evidence against him, what she was to say, or saying during the weekend.

MR MANDER:

No. There is some evidence, I think there is – I'm not sure whether it actually is evidence about whether or not the witness and the appellant spoke during the weekend. There is evidence, however – if I just may confer with my learned friend – at volume 3 of the case on appeal, page 261 – I'll just check that.

GLAZEBROOK J:

I don't think that's the right page.

MR MANDER:

No.

GLAZEBROOK J:

Maybe 261 of the notes of evidence.

MR MANDER:

Of the original record.

GLAZEBROOK J:

Yes.

MR MANDER:

Yes, page 379 of the case on appeal at line 29. It really commences about line 24. This is the appellant giving evidence. "'Cos I remember, you know, we'd been in the months talking about this like previously. No we knew this day was coming and so it's easy to get, you know, forget stuff, dates and all that kind of stuff. It's overwhelming, you know. So in all fairness to my wife, three months later you're not going to remember, you know, if it was a snow day. It's just – oh, sorry." So that's the only reference to communication. I suspect it's really just a matter of common sense that –

GLAZEBROOK J:

Where's the reference? There is a reference in the closing address to communicating with her husband isn't there?

WILLIAM YOUNG J:

Page 67, the prosecutor says, "After she can go back to Court the following weekend, we've heard today in Mr Hannigan's cross-examination that he'd talked to his wife about the case at least while he was giving evidence, after she came back after the weekend."

MR MANDER:

Yes.

WILLIAM YOUNG J:

So is that the reference to there?

MR MANDER:

Yes.

CHAMBERS J:

It can't be that, though, because he's talking there, isn't he – he's going back to the week in June that the fire took place. There must be another reference, mustn't there, or have I got –

MR MANDER:

Well in my submission, at line 25 –

CHAMBERS J:

The June he's talking –

MR MANDER:

– the reference, "You know, we knew this day was coming and so it's easy to get, you know, forget stuff, dates and all that kind of stuff."

CHAMBERS J:

Yes but he's talking during that week in June. He means during that week in June 2009, "We made a recollection of the whole week," but that's not talking about the weekend.

MR MANDER:

No, it's not talking about the weekend.

CHAMBERS J:

Well, where is the reference to what the prosecutor is referring to at page 67?

MR MANDER:

There is no reference to, specifically in the evidence, to a weekend.

CHAMBERS J:

Well, "At least while we – I can't believe the prosecutor would have said that.

MR MANDER:

Can I just take Your Honour, take the Court through the closing at 67, if I may? Counsel refers to the earlier statements and refers to his examination-in-chief of the witness. It commences, "When I asked who of them went into the property on the 20th, she said, 'It was Mr Hannigan.'" That's a reference to his examination-in-chief. This is page 67 of his closing address, about three-quarters of the way through the second paragraph. "She stayed in the car but I'd suggest it was the way in which she said that, that was important." So it's a reference to how she looked, or her demeanour in the witness box. "It was as though the penny had dropped. It was

difficult for her to say and I suggest that's because she appreciated the significance of it."

ELIAS CJ:

So she referred to the entry onto the property, into the property, do you mean?

MR MANDER:

Yes, and there's something of a rub, a twist on that as well because counsel acknowledges that the question was not a very good question, but there's earlier questioning in the same context of that examination-in-chief where he asks the witness, "What did these visits entail?" and she says, "Going into the property," and that question relates back to that, and that's certainly how the jury interpreted it, that in her examination-in-chief, when the question was being asked, "Did he go into the property?" it was interpreted, having regard to the other evidence she'd given, that meant into the house. So that's just a footnote. I'm sorry, Ma'am.

ELIAS CJ:

No. If that's all right. I'm sorry to do this to you but we'll resume at 2.15 pm.

COURT ADJOURNS: 12.50 PM

COURT RESUMES: 2.18 PM

ELIAS CJ:

Thank you, Mr Mander.

MR MANDER:

Yes, may it please the Court, I was taking the Court through the Crown closing, or the relevant part of the Crown's closing at page 67 of tab 9 of the second volume case on appeal, and at page 67, the prosecutor starts with describing Mrs Hannigan being all over the place on the point. So at the beginning of the second paragraph, "And that is going to take quite some deliberation," obviously in reference to the jury. He, then, describes the difference between, or perceived difference between the witness' evidence on the Friday and then how she appears to have changed her position on the Monday. Then there's this admission she came back to the Court following the weekend, "And we heard today in Mr Hannigan's cross-examination that

he'd talked to his wife about the case, at least while he was giving evidence. After she came back from the weekend, her evidence was that he went onto the property, not inside the house." And that reference to the witnesses having spoken together is not a reference to any direct evidence that they'd spoken together on the weekend, but that that may have been a possibility, having regard to the appellant's evidence at page 379 in volume 3, commencing around line 24 when the –

CHAMBERS J:

Well, it doesn't really support the submission, does it?

MR MANDER:

Well it only supports the submission that there appears to have been a change in the witness' evidence over the weekend. She was in examination-in-chief, the weekend, cross-examination and her evidence appears to have changed.

ELIAS CJ:

Why do you say her evidence appears to have changed because it is ambiguous?

MR MANDER:

Well, in my submission –

ELIAS CJ:

It changes from the earlier statements but –

CHAMBERS J:

Well, it did change from the evidence-in-chief because she said in evidence-in-chief, "There was a quick check of the house." "Who went into the property?" "Shane did." I mean, checking the house was more likely to involve having gone inside it.

ELIAS CJ:

Well, yes, but that's the ambiguity that had to be –

CHAMBERS J:

Yes.

ELIAS CJ:

– cleared up.

McGRATH J:

The key point is that the evidence doesn't really support counsel's contention to the jury that, "We heard today in Mr Hannigan's cross-examination that he talked to his wife about the case, at least while he was giving evidence." I mean that's quite wrong isn't it, if the only part that you rely on to support is that at page 379?

WILLIAM YOUNG J:

It depends if there's meant to be a hyphen there. "We heard him today, at least while he was giving evidence.' You'd probably have to –

McGRATH J:

Sorry, where did you put the hyphen?

ELIAS CJ:

Dash.

WILLIAM YOUNG J:

Dash, yes. "We heard about the day – I'll have to look it up.

ELIAS CJ:

Sorry, what page is it again?

WILLIAM YOUNG J:

Sixty-seven.

WILLIAM YOUNG J:

It's not very elegant anyway.

McGRATH J:

But Ms Stevens knew about it –

WILLIAM YOUNG J:

"We heard about the day Mr –

McGRATH J:

– because she refers to it doesn't she? She talks about the suggestion. I think at page 89.

MR MANDER:

In her closing, yes she does.

CHAMBERS J:

It's possible there's a hyphen after, as Justice Young suggests, after "case". "And we heard today in Mr Hannigan's cross-examination that he'd talked to his wife about the case. At least while he was giving evidence." I suppose it's possible to –

WILLIAM YOUNG J:

Well, he may have just – it may be a sort of – it's not a book. It's a written text. It's something that's been spoken.

MR MANDER:

Yes.

WILLIAM YOUNG J:

So he may have made a mistake – a mis-start or something, but it's – the Judge doesn't seem to have said anything about it.

MR MANDER:

No, the Judge doesn't say anything about it. My submission –

GLAZEBROOK J:

Where's the suggestion, where does Mrs Stevens mention it? I'm sorry, I just can't find it.

CHAMBERS J:

It's at 82.

GLAZEBROOK J:

Eighty-two is it?

McGRATH J:

Yes, 82.

MR MANDER:

My submission is that it is an inelegant and clumsy submission but, if one reads the prosecutor's submissions on this point in his closing address as a whole, he is not suggesting that Mrs Hannigan is being dishonest. He is suggesting that she is an unreliable witness –

ELIAS CJ:

What do you mean by unreliable?

MR MANDER:

She's a witness that –

ELIAS CJ:

Well, it's not inaccuracy they're talking about here, is it?

MR MANDER:

Well, a witness that's unreliable is a witness that's changed their story, that seems to be saying different things. An unreliable witness might be a witness whose view of an act may have been limited. You can't rely upon their witness. It's not a submission that the witness is being dishonest or deliberately so, but there are circumstances relating to the evidence that they give which renders their evidence unreliable and, clearly, the inference that is being made, or that is being asked to be drawn, is that where she unsure about things, she is favouring the story that favours, understandably, her husband, the accused.

GLAZEBROOK J:

And that's – perhaps the passage is page 69 where that submission was put by the prosecutor pretty starkly. That is, "She can't remember, she's given different versions." Is that –

MR MANDER:

That's right.

GLAZEBROOK J:

That's the nub of the prosecutor's submission, isn't it?

MR MANDER:

It is, in my submission, and it's summarised by the prosecutor at page 69, second paragraph. "The reality is she gave a number of different versions of that visit and her very final answer ought to have left you with real doubt as to her reliability. I'd suggest she simply can't remember, that she's drawn to the version that best supports her husband's case. I suggest the most accurate account is what she gave five days after the fire, once the emotions had settled down a little, in that detailed statement." So, in my submission, the prosecutor is entitled to critique the witness' performance in the witness box and compare the way she related to him, as the prosecutor, in providing information and compared to the way the witness related to the cross-examination and the defence counsel, who put various propositions to her. But that doesn't, in my submission, and it's a careful line that a prosecutor has to walk, it did not cross over into an allegation that the witness was being deliberately untruthful and dishonest.

ELIAS CJ:

Well, what do you make of the very odd definition of veracity? The disposition to refrain from lying, whether generally or in the proceeding.

MR MANDER:

Well, lying is to deliberately not tell the truth and so it's a disposition to not –

ELIAS CJ:

It's a disposition, though, isn't it? A disposition seems pretty much what the prosecutor is talking about here.

MR MANDER:

Well, in my submission, Ma'am –

ELIAS CJ:

You say it's a disposition but not to the point of lying. I'm very worried about how we dance on these pinheads and wonder whether it's not better to have a fairly clear rule which is available on this statute.

MR MANDER:

Well, in my submission, we're dealing with matters of human affairs, particularly when it comes to witnesses, and assessments have to be made in the course of trials as to what may or may not be motivating witnesses, and in my submission, the

approach is the opposite one, that in the absence of a clear allegation of deliberate lying, one is not –

ELIAS CJ:

Prosecutors will be able to get around this very easily, won't they, the restrictions in the Act if they don't use the "lie" word or if they protest that they're not suggesting that the person is lying?

MR MANDER:

It will ultimately be – obviously it has to be assessed ultimately by the trial Judge.

ELIAS CJ:

But isn't it the substance of what is being put that's the critical thing and, if a witness is confronted by an inconsistent statement, is that not an attack on her veracity, particularly when couple with sort of statements about the tendency to support her husband, which seems pretty good and, of course, it's also consistent with the way previous consistent statements are treated, that it's an exception that you can put in a previous consistent statement if it's necessary to counter an attack on veracity through an inconsistent statement? And it just seems to be a legislative context here that's quite difficult to get around and which, I'm not sure, is adequately answer by saying, "Well, you know, the Judge will sort it all out."

MR MANDER:

Well I have difficulty struggling or identifying what is wrong with the jury being provided with evidence of the previous inconsistent statement.

ELIAS CJ:

Well, if you put an inconsistent statement – I think we're just going round in circles really, but if you put an inconsistent statement to a witness who has given evidence, then that is implicitly, in the scheme of this Act, I would have thought, impugning veracity.

MR MANDER:

Well –

ELIAS CJ:

And why isn't that quite a workable rule, so that everyone knows where they stand?

MR MANDER:

In my submission, for there to be a rule that introducing a previous inconsistent statement simpliciter –

ELIAS CJ:

Yes.

MR MANDER:

– renders that witness, your witness' veracity in issue –

ELIAS CJ:

Yes.

MR MANDER:

– goes far too far, in my submission.

CHAMBERS J:

Well, you would need leave on every occasion to put the prior inconsistent statement because you'd – if it comes within section 37, wouldn't you have to show that it was substantially helpful and things?

MR MANDER:

You'd have to fall into the – well, you'd have to satisfy the –

ELIAS CJ:

Yes, I'd like to know what's wrong with that.

WILLIAM YOUNG J:

Well, there may be inconsistent statements that don't engage veracity, the green or blue car.

ELIAS CJ:

But then you're out of it.

GLAZEBROOK J:

But isn't the difficulty you can only do it if the witness is hostile and if the witness hasn't showed any signs of hostility it becomes difficult to know what the truth is? So in the blue car, green car, the person may have shown absolutely no difficulty in terms of hostility. They actually have nothing what so ever to do with it, they're a total bystander and so the argument there would be that unless they're hostile you can't put their previous blue car statement to them.

ELIAS CJ:

Yes.

GLAZEBROOK J:

Well, that's can't be right because this is somebody who's trying to tell the truth and might well have been mistaken. I think that would be the difficulty in having a rule of that nature I think.

ELIAS CJ:

But it – well, yes, it depends the basis on which the statement has been put in, whether it is only capable of being treated as inconsistent with the witness telling the truth in her evidence, or whether it may be consistent with her being inaccurate. But I have real doubts about unreliability.

MR MANDER:

Well, in my submission, the law's always made a distinction between reliableness and credibility and –

ELIAS CJ:

Absolutely, but this Act tries to have a one size fits all, which isn't, you know, perhaps it has to stretch a bit.

MR MANDER:

And the other submission I'd make is that the law has always differentiated between adducing evidence which attacks veracity and credibility and evidence that, or questioning that, doesn't, or submissions that doesn't.

ELIAS CJ:

Well, why does section 35(2) envisage that – well, I suppose there's still a judgment, you'd say, as to whether it's necessary to respond to a challenge, yes?

MR MANDER:

Yes. I wonder, could I refer the Court please to the case of – it's an English Court of Appeal case of *Cairns* [2002] EWCA Crim 2838, 2003 1 Crim App R 38, which is at tab 9 of the Crown's bundle, at tab 9.

This was a case in which there was challenge to the Crown calling a witness in a drugs trial. The witness had been part of a drug operation with four other accused. He pleaded guilty and was made available to the Crown to give evidence. He gave evidence which incriminated two of the other offenders. His wife and a friend were two of the other co-accused. His evidence incriminated two of the offenders but did not incriminate his wife or his friend, and the challenge to the prosecution's discretion to call this evidence was that it couldn't rely on part of this witness' evidence and disassociate itself from the other part of his evidence as it related to the two accused.

ELIAS CJ:

The exonerating evidence you mean?

MR MANDER:

Yes.

ELIAS CJ:

Yes.

MR MANDER:

Which the Crown didn't accept as the truth of the situation.

At page 660 there is a discussion –

CHAMBERS J:

Wrong page.

MR MANDER:

Page 670?

CHAMBERS J:

Six 70, thanks, yes.

MR MANDER:

Page 670, at the top of the page the discussion commences on the Crown's duties, which talks about that, "The Crown does not have to be satisfied as to the reliability of all the witness' evidence." I won't read it out.

GLAZEBROOK J:

Do we know what was said in closing in this case? Is it set out? Well, at least – because presumably, let's just put it about presumably the Crown said, "Well, we're asking you to rely on this evidence for these purposes and to disregard the rest of the evidence."

MR MANDER:

Sorry, in *Cairns*?

GLAZEBROOK J:

Yes.

MR MANDER:

No, I don't think there's a discussion of that.

GLAZEBROOK J:

Because that's really the point here, that it went further than just saying, "Well, the Crown case is X."

MR MANDER:

Yes well –

GLAZEBROOK J:

They were actually asking for a positive disbelief, although I suppose that's splitting hairs in the *Cairns* situation because if you can call a witness that way, your whole case is inconsistent with it, then.

MR MANDER:

Well, indeed, and it would have been patent on the face of the Crown's case that it didn't accept the witness as a witness of truth in respect of two of the – his evidence on two of the accused.

GLAZEBROOK J:

Yes.

MR MANDER:

And as I say, I won't read it all and take up the Court's time, but towards the bottom of that page, there is reference to the approach recognised in *Pacey*, and quotes from that judgment. "It was not open to the prosecutor to attack her credit. All they could do was to point to inconsistencies, if they existed, between her evidence and other evidence, or to point to matters upon which her evidence might be unreliable."

ELIAS CJ:

Well, that's no more than an Act provides for. The question is whether it's different when the inconsistency is what the witness has said on a previous occasion.

MR MANDER:

But if one accepts that the inconsistency is other evidence –

ELIAS CJ:

Well, I accept that.

MR MANDER:

– then why can't – then the Crown, sorry, Ma'am –

ELIAS CJ:

Well, because look at –

MR MANDER:

– the Crown point to that other evidence and say, "This may give you cause to pause."

ELIAS CJ:

Well, look at the scheme of the Act. It is treated. A previous inconsistent statement is treated as impeaching the veracity or accuracy of the witness.

MR MANDER:

Well, it can have that. My submission is it can have that effect but, equally, it need not. That's my submission, Ma'am.

ELIAS CJ:

Yes.

MR MANDER:

And just to finish off –

ELIAS CJ:

When would previous statements ever be excluded? They'd never be excluded on your approach.

MR MANDER:

Previous inconsistent statements?

ELIAS CJ:

Yes.

MR MANDER:

They could be excluded if –

ELIAS CJ:

Well, if there's a section 7 or section 8 issue, but when else?

MR MANDER:

Well, the division that I would apply is when the previous inconsistent statement is being used to attack the veracity of the witness, in which case it falls under subsection (4). If it is not being used and the prosecutor is not –

ELIAS CJ:

Well, how do you establish that? Is it only if it is put to the witness that they're lying? Is that how you decide whether it's being used to impugn veracity?

MR MANDER:

Well, a decision will have to be made as to whether or not the witness can be declared hostile. So, if the Crown cannot get to that point and, clearly, it cannot, it is not permitted to attack the veracity of the witness.

ELIAS CJ:

But I'm trying to feel for what you say is attacking the veracity. I'm putting to you that it seems to me that you inevitably attack veracity if you have a previous inconsistent statement that is inconsistent with the witness' evidence.

WILLIAM YOUNG J:

In the end it may just be a challenge to the memory. Your memory now is – your memory at the time –

ELIAS CJ:

I know but if there's no other explanation, if it is, this is inconsistent with what you're now saying, which is the way – I'm just really trying to feel what are we going to do in terms of –

MR MANDER:

Well, look, Ma'am, if you get to that point, let's say in this case, the re-examination went somewhere else, and in the course of the preliminary part of the re-examination, the witness began to display animus or was clearly being deliberately unhelpful, then at that point in time, before the prosecutor could take the matter any further, he would be required to get the Judge to declare the witness hostile.

ELIAS CJ:

I see, yes.

MR MANDER:

In the absence of doing that, he could not pursue the matter.

ELIAS CJ:

Be prevented – he could not be prevented from simply putting in an opposing inconsistent statement.

ELIAS CJ:

In my submission.

GLAZEBROOK J:

One of the difficulties, though, is the difficulty that the Chief Justice was indicating, that the prosecutor would actually fall – well, take this case. You say the prosecutor didn't say, "Well, you're lying," et cetera, and didn't carry on in respect of that cross-examination but, in fact, and so, therefore, didn't cross the line, didn't give her an opportunity to either show hostility or not show hostility because it was really not taken far enough but, then, in closing, the prosecutor does start to attack veracity and one of the difficulties is that they, if you allow a rule that allows them to do that in closing, then you're effectively having them attack veracity without actually having put that directly to the witness. So the witness didn't have any chance to say, well, one, "I didn't talk to my husband over the weekend," and, two, "I'm not trying to tailor my evidence. I honestly can't remember," or, "I can't recall," or, "That was my recollection."

MR MANDER:

Two responses to that. Firstly, in general, the trial Judge retains the ability to supervise what happens in closing. So what happens in re-examination is discrete from what might ultimately happen at some later stage in the trial. So –

GLAZEBROOK J:

Yes, but it's already said, because the Judge might have stopped them, but it had already been said at that stage, hadn't it? The attack on credibility had already been made.

MR MANDER:

On the appellant's case in the closing address.

GLAZEBROOK J:

Absolutely.

WILLIAM YOUNG J:

But the restriction is on offering evidence to challenge veracity. Section 37 is – proving an inconsistent prior statement is a very small subset of veracity and such as calling evidence that says Mrs Hannigan has a reputation for lying.

ELIAS CJ:

For being a liar, yes.

WILLIAM YOUNG J:

And so on. Now, the restriction is on offering evidence. When the question is asked, "What's the explanation for the inconsistency?" there are a number of possible responses, and it's only when she gives her response that the issue of veracity or mistakes starts to come into sharp focus. Now, she, having given her evidence, there's nothing, and oral evidence being inconsistent with other facts all – apparently proved by the evidence, it's open to the prosecutor to make a submission on it. Now it may be that he went a bit far because he wasn't really arguing to the Judge that she was shaping her evidence to help her husband, but that's sort of what he argued in submissions. But that's really a different issue. It's not an admissibility issue.

McGRATH J:

And it's controlled, in the end, by the Judge.

MR MANDER:

It must be.

McGRATH J:

Presumably. That's what the adversary system provides for, for a prosecutor who overstates in submissions –

MR MANDER:

Indeed.

McGRATH J:

– his case, because he hasn't got evidence to support it.

ELIAS CJ:

Well, why not have a rule of evidence that anything comes in that the Judge thinks is relevant. I mean, why do we have all of this elaboration in the Act.

MR MANDER:

In my submission, the rules of evidence can't control what a prosecutor might go on and do with that evidence.

ELIAS CJ:

No, but isn't that why the prosecutor should not have led the evidence of what was in the previous statement until he had ascertained that she was maintaining her version? It's the fact that it came out. They get the statement, and they get it, actually, in quite an unsatisfactory way.

MR MANDER:

Sorry, Ma'am, but the prosecutor did get to that point because he asked the questions. You said this on this occasion and you said this on another occasion –

ELIAS CJ:

Yes, but you don't need to say that. You can say, "Have a look at your statement. Do you want to modify the answer that you give here?" If she says no, then counsel says, "I wish to have this witness treated as hostile." What's wrong with that orderly process, which seems to be envisaged by the scheme of the Act, and otherwise, I mean you've got no rule except, well, we'll leave it to the Judge to sort out?

MR MANDER:

But in that scenario, Ma'am, the jury don't know what the previous statement said.

ELIAS CJ:

I know. That's the whole point. But as soon as the Judge gives the green light and says, "You can cross-examine," then it comes in.

MR MANDER:

Bu that – I'm sorry, Ma'am, we're probably going round in circles, but that can only be after you can reach the threshold of hostility.

ELIAS CJ:

Well, the Judge knows what's in the statement, counsel knows what's in the statement. If she's adhering to the evidence she's given in Court against an inconsistent statement, then there's a judgment call to be made by the prosecutor.

CHAMBERS J:

But she may not be hostile. She may have a perfectly valid explanation as to why the statement isn't correct.

McGRATH J:

But in terms of the statute she will only be hostile if she manifests an intention to be unhelpful.

ELIAS CJ:

Yes.

McGRATH J:

That's what the Act says.

ELIAS CJ:

That's true and we've got the submission that she wa –

MR MANDER:

The other issue that arises is if the prosecutor's application is declined.

ELIAS CJ:

Sorry?

MR MANDER:

If the prosecutor's application at that point, in Your Honour's scenario, is declined –

ELIAS CJ:

Then it can't come in.

MR MANDER:

Well, in my submission it can because – under section 7.

WILLIAM YOUNG J:

Can I put it another way?

ELIAS CJ:

Under which?

MR MANDER:

Section 7.

ELIAS CJ:

No, section 7 doesn't sort of ride over everything. What's the point of having these specific rules.

WILLIAM YOUNG J:

Well can I –

MR MANDER:

But hasn't the Judge determined that you're not attacking, that the witness is not hostile, you're not allow to attack her veracity, therefore, subsection 4 isn't applicable but you are entitled to adduce other evidence that might be contradictory of the witness' evidence.

WILLIAM YOUNG J:

Can I put it – if you look at section 37(4) and reverse the subsections so that it reads, "A party who calls a witness may offer evidence as to the facts in issue contrary to the evidence of that witness but may not otherwise challenge that witness' veracity."

ELIAS CJ:

But that changes it altogether.

WILLIAM YOUNG J:

Well, does it? I mean that is –

ELIAS CJ:

Well, I think it does.

WILLIAM YOUNG J:

– one way of interpreting the “but”.

McGRATH J:

Yes.

ELIAS CJ:

Well, I think that that’s a huge statutory gloss and we should really be looking at the legislative history and what’s happened in some of the other jurisdictions too. Anyway.

WILLIAM YOUNG J:

Are there other jurisdictions where prior inconsistent statements have independent evidential value?

MR MANDER:

Canada allows for it.

ELIAS CJ:

Canada I think.

WILLIAM YOUNG J:

It’s Canada, is it?

ELIAS CJ:

Yes, Canada.

McGRATH J:

Where the common law changed, I think.

MR MANDER:

Indeed.

McGRATH J:

Was it not, by Justice Lamer, Chief Justice Lamer.

GLAZEBROOK J:

But I think they will still be hearsay, aren't they? So there's other glosses in Canada.

MR MANDER:

Section 9 of their Act, which allows for – to immediately introduce the inconsistent statement but, it doesn't, by introducing it, become proof of the truth of its contents, but the common law, the Canadian Supreme Court has gone one step further and said if you satisfy various issues relating to reliability, it can go in as proof of the truth of its contents. So that you'd take it in stages.

McGRATH J:

It's quite an interesting discussion of the lack of any common sense underlying the common law rule. It appeared that in Chief Justice Lamer's judgments, he goes back into the history of the whole matter.

MR MANDER:

And there's a disagreement as to the status of the –

McGRATH J:

Yes, there's some dissent in there too, yes.

MR MANDER:

If I can just make one final, the final point that I wish to make in respect to the case of *Cairns*. Towards the end of the page, the English Court of Appeal, it's the second to last paragraph, identify it as a rational –

McGRATH J:

Just tell me what page you're on again.

MR MANDER:

Sorry, Sir, page 670.

McGRATH J:

Okay, after the passage you last referred to.

MR MANDER:

That's right. "So it's clear, in our view, that the prosecution may properly call a witness when they rely on one part of the evidence but not on another part. Whether they choose to call such a witness is a matter for their discretion, to be exercised from the principles which we have already set out. But that does not amount to an attack on their own witness' credit. In the present case, the prosecution identified a rational explanation for not relying on part of Barry Cairns' evidence, namely his relationship with his wife and with his friend Hussain. That explanation did not cast doubt on his evidence about Chaudhary and Zaidi."

So my case, in my submission, the relationship between the witness and the accused was seen as something which could be put in front of the jury, something that could be used to rationalise whey the Crown accepted, or relied on, some parts of the evidence but not on others and, so, in my submission, going back to the closing address of Crown counsel here, in this case, his reliance upon, "Look at the way she answered the defence counsel's questions. Look at the way she answered my questions." The reference is made, "She's really a witness for the defence and friendly to the defence, understandably so." That does not, in of itself, amount to an attack on her veracity in my submission.

If there are no further questions, those are my submission.

ELIAS CJ:

Thank you, Mr Mander. Yes, Mrs Ablett-Kerr.

MRS ABLETT-KERR QC:

Your Honours, I produce the Canadian legislation for you. It's at tab 8 of the bundle of authorities. It's half in French and the translation is in English. I'm not sure which way. I know my junior speaks French, so I should have left it to him to deal with that but I shan't.

ELIAS CJ:

Sorry, which – I see.

MRS ABLETT-KERR QC:

It's at tab 8 and you can see it's 9(1). It's on the bottom of the first page that has been...

So the legislation in Canada is different and it does envisage the two-stage process, but at each stage leave has to be granted by the Judge, and so, even though you can, with the leave of the Judge, the first stage put the statement, it doesn't, of itself, become evidence, which is quite different to the legislation we now have in place. That part of it is more in line with how matters used to be before the Courts in New Zealand. Now, presumably, the Act, those that drafted the Act in New Zealand were well aware of what would've been happening in Canada and so that the legislators here have not gone down this path. They could've gone down the path. It's nothing radically new or taken by surprise and they haven't.

Instead, we have an Act, the scope of which clearly preserves the cross-examination of your own witness to situations where hostility is found by the Judge and, with respect, straining the statutes in order to try and make it fit this case doesn't really help develop the law here. If we are to – if it is to be changed, if people's inconsistent statements are to be able to be produced in the way my learned friend, Mr Mander, has suggested they should be, then that is a matter for the legislator to deal with. That's the purpose, isn't it, of code applying?

And, Your Honour, to say that somehow the position of a non-hostile witness getting the previous inconsistent statement of a non-hostile witness in, is an easier path than a hostile witness, doesn't actually make, in my submission, a lot of sense, nor does it do justice much good, because if my friend is right, if you have person who is not displaying the demeanour of hostility and doesn't otherwise fit the classical picture of a hostile witness, then the prosecutor does not need to worry about that, about proving hostility but can get it in anyway. So where were the rules that stop inconsistent statements coming in? It seems to me there would be very little restriction on previous inconsistent statements being produced.

GLAZEBROOK J:

Can I just ask you, in the case where a witness is genuinely mistaken in Court, and let's say we have our genuine person who has absolutely nothing to do with the traffic accident, Mr Mander, who says the car was blue, had earlier said it was green, presumably have shown the statement, although it could be done in the way the Chief Justice suggested and then the person might well say, "Oh, whoops, actually

I'm probably wrong. It was green." But the difficulty is that your suggestion is you can't even put the inconsistent statement to them at all, except perhaps in a voir dire because it might be the person says, "Oh, my memory must have failed me," or, "Now I think about it, that was actually a slip of the tongue. I didn't mean to say blue. I meant to say green." I've forgotten which way round Mr Mander's example was but –

MRS ABLETT-KERR QC:

Yes, Ma'am, that might be a situation. One can envisage that as a situation and that's why you have the voir dire isn't it? That this is not done in front of a jury, but a Judge who has the responsibility, the gatekeeper, is provided with sufficient information upon which he can then give his permissions, or decline his permissions. But to say that, "Well, you can just go ahead and do it, and then if it looks as though the person is hostile, then we'll have them declared hostile." What's the point? The statement is in, isn't it? Or if it really is a refreshing memory case, then the statement is in as well.

And in this particular case, if we approached it on the basis that perhaps this is just a refreshing memory because the passage of time, two years, might have confused the lady and it's a passage of time, then we are saying that it was all right –

ELIAS CJ:

What's the provision of the Act about by reason of the time that's elapsed? You can't remember?

GLAZEBROOK J:

That's section 35.

WILLIAM YOUNG J:

Yes, 35, but there's also section 19.

GLAZEBROOK J:

But that's with consistent statements.

ELIAS CJ:

All right, thank you.

WILLIAM YOUNG J:

Sections 35 and 19.

MRS ABLETT-KERR QC:

But if we are saying, well that's all right, because it might be a refreshing memory situation really and there's no bad intentions on the part of the witness, by the time the prosecutor has put this statement in the way that has been done in this case. He's actually done exactly what was done in *Rongonui*. He has led her through the statement.

Now I appreciate that, of course, in *Rongonui* we were talking about, or this Court was talking about, refreshing memory, as opposed to questions of hostility, potential, or veracity, but it's the procedure that this Court was talking about. That's the important thing about *Rongonui*, isn't it? That if the prosecutor takes the witness, his own witness, line by line, "virtually" I think *Rongonui* says, "virtually" line by line through the statement, that's leading questions.

Now, why should it be any different in Mr Hannibal's case, whether it's refreshing memory or whether it's leading up to hostility and doesn't turn out to be hostility, or does, where is the difference in the procedure? Why should the procedure be any different? And in this case, in Mr Hannibal's case, we can see that Mr Smith, for the Crown, didn't stop at putting the one inconsistency that he was concerned with and had been articulated in front of the Judge, and that was, did he go into the house or not, but he also led her, at page 215, bundle 3, volume 3, sorry, and down at line 25, "Do you recall saying to that constable, 'We were last at our house in 31 Eskvale Street, on Saturday morning at 10.30 am?'"

Now I don't wish to distract you but timings of arrival at the property were important. They were important because of when fires started, et cetera, et cetera. So he hasn't even confined himself to the one issue that the trial Judge had been told was a matter of concern.

My friend has argued in front of you today this is not cross-examination. My submission is that if *Rongonui* is right about leading a witness line by line amounts to cross-examination, then it's cross-examination for refreshing of memory

or a hostile witness, and that shouldn't have been allowed, and that His Honour was incorrect in making that decision.

If I may, I'd like to take you to the in-chambers discussion that took place between counsel and the learned Judge, and I think His Honour, Justice Chambers was suggesting that, really, we should focus our attention, start our attentions on what the Judge said on the bottom of page 43, and not be concerned about what had gone on before, because that was the Judge, sort of, working through things in his mind and that, really, he focuses his attention at the bottom of page 43. And certainly at the bottom of 43, His Honour is right to the extent, in my respectful submission, that that is the ultimate decision that the trial Judge gives, albeit at 42 he says, "Okay, all right, well, I rule that you can re-examine her on the contents," but then a page and a bit later he says, "What I think we should do is put it to her on the basis that you ask her in chief whether Mr Hannigan went into the property and she says, 'Yes he did.' In cross-examination Mrs Stevens has asked you whether Mr Hannigan went into the house, perhaps placing emphasis on that to which he said that he did not. Can she explain the difference?" That's what the permission was. And then he says, "It may be," so there's a stepping back here, "It may be, depending upon her answer," which he hasn't discussed the variety of answers that could potentially come, "It may be, depending upon her answer, that you can put to her, her prior statement that was not consistent with her evidence in cross-examination."

Now, in my submission, what the Judge envisaged there was Mr Smith coming back to him to see where that took them. Did that take them into the realms of hostility or didn't it? It is not a licence to cross-examine the witness, albeit at page 42, he has said, "Well I rule you can re-examine her on the contents of the statement to provide a fair and complete picture."

If that is, as my friend suggests, a subject of – subject to 89, then is he saying that the whole statement can be put or only bits that are relevant, only bits that need clarification to remove ambiguity? In my submission, he's wrong. That permission should not have been granted in the first place, and whether it was based on this proposition that even if he hadn't given permission, it could have been put in, in any event, because there is a right to do that, to prove it, and maybe that is the key question here, as to whether there was a right to produce this statement come what may? And in my submission, that can't be so because if that is so, it renders statutory provisions, not just 94, but other provisions really having no force behind

them at all, and we know that when permission is given, the Judge has an obligation, for example, in 94, the permission to cross-examine the witness is only to the extent authorised by the Judge. So if you were going to cross-examine a hostile witness, the hostile witness can only be cross-examined to the extent the Judge allows it, but if the witness is not hostile, you can put all of their statement in and you can lead them? Your Honour, in my submission, that really just doesn't – it defeats the purpose of the scope of the Act that we have in front of us and that we've had to deal with it, to deal with.

If I may, there are just some other points that I really would like to deal with. I think it was, again, Justice Chambers, who suggested that what the prosecutor was doing was merely authenticating the statement when he asked the questions at 214 and the top of 215. My submission would be that it goes much further on authenticating when you actually put the content. You put the content and you ask for an explanation. That's much further, in my submission, than authenticating the statement and, in this case, we can see that there were, in fact, follow up questions. I know my friend, Mr Mander, perhaps doesn't see them as follow up questions but, in my submission, if we look closely at 214, 215, 16 and 17, there are follow up questions. There are other issues that are raised, testing, testing the content of the 26th statement and the 21st statement.

His Honour says at page 42, he was talking to – page 43 of volume 2, half way down, there'd been a discussion about whether both statements are to be put or only one, that's the 21st, which was a tight statement made by Ms White, Mrs Hannigan, on the day of the fire, and then a lengthy, handwritten statement that was made on the 26th and Mr Smith then wonders whether the simplest thing to do is to, simply, allow her to read it or have her read the relevant passages out loud, so that she reads it out to the jury and the Court says, "Well, I would only do that with Mrs Stevens' consent, because there's, otherwise, no basis upon which you could do so. She has not had any difficulty with remembering, so it's not an issue of refreshing her memory. I mean, I think, in fairness, if there's been any reference or absence of relevant reference to going into the house in either statement then it should be put to her." So, he's declining permission for her to read it and for her to, I don't know whether he means actually see it or not, and yet, gives permission for Mr Smith to put these matters. Well, it seems to me that whoever gives it, whether it's Mr Smith, or whether it's Mrs Hannigan reads it and then gives it, it's the same principle behind it. It's the same principle and, in my submission, that goes much further.

My friend, Mr Mander, said that this issue has been made more important – I think, what were the words, "The issue was made to seem more important for appellate purposes." Well that, in my submission, is quite incorrect. The Judge, himself, saw this as the crucial issue. It was an important issue. This isn't something that's been elevated to a level of importance that it didn't have at the trial and the Judge recognised it as such.

Perhaps I should also emphasise that my learned friend said that I had only referred to a couple of matters on page 66 or 67. I haven't gone through them all. This is the closing speech and I certainly highlighted one or two. I didn't take you through each or every one of them, of the items, but they are there, page 66, 20th of June. I'm going to take a little time over this because it's perhaps the most contentious day. The Crown says, "Mr Hannigan was the last to leave the house," et cetera, "It would only require a minute." Well that's – he goes into that and I don't need to go into that. Then page 67. Sixty-six acknowledges that this is the most contentious day.

ELIAS CJ:

Well we have really -

MRS ABLETT-KERR QC:

Yes, well I don't need – I was just a little perturbed –

ELIAS CJ:

– done this a bit to death, Mrs Ablett-Kerr. I mean, if there's any point of reply that you want to draw to our attention, of course, do so.

MRS ABLETT-KERR QC:

Yes. I point, then, on 67, which is a very significant – I don't wish to delay you any further than necessary, of course, but 67 is the part of the evidence where, closing where Crown counsel is describing to the jury how Mrs Hannigan came back to Court following the weekend, and we'd heard from Mr Hannigan's cross-examination. He then follows that up with, "But we then learnt, however, that she told the story in a very detailed statement." It's as though the story was gradually unravelling. Well that's not, of course, how it was at all, and the point I wish to make is this. That the accusation of bias and collusion is borne out, in my submission, by the words and is not answered by the suggestion that he was entitled to criticise Mrs Hannigan's

reliability. He didn't, in fact, confine himself to reliability. He went much further than that and said that where she didn't have a memory, my friend said that well, she was unsure and that she – there was a memory problem, then she couldn't remember back, but she was prepared, so the prosecutor said, to fill the gaps with what Mrs Stevens had put to her. And that must be, then, lying, if she hasn't got a memory and she accepts that the propositions that are put to her by counsel for the defence, then she is not telling the Court the truth. So that, even whether you're calling it lying or whether you don't call it lying, that's what it is. It's saying, she's prepared to come to Court and to tell you that she has got a memory to accept that as a proposition.

Ma'am, the other things that I've said, I've said it earlier and unless there is something that you think that I can help you over – well not help, just make a comment –

McGRATH J:

Just on the point you've just been discussing, Mrs Stevens certainly made no bones about her own criticisms of counsel on that respect, didn't she? This is Mr Mander was suggesting there was some balance, and I've read that passage over lunchtime and she got stuck in, Mrs Ablett-Kerr.

MRS ABLETT-KERR QC:

She did the best she could in the circumstances but whether that creates a true balance. I mean, at the end of the day, if this matter shouldn't have gone in at all, then it doesn't matter what Mrs Stevens says. If it shouldn't have been in, it shouldn't have been in and it's not saved because of Mrs Stevens' criticisms in her closing address.

McGRATH J:

I certainly don't dispute that. It's really just the tenure of the comments in final submissions.

MRS ABLETT-KERR QC:

She wasn't happy about what he'd been saying, certainly.

McGRATH J:

And she gave as good as he got.

WILLIAM YOUNG J:

Well, there are two issues here, though. One is, should the evidence have been led, and what Mrs Stevens has got to say in closing has got nothing to do with that.

MRS ABLETT-KERR QC:

Yes.

McGRATH J:

Yes.

WILLIAM YOUNG J:

Whether a few rough edges of what the prosecutor has said and whether that's material, and even if we get there anyway, leaving aside it wasn't the point on which leave to appeal was granted, but just dealing with it on a merit, whether he was over the top and whether that matters, is to be assessed in light of all the facts, including what defence counsel said.

MRS ABLETT-KERR QC:

Well, yes, you take that into account but if it shouldn't have been there, it shouldn't have been there and that's, in my submission, that should –

McGRATH J:

That's the issue we've got to look at.

MRS ABLETT-KERR QC:

– be the end of it really, and we can't, of course, get away from the fact that, despite it being in and dealt with, this was a majority verdict after an overnight deliberating and the jury pointing out actually that was an issue. That was an issue, and it was an issue that clearly may well have been the one that tipped – there's a real risk, in my submission, that that issue was the one that tipped the balance against Mr Hannigan.

ELIAS CJ:

Thank you, counsel. We'll take time to consider our decision. Thank you for your submissions.

COURT ADJOURNS:3.20 PM