IN THE SUPREME COURT OF NEW ZEALAND

SC 20/2012
[2013] NZSC 41

SHANE DANIEL HANNIGAN

v

THE QUEEN

Hearing:	2 October 2012
Court:	Elias CJ, McGrath, William Young, Chambers and Glazebrook JJ
Counsel:	J M Ablett-Kerr QC and D J Matthews for Appellant C L Mander and L C Preston for Crown
Judgment:	26 April 2013

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS

ELIAS CJ

[1] The appeal concerns the conditions upon which the Evidence Act 2006 permits a witness to be contradicted on examination by the party who calls him by reference to a previous statement made by the witness inconsistent with the evidence he has given. The appellant argues that such contradiction is cross-examination

which can be undertaken in conformity with s 94 of the Act only following a determination of hostility.

[2] A previous inconsistent statement is not hearsay for the purposes of the Act if the maker of the statement is called as a witness.[1] It does not therefore attract the former common law restrictions and may be admitted as truth of its contents even if not adopted by the witness. Nor is an inconsistent previous statement subject to the limitations on the introduction of previous consistent statements under s 35.[2] In addition, if offered as proof of the facts in issue rather than to challenge the veracity of the witness, a previous inconsistent statement is not subject to the restriction in s 37(4)(a) on the party calling the witness offering evidence to challenge the witness's veracity without a prior determination that the witness is hostile.

[3] Whether the previous statement by the witness was otherwise admissible under the Act is not directly in issue on the appeal because it was not offered in evidence. Nor were its contents elicited by "cross-examining a witness called by another party" (as the definition of "offer evidence" in the Act envisages is permissible).[3] Instead, the contents of the previous statement which contradicted the witness's testimony were led from the witness by the party calling her in re-examination. For the reasons that follow, I am of the view that the fact that other impediments under the Act would not have applied to restrict the introduction of the statement does not affect the need for compliance with s 94 where the inconsistency of the statement was put to the witness by the party calling her to challenge the account she had given in evidence. Determination of the appeal turns on distinct application of s 94, such as was undertaken by this Court in *Rongonui v R*[4] and *Morgan v R*.[5] I consider that the trial Judge erred in law by failing to apply s 94. He should not have permitted the Crown to cross-examine its own witness (as in my view he did) without first determining that the witness was hostile.

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1 Section 4 of the Evidence Act 2006 defines "hearsay statement" to apply only to statements made by a person who is not a witness.

2 Section 35 applies to "a previous statements of a witness that is consistent with the witness's evidence".

3 Evidence Act, s 4.

4 *Rongonui v R* [2010] NZSC 92, [2011] 1 NZLR 23.

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

[4] Nor am I able to agree with the view suggested in the reasons of other members of this Court (although it is not one developed in the District Court or in the Court of Appeal), that the leading questions put to its own witness in the present case by the Crown were allowed by the trial Judge in the exercise of his discretion under s 89 of the Act and did not otherwise amount to cross-examination, so that s 94 was not engaged. For the reasons given in what follows, I consider that the exercise of the discretion under s 89 is not properly to be inferred from what happened and that the challenge to the witness based on her previous inconsistent statement was cross-examination not properly undertaken in examination in chief or re-examination by the party calling the witness without a prior determination of hostility.

[5] As I consider other restrictions on admissibility are immaterial to application of s 94 of the Act and determination of the present appeal, it is strictly unnecessary to determine whether the veracity rules under s 37 would have prevented the statement itself being offered in evidence. The view that s 37(4) would not have prevented admission of the previous statement was however influential in the conclusion of the Court of Appeal[6] and in the reasons given by the other members of this Court that s 94 did not prevent the questions put.[7] And the requirement of a determination of hostility under s 37(4) before a party can offer evidence challenging the veracity of its witness suggests some symmetry with s 94, although the symmetry is imperfect. It is therefore necessary to consider the meaning and application of s 37(4), because it has contextual relevance when considering the meaning and application of s 94 in the scheme of the Act.

The conduct of the trial

[6] Shane Hannigan was convicted at trial before a judge and jury on a charge of arson. He appealed unsuccessfully to the Court of Appeal on a number of grounds. He was granted leave to appeal to this Court on the single question of whether the way in which his wife, a witness for the Crown, was re-examined complied with the Evidence Act.[8]

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6 *Hannigan v R* [2012] NZCA 133 at [32].
7 At [85]–[109].
8 *Hannigan v R* [2012] NZSC 43.

[7] It was the Crown case that Mr Hannigan had attempted to set fire on two previous occasions to the kitchen of a house the couple owned before succeeding in destroying it in the fire on 21 June 2009 which was the basis of the charge of arson. The house was unoccupied at the time and was for sale, but the sub-standard lean-to kitchen was apparently deterring purchasers. The Crown suggested at trial that Mr Hannigan's purpose in lighting the fires was to obtain insurance which would enable the kitchen to be rebuilt.

[8] Mr Hannigan's opportunity on 20 June to light one of the earlier fires was in issue at the trial. Indeed, the Judge described it as the "crucial issue" in the context of the trial. In a statement to the police given on 26 June, Mrs Hannigan said that the couple had driven to the house on 20 June to check that it was secure. She said that, while she waited in the car, Mr Hannigan "went inside the house also just to look around, as we had been doing [on previous occasions]". If Mr Hannigan went into the house, there was opportunity for him to start the fire. In her evidence in chief at the trial, however, Mrs Hannigan's account was not specific on the question of entry into the dwelling. On this point, she simply responded to a question from the prosecutor which referred to entry "into the property" by confirming "Shane did. I stayed in the car."

[9] The prosecutor seems not to have picked up on the potential distinction between entry into the house and entry into the property, perhaps because the particular exchange followed Mrs Hannigan's description of the general practice she and her husband had followed on previous occasions when checking that the unoccupied house was secure and in which she said that they would "go inside and check everything was all right". Indeed, as appeared from a subsequent jury question (referred to below), the jury seemed to have understood Mrs Hannigan's evidence in chief to be that her husband had gone inside the house on 20 June while she remained in the car outside. So it is perhaps not surprising that the potential gap between Mrs Hannigan's earlier statement and her evidence in chief seems not to have been noticed by Crown counsel.

[10] When Mrs Hannigan was cross-examined for the defence on the events of 20 June, however, she agreed with questions put to her suggesting that Mr Hannigan

had checked the outside of the house only. She supplied the additional information, again in response to a suggestive question, that her husband could not have gone inside the house because she had the key. These answers set up a clear conflict with the previous statement of 26 June made to the police.

[11] In the absence of the jury, Crown counsel raised what he thought was an inconsistency between the witness's evidence in chief and cross-examination. Defence counsel pointed out that there was not any necessary inconsistency because of the way in which the question had been answered. It was agreed that this could be clarified in re-examination. Crown counsel also sought "some guidance" from the Judge as to "whether or not I can permissibly raise her previous statement to police where she did say again Mr Hannigan went inside the property". Crown counsel indicated that he would simply ask the witness whether she "recall[ed] making a statement around the time and if she sticks to the evidence that she's given today, does she recall saying something different". As Crown counsel explained:

> Certainly not cross-examination but questions around that prior statement. Might she have said something different?

[12] The discussion was inconclusive before the morning adjournment was taken although the Judge indicated his preliminary view that the previous statement could not be put to Mrs Hannigan without attacking her veracity, a course that he considered would require her to be treated as hostile and for which he thought there was insufficient basis:

> Well as it stands she has not said in cross-examination anything that's necessarily inconsistent with her evidence-in-chief. Strictly speaking she has told you that, in-chief, that Mr Hannigan went into the property and was there for only a minute or two minutes. In cross-examination she was more specific and said that Mr Hannigan did not go into the house. You can re-examine her about that issue, but really I suppose depending upon her answer at this stage you can't put to her what she said to police. ... Depending upon her answer what possible basis would you have in any event for putting to her her prior inconsistent statement?

[13] Crown counsel accepted that he could not put the statement and indicated that he had raised the matter so that he did not cross the line of what was acceptable. The Judge commented that even if the evidence, when clarified, made it clear there was an inconsistency with the previous statement "the issue is how do you get [the

previous inconsistent statement] in" in circumstances where there was no issue of the witness not being able to remember and "there's been no attack upon her veracity". Crown counsel agreed that there had been no attack on the witness's veracity. The Judge doubted that the evidence could be got in on that basis. After thanking defence counsel for pointing out that there was no necessary inconsistency between the witness's evidence in chief and her evidence in cross-examination, the Judge asked her if she wanted to be heard on what was "a hypothetical situation at the moment":

> ... I don't see how [Crown counsel] at the moment could possibly adduce evidence of what Mrs Hannigan told police in her earlier statement, even if there is a difference between them, 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 actually that she's quite an impressive witness. I suppose it – and of course you [the defence] haven't attacked her veracity; she's effectively a defence witness.

[14] Defence counsel confirmed that she did not wish to be heard on the point "because I understood your direction to [Crown counsel] that we hadn't got to a point where he could put her police statement to her". The Judge then took the morning adjournment noting that the matter needed careful consideration "because from what I can see of the case it is the crucial issue of the case".

[15] During the morning adjournment, the Judge received a note from the jury querying what it regarded as the inconsistency between the evidence given by Mrs Hannigan in chief and the replies she had given in answer to the questions put to her in cross-examination:

> On Friday - [Mrs Hannigan] stated on 20th she stayed in car while he checked for 1-2 minutes inside.
>
> But Today - [Mrs Hannigan] said she stayed in car with keys & he only checked outside.
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> Could this please be clarified.

[16] As had already been resolved in the discussion in chambers**,** the transcript showed that the evidence in chief was not explicit as to whether Mr Hannigan went into the house as opposed to into the property. The jury however seems to have gained the impression from the context of the evidence given by Mrs Hannigan

immediately prior as to the practice followed by the couple in checking that the property was secure by entering the house (evidence that immediately preceded the questions about what happened on 20 June) that there was a conflict in the evidence. As had been discussed in chambers, this point was to be clarified in re-examination.

[17] The answer given in cross-examination was, however, inconsistent with the statement Mrs Hannigan had made to the police on 26 June, as was known to counsel and the Judge. If Mrs Hannigan were to maintain the evidence she had given in cross-examination, the question whether the previous inconsistent statement could be put to her remained for determination.

[18] Over the morning adjournment the Judge revised his initial impression that the previous statement could not be put to Mrs Hannigan without questioning her veracity and required a determination of hostility. On checking an evidence textbook over the adjournment he seems to have come to the view that the statement was admissible independently. That was on the basis that, being inconsistent, the statement was not precluded from being offered in evidence by s 35 and, if offered as truth of its contents, the Judge considered it was not for the purpose of challenging the witness's veracity so that the veracity rules of the Act (which required a determination of hostility) were therefore not engaged. In his remarks to counsel, the Judge made no specific reference to s 94.

[19] The Judge directed that Crown counsel, in re-examination, should first clarify whether there was inconsistency between the answers given in evidence in chief and cross-examination. That direction responded to the jury query. The Judge indicated that then, "depending upon her answer, ... you can put to her her prior statement that was not consistent with her evidence in cross-examination". In that event, "to provide a fair and complete picture", the Judge directed that she should be referred both to the statement of 26 June and to an earlier one made on 21 June. In the statement of 21 June Mrs Hannigan had not been explicit about entry into the dwelling but referred to having herself helped check that the windows and doors were secure on 20 June (a detail itself inconsistent with her evidence that she remained in the car). Defence counsel was advised she would then have the opportunity for further cross-examination.

[20] In the presence of the jury, Crown counsel reminded Mrs Hannigan of what she had said in evidence in chief and cross-examination and asked her to clarify whether her evidence was that her husband had gone on to the property or gone into the house. She answered:

> I was meaning he went on to the property not physically inside the house.

This answer confirmed the conflict between the evidence of the witness given in cross-examination and the previous statement to the police, and claimed that her evidence in chief had been to the same effect as the evidence she had given when cross-examined.

[21] Crown counsel then asked about the two earlier statements made by Mrs Hannigan to the police. He asked Mrs Hannigan if she remembered saying in her statement of 26 June that she had waited in the car while Mr Hannigan "went inside the house and also just to look around as we had been doing". Mrs Hannigan said in answer that she recalled the interview but did not recall "exactly that but I've, from my memory just went round the outside of the house". Similarly, Mrs Hannigan was asked whether in the earlier statement she had made on the day of the arson, 21 June, she had described participating with her husband in checking that the doors and windows were secure. In answer to a question whether she recalled making that statement she said "Yeah, I think so, yeah." These questions entailed Crown counsel leading from the Crown's witness the substance of her earlier statements. Crown counsel then asked Mrs Hannigan, "in fairness" to her, to take the opportunity to explain the differences between the evidence she had given and the two statements. When she did not answer, he prompted her with additional questions:

> Q Can you explain why the statement to the police on the 21st, the day of the fire, says that you both, or that, "We checked all the windows and doors", but that your statement five days later says that you stayed in the car?
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> A No, I can't. It was very hard at that time. I don't know whether we were just saying we or things, just …
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> Q Secondly, can you explain why the statement on the 26th of June says, "Shane went inside and looked around just as we had been doing", but then today you've said he didn't go inside?

A Um, I thought he didn't but I could be just getting my days mixed up. I can't recall right now.

[22] When Mrs Hannigan was further cross-examined by defence counsel, she said in response to leading questions that she had been upset and under stress when she had given the 26 June statement and might have made a mistake. She then confirmed in answer to propositions put to her the evidence that she had remained in the car with the key, making it impossible for Mr Hannigan to have gone inside:

Q When 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 and your evidence is in fact the correct position?

A Yeah.

Q That he couldn't have gone inside because you had the keys?

A Yes.

Q And you certainly didn't see him from your position do anything other than check the outside?

A That's right.

[23] In his closing address to the jury, Crown counsel disclaimed any intention to suggest that Mrs Hannigan "is a dishonest person". But he suggested that she was, "understandabl[y]", "doing what she could to assist her husband" when she had the opportunity to do so in her evidence and that "in reality Mrs Hannigan was a witness who was friendly to the defence":

> 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. But she's drawn to the version that best supports her husband's case.

The appeal

[24] Two points are taken on behalf of the appellant. The first is that the Judge failed to observe the requirement of s 94 of the Evidence Act relating to the cross-examination by a party of its own witness:

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

The second point taken is that the Judge wrongly proceeded on the basis that the previous statement would have been admissible independently under s 37(4)(b) if offered, not as evidence challenging the witness's veracity (which would have required a prior determination of hostility), but as to the facts in issue:

> (4) A party who calls a witness—
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> (a) may not offer evidence to challenge that witness's veracity unless the Judge determines the witness to be hostile; but
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> (b) may offer evidence as to the facts in issue contrary to the evidence of that witness.

[25] The Court of Appeal did not deal distinctly with the requirements of s 94 of the Evidence Act. Argument based on s 94 does not seem to have been much developed in that Court, which seems to have focussed on the veracity rules under the Act. The heading in the Court of Appeal judgment dealing with the Evidence Act point (one of three points taken in the Court of Appeal) describes it as concerned with the "[i]mproper challenge by Crown to veracity of its own witness". The Court of Appeal took the view that s 37(4) was not engaged because, in re-examining Mrs Hannigan, Crown counsel did not "offer evidence to challenge that witness's veracity".[9]

[26] The Court of Appeal was strictly correct in the view that s 37(4) was not directly engaged. The Crown did not seek to offer the previous statement as evidence by production of the statement itself. If the Court of Appeal intended to go further by proposing, as is suggested in the majority reasons in this Court, that the statement itself could have been offered (an interpretation of its judgment that is doubtful), then I am unable to agree, for the reasons developed below.

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9 *Hannigan v R*, above n 6, at [32].

[27] On the course of examination followed (and therefore in apparent reference to s 94), the Court of Appeal took the view that there was nothing amounting to cross-examination or challenge to veracity:

> [33] Indeed the prosecutor expressly told the jury that he was "not suggesting [Mrs Hannigan] is a dishonest person". He certainly questioned the accuracy and reliability of her evidence, given the inconsistency between what she had said in her evidence-in-chief, and what she had said under cross-examination, compounded by the further inconsistency between those two versions on the one hand, and, on the other hand, what [Mrs Hannigan] had stated to the police on two successive occasions both very close to 21 June 2009.
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> [34] The prosecutor was perfectly entitled to clarify, in re-examination, what [Mrs Hannigan] had said under cross-examination. And there could be no objection to the prosecutor re-examining in a manner which cast doubt on the reliability of [Mrs Hannigan's] evidence. Reliability and veracity are distinctly different concepts.
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> [35] Quite apart from that, had the prosecutor not clarified [Mrs Hannigan's] evidence, then the jury's question obliged the Judge to do so. What occurred was necessary and proper, and in no way gave rise to a miscarriage of justice.

[28] In this Court, Mrs Ablett-Kerr contends that s 94 was not complied with and that s 37(4) would have prevented the statement being introduced to challenge the veracity of the witness without similar determination of hostility. The re-examination conducted by Crown counsel amounted to cross-examination as to the veracity of the witness in her evidence and went beyond the clarification sought by the jury. She argues that it was necessary for the Judge to find Mrs Hannigan to be hostile before the Crown, the party calling her, could cross-examine her or offer evidence to challenge her veracity. The question of hostility could have been addressed on voir dire, if necessary.

The jury question

[29] Contrary to the way in which it was treated by the Court of Appeal, I do not regard the question asked by the jury as requiring reference to the statement of 26 June. The jury question was directed to its understandable impression that there was a contradiction between the evidence given in chief by Mrs Hannigan and in cross-examination. As has already been described, there was no necessary inconsistency because of the loose way in which the question to which

Mrs Hannigan responded in evidence in chief was phrased. The impression of contradiction in the evidence was resolved when the ambiguity was pointed out and the witness adhered to the evidence she had given in cross-examination. No further examination on the point was necessary to resolve the jury query, as the trial Judge appreciated.

Leave to put leading questions

[30] Section 89(1) prohibits leading questions being put to witnesses in examination in chief or re-examination except in three circumstances:

(a) the question relates to introductory or undisputed matters; or

(b) the question is put with the consent of all other parties; or

(c) the Judge, in exercise of the Judge's discretion, allows the question.

[31] Section 89(2) makes it clear that tendering a written statement of a witness is a form of leading question by permitting such course to be followed only when allowed by the Judge "if permitted by rules of court", allowing a written statement or report of a witness to be "tendered or treated as the evidence in chief of that person". No such rules of court permit this treatment of written statements or reports in criminal proceedings except by consent.[10]

[32] I am unable to read the direction given by the trial Judge as permission under s 89(1)(c) to lead the content of the statements from the witness. It is unclear whether, in indicating on a contingent basis that the statements might be "put" to the witness, the Judge envisaged that their contents would be put in leading questions for comment by the witness. The statements could have been drawn to the attention of the witness, to see if she maintained the evidence she had given in cross-examination and re-examination and to provide proper foundation for a request to determine her hostile, in order to allow cross-examination. If leading questions had been envisaged on a point that the Judge indicated was crucial to the case, one would have expected

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[10] Evidence Act, s 9.

closer consideration and more direction. In *Rongonui*, this Court took the view that exercise of the s 89(1) discretion is not readily to be inferred where it is not explicitly undertaken, at least where the evidence being led is significant.[11] Here, the contents of the statement went to what the Judge described as a crucial point in the case. The witness was led through the earlier statements. Permitting such leading was to allow cross-examination, as was recognised by this Court in *Rongonui*.[12] In those circumstances, the s 89(1) discretion could not have been exercised to evade the requirement in s 94 that such cross-examination be preceded by a determination of hostility.

Cross-examination of own witness

[33] Section 94, set out at [24], requires a determination of hostility before a party calling a witness is permitted to cross-examine the witness. The questions put in re-examination here were leading. In substance, they first introduced the previous statements and then asked the witness to explain discrepancy with her testimony.

[34] In *Morgan* (where a determination of hostility was made and cross-examination allowed), this Court was unanimous in treating questions which ask the witness to confirm previous statements as leading questions which require either a determination of hostility under s 94[13] or the exercise of the discretion under s 89(1)(c).[14] In *Rongonui*, the Court was unanimous in holding that the questions by which a Crown witness was asked to confirm what she had said in a previous statement (having first refreshed her memory with the leave of the Judge by reviewing the statement) were leading questions.[15] As Tipping J there said for all members of the Court, such procedure "would have been justified if the witness had been declared hostile under s 94", but no such determination had been sought.[16] Nor did the Court accept that the leading questions were simply to "jog" the memory of the witness, or could properly be treated as put with the implicit permission of the

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11 *Rongonui v R*, above n 4, at [58] per Tipping J for all members of the Court on this point.
12 At [55]–[56].
13 *Morgan v R*, above n 5, at [36] per Blanchard, Tipping, McGrath and Wilson JJ.
14 At [2] per Elias CJ.
15 *Rongonui v R*, above n 4, at [55]–[56] per Tipping J for all members of the Court on this point.
16 At [56].

Judge in exercise of the s 89(1)(c) discretion.[17] As is the case on the present appeal, the leading questions went to a central issue in the case. The Court considered that the Judge was not to be taken to have exercised the s 89(1)(c) discretion by implication on such an important point.[18]

[35] In the same way that the questions in *Rongonui* could not be minimised as simply ones to "jog" the memory of the witness, I do not think the questions here asked of Mrs Hannigan, which repeated the substance of her previous statement that her husband had gone into the house (the critical issue upon which the re-examination took place), can be properly described as "scene-setting".[19] They were leading on a critical issue in the case.

[36] In addition to being leading, the previous statements invoked by the questioner contradicted the evidence given in cross-examination and confirmed in re-examination. Such contradiction is cross-examination, as s 92 suggests in describing the duties of cross-examination as extending to "significant matters that are relevant and in issue and that contradict the evidence of the witness".

[37] Relevant to the interpretation of s 94 (as well as to the interpretation and application of s 37(4)) is the definition of "hostile". Section 4 of the Act defines "hostile" in relation to a witness as meaning that the witness:

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

[38] "[A]n intention to be unhelpful" to the Crown in terms of the inconsistent statement (the second description of "hostile" in the definition) is precisely what was suggested by Crown counsel in his address to the jury in explaining that

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17 At [57] and [58].
18 At [58].
19 Compare majority reasons at [106].

Mrs Hannigan was trying in her evidence to be "friendly" to the defence. The evidentiary basis for that suggestion was the previous inconsistent statement elicited through her in re-examination. In addition, the contradiction put to the witness (on what the Judge referred to as the crucial issue in the case) inevitably entailed challenge to the veracity of the witness in the proceeding.[20] The evidence that Mrs Hannigan had retained the keys and thus that Mr Hannigan could not have gone inside the house was completely at odds with the statement and contained significant additional detail as to the keys, which was not able to be explained by mistake in the evidence or loss of memory. The failure of the witness to adopt the substance of the statements in her evidence meant that her answers were relevant only to discredit the account Mrs Hannigan had given in evidence. And that is how it was used by Crown counsel. In his closing address to the jury he said:

- "Mrs Hannigan was all over the place" on what happened on 20 June (a criticism that depended on proof of the previous statements);

- "in reality Mrs Hannigan was a witness who was friendly to the defence";

- "where she had the opportunity in her evidence, she was doing what she could to assist her husband";

- "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. But she's drawn to the version that best supports her husband's case".

[39] Notwithstanding the disclaimer in the address that he was "not suggesting Mrs Hannigan is a dishonest person" and the suggestion that she might simply not remember, the remarks of Crown counsel in my view conveyed that Mrs Hannigan was untruthful in the critical evidence given, and explicitly raised bias in favour of the defence as the explanation. As indicated, I consider such challenge was

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[20] In the language of s 37(5).

inevitable since the particular inconsistency necessarily impacted on the veracity of the witness.

[40] The Judge made no reference to s 94. The Court of Appeal seems to have taken the view that the questions did not amount to cross-examination but, rather, provided necessary clarification of the evidence already given (a view with which I have already expressed disagreement at [29]).[21] Taking a different approach, but also to the effect that s 94 did not apply, the other members of this Court express doubt as to whether the questions put amounted to cross-examination, saying that there was no attempt to "break down" the account given and that the reference to the previous statements largely involved "scene-setting" which was then followed by open-ended questions.

[41] It is necessary to express disagreement with the analysis. As already indicated, I am of the view that the questions put to Mrs Hannigan by Crown counsel were cross-examination which required a determination of hostility under s 94. The questions were leading as to the substance of the previous inconsistent statements. The previous statements were referred to in order to contradict the evidence given by the witness, as their use by Crown counsel makes clear. In the scheme of the Act, such questions amounted to cross-examination. Indeed, as explained below (and for the reasons given in [39]), I also consider the challenge was as to the truthfulness of the evidence and the veracity of the witness in giving it.

Compliance with s 94 was required even if the previous statement was otherwise admissible

[42] Given his earlier indication that there was no basis for determining the witness to be hostile, the Judge seems to have taken the view that s 94 was not engaged. In part, that seems to have been because he accepted that the statement could be referred to without "cross-examination". I have already given my reasons for disagreeing with that assessment. But the Judge seems also to have thought s 94 was not engaged because he came to the view that the previous statement was independently admissible and that, in consequence, its substance could be elicited

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21 *Hannigan v R*, above n 6, at [35].

from the witness in re-examination without compliance with s 94. It seems from the record that the Judge formed this view after checking that under the Evidence Act the statement did not fall within the restriction on offering previous consistent statements in evidence under s 35 of the Act. He seems to have considered that, because the statement was not inadmissible under s 35 and because he treated it as not amounting to a challenge to veracity, it was admissible if offered and could be referred to Mrs Hannigan in re-examination for explanation of the inconsistency, without a previous determination of hostility. Certainly, the Judge did not refer in his ruling to the application of s 94 and seems to have considered that it had no further application.

[43] I consider that this approach was wrong and that s 94 must be complied with even if another potential statutory basis of exclusion of evidence or restriction on the way in which it can be introduced does not apply. So, in the present case, the fact that the statement, being inconsistent, was not excluded under s 35 does not overtake the need for compliance with the rule in s 94 or the conditions of offer provided by the rule in s 37(4). In the same way, the fact that the previous statement was not hearsay, because the maker was a witness, does not overtake the need for compliance with the rule in s 94 or the conditions of offer provided by the rule in s 37(4). The rules established by the Evidence Act are layered and are designed to meet different policies. Such approach is, I consider, consistent with that taken by this Court in *Rongonui* and *Morgan.*

[44] *Rongonui* is not properly distinguished, as the majority would distinguish it, on the basis that the case concerned a previous consistent statement which was in any event inadmissible in terms of s 35. The Court accepted that restrictions on cross-examination of a witness applied independently and required distinct consideration and compliance.

Consistency with s 37(4)

[45] As I take the view that s 94 must be observed irrespective of whether evidence contradicting the witness is not otherwise subject to restriction, it is not strictly necessary to determine the circumstances in which s 37(4) prevents a party

calling a witness from offering evidence of the witness's inconsistent previous statement without a determination that the witness is hostile. It is however important to the reasons of the majority in this Court (in holding that s 94 did not prevent the contents of Mrs Hannigan's previous statement being elicited from her in re-examination) that they consider Mrs Hannigan's previous inconsistent statement to have been "independently admissible" evidence under s 37(4)(b). The approach they take is that the "practical operation" of the legislation requires some equivalence between s 94 and s 37(4), so that a determination of hostility is not required before a party elicits from its own witness a previous statement inconsistent with the evidence given where it is "independently admissible" under s 37(4)(b) because "evidence as to the facts in issue".

[46] The approach taken by the majority requires some reading down of the definition of veracity in s 37(5), which recognises that the disposition to refrain from lying may either be generally or "in the proceeding". It is also difficult to reconcile the reading, which effectively confines veracity to general propensity to lie, with the definition of "hostile" (referred to in [37]), which assumes that "lack of veracity" may be in relation to a particular "matter about which the witness may reasonably be supposed to have knowledge".

[47] In my view the need for the "practical operation" of the legislation does not prevent observance of s 37(4)(a) in cases where a previous inconsistent statement is offered by the party calling the witness both as proof of the truth of its contents (admissible under s 37(4)(b)) and to challenge the veracity of the witness in the evidence given in the proceedings. In such cases of overlap (which will not arise whenever there is inconsistency between a previous statement and the evidence of the witness), I consider that a determination of hostility must be sought if the statement is to be used to impugn the veracity of the witness. Inquiry of counsel before such evidence is offered may be necessary, but I do not think there is anything impractical in the use of such evidence to contradict a witness called by the party.

[48] As is relevant, s 37 provides:

> **37 Veracity rules**
>
> (1) A party may not offer evidence in a civil or criminal proceeding about a person's veracity unless the evidence is substantially helpful in assessing that person's veracity.
>
> (2) …
>
> (3) In deciding, for the purposes of subsection (1), whether or not evidence proposed to be offered about the veracity of a person is substantially helpful, the Judge may consider, among any other matters, whether the proposed evidence tends to show 1 or more of the following matters:
>
> (a) …
>
> (b) …
>
> (c) any previous inconsistent statements made by the person:
>
> (d) bias on the part of the person:
>
> (e) a motive on the part of the person to be untruthful.
>
> (4) A party who calls a witness—
>
> (a) may not offer evidence to challenge that witness's veracity unless the Judge determines the witness to be hostile; but
>
> (b) may offer evidence as to the facts in issue contrary to the evidence of that witness.
>
> (5) For the purposes of this Act, **veracity** means the disposition of a person to refrain from lying whether generally or in the proceeding.

[49] It should be noted that there is no exact symmetry between ss 94 and 37(4), since s 94 prevents cross-examination whether or not the questioning challenges the veracity of the witness. Section 37(4) does not encroach upon the general prohibition on cross-examination of a witness under s 94 any more than s 9 of the Evidence Act 1908, which it replaces and reforms, exempted from the general common law restriction on cross-examination of a witness called by the party cross-examining based on "other evidence" which contradicted him.[22] Nevertheless, where the veracity of a witness is in issue, ss 94 and 37(4) express a common policy:

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[22] Section 37(4) echoes s 9 of the former Evidence Act 1908 (the text of which is set out at [124]) which was, however, not confined to challenges to veracity.

a party may not challenge the veracity of its witness through cross-examination or by evidence unless the witness is determined to be hostile.

[50] Not all previous inconsistent statements by a witness challenge the veracity of the witness. Nor does other evidence as to the facts which contradicts the evidence of a witness necessarily challenge the witness's veracity (as s 37(4)(b) explicitly acknowledges). In many cases a previous inconsistent statement may be offered not to challenge the truthfulness of the witness in the evidence given but to contradict it for inaccuracy or incompleteness not attributable to lack of veracity but to some other cause, such as lapse of memory. In others, a previous inconsistent statement may be offered, not to challenge the truthfulness of the witness's evidence (which may be silent on the matter covered in the statement), but rather as direct evidence of facts in issue. Neither of these cases requires application of the veracity rules contained in s 37 of the Act, which are generally (but not exclusively[23]) concerned to provide the judge with powers to control the proliferation of what is often a collateral issue. Where however discrepancy cannot be explained except by untruthfulness in one account and where the purpose of putting the discrepancy in evidence is to submit untruthfulness, bias, or a motive for untruthfulness "whether generally or in the proceeding" (indications specifically identified in s 37(3)), then the scheme of the Act is that a party calling the witness may offer it in evidence for that purpose only if "the Judge determines the witness to be hostile".

[51] There may be overlap between the purposes for which a previous inconsistent statement of a witness is offered. It may be offered both as proof of its contents and to challenge the veracity of the witness who made the statement, either generally or in the evidence he has given which is inconsistent with the statement. It may be necessary to ascertain the use to which the inconsistent statement is to be put by the party offering it in order to know whether there is such overlap and therefore whether a determination of hostility is required for the use to challenge veracity.

[52] The rule contained in s 37(1) does not prohibit any evidence that is "substantially helpful" and s 37(3) recognises the obvious point that previous

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[23] As inclusion of s 37(4), in restatement of the former s 9 of the Evidence Act 1908 (concerning the control of the extent to which a party can impeach its own witness), indicates.

inconsistent statements are likely to be substantially helpful in assessing whether the witness is being untruthful in the evidence given, at least where inconsistency cannot otherwise be explained. Similarly, in cases where offering a previous inconsistent statement challenges the veracity of a witness as well as providing itself direct evidence of the facts in issue, the hostility of the witness may be inferred from the inconsistency in a matter relevant to the proceeding (as the Law Commission thought likely to be the case[24]).

The challenge here was as to veracity

[53] As already indicated, I consider that the challenge to the credibility of Mrs Hannigan's evidence is unable to be explained except by reference to her lack of veracity in the proceedings: the Judge had made it clear there was no issue with her memory in the evidence she had given, and the new detail about retention of the keys was inexplicable except on the basis of untruthfulness. As has been explained, although the veracity rules in ss 37–39 of the Act cover general propensity to be untruthful (and are concerned in that respect to limit such potentially collateral issue unless "substantially helpful" in the particular case), they are also concerned with untruthfulness in the evidence given in the proceeding, especially if there is some motive or bias suggested to prompt it, as the terms of s 37(5) and the substantive rules make clear.

[54] Crown counsel expressly disclaimed any intention to suggest that Mrs Hannigan "is a dishonest person". He was not inviting the jury to conclude that Mrs Hannigan had a general disposition towards untruthfulness. But he was suggesting that her evidence on the critical point was untruthful. He specifically invited the jury to disbelieve it on the basis of her previous inconsistent statement and suggested the witness had been motivated to help her husband. The contradiction elicited by the re-examination was not simply as to the facts in issue (as it would be if, for example, another witness had been called to say that Mr Hannigan had gone into the house). Rather it was also as to the truthfulness of Mrs Hannigan's evidence that her husband could not have gone into the house

[24] Law Commission *Evidence*: *Reform of the Law* (NZLC R55(1), 1999) at [412].

because she had the key. That was not simply a challenge to "reliability of the evidence", as the Court of Appeal sought to characterise it.[25] The use made of the re-examination in the address of Crown counsel was to challenge Mrs Hannigan's veracity in the account she gave in evidence of the visit on 20 June. The evidence which provided the foundation for the submission could in my view only have been offered through her by the party which called her through cross-examination following a determination of hostility.

[55] To the extent that the common requirement of hostility under ss 94 and 37(4) points to some equivalence (not exact) between a party cross-examining its own witness and challenging the veracity of its own witness through evidence, I consider that there is such equivalence here. The "practical operation" of the Act did not require the statement to be put to Mrs Hannigan, except in compliance with s 94. And the statement itself could not have been introduced in evidence to challenge her veracity except in compliance with s 37(4)(a). In application of both s 94 and s 37(4) prior determination of hostility was here necessary.

[56] Although the Judge was not apparently convinced at the outset that a determination of hostility was warranted, the matter should have been revisited after clarification of Mrs Hannigan's earlier answers had established the inconsistency unmistakably. The witness could properly have been invited to refresh her memory from her earlier statement in conformity with s 90, without leading her previous statements from her. If she had adhered to the account given in evidence, then before leading questions were asked eliciting the fact and effect of the earlier statements and necessarily challenging the truthfulness of her evidence, the Judge should have considered the question of hostility. That would have enabled some consideration of the suggestions later put by Crown counsel to the jury and would perhaps have benefited from the discipline of assessment against factors such as those identified in s 37(3).

[57] The inconsistency itself, if not properly explained (by voir dire if necessary), was foundation upon which the Judge could have made a determination of hostility. Indeed, the Judge seems to have come close to such a determination, as is indicated

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[25] *Hannigan v R*, above n 6, at [34].

by his remarks prior to the morning adjournment, describing Mrs Hannigan as "effectively a defence witness". The Judge should, in my view have made a determination of hostility before permitting the additional questions which amounted to cross-examination.

Conclusion

[58] The Crown should not have been permitted to cross-examine its own witness without prior determination of hostility by the Judge, in conformity with s 94. The questions which led from the witness her earlier inconsistent statement to the police amounted to cross-examination. They were leading and were asked in order to elicit evidence which contradicted the witness in necessary challenge to the truthfulness of her evidence. In the legislative context provided by ss 89 and 92 such questions are properly treated as cross-examination.

[59] The previous statement itself could not have been admitted in evidence to challenge the witness's veracity, as was inevitable and as it was used, without similar determination of hostility under s 37(4)(a). The view that the previous statement was independently admissible for all purposes despite s 37(4)(a) (an important plank of the reasoning of the majority in this Court that s 94 was not engaged) is I consider erroneous.

[60] It was necessary for a determination of hostility to precede the challenge to the veracity of the Crown's own witness through cross-examination which led from her the substance of her previous inconsistent statement. I would therefore allow the appeal. The error in application of s 94 was material because it allowed evidence to contradict the truthfulness of the witness in her testimony on a point the trial Judge regarded as critical, without the protection prescribed by the legislation.

McGRATH, WILLIAM YOUNG, CHAMBERS AND GLAZEBROOK JJ

(Given by William Young J)

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Introduction

[61] Following trial before Judge Kellar and a jury in the District Court at Dunedin Shane Hannigan was found guilty on a charge of arson. His later appeal to the Court of Appeal was dismissed.[26] His further appeal to this Court arises out of the way in which his wife, a Crown witness, was questioned by the prosecutor in re-examination on a prior statement which she had made to the police and which was inconsistent with her evidence in cross-examination.[27]

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[26] *Hannigan v R* [2012] NZCA 133.
[27] *Hannigan v R* [2012] NZSC 43.

Background

[62] At the time of the events giving rise to the charge, the appellant was living with Kirsty White. By the time of the trial, they were married and she was known as Kirsty Hannigan. For ease of reference we will refer to her throughout as Mrs Hannigan.

[63] The Crown case was that on 21 June 2009, the appellant started a fire in the kitchen of the house which he and Mrs Hannigan owned. The house was on the market at the time and the appellant and Mrs Hannigan had not been living in it for some time. The kitchen was an unsatisfactory feature of the house. It was a small and unattractive lean-to structure that had prompted unfavourable comments from prospective purchasers. On the Crown case, the 21 June 2009 fire was lit by the appellant to generate an insurance claim which he hoped would provide sufficient funds to build a better kitchen. There had been two earlier fires in the kitchen, both of which, according to the Crown, had been started by the appellant. The first of these was on 14 June 2009 and the second occurred on 20 June 2009. The defence case was that Mr Hannigan had not started any of the fires.[28]

[64] The evidence of Mrs Hannigan in issue on this appeal related to the events of 20 June, and thus, to what the Crown maintained, was the second of the attempts to burn down the kitchen. It was common ground at trial that the appellant and Mrs Hannigan visited the house on 20 June and did so before the fire started. In her first and brief discussion with the police on 21 June (that is, just after the third fire), Mrs Hannigan did not address in detail the question whether the appellant had, on 20 June, gone into the house. Instead she implied (by the use of the word "we") that they had both inspected the doors and windows inside the house. But in a more formal interview on 26 June, she said that after they arrived at the house on 20 June:

> I waited in the car at this time. Shane went inside the house also just to look around as we had been doing.

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[28] On the Crown's case, these fires constituted circumstantial evidence as to who was responsible for the third fire, which was the subject of the charge of arson.

The Crown's position was that it was at this time that the appellant lit the second of the two fires. It will be noted in passing that there was some apparent inconsistency between the two statements as to whether Mrs Hannigan had stayed in the car.

[65] The trial started on Friday 4 March 2011. Mrs Hannigan began giving her evidence that afternoon. Her evidence in chief seems to have been generally in accord with what she had told the police and there was apparently nothing in what she said, or how she said it, to suggest hostility to the Crown or partiality to the interests of her husband. But on the issue of what happened on the visit to the property on 20 June, there was an element of ambiguity as to what she meant, an ambiguity which arose primarily because of the form of the question that was put to her by the prosecutor.

[66] Before dealing directly with what happened on 20 June, the prosecutor asked Mrs Hannigan about the usual practice that she and her husband followed when visiting the house:

> Q And what would you do when you checked the house over that period?
>
> A We'd just go inside and check everything was all right.
>
> Q Check what sort of things?
>
> A Um, just check the windows and just check the doors were all locked, just have a general walk around.
>
> Q What about items within the house?
>
> A Um, well we'd just, yeah, walk around the house and the bedrooms and just check everything was all okay.
>
> Q Check nothing was out of place?
>
> A Yeah.
>
> Q Would you check that nothing had been disturbed?
>
> A Yes.

[67] The prosecutor then moved to what happened on 20 June when Mrs Hannigan and the appellant visited the house and this produced the following exchange:

Q And this was just a quick check of the house?

A Yes.

Q Who went into the property?

A Um, Shane did. I stayed in the car.

The use by the prosecutor of the word "into" and the affirmative answer from Mrs Hannigan perhaps conveyed the impression that the appellant had gone into the house, an impression which is strengthened by her immediately preceding evidence in which she had referred generally to what happened when she and her husband visited the house on other occasions. But there was undoubtedly an element of equivocality as to whether she meant that the appellant had gone into the house and not merely onto the property.

[68] Mrs Hannigan was still being cross-examined by the appellant's counsel when the court adjourned for the weekend. Cross-examination continued when the trial resumed on the following Monday and counsel soon turned to what had happened on 20 June. The critical exchange was as follows:

Q … Mr Hannigan is the one delegated to go and do the check round the house?

A Yes.

Q And he's just gone a minute checking the outside is he?

A Yes, he is.

Q He couldn't go inside, could he, you had the –

A I had the key.

This is quite an important point. On the basis of what Mrs Hannigan had told the police, the appellant had an opportunity to light the second fire. But in her evidence in cross-examination, she effectively gave him an alibi.

[69] The cross-examination concluded at 11.10 am and there followed a discussion between the Judge and counsel in the absence of the jury. The prosecutor noted what Mrs Hannigan had said in evidence in chief and in cross-examination and he then referred to the second of the statements she made to the police. He sought

permission to draw the statement to Mrs Hannigan's attention and to ask "questions around that prior statement" but "[c]ertainly not cross-examination". As that disclaimer indicated, the prosecutor did not seek a determination that Mrs Hannigan was hostile. Indeed, it would appear that had he done so, the Judge would have refused to give it. On the Judge's preliminary thinking, the prior inconsistent statement was not independently admissible[29] and could only be put to Mrs Hannigan if her veracity was attacked – something which would not be permissible unless he first determined her to be hostile. Since the Judge was not inclined to do this, it appeared likely that the prosecutor would not be able to put the prior inconsistent statement to Mrs Hannigan. At this point, the proceedings were adjourned for morning tea.

[70] By the time the Judge and counsel reconvened after morning tea, a question had been received from the jury. It was in these terms:

> On Friday – Kirsty stated on 20th she stayed in car while he checked for 1–2 mins inside
>
> But Today – Kirsty said she stayed in car with keys & he only checked outside
>
> Could this please be clarified.

[71] Over the morning tea adjournment, the Judge consulted *The Evidence Act 2006: Act and Analysis*[30] and, as a result, revised his thinking. When the Court resumed, he told counsel that because Mrs Hannigan's statements in cross-examination were inconsistent with what she had told the police, her police statement was admissible as to the truth of its contents. He also expressed the view that putting the previous statement to Mrs Hannigan would not necessarily be an attack on her veracity (and it would not, therefore, require a prior determination of hostility). In adopting this approach, the Judge recognised that under the Evidence Act 2006, and contrary to the former common law position, a prior statement by a witness which is inconsistent with the evidence given by that witness is admissible as to the truth of its contents even if not adopted by the witness as true.

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[29] "Independently admissible" in the sense of being admissible as to the truth of its contents (as opposed to admissible as to veracity) independently of whether it was adopted by Mrs Hannigan in her evidence.

[30] Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (2nd ed, Brookers Ltd, Wellington, 2010).

[72] The upshot of this was that the Judge gave the prosecutor the following direction:

> Okay. All right well I rule that you can re-examine her on the contents of her statement to police on 26 June to provide a fair and complete picture. You should also examine her as to what she told police on the relevant topic on 21st of June.
>
> … What I think we should do is put it to her on the basis that you asked her in-chief whether Mr Hannigan went into the property and she said, "Yes he did." "In cross-examination Mrs Stevens asked you whether Mr Hannigan went into the house," perhaps placing the emphasis on that, to which she said that he did not. Can she explain the difference. 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, but I think in fairness you should put to her also that she made a statement to police just shortly after the incident on the 21st of June in which she'd made no reference one way or t'other to going into the house or property. And following that I would certainly give Mrs Stevens the right at least to cross-examine her further.

[73] The prosecutor then re-examined Mrs Hannigan. He reminded her of what she had said in evidence in chief and then in cross-examination and asked her to clarify what she meant. Mrs Hannigan answered:

> I was meaning he [Mr Hannigan] went onto the property not physically inside the house.

The appellant does not challenge the legitimacy of that question and answer. He does, however, complain about what followed.

[74] The prosecutor took Mrs Hannigan to the detailed statement made after the third fire on 26 June:

> Q Do you recall in that statement that you said to the detective in respect to this visit on the 20th, "I waited in the car at this time. Shane went inside the house and also just to look around as we had been doing." Do you recall that?
>
> A I recall that interview, I don't recall exactly that but I've, from my memory just went round the outside of the house.

[75] Next the prosecutor put to Mrs Hannigan the brief statement she had made on 21 June, after the third fire. The notes of evidence record:

> Q Do you recall saying to that constable, "We were last at our house ... on Saturday morning [that is, Saturday 20 June] at 10.30 am."?

A Yes.

Q "When we were there, we checked all the windows and doors to make sure they were locked and secure."

A Yes.

Q Do you recall saying that?

A Yeah, I think so, yeah.

[76] There was then this exchange between the prosecutor and Mrs Hannigan:

Q In fairness to you, Mrs Hannigan, I want to give you the opportunity to explain the differences between the evidence on Friday, the evidence today and the two statements which appear to say different things don't they?

A (no audible answer 12:38:15).

Q Can you explain why the statement to the police on the 21st, the day of the fire, says that you both, or that, "We checked all the windows and doors," but that your statement five days later says that you stayed in the car?

A No, I can't. It was very hard at that time. I don't know whether we were just saying we or things, just …

Q Secondly, can you explain why the statement on the 26th of June says, "Shane went inside and looked around just as we had been doing", but then today you've said he didn't go inside?

A Um, I thought he didn't but I could be just getting my days mixed up. I can't recall right now.

The prosecutor then wrapped up this aspect of re-examination with anodyne questions as to the time the two statements took to take and the proposition, which Mrs Hannigan accepted, that the second statement was "very detailed".

[77] Mrs Hannigan was then cross-examined again by counsel for the defence. When dealing with what happened on 20 June, she reverted to the evidence she had given in cross-examination, that is, that she stayed in the car and that the appellant went onto the property but not into the house. In response to a series of closed and very suggestive questions, she said that she had been "upset" at the 26 June interview and had found the process "very stressful", it had been hard to be "100 per cent accurate" and it was possible that she had made a mistake. There was then this sequence of questions and answers:

Q When 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 and your evidence is in fact the correct position?

A Yeah.

Q That he couldn't have gone inside because you had the keys?

A Yes.

Q And you certainly didn't see him from your position do anything other than check the outside?

A That's right.

[78] The use the prosecutor made of the inconsistency between Mrs Hannigan's evidence in chief, cross-examination and her prior statements is apparent from the following extracts from his closing address:

> Well, with all due respect, Mrs Hannigan was all over the place on that point [the visit to the house on 20 June].
>
> …
>
> Now I'm not suggesting Mrs Hannigan is a dishonest person. But I'm suggesting that where she had the opportunity in her evidence, she was doing what she could to assist her husband. Understandable.
>
> …
>
> As I said, I'd suggest this is because in reality Mrs Hannigan was a witness who was friendly to the defence.
>
> …
>
> 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. But she's drawn to the version that best supports her husband's case.

The admissibility of the statement of 26 June 2009

[79] The 26 June statement was admissible under the Evidence Act. Mrs Hannigan's statement was not hearsay since she gave evidence.[31] The hearsay rules were thus inapplicable. The account given by Mrs Hannigan on 26 June as to

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[31] The definition of "hearsay statement" in s 4 of the Act does not encompass a statement made by a witness.

what had happened on 20 June was not consistent with her evidence in cross-examination, thus the admissibility of that account did not fall to be determined under s 35 (which applies to prior consistent statements). Since the statement was plainly relevant for the purposes of s 7 and its probative effect was not outweighed by unfair prejudice or a tendency to needlessly prolong the proceedings for the purposes of s 8(1), it was therefore admissible unless, as the appellant argues, the Crown was precluded from relying on it by reason of s 37.

The appellant's argument

[80] Mrs Ablett-Kerr QC (who did not appear for the appellant at trial) did not seriously challenge the admissibility of the 26 June statement other than on process grounds. Her broad position was that its practical admissibility was subject to the Judge making a determination of hostility and permitting cross-examination.

[81] Mrs Ablett-Kerr had two complaints. The first was that the course adopted was inconsistent with s 94 of the Evidence Act in that the prosecutor had been permitted to cross-examine Mrs Hannigan on her prior statements without the Judge having first determined that she was hostile. The second was that the prosecutor had been permitted to challenge the veracity of Mrs Hannigan despite the absence of a determination of hostility and was thus in breach of s 37(4)(a).

[82] Although these complaints may seem to be closely related, they in fact raise different issues and we will address them separately. But before we do so, we should explain how the Court of Appeal dealt with the appellant's argument.

The Court of Appeal judgment

[83] On this aspect of the case in the Court of Appeal, the appellant's argument seems to have been primarily addressed to s 37(4) rather than s 94.

[84] The Court of Appeal rejected the argument, concluding that the challenge was to Mrs Hannigan's reliability (which is permitted)[32] rather than her veracity and that, in any event, given the inconsistencies between her previous statements and her evidence at trial and the jury's question, it was incumbent on the Judge to ensure that the issue was clarified.[33]

The s 94 argument

The relevant statutory provisions

[85] The provisions of the Evidence Act which are relevant to the appellant's s 94 argument are as follows:

> **89 Leading questions in examination in chief and re-examination**
>
> (1) In any proceeding, a leading question must not be put to a witness in examination in chief or re-examination unless—
>
> (a) the question relates to introductory or undisputed matters; or
>
> (b) the question is put with the consent of all other parties; or
>
> (c) the Judge, in exercise of the Judge's discretion, allows the question.
>
> …
>
> **90 Use of documents in questioning witness or refreshing memory**
>
> …
>
> (5) For the purposes of refreshing his or her memory while giving evidence, a witness may, with the prior leave of the Judge, consult a document made or adopted at a time when his or her memory was fresh.
>
> …
>
> **92 Cross-examination duties**
>
> (1) In any proceeding, a party must cross-examine a witness on significant matters that are relevant and in issue and that contradict the evidence of the witness, if the witness could reasonably be expected to be in a position to give admissible evidence on those matters.

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[32] See *R v Biddle* [2008] NZCA 398.

[33] *Hannigan v R*, above n 26, at [33]–[35].

(2) If a party fails to comply with this section, the Judge may—

(a) grant permission for the witness to be recalled and questioned about the contradictory evidence; or

(b) admit the contradictory evidence on the basis that the weight to be given to it may be affected by the fact that the witness, who may have been able to explain the contradiction, was not questioned about the evidence; or

(c) exclude the contradictory evidence; or

(d) make any other order that the Judge considers just.

94 Cross-examination by party of own witness

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

[86] We should also note the procedure provided for in s 101 if a jury wishes to put a question to a witness. Where a jury informs the Judge of the question it wishes to be asked:[34]

the Judge must determine—

(i) whether and how the question should be put to the witness; and

(ii) if the question is to be put to the witness, whether the parties may question the witness about matters raised by the question.

The default position (that is, subject to any determination made by the Judge) is for cross-examination on "any matter raised by the jury's question" by the parties who did not call the witness and for re-examination by the party who did.[35]

Rongonui v R

[87] Mrs Ablett-Kerr placed considerable reliance on the judgment of this Court in *Rongonui v R*.[36] In that case, a Crown witness had been called to give evidence of admissions made to her by the defendant the day after the alleged sexual offending against the complainant. She told the jury that she had accused the defendant of having raped the complainant but her evidence as to his response was vague. When

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34 Section 101(1)(b).
35 Section 101(2).
36 *Rongonui v R* [2010] NZSC 92, [2011] 1 NZLR 23.

pressed for detail she said she could not remember. With the permission of the Judge she was shown a statement she made about six weeks after the incident for the purpose of refreshing her memory. Her evidence as to what the defendant had said continued to be vague and she claimed that her mind had "gone blank". She was then asked leading questions based on her statement as to the defendant's admissions and she adopted what she had said in the statement. This Court held that what happened went well beyond what was appropriate in terms of a refreshing memory exercise under s 90(5) and, as well, could not be justified under s 89(1)(c). The course of events was seen as "a major and prejudicial departure from proper practice" and as a result the conviction was set aside.[37]

[88] There are some similarities between what happened in *Rongonui* and the way in which Mrs Hannigan was examined. In both cases Crown witnesses whose evidence had been less favourable to the prosecution than anticipated, given their prior statements to the police, were questioned by the prosecutor on those statements without determinations of hostility. There is, however, one significant difference. In the present case, the Judge proceeded on the basis that the prior statement was itself admissible as to the truth of its contents. In *Rongonui*, the Court would appear to have proceeded on the basis that the prior statement made by the witness was inadmissible as to the truth of its contents.[38] So the Court was not addressing what questions can be legitimately asked of a witness in relation to a statement which is independently admissible as to the truth of its contents. We consider that this means that the approach taken in *Rongonui* is not controlling in the present case.

The situation which the Judge faced and the options available to the prosecutor

[89] When the Judge came to give directions, there were two issues which had to be addressed. The first was that Mrs Hannigan had given evidence in cross-examination which was distinctly inconsistent with what she had told the police on 26 June. The second was that the jury had made it clear that it saw an

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[37] At [58] per Blanchard, Tipping, McGrath and Wilson JJ.

[38] The witness's evidence was not in the end inconsistent with the prior statement. So it was not admissible as a prior inconsistent statement under s 37. It might conceivably have been admissible under s 35(3)(b) on the basis that it provided detail the witness could not remember. But the judgment does not address this and its tenor is that the statement was not independently admissible.

inconsistency between what she had said in her evidence in chief and her answers in cross-examination and had asked for clarification.

[90] At this point, it would have been premature for the Judge to have made, and thus for counsel to have sought, a determination of hostility. Mrs Hannigan had not otherwise said anything suggestive of hostility and although the inconsistency was stark,[39] it was conceivable that she would be able to explain it if given a fair opportunity. Such explanation was likely to involve her saying that she had been mistaken either in what she had told the police or in her answers in cross-examination.

[91] All of this means that when it came to re-examination, there were three options which were practically open to the prosecutor:

(a) He could have invited Mrs Hannigan to refresh her memory from her prior statement. This would not have necessitated the use of leading questions but would have required the leave of the Judge under s 90(5). With the assistance of her statement, she may have reverted to the account which she had given to the police. Alternatively she may have sought to adhere to the account she had given in cross-examination. A repudiation of the 26 June statement (depending on the way it was expressed) may have set the scene for a determination of hostility.

(b) He could, with the leave of the Judge given under s 89(1)(c), address leading questions to Mrs Hannigan as to the statement. This is the course he adopted.

(c) He could have required the 26 June statement to be produced as an exhibit. This could have been effected through either Mrs Hannigan or the interviewing police officer.

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[39] As explained at [103] below an inconsistency in and of itself does not necessarily demonstrate hostility. Compare the Chief Justice's reasons at [52].

These options are not mutually exclusive. The availability of option (c), which did not require the leave of the Judge, was highly relevant to any decisions which the Judge had to make in relation to options (a) and (b).

Were the prosecutor's questions proper in light of s 94?

[92] We discuss this issue by reference to three topics:

(a) the scope of s 89(1)(a);

(b) the extent of the permission granted by the Judge under s 89(1)(c); and

(c) the appropriateness of the Judge's approach given s 94.

[93] Section 89 prohibits leading questions in examination in chief and re-examination unless the exceptions set out in s 89(1) apply. A leading question, as defined by s 4, is one that directly or indirectly suggests a particular answer.

[94] Section 89(1)(a) permits leading questions to be asked, without permission, on introductory or undisputed matters. In the present case, it was undisputed that Mrs Hannigan had made the 26 June statement. The substance of what she had told the police on that occasion was also undisputed.[40] For these reasons there is scope for argument that under s 89(1)(a) the prosecutor was entitled to take her to the statement and its contents and that he did not require leave to do so. Indeed, we can see no reason why the prosecutor would have needed leave to require her to produce the statement as an exhibit.

[95] It is fair to say that at the time, neither counsel nor the Judge saw the matter that way and the production of the statement as an exhibit does not seem to have been envisaged. Given the course which was taken, and for the sake of argument, we are prepared to accept that permission of the Judge may have been required for

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[40] In the sense that there could be no dispute as to the content of the statements. Whether that content was accurate or not is another matter.

some of the questions which the prosecutor asked. For this reason, we propose to explore the scope of the permission granted by the Judge.

[96] First, some context is necessary.

[97] As already noted, the jury had asked for clarification of what it saw as the apparent discrepancy between Mrs Hannigan's evidence in examination-in-chief and that given in cross-examination. Perhaps more importantly, by the time the Judge came to give his ruling he was aware that what Mrs Hannigan had said in cross-examination was inconsistent with what she had said in her 26 June statement. He also appreciated that this inconsistency meant that the statement was admissible as to the truth of its contents. The Judge, therefore, gave permission for this inconsistency to be explored in re-examination (in that he permitted counsel to re-examine Mrs Hannigan on the 26 June statement). In spelling out the sequence of the questions he expected, he indicated that counsel should explore with Mrs Hannigan the difference between what she said in evidence in chief and in cross-examination (which was what the jury question was addressed to). He then said that, "depending on her answer" to a request to explain the difference, the prosecutor could put the statement of 26 June 2009 to Mrs Hannigan and also, for the sake of fairness, the ambiguous statement she made shortly after the incident on 21 June 2009.

[98] Against that background, we think it clear that the conditionality of the Judge's direction, "depending on her answer", was to cover the possibility that Mrs Hannigan might resolve the apparent inconsistency by giving evidence in accordance with what she had told the police in her 26 June statement.[41] But instead, Mrs Hannigan confirmed the account of events given in cross-examination, rendering the 26 June statement undoubtedly admissible as to the truth of its contents. This meant the Judge's permission to put the statement to her became operative. The Judge was plainly of this view as he did not stop the line of questioning as it developed. Nor did defence counsel object, obviously considering that the re-examination was as contemplated by the Judge.

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[41] If so, the 26 June statement would probably have been best regarded as "consistent" and its admissibility subject to s 35; this despite the postulated temporary inconsistency between the statement and what had been said in cross-examination.

[99] The argument that the Judge ought not to have granted such permission seems to depend on the proposition (or assumption) that the questions were in the nature of cross-examination and that, given s 94, they could not properly be permitted unless the Judge had first determined Mrs Hannigan to be hostile.

[100] Sections 89 and 94 must be read together. In doing so, it is important to appreciate that they are permissive in character. Both operate as exceptions to the s 89(1) prohibition on leading questions in examination in chief and re-examination. Importantly, s 94 does not provide that questions in the nature of cross-examination can only be permitted if there is a determination of hostility.[42] Indeed, the two sections cannot sensibly operate together if every leading question which a judge might give permission to ask is also to be treated as cross-examination requiring leave under s 94. On the other hand, we accept that if s 89(1)(c) is construed too generously, s 94 would itself be redundant.

[101] At this point, some further context is appropriate.

[102] When the Judge gave his ruling that the 26 June statement might be put to Mrs Hannigan, it was unclear how she would react. It was possible that she might have adopted that statement as her evidence. It was also possible that she would claim to be unsure about what happened, as indeed she did at the end of the prosecutor's re-examination when she said: "I thought he didn't [go into the house] but I could be just getting my days mixed up. I can't recall right now." The other possibility was that she might adhere to the version of events she first gave in cross-examination which she did after further defence cross-examination. It was only after this further cross-examination by the defence that she could fairly be thought to have shown hostility but by this stage the prosecutor did not wish to ask any further questions.

[103] It must be remembered that Mrs Hannigan was giving evidence almost two years after the events in question. Memory of events can be unreliable and is likely to become more so with time. Inconsistencies between police statements and evidence in court may therefore bear on the reliability of the evidence of a witness

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[42] In contrast to the way in which s 37(4)(a) is expressed, see [111] below.

and are not necessarily related to the witness's credibility (veracity) or possible hostility to the party calling him or her.

[104] The statement of 26 June was admissible under the Act independently of the s 37 veracity provision.[43] It could have been proved directly through Mrs Hannigan or, alternatively, the police officer who took the statement could have produced it in evidence. But, however the statement was to be proved, it was necessary, in fairness to Mrs Hannigan, to give her the opportunity to explain the inconsistencies between it and her evidence in Court. This point, while reasonably obvious, warrants some brief elaboration. Section 92 is not directly relevant because the questions were asked of Mrs Hannigan in the course of re-examination and not cross-examination. But the principles of fairness and completeness which s 92 embodies were applicable and their practical operation required that Mrs Hannigan be given the opportunity to comment on why her evidence in cross-examination differed from what she had told the police.

[105] In light of this context, we are satisfied that the Judge was entitled to give counsel permission to ask the questions he did without first determining that she was hostile.

[106] The questions asked by the prosecutor involved: (a) scene-setting, in terms of taking her to the document which was the subject of the questioning and which was independently admissible as to the truth of its contents and then (b) what were arguably open questions (in the sense that they did not suggest answers) as to her explanation for the inconsistencies. For the reasons given, fairness to Mrs Hannigan and the requirements of the jury required her to be asked for such an explanation. Beyond that, there was no substantial attempt to break down the account of events she gave in cross-examination and none of the rhetorical flourishes one might expect of cross-examination in this context, for instance, along the lines that her memory would have been sharper on 26 June 2009 than at trial.

[107] We see resort to s 89(1)(c) as appropriate where counsel wishes to explore (for instance, by seeking an explanation for) ambiguities in the evidence of a witness

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[43] See above at [79].

or apparent inconsistencies between the evidence of that witness and other evidence which is, or will be, before the court. We also see it as appropriate where the point of the exercise is to ensure that admissible and relevant evidence is placed before the court. In contrast, questioning which is primarily addressed to the breaking down (or impeachment) of the evidence of a witness might properly be seen as requiring a prior determination of hostility. The distinction between these two categories of questions is not hard and fast and its application in particular cases will call for the exercise of judgement. We have no doubt, however, that in the present case, the questions were in the former and not the latter category and that the Judge was right to allow them without a prior determination of hostility.

Should there have been a voir dire?

[108] Mrs Ablett-Kerr suggested that the Judge should have conducted a voir dire before permitting the prosecutor to ask Mrs Hannigan questions about the 26 June statement. This was premised on the assumption that such questions could only be proper if preceded by a determination of hostility, a premise we do not accept. For the reasons given, the admissibility of the statement did not depend on any decision which the Judge had to make and which could usefully have been preceded by a voir dire. It is right to say, however, that we do not see a voir dire as likely to be appropriate where a witness's evidence departs from a previous statement and a determination of hostility is under consideration.

[109] When this happens, it usually occurs in examination in chief. A prosecutor should be able to explore the issue in a preliminary way with open questions and perhaps an invitation to the witness to refresh his or her memory from the statement (assuming s 90(5) can be invoked). Sometimes the witness will then give evidence in accordance with the prior statement. In other instances, the way the witness responds will: (a) enable the judge to decide whether to make a determination of hostility and (b) be material to the jury's consideration of the credibility of the witness. All of this should usually be able to be achieved without either deviation from the rules which apply to the leading of evidence or reference to inadmissible

evidence. For these reasons, there will usually be no need for a voir dire.[44] As well, because the way in which the evidence unfolds will be very relevant to what the jury makes of it, it is better for the whole process to take place in front of the jury.[45]

The s 37(4) argument

The veracity rules

[110] The veracity rules form part of sub-pt 5 of pt 2 of the Evidence Act. Subpart 5 concerns not only veracity but also propensity evidence. Section 36(1), which is addressed to the application of sub-pt 5, provides:

> This subpart does not apply to evidence about a person's veracity if that veracity is an ingredient of the claim in a civil proceeding or one of the elements of the offence for which a person is being tried in a criminal proceeding.

[111] The veracity rules are otherwise constituted by ss 37–39 of the Evidence Act. Section 39 is addressed to veracity evidence offered in criminal cases by one defendant in relation to another and its terms are not relevant for present purposes. The other two sections are in these terms:

> **37 Veracity rules**
>
> (1) A party may not offer evidence in a civil or criminal proceeding about a person's veracity unless the evidence is substantially helpful in assessing that person's veracity.
>
> …
>
> (3) In deciding, for the purposes of subsection (1), whether or not evidence proposed to be offered about the veracity of a person is substantially helpful, the Judge may consider, among any other matters, whether the proposed evidence tends to show 1 or more of the following matters:
>
> (a) lack of veracity on the part of the person when under a legal obligation to tell the truth (for example, in an earlier proceeding or in a signed declaration):

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[44] We note that there was no issue in the present case whether the prior statement should have been excluded under s 8 as unfairly prejudicial. If this is in issue, it may need to be explored in the absence of the jury, see *Morgan v R* [2010] NZSC 23, [2010] 2 NZLR 508 at [42].

[45] This is consistent with the approach favoured in *R v Darby* [1989] Crim LR 817 (CA) and *R v Khan* [2002] EWCA Crim 945, [2003] Crim LR 428.

(b) that the person has been convicted of 1 or more offences that indicate a propensity for dishonesty or lack of veracity:

(c) any previous inconsistent statements made by the person:

(d) bias on the part of the person:

(e) a motive on the part of the person to be untruthful.

(4) A party who calls a witness—

(a) may not offer evidence to challenge that witness's veracity unless the Judge determines the witness to be hostile; but

(b) may offer evidence as to the facts in issue contrary to the evidence of that witness.

(5) For the purposes of this Act, **veracity** means the disposition of a person to refrain from lying, whether generally or in the proceeding.

38 Evidence of defendant's veracity

(1) A defendant in a criminal proceeding may offer evidence about his or her veracity.

(2) The prosecution in a criminal proceeding may offer evidence about a defendant's veracity only if—

(a) the defendant has offered evidence about his or her veracity or has challenged the veracity of a prosecution witness by reference to matters other than the facts in issue; and

(b) the Judge permits the prosecution to do so.

(3) In determining whether to give permission under subsection (2)(b), the Judge may take into account any of the following matters:

(a) the extent to which the defendant's veracity or the veracity of a prosecution witness has been put in issue in the defendant's evidence:

(b) the time that has elapsed since any conviction about which the prosecution seeks to give evidence:

(c) whether any evidence given by the defendant about veracity was elicited by the prosecution.

A preliminary comment

[112] When the prosecutor came to re-examine Mrs Hannigan, he was seeking: (a) to resolve the ambiguities and apparent inconsistencies in relation to her evidence in chief and in cross-examination, (b) if she were to adhere to the evidence given in

cross-examination, to challenge the accuracy of that evidence, and (c) to put before the jury, as admissible evidence, the substance of what she had said to the police on 26 June. He was not seeking to show she had a disposition to tell lies.[46] And there is nothing in the questions he asked to suggest that he was implicitly contending that she was lying.

[113] Mrs Ablett-Kerr relied on the arguments advanced by the prosecutor in his closing address to show that he was in fact contending that Mrs Hannigan had lied. We consider that what the prosecutor said in his closing address is not material. The restriction in s 37(4)(a) is on "offer[ing] evidence", not on making submissions. And, to the extent to which the closing submissions might arguably be relevant in terms of discerning a previously undisclosed underlying purpose of the re-examination, it should be remembered that: (a) the evidence he was commenting on included the subsequent docile acceptance by Mrs Hannigan of the propositions which defence counsel put to her[47] and (b) even then, the primary contention was that Mrs Hannigan could not remember what had happened rather than that she was lying.

[114] For these reasons, we are of the view that the prosecutor's re-examination of Mrs Hannigan was not a challenge to her veracity with the result that the veracity rules do not apply. This conclusion is sufficient to dispose of this aspect of the case but, given the arguments which have been advanced and necessarily considered and their practical significance to the orderly operation of the criminal justice system, we propose to discuss what the position would have been if prosecutor's questioning of Mrs Hannigan and, in particular, his adducing in evidence of what she had told the police on 26 June, had amounted to the offering of evidence which tended to show that she had lied in cross-examination as to what had happened on 20 June.

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46 We treat a disposition to tell lies as being substantially the opposite of a disposition to refrain from lying (in terms of the definition of veracity in s 37(5)), and evidence indicative of a disposition to tell lies as necessarily bearing on the disposition of the person in question to refrain from lying.

47 At [77] above.

Section 37(4)(a) and (b)

[115] Section 37(4) postulates two situations:

(a) a challenge to veracity which is permissible if the judge has first determined the witness to be hostile (subs (4)(a)); and

(b) the offering of evidence which is contrary to the evidence of the witness, which is generally permissible under subs (4)(b), providing of course it is directly relevant to the facts in issue.

But s 37(4) does not address explicitly which of (a) or (b) prevails if the evidence to be offered is not only contrary to the evidence of the witness but also challenges his or her veracity.

[116] On the argument of the appellant, (b) is subject to (a), so that if the evidence offered under (b) is also a challenge to veracity, a determination of hostility is required. On this approach s 37(4) should be construed as meaning:

> A party who calls a witness—
>
> (a) may offer evidence as to the facts in issue contrary to the evidence of that witness; but
>
> (b) may not offer evidence (including evidence which would otherwise be admissible under (a)) to challenge that witness's veracity unless the Judge determines the witness to be hostile.

[117] The case can be resolved the other way by reversing the priority and concluding that (a) gives way to (b) where both are engaged. On this approach s 37(4) should be construed as meaning:

> A party who calls a witness—
>
> (a) may not lead evidence which challenges that witness's veracity, unless the Judge determines the witness to be hostile; but
>
> (b) this restriction does not apply to evidence which is offered as to the facts in issue contrary to the evidence of that witness.

[118] We see the second of the two interpretations as the more consistent with the structure and language of the subsection. The use of the word "but" before s 37(4)(b) marks s 37(4)(b) out as an exception to what might otherwise have been the scope of s 37(4)(a). We see no reason why s 37(4)(b) should not apply in accordance with its terms where the evidence in question is the prior inconsistent statement of the witness, given that such a statement is directly admissible as to the truth of its contents.

[119] If we were of the view that the veracity rules were engaged by this case, the conclusion just expressed would resolve the case in favour of the Crown. But, as will become apparent, we see s 37(4) as consistent with a broader legislative purpose that the exclusionary operation of the veracity rules is confined to evidence which is not admissible independently of those rules, and is thus not applicable to Mrs Hannigan's 26 June statement which was directly relevant to the facts in issue.

Possible problems with a broad approach to the exclusions in the veracity rules

[120] The veracity rules contemplate evidence being adduced as to the veracity of a witness in relation to matters which have no other relevance to the case at hand. For instance, if a witness has numerous previous convictions for perjury, evidence of those convictions will be admissible as to the veracity of that witness (providing the substantial helpfulness test in s 37(1) is satisfied) even though they do not directly bear on any factual question which is in issue in the proceedings.[48] Likewise, if a witness has a reputation for, and a past history of, scrupulous honesty, evidence of that reputation and past history may be admissible (again subject to the s 37(1) being satisfied) despite having nothing to do with the facts of the case at hand. There can be no doubt that the primary purpose of the veracity rules is to provide for, but also limit by exclusionary provisions, the admissibility of evidence of that kind.[49] These exclusionary provisions include the "substantial helpfulness" rule in s 37(1), the restriction on challenges to the veracity of a party's own witness in s 37(4) and,

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48 Section 37(3)(b).

49 See Law Commission *Evidence: Reform of the Law* (NZLC R55(1), 1999) at [157]–[162] [Law Commission *Evidence: Reform of the Law* Vol 1].

importantly, the s 38 exclusion, subject to limited exceptions, of prosecution evidence as to the veracity of a defendant.

[121] "Positive" evidence of veracity – to the effect that someone has a disposition to refrain from lying – will seldom, if ever, be directly relevant to the facts of the case at hand. So restrictive rules as to when such positive evidence is admissible are not likely to be problematical. This, however, is not the case in relation to "negative" evidence of a disposition – that is, evidence indicative of a disposition to lie. That someone has such a disposition can only be established by evidence of previously told lies. The logical corollary of this is that evidence of lies is, or at least can be, indicative of a disposition to lie and such evidence might, for this reason, be thought to be within the s 37(5) definition of veracity.[50] But evidence of this kind is often directly relevant to the facts in issue.

[122] Where a party wishes to lead evidence which is directly relevant to the facts in issue but inconsistent with the evidence of a witness called by that party, our interpretation of s 37(4) avoids the problem we have just identified. But the problem remains in relation to other situations covered by the veracity rules, most particularly the situations where the veracity of a defendant in criminal proceedings is said to be under challenge. Evidence which tends to show that a defendant is guilty will necessarily also show that denials of guilt by that defendant are untrue and, in this sense, might be thought to be a challenge to the defendant's veracity. Plainly there would be severely adverse consequences for the justice system if the admissibility of such evidence were subject to the exclusions provided for in the veracity rules.[51]

Legislative history

[123] The veracity rules as enacted involved a shift from the "truthfulness" rules in the draft Evidence Code prepared by the Law Commission. The definition of "truthfulness" proposed by the Law Commission was significantly different from the "veracity" definition which was eventually enacted. Although this limits the

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50 For the reasons given at n 46.

51 See below at [134].

relevance of aspects of the report of the Law Commission, three important points come out of it.

[124] The first is that s 39(3) of the draft Evidence Code, which is the precursor to s 37(4)(a) of the Evidence Act 2006, was intended to replace s 9 of the Evidence Act 1908.[52] This section was in these terms:

> **9 How far witness may be discredited by the party producing him**
>
> A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but may contradict him by other evidence.

[125] The second is that the commentary to s 94 of the draft Evidence Code, which corresponds to s 94 of the Act, makes it clear that the Law Commission envisaged that the sort of cross-examination likely to be permitted under that section would not necessarily engage s 39(3).[53]

[126] Thirdly, in describing the intended scope and application of the truthfulness rules, the Law Commission commented:[54]

> C171 In most cases, the truthfulness rules will not apply to evidence of previous statements because such statements will not be solely or mainly about truthfulness … . This may be the case even if a previous consistent statement is admitted to answer a challenge to truthfulness. By way of an example, a witness testifies that the defendant hit her friend. Suppose it is put to her that this is a recent fabrication, and evidence is given that immediately after the incident, she had told a police officer that the defendant had hit her friend. Her previous statement is capable of supporting the truth of her testimony because the contents of the two are the same. That content is not about her truthfulness as such (that is, whether she habitually tells the truth or lies). Likewise, a previous inconsistent statement is used to cross-examine a witness to suggest that his testimony is untrue because the content of his testimony is different from the content of his previous statement. In this situation also, the previous statement, although capable of showing that the witness's testimony is untrue, is not about the witness's truthfulness as such.
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> …
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> C176 *Sections 39* to *41* comprise the rules on evidence of truthfulness. The Code distinguishes between two concepts that contribute to assessing credibility: reliability and truthfulness. The first is a function of the witness's

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52 Law Commission *Evidence: Reform of the Law* (NZLC R55(2), 1999) at [C184] [Law Commission *Evidence: Reform of the Law* Vol 2].

53 Law Commission *Evidence: Reform of the Law* Vol 1, above n 49, at [413].

54 Law Commission *Evidence: Reform of the Law* Vol 2, above n 52.

> ability to perceive and recall, and the second of the witness's intention to tell the truth. The concern in Subpart 5 is not with evidence of reliability or error, the admissibility of which is limited only by relevance and the general exclusionary rule. The concern is with evidence of truthfulness – or, more usually, a lack of truthfulness.
>
> …
>
> C178 All evidence that is solely or mainly about a person's truthfulness must comply with the requirement of *substantial helpfulness*: in all cases the evidence must be substantially helpful in assessing the truthfulness of the person about whom it is offered. The purpose of the substantial helpfulness test is to avoid a volume of evidence that may only be marginally relevant in deciding what is itself a side issue.

[127] The terms of s 36(1)[55] could be taken as implying an acceptance by the legislature that, but for the exceptions provided, the veracity rules are engaged by, and apply to, evidence which both bears on veracity and is otherwise relevant to the issues in dispute between the parties. A similar argument might be based on s 38(2)(a). But s 39(3) of the proposed Evidence Code, which was prepared by the Law Commission and was the subject of the commentary just set out, was identical to the current s 37(4)(a), save that it referred to "truthfulness" rather than veracity. It follows that s 36(1) can fairly be regarded as being the product of an abundance of caution. By parity of reasoning, the same can also be said of s 38(2)(a).[56]

[128] The shift from truthfulness to veracity was proposed by the Justice and Electoral Committee in its report on the Evidence Bill.[57] It also proposed the insertion into the Evidence Act of what is now s 37(4)(b). This was explained in this way:[58]

> **Veracity rules**
>
> … We recommend that clause 33(4) be amended to remove any possible impression that the clause will change the current practice of allowing parties to challenge the testimony of their own witnesses by calling other evidence or by cross-examining witnesses called by the opposing party. The

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55 Reproduced at [110] above.

56 The structural differences between s 38(2)(a) and its precursor in the proposed Code (s 39(2)) makes a comparison exercise a little more difficult to explain succinctly but essentially the same point is available. This is because the proposed s 40(2) permitted the prosecution to adduce evidence of a defendant's truthfulness imposing restrictions only on evidence to the effect that the defendant had been previously charged with, or convicted of, other offences relevant to truthfulness.

57 Evidence Bill 2005 (256-2) (select committee report) at 5.

58 At 5–6.

> amendment would make it clear that the current law is unchanged in this respect.

Section 37(4)(b) as enacted is substantially to the same effect as the permissive component of s 9 of the Evidence Act 1908.[59] Given its legislative history, it too can be seen as the product of an abundance of caution.

[129] This last aspect of the legislative history suggests that s 37(4) was intended to be to the same general effect as the former s 9, in other words, imposing no restriction on a party adducing evidence to contradict the evidence of a witness called by that party but precluding a general attack on credibility. There is, of course, the difference that under s 9, such a general attack was precluded whereas under s 37(4) it is permissible if preceded by a determination of hostility.

Practical issues arising out of two Court of Appeal decisions

[130] The practical operation of the veracity rules and difficulties which would arise in practice if the approach contended for by the appellant were adopted are illustrated by two Court of Appeal decisions.

[131] The first of these, *R v Davidson*,[60] involved a complainant who had given two separate statements which were recorded on video tape. The allegations against the defendant were only mentioned in the second statement which was produced as part of her evidence in chief at trial. The first statement was a prior inconsistent statement which the defence wished to rely on. But the Judge treated the first statement as relevant only to the credibility of the complainant and on this basis applied the veracity rules to determine that it could not be played to the jury. In this he was, as the Court of Appeal pointed out, in error:

> [71] Although the Judge considered the principles in ss 7 and 8, his analysis was flawed because he failed to accurately identify the relevance of the evidence. The Judge erred in identifying the first videotape as evidence relevant only or predominantly to the veracity of [the complainant]. The earlier videotape statement was relevant and relied on not because it tended to show lack of veracity on the part of [the complainant], but because it was evidence that the defence could rely on that no offending had taken place.

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59 The operation of s 9 was discussed in *R v Eagles* [2004] 2 NZLR 468 (CA) at [22]–[27].

60 *R v Davidson* [2008] NZCA 410.

> The defence sought to rely on it as a truthful statement by [the complainant] on that occasion. If her first account were accepted by the jury, it would follow that her later account was untruthful. However, that was only a subsidiary effect of the evidence, and not its purpose. It follows that the admissibility of the [first] videotape statement was not governed by the veracity rules in s 37.

[132] *R v Tepu*[61] involved what was said to be a challenge to the veracity of the defendant who was charged with sexual offending. When interviewed he denied engaging in sexual activity with the complainant or being with her at the time of the alleged offending. There was overwhelming evidence to show that those denials were untrue. Recognising this, he proposed to give evidence at trial acknowledging sexual activity with the complainant but claiming that it was consensual. He sought (a) to have the evidence of the interview ruled inadmissible and (b) to resist any use in cross-examination of his prior inconsistent and untruthful statement. The argument was that evidence that he had lied was relevant to whether he had a disposition to refrain from lying. It was said that (a) it was thus veracity evidence and (b) because s 38(2)(a) was not satisfied, it had to be excluded. The Court of Appeal had no hesitation in concluding that s 38 was not engaged.

[133] It will be recalled that the scope for offering veracity evidence against a defendant is very limited. Such evidence cannot be offered unless the defendant has offered evidence as to his or her own veracity or challenged the veracity of a prosecution witness "by reference to matters other than the facts in issue".[62] These are admissibility conditions which are entirely within the control of the defendant.

[134] If evidence to the effect that a defendant has lied is subject to the veracity exclusions despite being otherwise relevant to the facts of the case at hand, there would be significant and perhaps rather awkward consequences for our system of criminal justice. Here are some examples:

(a) A prosecutor would virtually never[63] be in a position to adduce evidence that a defendant had lied (for instance, when taxed with the

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61 *R v Tepu* [2008] NZCA 460, [2009] 3 NZLR 216.

62 Subsections 38(1) and (2)(a).

63 The evidence would only be admissible if s 38(2)(a) was satisfied but given the consequences this would seldom, if ever, happen.

offending), thus rendering s 124 (which deals in some detail with such lies) largely redundant. This consideration was referred to in *Tepu*.[64]

(b) If a defendant denied committing the offence, either in an out of court statement which was produced (as in *Tepu*) or in evidence, offering evidence to prove that he or she was guilty of the offence would be precluded under s 38 because it would also incidentally challenge his veracity in denying the offending.[65]

Some other considerations

[135] The broad approach to the exclusionary aspects of the veracity rules favoured by the appellant seems to us to be illogical. We can see no sensible reason why evidence which is of direct relevance to the case should be subject to exclusionary rules just because it also bears on the veracity of a witness or defendant.

[136] As well, if the law were as the appellant maintains, judges would be called on to make impressionistic decisions as to whether evidence which suggests that a witness is wrong also carries the implication that the witness is deliberately untruthful. It might also require judges to inquire into the motives of counsel for asking particular questions or leading particular evidence, something which would often be somewhat awkward. This is particularly so given that (a) in almost all cases, what matters is whether the witness is incorrect rather than whether he or she is lying and (b) when counsel embarks on a line of questioning it is often unclear how the witness will respond.

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64 *Tepu*, above n 61, at [16].

65 This argument was not actually advanced in *Tepu*, above n 61, but in *Weatherston v R* [2011] NZCA 276 at [55]–[61] the Court of Appeal addressed (and rejected) a similar, albeit less extreme, argument to the effect that a challenge to the truthfulness of the defendant's account of his background was precluded by the veracity rules.

A recent report of the Law Commission

[137] The Law Commission has just reported on the operation of the Evidence Act.[66] In doing so, it commented on the operation of the veracity rules.[67] Although the focus of the discussion was on an amendment which it proposes should be made to the s 37(5) definition of "veracity",[68] the drift of the commentary is very much consistent with the overall approach to the veracity rules which we favour.

A conclusion

[138] The exclusionary elements of the veracity rules do not operate so as to exclude evidence which is admissible as to the facts in issue. As this was the case with the 26 June statement made by Mrs Hannigan, the offering of evidence about the statement – in the form of her responses to questions as to its contents – could not infringe s 37(4).

Disposition

[139] For these reasons, the appeal should be dismissed.

Solicitors:
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66 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013).

67 At [6.56]–[6.69].

68 Adopting the suggestion proposed in Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Brookers Ltd, Wellington, 2012) at 170. See also, Law Commission *The 2013 Review of the Evidence Act 2006*, above n 66, at [6.68].