IN THE SUPREME COURT OF NEW ZEALAND SC 74/2009

PHILLIP WAYNE HART

Appellant

v

THE QUEEN

Respondent

Hearing:	18 November 2009
Coram:	Elias CJ Blanchard J Tipping J McGrath J Wilson J
Appearances:	S J Shamy for the Appellant M D Downs with T Epati for the Respondent

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CRIMINAL APPEAL

MR SHAMY:

May it please the Court, my name is Shamy, I appear as counsel assigned for the appellant.

ELIAS CJ:

Thank you, Mr Shamy.

MR DOWNS:

May it please the Court, Downs and Epati for the Crown respondent.

ELIAS CJ:

Thank you, Mr Downs and Ms Epati. Yes, Mr Shamy?

MR SHAMY:

Thank you, Your Honour. At the heart of the case for the appellant –

TIPPING J:

You realise what you've just said, Mr Shamy, sorry, the client's name is Hart.

MR SHAMY:

Ah, sorry, Sir.

TIPPING J:

That's the only reason I…

MR SHAMY:

The nub of the case for the appellant is that the Act has not changed the common law as to A, admissibility and B, use of previous consistent statements in the context of an allegation of recent invention that the words used by Parliament, both in the section and in the Act overall, do not lead to the conclusion that the common law has been changed. The Crown and the appellant are effectively ad idem as regards what the common law position was in terms of an allegation of recent fabrication. Firstly, that there was, in terms of the allegation itself, some element of timing in the words of the text, which I've quoted in my written submissions, "When did you make this up?" Which was the trigger, therefore, for the admission of a previous consistent statement, it being accepted effectively that the previous consistent statement would be admitted if the timing of that statement pre-dated the timing of the alleged motive. That appears to have been the situation throughout the common law jurisdictions. For instance, in the United States Supreme Court, the decision of *Tome* and I'm dealing with that – it's in both booklets, but this

is at tab 5 of the appellant's booklet at page 8. So, tab 5 page 8 of that judgement, which is the majority decision. It's the page beginning, "This limitation is instructive," and about halfway through that paragraph, the majority of the United States Supreme Court said, "A consistent statement that pre-dates the motive is a square rebuttal of the charge that the testimony was contrived as a consequence of that motive." And that was the common law and, says the appellant, remains the law in this country. The –

TIPPING J:

Did the majority expressly say that the subsequent statement was not admissible, or did they just simply say the prior one was?

MR SHAMY:

Well –

TIPPING J:

Because the minority went on to elaborate a bit, didn't they?

MR SHAMY:

Yes.

BLANCHARD J:

Well, the next paragraph begins with that.

TIPPING J:

On page 8?

BLANCHARD J:

Yes.

MR SHAMY:

Yes, the next paragraph down, "There may arise instances when out-of-court statements that postdate the alleged fabrication have some probative force in rebutting a charge of fabrication or improper influence or motive, but those

statements refute the charged fabrication in a less direct and forceful way." Further down that paragraph, "If consistent statements are admissible without reference to the time frame we find embedded in the Rule, there appears no sound reason not to admit consistent statements to rebut other forms of impeachment as well." Put another way, what the Crown has said is that there may be factors outside of the timing of a previous consistent statement which render it probative in assessing a witness's creditability per se on a fabrication issue generally. For instance, I think, as the Crown says "spontaneous," a spontaneous statement. Now, that was normally along the lines of a recent complaint. Now, that may well have probative value in assessing the credibility of a witness, but it isn't linked at all to the timeous aspect of the attack that's made on the witness. It's a general credibility tool, as opposed to a tool which is focused upon the attack which has been made.

TIPPING J:

Do you say that it can't logically rebut recent invention, if it follows motive?

MR SHAMY:

Well, I'm not saying that. I'm saying that any tool which reinforces a witness's credibility may go some way to rebutting an allegation of fabrication, or an allegation of recent fabrication. But it isn't aimed particularly at the recency or the time factor which converts the allegation from being an allegation of fabrication into an allegation of recent fabrication. So, there's no linkage, if you like, between the particular factor that makes this type of attack and a general reliability factor which the Crown, or a general credibility factor which the Crown would seek to introduce.

ELIAS CJ:

In some cases the timing may be absolutely critical, because it may be a king hit, because the motivation being attributed to the complainant could not have been operative. In other cases it may be a sort of an inchoate background, potential motivation, in which case you don't have a king hit but you still may have relevant evidence if the complaint is made ahead of the formal complainant, if you like, to the police.

MR SHAMY:

Yes, well, there's still that pre-dating aspect to it, which may simply weaken the attack, as opposed to completely refute it. And the wording of the section doesn't say that it has to completely refute it, but it does have to at least answer it. So, the issue, I suppose, is whether it has to answer the timing of the allegation that's put to them, "that you made this up about a certain time period," or does it just have to answer a general allegation of fabrication?

ELIAS CJ:

Well, doesn't it depend on the nature of the allegation in all cases? It's highly contextual, isn't it?

MR SHAMY:

Yes, and the context is, in terms of an allegation of recent fabrication, is time. The thread running through all the cases is that for it to be defined as an allegation of recent fabrication there is the, "you made this up at a particular time period," within a span of time. For instance, I think the recent English Court of Appeal case, which my learned friend relies on, with the Indians, there was the allegation, "Look, you made this up in 2005." The rebuttal evidence was, "Well, look, I told someone about this in 1999." So, it logically rebutted it, because it pre-dated the motive. What effectively –

ELIAS CJ:

Well, it pre-dated the allegation that was being put to the witness.

MR SHAMY:

That it had been made up at a particular time.

TIPPING J:

Are you really saying that the important word in the phrase "recent invention" is the word "recent?"

MR SHAMY:

Yes. If one looks perhaps at the legislative history a little, and I don't want to go into it a great deal because I don't think we need to. But if one looks at the wording of the section as first put forward by the Law Commission, which is in tab 23 of the Crown's authorities, the wording was, "A previous statement of a witness, which is consistent with the witness's evidence, is not admissible except to the extent necessary to meet a challenge to that witness' truthfulness or accuracy." So, the Court will see that that was any challenge – you're lying, therefore any, a statement can come in, if it's necessary.

ELIAS CJ:

Well, that doesn't follow. It's only to the extent necessary to meet that challenge, and it might not, it depends on the context.

MR SHAMY:

Certainly. Well, I suppose what I'm saying is, there it's a challenge. The wording of the section as amended, at the result of the select committee, was as the result of a recent invention challenge.

TIPPING J:

That's a change to a challenge on the basis of recent invention.

MR SHAMY:

Certainly, and –

TIPPING J:

Although that's not the precise terminology.

MR SHAMY:

Well –

TIPPING J:

But that's the effect of it.

MR SHAMY:

But that's the effect of it, because as drafted it was a challenge to their truthfulness, “You're lying, therefore that was the trigger.” The trigger is now phrased, in terms of the section, to be, “Admissible to the extent that the statement is necessary to respond to a challenge to the witness’s veracity or accuracy, based on a previous inconsistent statement of the witness or on a claim of recent invention on the part of the witness.”

ELIAS CJ:

But a recent invention can only, surely, mean invention post the events. And does it really add very much?

MR SHAMY:

Well, the use of that phrase, which is a common law phrase –

ELIAS CJ:

Yes.

MR SHAMY:

– brings in not only the definition of the attack but has also, in my submission, brought in the definition or brought in the common law understanding of the rebuttal of that attack.

ELIAS CJ:

But in some cases the invention, which has been put to the witness, may be some distance in the past. It’s a relative concept here, isn’t it, and it really can only mean post the events.

MR SHAMY:

Yes, but a recent invention is an allegation that it has been made up at a particular timeframe.

ELIAS CJ:

Not necessarily.

MR SHAMY:

Well, if one looks at the cases, normally what it is is not just simply a matter of, "Look, you've made this up at some stage." It's a, "You've made it up about now." The Crown, in their booklet, of the case of *R v S*, is a good example. In that case there were two evidential interviews of a complainant. The first interview, the girl didn't say anything had happened, the second interview, she did say something had happened. The defence said to her, "Look, people got at you between the two interviews and made you make it up." She had made a complaint prior to the first interview, so that rebutted that timeframe argument.

ELIAS CJ:

Yes.

MR SHAMY:

So, the recent complaint definition is taken to mean, "You made it up at a particular time," which then renders the timing of the previous statement relevant to rebut that, because it pre-dates that date of alleged fabrication, and that's what –

TIPPING J:

It's a term of art, isn't it, in the law of evidence, this phrase "recent invention", which is classically formulated, if you like, by Justice Dixon, wasn't it, in *Clements*?

MR SHAMY:

Yes, and –

TIPPING J:

And it does give some support to your proposition that it's not general invention, it's invention, if you like, at a particular time.

MR SHAMY:

And in all of the cases which are referred to, they all involve an allegation of fabrication in a particular timeframe, not a general, "It's been 20 years since you allege this abuse took place, at some stage over that 20 years you've made it up." That wouldn't be an allegation of recent invention for the purposes of this, because there's no particular timeframe that's going to be rebuttable by a previous consistent statement. If one looks at –

ELIAS CJ:

Except a statement that is nearly contemporaneous with the events perhaps.

MR SHAMY:

Certainly, certainly. If you made this up in the last 19 years, well, 19 and a half years ago I told someone it had happened. Well, that would rebut it. But all of the cases, including the nominal defendant case, speaks of the circumstances, but also speaks of the time and circumstances, and that's why the word "recent", in my submission, is inserted into the definition.

TIPPING J:

It's the same difficult word as we traditionally use in the phrase "recent complaint". Somehow or other this word "recent" has been seized on in the law of evidence and asked to do some rather strange work.

MR SHAMY:

It seems that, effectively, if one widens the admissibility to say, "Recent invention is only the trigger and there does not need to be any linkage between the – ", "recent" being the bad word – "the timeous aspect of the allegation and the rebuttal," then it lets in anything which supports the credibility of the witness. "If it's probative to the witness's credibility," says the Crown, "once that trigger has occurred then a previous consistent statement can come in." It may be probative because it appeared to be spontaneous.

ELIAS CJ:

But it's not as open as that, because this section has to be construed in the context of the legislation as a whole, which makes it quite clear that evidence is admissible if it's relevant, and defines relevancy, so there has to be some logical connection. I don't see any – it is the fact that in most of the cases consistent statements have been occasioned because they answer an allegation, but it just depends on the nature of the allegation, doesn't it, whether there is probative force in the similar statement?

MR SHAMY:

Well, if the nature of the allegation is one that, you made this up at a particular time, then the probative force –

ELIAS CJ:

Yes.

MR SHAMY:

– comes from a statement made prior to that.

ELIAS CJ:

Absolutely.

MR SHAMY:

And –

ELIAS CJ:

But if the allegation is, you have made this up, because you don't like the accused, then aren't you forced back into considering whether a statement made which is nearly contemporaneous with the events is probative, to answer that suggestion?

MR SHAMY:

Well, in my submission, an allegation, you made this up because you don't like the accused, isn't an allegation of recent invention. It's like saying –

ELIAS CJ:

Well, sorry, what do you say then is recent invention? It has to be close to the occasion on which the evidence is being given?

MR SHAMY:

No, recent invention is where implied in the question, you made this up at a particular time –

ELIAS CJ:

Well, that's a substantial gloss that you're asking us to read into the provision.

MR SHAMY:

Well, the definition of "recent invention" in terms of the common law – looking perhaps at the text which I've included in the bundle. If we look at the extract from *Cross* at tab 3, page 211 is discussion of it, just the second paragraph –

ELIAS CJ:

Sorry, this is –

MR SHAMY:

This is tab 3 –

ELIAS CJ:

Whose bundle?

MR SHAMY:

– in the appellant's bundle.

ELIAS CJ:

Yes, sorry.

MR SHAMY:

And it's the second page in that tab, at 211, the second paragraph down, "The fact that the whole of the witness' testimony is attacked will not bring the exception into play. The cross-examination must be such that it can be interpreted as containing the direct question, 'When did you first invent this story?'" So, the timing is integral for an allegation to be categorised as an allegation of recent invention, and that's what the US Supreme Court was saying in that matter which I quoted, they say that –

ELIAS CJ:

Do you mean to say that that question has to be capable of answer in terms of a specific time, in order for it to come with the exception?

MR SHAMY:

In order for it to come within the exception there must be express or implied in the cross-examination a putting to the witness that, you made this up at some particular time band, as opposed to, you just made it up generally. Because that's an allegation of invention, that's not an allegation of recent invention.

ELIAS CJ:

Why do you exclude, you made this up after the events, immediately after the event?

MR SHAMY:

Well, in terms of the definition of it, the definition is normally that the allegation was made up at some stage after the date of the alleged events. Any allegation of fabrication is, "You made it up." It's only if there can be a reasonably known timeframe for the fabrication that it falls within the categorisation of "recent invention". That if one looks through all of the cases, for instance, just perhaps looking back at the Supreme Court, the United States Supreme Court –

McGRATH J:

Which tab was that again?

MR SHAMY:

This – well, it's in both booklets, but I'm dealing with the one in the appellant's tab, at tab 5, it's the *Tome* case.

TIPPING J:

It's also perhaps of some significance, Mr Shamy, that although relevant is the general touchstone for admissibility, the premise on which section 35 is based is that previous consistent statements are not in unless they constitute recent invention, amongst other things.

MR SHAMY:

Yes, and –

TIPPING J:

So it's not a general concept of because it's relevant it's in, it's only in if it has the enhanced relevance, if you like, of being able to rebut a specific situation, like a previous inconsistent statement or a claim of recent invention.

MR SHAMY:

Certainly, and the overall purpose of section 7 about all relevant evidence must be subject to the specific exceptions in the Act.

ELIAS CJ:

Well, I accept that.

MR SHAMY:

And so if we look perhaps at, coming back to page 8 in the *Tome* decision, which is at tab 5 of the appellant's bundles, the next paragraph down, "The underlying theory of the Government's position is that an out-of-court consistent statement, whenever it was made, tends to bolster the testimony of a witness and so tends also to rebut an express or implied charge that the testimony has been the product of an improper influence. Congress could have adopted that rule with ease, providing, for instance, that 'a witness' prior

consistent statements are admissible whenever relevant to assess the witness' truthfulness or accuracy.' The theory would be that, in a broad sense, any prior statement by a witness concerning the disputed issues at trial would have some relevance in assessing the accuracy or truthfulness of the witness's in-court testimony." But that, as here, is not what Parliament has enacted. There are specific –

TIPPING J:

Where were you reading from, I'm sorry?

MR SHAMY:

That was at page 8, the third paragraph down.

TIPPING J:

Thank you.

MR SHAMY:

We dealt with, "The limitation is instructive," which is the first paragraph, talking about impeachment, by testimony means "a recent fabrication" and it's rebuttal by the timing of the prior consistent statement. Then talking generally about, well, other statements that don't pre-date it might still be probative, but it can't have been intended that just any previous statement comes in. I suppose one of the aspects put forward by the United States Supreme Court at page 11 of that case, the second paragraph down, is relevant in response to the Crown, which is, the Crown's approach is, "Well, timing isn't the only factor, you could look at anything else that makes it relevant." "The statement-by-statement balancing approach advocated by the government and adopted by the Tenth Circuit contains the precise dangers the advisory committee noted and sought to avoid. It involves considerable judicial discretion, it reduces predictability and it enhances the difficulties of trial preparation because parties will have difficulty in knowing in advance whether or not particular out-of-Court statements will be admitted." And that echoes, to an extent, what was said by the select committee, which is at tab 12 of the appellant –

TIPPING J:

And I would add to that the difficulties of cross-examining without falling foul of the rules.

MR SHAMY:

Yes. Well, it can be seen that the select committee recommended that the Bill be amended to limit the scope of rebuttal evidence for which previous statements are admissible, "We consider that the –

ELIAS CJ:

So, where are you reading from now?

MR SHAMY:

This is the select committee report at tab 12 of the appellant's bundle.

ELIAS CJ:

And where?

MR SHAMY:

And this is the second page in, which has got page 5, and there's a subheading, "Previous consistent statements rule. We recommend clause 32(2) be amended to limit the scope of rebuttal evidence for which previous statements are admissible. We consider that the exception in the Bill as introduced is unworkable and too broad. Evidence should be allowed where necessary to respond directly to a challenge to the witness's veracity or accuracy, based on a previous consistent statement of the witness or on a claim of recent invention. This would ensure a workable rule and limit the circumstances in which previous consistent statements could be used to those available under current law." So, apart from the fact that there is nothing explicit in the Act changing the law, it would seem that that wording of the select committee report tends to indicate that there was no intention to change the law as it then was. So, moving then perhaps to the facts of this case, what we had was some reasonably oblique questioning –

ELIAS CJ:

Sorry, just before that, the reference to, "Previous consistent statements being able to be used in the manner available under current law," would extend, would it not, to the old recent complaint evidence. Which is why I really question you about being absolutely categorical about a time requirement before "recent complaint" is triggered. Because it seems to me that the timing really is adopted from the context.

MR SHAMY:

Well, recent complaint, in my submission – and this isn't, because the appeal is initially about recent complaint –

ELIAS CJ:

No, but we have to keep in mind the whole scope.

MR SHAMY:

But perhaps if I could say it off the cuff. Recent complaint was traditionally admitted on the basis of a consistency of conduct, that you might – the hue and cry, if you like. So, again "recent" wasn't meant to be as in "shortly, necessarily shortly after the events alleged," it was that at a reasonably first available opportunity someone complained, as you may expect someone to do, and it was a consistency of conduct as opposed to a consistency of account issue. So, there was a different rationale, although the same word recent was used, there was a very different rationale behind that admission of that evidence and –

ELIAS CJ:

A statement was, however, admissible, and it was a previous consistent statement. I'm just wondering whether we don't have to be alive to a compression in this legislation of –

MR SHAMY:

Well, I am aware, from a very brief read of the Law Commission – this is at tab 23 of the Crown bundle that says, "37A replaces the law on recent complaints," this is a C168, tab 23 of the Crown bundle.

ELIAS CJ:

Sorry –

MR SHAMY:

C168, it's on the right-hand side, third paragraph down, the Crown bundle's printed on both sides.

BLANCHARD J:

Tab 23.

ELIAS CJ:

Tab 23, thank you.

MR SHAMY:

Yes, and it's 168, and it says, "Section 37A replaces the law on recent complaints in sexual cases. Such complaints will now be admissible under this subsection, but only to meet a challenge to truthfulness, for example, an allegation of recent invention."

BLANCHARD J:

And while we're on the subject, you might as well note the next sentence.

MR SHAMY:

"The complaints may not be recent and can be – "

BLANCHARD J:

"And can be admitted to prove the truth of the contents."

MR SHAMY:

Yes, which I think is what the Crown is relying in the directions issue.

BLANCHARD J:

Yes, and note in that connection that the words "except to the extent necessary" appeared in the Law Commission draft.

MR SHAMY:

Yes.

TIPPING J:

When the select committee – going back to the select committee's material – talked about, "In which previous consistent statements, but could be used, limiting them to those available under the current law," is it perhaps the case that they were simply focusing there on the rebuttal of previous inconsistent or – sorry, the answering of an allegation that you've made a previous inconsistent statement, by being able to show that you'd actually made a previous consistent one too, and the recent invention one. In other words, that the current law was only designed to reflect those two situations, which were classically, apart from recent complaint, which is a different genre, were classically the two situations where you could put in a previous consistent statement.

MR SHAMY:

Because the statement wasn't being put in as hearsay, that is, to prove the truth of its contents, it was really being put in as a credibility tool, and that seemed to be what –

TIPPING J:

Well, that starts getting into a very difficult –

ELIAS CJ:

Another twist to the skein, really.

TIPPING J:

That's sort of almost getting on to our next point.

MR SHAMY:

Yes.

ELIAS CJ:

But on this, the select committee is modifying the Law Commission proposal, and the Law Commission proposal was collapsing recent complaint and previous consistent statements as separately looked at in the law into one. So, I'm not sure that the inference can be drawn that the select committee, in saying that it intended no change with the existing law wasn't also referring to recent complaint.

MR SHAMY:

As I say, I haven't really been able to consider the recent complaint issue in any detail. I suppose that the nub of what is said on behalf of the appellant is that, echoing the United States Supreme Court, if there was to be a real change to the current law there would have been explicit wording in the statute to that extent, and that if we are struggling with implications that the same words, like recent invention, are used, but they have a different meaning, or rebuttal of recent invention, which was a common law phrase, is used, but because the Law Commission thought differently that it must have a different meaning, in my submission it really does take some reasonably clear wording from Parliament to change the current law, and they have used the traditional common law terms, and that really is the nub of what the appellant says.

ELIAS CJ:

Yes, thank you.

MR SHAMY:

If the Court pleases, I could move on to the actual case at issue.

WILSON J:

Well, perhaps if you're doing that, Mr Shamy, can I ask you first to refer to page 208, I think it is – yes, 208 of the case on appeal.

MR SHAMY:

Yes.

WILSON J:

And can I direct your attention in particular towards the foot of the page, where the Judge is recorded as saying to defence counsel at trial, "So, if you want to close to the jury on that basis, I really need to know whether there can be any objection to what the Crown want to do," and that's a reference back to the statement by the Judge two paragraphs up. And then Mr Stevens, "No, no objection, Sir." I realise, of course, you weren't trial counsel but, looking at the transcript, there seems to have been a very clear withdrawal by counsel of an objection to the Crown calling evidence from Mr Loos.

MR SHAMY:

The background, Your Honour, is that when I was assigned this I read – I didn't have this transcript, I just simply had the notes of evidence, and the recent previous statement came up at me, and I spoke to trial counsel, whose recollection was that he'd objected to it. So –

WILSON J:

I think he did object, but he withdrew the objection.

MR SHAMY:

Yes, but he didn't tell me that part, so I filed the appeal on the basis that there was an error on the part of the trial Judge, and it was only quite close to the hearing of the matter in the Court of Appeal that I came into possession in respect – of this transcript. And the Court of Appeal – I'm just looking at the judgment now – said that, I'd phrase it, that it would either be a competence of counsel issue and withdrawing the objection, or a complaint about the Judge. At the Court of Appeal stage, really nothing turned on it, because I didn't think

it – well, the Court of Appeal didn't want me to run a competence of counsel argument on that basis, it was simply on the basis that the trial Judge has basically told trial counsel which way he was going to deal with it, and trial counsel effectively acquiesced. So, the analysis at Court of Appeal level was on the decision of the trial Judge rather than the withdrawal of the objection by trial counsel, and I do see that the Crown have raised that point as, effectively, a procedural issue. However, it certainly wasn't at the time of filing the original appeal in the Court of Appeal a second bite of the cherry, because I had understood there had been an objection but it had been overruled, and it was, as you can imagine, took quite some time to get the tape played and get the transcript typed, and we realised there'd been a withdrawal of the objection.

WILSON J:

I accept completely what you say as to what happened but, it does seem to me, that because the objection was withdrawn after the statement by the Judge, the Court of Appeal would be correct in saying that the issue must be seen either as a trial counsel competence issue or a criticism of the Judge for, in effect, forcing – and the transcript makes this quite clear – forcing counsel to elect between allowing the evidence to come in and running, in closing, the point in summary that the complainant, that this was an invention because the complainant was following the example of her mother in obtaining a lump sum from ACC.

MR SHAMY:

I suppose I simply addressed it on the basis of the miscarriage point, as opposed to trying to necessarily pigeonhole it in, and the fact of that transcript. It does seem that the learned trial Judge had a very clear view on it and counsel for the accused simply, grudgingly, acquiesced. Unless the Court wants to hear from me further on that point of procedure –

ELIAS CJ:

I don't know that it can simply be said to be procedure. Why do you say, notwithstanding the withdrawal of the objection there's been a miscarriage of justice?

MR SHAMY:

The argument for the appellant would be that inadmissible evidence has been admitted that could have affected the verdict, and as a result that's a miscarriage.

TIPPING J:

And the Judge had no business to put it to counsel on those terms. Because that's necessarily implicit, isn't it, because if counsel wasn't, as it were, pressured into it or forced with Hobson's choice, then the fact that you've consented to evidence going in, even if it's technically admissible, would be a very strong factor in any question of miscarriage?

BLANCHARD J:

I don't think we should get bogged down on questions of counsel competency. The real question, as Mr Shamy is suggesting I think, is whether this was inadmissible evidence.

MR SHAMY:

That's really the only point I can take.

WILSON J:

Well, just on that point, in determining whether the evidence was admissible or otherwise, is it relevant that defence counsel had made clear, in answer to the Judge, that in closing the defence wanted to run this argument I summarised a minute ago? In other words, the complainant being motivated by a desire to obtain ACC compensation.

MR SHAMY:

I suppose that one factor to be considered is if the evidence was inadmissible and prejudicial, can the acquiescence of trial counsel cure all that from being a miscarriage?

TIPPING J:

But isn't the more significant point that the Judge elicited here, pretty clearly, that counsel was wanting to address the jury on the basis that this was a recent invention, on any concept of that term? Therefore, surely it's relevant, to that extent, that there was to be an allegation of recent invention. Now, whether the statement was shown to be necessarily prior is then the crunch point.

MR SHAMY:

Yes, the necessary aspect.

TIPPING J:

Yes, and if you're right on that then you can address us that it wasn't clearly shown to be prior.

MR SHAMY:

Well, that is the nub of the objection.

TIPPING J:

Yes, yes.

MR SHAMY:

Well, perhaps dealing with then the evidence in the case –

BLANCHARD J:

But the very fact that trial counsel had been cross-examining her about her awareness of her entitlement to make a claim for lump sum payment, it seems to me is already the trigger at that point. Because why were those questions

being asked, what motivated questions of that kind? That's what the Judge would have been thinking.

MR SHAMY:

Yes, I think –

BLANCHARD J:

And the jury, if alert, would have been thinking the same thing. So, you know, once you get into asking that kind of question I think the trigger's been pressed.

TIPPING J:

That trigger has been pressed. The remaining question is whether there was a prior consistent statement, a prior consistent statement.

BLANCHARD J:

Yes, yes.

MR SHAMY:

If we assume that there's been an allegation of recent invention, that would seem to be that on the basis, you knew mother had received money, you knew this at the end of 2005, beginning of 2006, and it was your motivation to emulate her and to get this money, therefore you made up this allegation at some stage after the end of 2005, beginning of 2006. That would seem to be the implied rationale. Perhaps the criticism which is levelled at the trial Judge is that the second trigger wasn't investigated and neither was it really investigated at Court of Appeal level. If it is being put that the fabrication arose at the end of 2005, beginning of 2006, then how could a statement made in May 2006 logically rebut that proposition?

BLANCHARD J:

Yes, but the questions also involved her knowledge of her own entitlement to make a claim, which has got nothing to do with the motivation relating to what had happened to her mother.

MR SHAMY:

It's a very cloudy area, because of course the evidence was that in fact she didn't make a claim until the September, when she had spoken to the police in about the July. So –

BLANCHARD J:

And the evidence about Mr Loos, the timing of that, was April wasn't it, or May?

MR SHAMY:

May, May.

BLANCHARD J:

May?

MR SHAMY:

Yes.

BLANCHARD J:

So it's prior to that time.

MR SHAMY:

Yes, yes. Well, the point made is, in reality, if what was to be rebutted was the proposition that you made this up, say, at the beginning of 2006, the question is, was a statement made in May 2006 admissible as being necessary to rebut that proposition?

BLANCHARD J:

Yes, but as I understand it, the Crown's argument is that the evidence of Mr Loos was rebutting the idea that there had been a recent invention, motivated by her knowledge that she could claim herself, nothing to do with her mother.

MR SHAMY:

And the evidence was effectively, as I recall it, that that police told her to go to ACC, when they spoke to her in the July. So –

TIPPING J:

Was there any evidence, with any clarity, indicating when she first became aware, quite independently of her mother, if there was a time when she became aware, independently of her mother, that she could claim ACC, when that was?

MR SHAMY:

Well, her evidence, as I understand it –

TIPPING J:

Because it has to be after May 2006 –

MR SHAMY:

Yes.

TIPPING J:

– for that statement to be logically rebutting of it.

MR SHAMY:

On my understanding, her evidence was that she was told by the police to go to ACC – I'll just to the page.

BLANCHARD J:

And there's nothing to contradict that.

MR SHAMY:

Well, you see, what was put in cross-examination – and I'll go to the page. Now, this is at page 104, 105 of the casebook, this is the cross-examination which is the trigger. Beginning at line 12, "You are aware late 2005, 2006, your mother received a substantial amount of money, do you recall that?"

"Yes." "It was quite a lot of money?" "Yes." "Were you aware why she received that money?" "No." "You were aware she was making a claim on the government?" "No, I knew she just got a lot of money." "You see, I put it to you, you were aware of why she got that money." "No, I wasn't." So, what effectively is put to her, "You were aware at the end of 2005, beginning of 2006 that she got the money from ACC." "I put it to you," she was aware that, "that she had money in her account from ACC." "What do you mean, 'money in her account'?" "That she received money from ACC." "I was aware she received money, but I didn't know where she got it from." 105, "Now you've received counselling over your allegations of sexual abuse?" "Correct." "Yes, and I put it to you, you're aware that at a later stage you could be entitled to make a lump sum payment?" "Yes." "You're aware of that?" "Yes, I am." The difficulty, of course, is that that's a present tense, "You are now aware, as at the date of this trial." So, in terms of the trigger –

TIPPING J:

Well, that puts an awful lot on the accuracy of the transcript.

WILSON J:

Yes, but beyond that, but in fairness to Judge, wasn't part of the trigger the subsequent discussion between Judge and counsel as to the basis upon which counsel was proposing to close?

MR SHAMY:

Yes, and –

BLANCHARD J:

But more than that, to say to her, "Now, at trial, you're aware that you can make a claim for lump sum payment," why is that question being asked, if it's not directed to a motive for fabrication?

MR SHAMY:

Yes, yes.

BLANCHARD J:

I mean, it's an utterly irrelevant question, unless it has to do with fabrication.

MR SHAMY:

Yes, certainly. The important point, though, is when has it been put to the complainant as to, "When did you make this up?"

BLANCHARD J:

Well, it may not be, but the point is that it's a fabrication subsequent to the events, which gave rise to the charge.

TIPPING J:

If the cross-examination is going to be put on this loose basis, surely the Crown is entitled to protect itself against any conclusion that the jury might have made that she made it up after May 2007. I think we've got to look at it from both sides. I mean, here's this woolly sort of cross-examination, and the jury are surely entitled to know that as at May 2006, she was speaking, in terms of what had happened. So, if they were of the view that perhaps she made it up later than that, then that wouldn't run. I'm with you quite a long way, Mr Shamy, on this, but I really think that this is getting a bit too exact.

BLANCHARD J:

You see, the problem here is that what's been to put to her is that, "At a later stage," in other words, after she knew about her mother's position, she –

TIPPING J:

It's so –

BLANCHARD J:

– became aware she was entitled to make a claim for lump sum payment. Now, there's no significance in the trial of that awareness of hers, if it isn't that this caused her to fabricate.

MR SHAMY:

Yes.

BLANCHARD J:

So there's a timing issue there.

MR SHAMY:

I suppose the issue is, we're aware she complained to the police in the July, so was it really being put to her that she made it up sometime between May and July? Because if it was put to her that she made it up prior to May, then the statement to Loos is not relevant to rebut it. If it was put to her effectively, "Well, you made it up sometime between May and July," then the Loos statement is relevant.

TIPPING J:

But you can't expect the complainant – that question suggested by cross is rather naïve, "When did you make this up?" If the complainant said, I made it up on the 3rd of July 2006, end of trial. She's going to say, I didn't make it up, isn't she?

MR SHAMY:

Yes, yes.

TIPPING J:

I mean, it's a pretty odd sort of proposition in cross.

MR SHAMY:

Yes, well, I think it's simply trying to get across the point that there's usually a timeframe –

TIPPING J:

The timing point.

MR SHAMY:

– that's been put in.

TIPPING J:

But, look, if you're going to put it in this loose at a later stage, isn't the Crown entitled to close the gap between May and July?

MR SHAMY:

Well, what the question is, "You are aware," present tense, "that at a later stage," as in, after the trial, "you could be entitled to make a claim for a lump sum compensation." "I put it to you, you're aware, you are now aware, that at a later stage you could be entitled to make a lump sum –

TIPPING J:

Well, if the awareness was only at the time of the trial, it's irrelevant. So, I just wonder whether this, either counsel has asked a crazy question, or the transcript's, "I put it to you, you were aware, that at a later stage," I don't know.

MR SHAMY:

Well, but I've not been pointing to any indication that the transcript is not accurate.

TIPPING J:

But if it is accurate it's a bizarre question, isn't it?

ELIAS CJ:

It's a question as to motive, in the evidence she's giving, as it's recorded.

TIPPING J:

Mmm, exactly.

MR SHAMY:

My submission, in my written submissions, is that it is very unclear whether this crosses the line between exploring motive and putting an allegation of recent invention. Because they also, trial counsel also explores, "Well, look, you didn't like the new girlfriend, and you stopped –

WILSON J:

But if that's right, if there was any ambiguity in the questions, wasn't that ambiguity resolved by the subsequent discussions between Judge and counsel? I just happened to notice at page 206 of the case further confirmation of that, on top of page 206.

MR SHAMY:

You see, the point I'm making is that a putting of motive alone isn't an allegation of recent invention. You're making this up for money. That isn't an allegation of recent invention. You're making this up because you hate the accused. That's not an allegation of recent invention. You're making this up for money, you found out at the end of 2005 you could get ACC, you made it up, you know, because you knew you could get money. That's recent invention. Making it up for money is motive. And in terms of the analysis, that's the problem that was struck by the trial judge, who didn't have a voir dire either to find out, really, when the statement was made to Mr Loos, or to clarify, well, what are you saying? When did she make it up? Are you saying this is just a motive, or are you saying she made it up at a particular time? Because it is very loose, the questioning. It's all over the place.

TIPPING J:

You say there was no voir dire?

MR SHAMY:

No voir dire, no. We've got the transcript here. This is the discussion.

TIPPING J:

I appreciate that.

ELIAS CJ:

In the conversation with the Judge, again, though, it's put simply on the basis of motive, without being time delineated. Was that the way it was used in the addresses? Presumably it was.

MR SHAMY:

I must confess, I'd have to have a look and see.

ELIAS CJ:

So your argument that there wasn't any necessity to – it wasn't necessary, in terms of the legislation, to have the previous consistent statement in order to rebut the allegation of motive? It wasn't so specific as to timing. It was a general allegation of motivation?

MR SHAMY:

Yes. So it didn't bring 35(2) into play.

TIPPING J:

I doubt you can sustain that, because of the focus of the questioner on late 2005, 2006. That can only be regarded as setting up a recent invention.

MR SHAMY:

But if that is the timeframe adopted, then one wonder how Loos –

TIPPING J:

Then it's too late, it's too late.

MR SHAMY:

- be relevant?

TIPPING J:

There are real intricacies here, which, unfortunately, and understandably, the Judge hasn't grappled with.

MR SHAMY:

Because what seems to have been the trigger, both for the Court of Appeal and the trial Judge, is that if you put to someone a motive, straight away 35(2) comes in. But that isn't what the law is. There still has to be a, when did this motive kick in?

ELIAS CJ:

Well, it still has to be relevant, the evidence that you're seeking to adduce of previous consistent statement, and it isn't if it's only as to motive, leaving aside the question of whether it was specific as to timing.

MR SHAMY:

Yes. Well, on the one hand, if it isn't specific as to timing, 35(2) doesn't come into play. If it is specific to timing, what was the timing, and then does this statement predate that timing?

ELIAS CJ:

Yes.

MR SHAMY:

And if one says there was a timing, it must have been the end of 2005, 2006, when it's put to you, you became aware mum got this money. So if that's the case, Loos does not rebut that. Loos can only rebut that if he'd say to her, you became aware in June 2006 mum had the money, and you formulated a plan to make this up. Well, of course, the statement the month before would then rebut it. And that's really the nub –

ELIAS CJ:

There's a crude impression that if you challenge as to motive by reference to any sort of timeframe that all previous consistent statements come in.

MR SHAMY:

And there seems to be, it is necessary that there is a time linkage not simply, as the Crown says, well, look, it seemed pretty spontaneous to Mr Loos, so therefore it rebuts this ACC thing.

TIPPING J:

Spontaneity has got nothing to do with it.

MR SHAMY:

Well, spontaneity may be probative.

TIPPING J:

Yes, it may enhance it. But it's got nothing to do with admissibility.

MR SHAMY:

Yes, well, that's precisely what the majority of the United States Supreme Court said. So in terms of this case, one would have to – if one is going to categorise this questioning, and I certainly can't put it forward as an example of how to cross-examine somebody on this basis, but if one is going to categorise it as an allegation of recent invention, one must pin a colour to a mast, and say, well, that's about the timeframe they say that the invention occurred.

TIPPING J:

I think the problem is that people, or, at least, in this context, in this trial, there was no clear distinction between invention and recent invention.

MR SHAMY:

Or motive and the time of motive.

TIPPING J:

Yes. Well, motive would normally be accompanied by motive, obviously. But recent invention is a different beast. It's a much narrower beast.

MR SHAMY:

And it was invention that was in the original draft of the Bill, and it was subsequently made much more strict. Unless I can assist further, those are my submissions on the admissibility issue. Turning to the use of the statement, or more particularly, to the question as phrased, which is what directions, if any, should the trial Judge have given the jury, if the statement had been properly admitted. On behalf of the appellant, it is advocated that *Wilson* is still good law, that the jury needs to be told, well, this evidence is relevant for the purpose of disproving the allegation of recent invention. It cannot be relied upon to prove the truth of the statements. This is *Wilson* at 418. *Wilson*, which is a quite recent Court of Appeal decision, at tab –

TIPPING J:

That's the old law, wasn't it?

MR SHAMY:

That was the common law, yes.

TIPPING J:

And you're saying that nothing has changed?

MR SHAMY:

Nothing has changed.

TIPPING J:

Well, they were meaning to change it, weren't they?

MR SHAMY:

The Law Commission wanted to change it. It's whether Parliament wanted to change it.

BLANCHARD J:

Well, Parliament didn't change the crucial words.

MR SHAMY:

None of the words have been changed, and certainly the select committee report doesn't seem to indicate that once it's in, it's open season.

BLANCHARD J:

Well, do they indicate the contrary?

MR SHAMY:

So the select committee report is at tab 12 of the appellant's bundle. And that's where, at the end of the third paragraph, "Limit the circumstances in which previous consistent statements could be used –" the word "used" is emphasised, "to those available under current law."

BLANCHARD J:

Well, it's the circumstances, not the purpose that they're dealing with there. They just don't get into the question of purpose. And they didn't disturb the Law Commission's wording relating to purpose.

MR SHAMY:

In the section, Your Honour?

BLANCHARD J:

Yes. The Law Commission used those words to the extent necessary, and said that it would be admissible to prove the truth of the contents. That's at that paragraph C168 that we looked at recently.

TIPPING J:

To the extent necessary doesn't seem to me to signal abuse issues. It signals the content of the statement. The statement goes in to the extent necessary, in other words, that part of it which is necessary, because it's not a wholesale, it's only how much of it is necessary to rebut. With respect, I don't think one can take anything in your client's favour out of those words, if anything. And perhaps marginally, they point the other way.

MR SHAMY:

Well, I suppose it comes back to the proposition if evidence has been admitted for a certain reason, should it logically, then, be used for that reason? If we are admitting evidence as an exception to a general rule, does that exception only apply to the admissibility and once it's in, it's in for the truth of the statement itself. Or in other words, does the statement effectively become hearsay, that's the truth of the statement.

TIPPING J:

But it's not hearsay under the new rule.

MR SHAMY:

Yes, but in terms of its use.

TIPPING J:

Well you can't invoke the hearsay rule in order to limit its use.

MR SHAMY:

No I'm certainly, I'm just talking about the – if you're using it as the truth of the contents of that statement, that's really what hearsay was defined as.

TIPPING J:

Do we really want to perpetuate this sophistication that first came in a hundred years ago in *Lillyman a*bout use for consistency only and not as truth. Have you ever seen the glazed looks that come over juries eyes Mr Shamy?

MR SHAMY:

Well I suppose it's a little bit like the recent complaint. We admitted that, not as the truth of what was said, but as a tool in assessing the credibility of a witness, we use veracity evidence, propensity evidence for particular uses. It doesn't – there are tools to enhance and derogate from credibility. Logically they do enhance credibility but do they necessarily have to be used in a much wider way?

TIPPING J:

Well the Judge ought properly, in my view, to explain to the jury what the primary relevance of this evidence is i.e. that it tends to, or if they accept it, rebuts any suggestion of subsequent invention but does the Judge then got to go on and say, but be very careful that you do not use this statement as in any way enhancing the reliability and accuracy of the complainant's evidence as you have heard it in the witness box?

MR SHAMY:

Well there's no problem with that because they go hand in glove. The Judge doesn't need to give that direction because one side of the coin is, it rebuts that allegation, but the other side of the coin is that by rebutting that it must enhance your credibility.

TIPPING J:

Well that's what makes the whole exercise of limiting use, such as angels on the head of pin matter.

ELIAS CJ:

Is there some assistance for you though in the wording of section 35(2) which is that it's necessary to respond to a challenge to a witness' veracity or accuracy, so those are the purposes for which the evidence is admitted under 35(2) and then of course the Act has a further regime dealing with veracity?

MR SHAMY:

Yes.

ELIAS CJ:

I mean it's not an accuracy issue here. It's clearly coming in for veracity.

MR SHAMY:

Yes and that's precisely the point. Is that it's –

ELIAS CJ:

And the Act does envisage a distinct treatment of veracity evidence and other evidence?

MR SHAMY:

That, it is logical that if the statement rebuts an allegation of recent invention that it enhances the credibility of the witness but the complaint made by the appellant about the Court of Appeal decision is that that doesn't, of itself, mean that the statement is truth of the statement itself. It's a tool, an assessment of credibility but to say that a statement once admitted is truth of the contents of that statement, the unsworn statement made previously, is, in the appellant's submission, too far to go.

ELIAS CJ:

Well you might then be, have to look at the hearsay busting provisions of the Act because it may also be admitted as truth of its contents under a different provision but section 35(2) does seem to be directed at evidence of veracity.

MR SHAMY:

The point I was endeavouring to make in perhaps not very clear terms to His Honour Justice Tipping was that effectively to say the statement can be used as truth of the contents of the statement is to do just that, to convert it into a hearsay, as opposed to a credibility tool and that's really at the nub of that complaint.

BLANCHARD J:

Well what's wrong with that provided that the jury has it pointed out to them that the repetition in the statement doesn't ensure its truthfulness?

MR SHAMY:

Well the jury's enquiry is whether the sworn testimony is true in Court. That's their enquiry. The previous statement is a tool to help them decide whether what the witness is saying on oath in Court is true. It's rebutting a proposition that's put to the witness. It enhances the witness' credibility but it isn't the

truth of the statement that's at issue under 35(2). It's whether it's rebutting the proposition, it's enhancing credibility, and a jury can be told this was admitted, it was put to her that you made it up at the end of 2005. Well look in 2003 she told someone else about it so that, you can assess it, if that statement was made and it's on all fours, then that's a tool that you can take into account in deciding whether you accept or reject the defence contention that this motivation arose at that date. There's no problem with that sort of direction to a jury and obviously it will enhance the credibility because if the only attack on the witness' credibility is this recent invention, then if that's disposed of then ipso facto it must enhance the credibility.

TIPPING J:

Well ipso facto almost proves the truth of the – I mean this is where the thing gets so fine and refined.

BLANCHARD J:

It's smoke and mirrors and juries would see it as such. It goes to prove the truth of the witness' primary statement.

MR SHAMY:

Well in my submission –

BLANCHARD J:

And the Court's have pretended otherwise for years and juries have been directed otherwise for years and that's why their eyes glaze over.

ELIAS CJ:

If there is, however, additional material in the previous consistent statement, that is not, that doesn't come in under the hearsay exception?

TIPPING J:

It's excluded unless it is necessary to rebut.

ELIAS CJ:

Yes. So I don't see that the conceptual difficulty can altogether be avoided. I do think Judges may have made more of a meal of it than it requires, but, however.

MR SHAMY:

In my submission –

ELIAS CJ:

The real issue is what has Parliament provided here and 35(2) does seem to make the submission directed to veracity which is your argument.

MR SHAMY:

Yes and following from that, that a Judge should direct the jury, well this is why it came in and this is its primary purpose.

ELIAS CJ:

Well it's probably its only purpose because it doesn't qualify under section 18.

MR SHAMY:

Because the witness is present.

TIPPING J:

Well that's the key question. Is it its primary purpose or its sole purpose? That's really the crunch.

MR SHAMY:

So –

TIPPING J:

Because if it is its primary – sole purpose, the Judge must caution against using it for other purposes which is – that's when the sort of possible difficulties arise.

ELIAS CJ:

Back to the future.

MR SHAMY:

But if the direction is approached in two stages. One, this has come in because this allegation has been made and it predates it. If that is said to a jury at least that helps them.

TIPPING J:

They should have that help anyway.

MR SHAMY:

But that wasn't here.

TIPPING J:

I know but that's the – looking generally, surely they should have that help anyway?

MR SHAMY:

Yes and then –

TIPPING J:

The only question then is are they warned off anymore?

MR SHAMY:

Yes and that's the more unclear issue. But the major complaint that the appellant has is that this direction didn't really take the jury anywhere.

BLANCHARD J:

Where do we find the direction?

MR SHAMY:

It is in volume 2 of the appellant's bundle and I'll just find the page. This is at page 271 and 272 of the casebook. The second to last paragraph.

McGRATH J:

Sorry, could you just repeat where we're looking at?

MR SHAMY:

This is volume 2 of the appellant's bundle?

McGRATH J:

Yes.

MR SHAMY:

And it's at page 271 and 272, sorry, not bundle. My apologies. The notes of evidence, the casebook.

McGRATH J:

Thank you. 271?

MR SHAMY:

Yes.

TIPPING J:

Did M also give evidence of the complaint? Sorry, I shouldn't have said that word.

MR SHAMY:

M's the complainant.

TIPPING J:

Yes I know but did she give evidence to the effect of having spoken to Timothy Loos –

MR SHAMY:

Yes, yes.

TIPPING J:

She did, right.

MR SHAMY:

But she was very vague about when she did it and what she did and –

TIPPING J:

Okay, that's fine.

MR SHAMY:

And that was it. That was the point I made about there being no voir dire because the Judge simply couldn't have told when it happened.

TIPPING J:

Exactly.

MR SHAMY:

So I must, this is the second to last paragraph, "I must also explain the relevance and effect of the evidence of Timothy Loos about the complaint made by M to him. He is, of course, the only witness who gave such evidence and you would not normally hear such evidence but are allowed to on this occasion because it is alleged that the complainant made all this up for financial reward. Dealing first with this evidence it is for you to decide whether M in fact made the complaint to him. Second, the fact she told Mr Loos what happened does not itself prove it did occur. Obviously if she's wrong about it then, she's wrong about it now. The relevance of such evidence is that it may show there's a consistency between what she said to Mr Loos and what she says about it now. That may be of assistance in assessing her credibility and truthfulness. Whether you believe it or not or how much weight you give to it is a matter for you to decide and I should point out that Mr Stevens submission is that the fact she told Mr Loos, she spurted it out on the occasion, was in fact evidence that once she'd done it she was stuck with the story, she never changed it."

So that's really the direction. So we're left hanging with this she made all this up for financial reward as being the rationale for the exception and then we're dealt with the consistency of the count.

TIPPING J:

The last two lines at the bottom of the first page surely warn them off from treating it as evidence of the truth? So he can't be accused of doing that?

MR SHAMY:

No, no, although the Court of Appeal said he should have.

TIPPING J:

Well he did. I would have thought he did. What else does that mean?

MR SHAMY:

Well the problem is that he wasn't told, it's relevant that it's put to her that she made it up at the end of 2005/2006.

TIPPING J:

There's a rather, with respect, broad reference to consistency.

MR SHAMY:

Yes.

TIPPING J:

Which is the mirror of not treating it as evidence of the facts. It's a sort of hybrid old/recent complaint direction though, isn't it?

MR SHAMY:

Which was consistency of conduct?

TIPPING J:

Yes, yes.

MR SHAMY:

Yes.

TIPPING J:

But really I don't think – what is the problem with it in your submission?

MR SHAMY:

Well the complaint is that there should have been a direction that – now it was put to M that she made this up at the end of 2005/2006. The reason you've heard from Mr Loos is because the statement was made in May 2006. Therefore you can take that into account when assessing the defence contention that she made it up on that date or in that timeframe.

TIPPING J:

On that premise it shouldn't have been in because it post-dated –

MR SHAMY:

Yes. Yes well, as I say, I'm arguing in the alternative, if it was properly admitted.

TIPPING J:

Well this is where it becomes difficult, if it was properly admitted, because it doesn't rebut an allegation of invention in 2005, late/early 2006, and put the Judge into a cleft stick, he couldn't direct that because an astute jury member would say, hey that doesn't follow.

MR SHAMY:

Well if one treats, if hypothetically it did rebut the recent invention, then he'd have to say –

TIPPING J:

He should have directed –

MR SHAMY:

– how it rebutted.

TIPPING J:

Yes.

MR SHAMY:

What the issue is, how it rebuts it, they use it therefore to determine this major aspect of the defence response.

TIPPING J:

He should strictly have said it goes to the witness' veracity or truthfulness in what she told you because there's been an attack on her truthfulness through the suggestion of invention. She made the statement before the suggested invention and that, you may find, quite significant.

MR SHAMY:

Yes.

TIPPING J:

In assessing that allegation.

MR SHAMY:

Yes.

TIPPING J:

That would be the purist approach but has he actually done anything prejudicial to the accused here?

MR SHAMY:

Well the difficulty we have, of course, is the argument that it shouldn't have been admitted so –

ELIAS CJ:

If it were, if it had been properly admitted, this really wouldn't give rise to a miscarriage of justice, would it?

MR SHAMY:

Well, if it had been properly admitted then it would seem that in assisting the jury the Judge should have given them some direction effectively as to why it was admitted and why it's relevant.

BLANCHARD J:

Well he has. It was allowed on this occasion because it is alleged the complainant made all of this up for financial reward, in other words, her financial reward.

ELIAS CJ:

You're really arguing against the proposition that the Crown is going to advance, but it's not really the, what happened here.

MR SHAMY:

Well effectively, it's difficult to see exactly what the Judge, how the Judge is assisting the jury.

TIPPING J:

If we looked at summing up with that sort of microscope, there wouldn't be very many that would get a high mark.

MR SHAMY:

Well, all I'm really submitting is that it's confusing for a jury. It's allowed in on –

TIPPING J:

But surely the key point Mr, the key point surely is, that if you're right on your second proposition of law, the Judge has expressly warned them in those terms?

MR SHAMY:

Yes.

TIPPING J:

Isn't that the key point? And within the ambit of what your admitted points of appeal are, if you're right on that the summing up is consistent with your legal proposition, otherwise it's not a perfect model, but I can't see how it's prejudicial or could lead to a miscarriage. I know you feel as I do, that it's not as good as it might have been but…

MR SHAMY:

Well I suppose all I can say is that it seems rather confusing and doesn't give the jury any particular help on what the relevance of Loos is and really that's it. It doesn't really say how you use it. If it's not evidence of the truth that it did occur, and consistency means nothing, then why are we hearing it?

TIPPING J:

I don't know that consistency means nothing. I think it's drawing the attention of the jury to the fact that she has told a consistent story and there may be, there's an alleged hiccup in the middle, the recent invention, but bearing in mind that it's really consistent.

MR SHAMY:

Yes. I can't advance that terribly much further, over and above what I've said in my written submissions. As I say, in my submission it just seems somewhat confusing to say it was allowed in because of an allegation of financial gain full stop and then another paragraph dealing with something else.

TIPPING J:

Well that probably elucidates why the Judge let it in.

MR SHAMY:

Motive.

TIPPING J:

Yes.

MR SHAMY:

As opposed to timing, exactly. Unless I can assist the Court further those are my submissions.

ELIAS CJ:

No thank you that's fine thank you.

COURT ADJOURNS: 11.28 AM

COURT RESUMES: 11.46 AM

ELIAS CJ:

Yes, Mr Downs.

MR DOWNS:

Yes, may it please the Court, by this case today and that tomorrow, this Court comes to, at least to what is the Crown's mind, a difficult provision of the Evidence Act, and in particular section 35 which, as we know, encapsulates the previous consistent statement rule. The overarching submission advanced by the Crown is that this provision effects change to both the admissibility and forensic use, or effective evidence, once admitted, and that while the common law is, of course, still relevant, in relation to recent invention the section, or in particular the subsection, has qualified it or, put more simply, we say that while the concept of recent invention, which is of course a well-known common law concept, while it operates as the gateway to admissibility in certain cases, its temporal requirement is now abandoned by virtue of section 35(2), and in relation to question 2, upon which leave is granted, the Crown submits that evidence, if properly admitted in terms of

section 35(2), is admissible for the truth of its contents. Now, it may be of assistance to make the observation that if the Court were to conclude that the evidence had been wrongly received, in other words, if it was inadmissible evidence, it wouldn't be proper for the Crown to seek to contest that there hadn't been a miscarriage of justice, given the nature of the evidence and the nature –

ELIAS CJ:

Sorry, there were lots of negatives in that.

MR DOWNS:

Yes.

ELIAS CJ:

Did you say that you will not be resisting a finding that there's been a miscarriage of justice if it was wrongly admitted?

MR DOWNS:

Yes.

ELIAS CJ:

Yes, thank you.

MR DOWNS:

And I'm sorry for putting it in an awkward way.

ELIAS CJ:

No, no, it was just me, I think.

BLANCHARD J:

But what about a substantial miscarriage?

MR DOWNS:

On *Matenga* we couldn't contend for the application of the proviso. We acknowledge, hopefully responsibly, that the nature of this case and the nature of sexual cases more generally is that they almost invariably turn upon credibility, and so the reception of this sort of material is capable of affecting the result in terms of *Matenga,* as a miscarriage, and given the inherent limitations of the records that this Court, in *Matenga,* spoke of an advice by which the Australia High Court recognised the proviso operated, meant that in sexual cases it's very difficult for a Court, an Appellate Court, to conclude that a person was undoubtedly guilty.

In terms of the admissibility question there are, I respectfully submit, probably two questions or sub questions. The first is, was there a claim of recent invention in terms as understood by the common law? And then secondly, if there was, was it necessary to respond or was this evidence necessary to respond to such a claim? Now, introducing things in that way, it may be more useful to first say something, however, about the Evidence Act and its principles and purposes. The first is that, as is abundantly clear from the text, section 10(1)(c) reminds us that the common law may be considered, but only to the extent that it's consistent with the Act's provisions and its purposes. Similarly, section 7 of the Evidence Act contains the statutory imperative that all relevant evidence is admissible, obviously subject of course to then corresponding provisions regulating specific cases. Similarly, sections 6(a) and (c) of the Evidence Act remind us that the Act intends to create a set of logical rules and that it is to be interpreted having regard to the interests of fairness according to witnesses as well, and that's a matter that we'll touch upon in terms of our admissibility argument, given the nature of the challenge to M's credibility.

Now, I mentioned those things because, with great respect to the many, many architects of the common law, some of its features were a little unusual. For example, the requirement that a complaint be made at the first reasonable opportunity before it could be admitted is, I think, proper to observe based on a particular view of how victims, or alleged victims, respond in sexual cases.

But more modern research, and indeed advancement of society, suggests that that may indeed be outdated thinking, and so we simply observe that this Act seeks to approach the difficult area of previous consistent statements afresh and with regard to the common law where necessary or where of assistance, but that the common law ultimately isn't controlling, and we acknowledge that's a prosaic submission but we respectfully contend it's an important one nonetheless.

Now, with that admittedly very brief introduction, the next logical question then is, was there a claim or challenge of "recent invention" as that particular concept or phrase was understood at common law? It's probably correct to observe that the leading case is *Nominal Defendant*, the decision of the Australian High Court. It's a decision that was adopted by the English Court of Appeal. It was a decision that was adopted by the New Zealand Court of Appeal in *R v Felise* and it has received, with respect, common law recognition. Now, the reason for making reference to *Nominal Defendant* in the first instance is that that case makes clear that it's not the intention of the cross-examiner that's important, but the effect upon the tribunal. So that it doesn't matter ultimately what the cross-examiner was intending to suggest or convey, but rather that how that challenge would be understood. So the Chief Justice Dixon in *Nominal Defendant*, this is at page 479 of the case, which is at tab 6 of our bundle, talked about it being based upon the conduct of the trial generally, and that it mattered not whether counsel proceeded with subtlety. Similarly, Justice McTiernan talked about what the record was reasonably capable of implying. Justice Menzies, at pages 483 and 484 of the decision, talked about what the record could not but convey, and in may be worthwhile to recall in that case, there was both a contention at trial and repeated before the Australian High Court that there was no intention to allege recent invention, that specific intention was abandoned by the parties in that case, or at least the cross-examiner in that case. But, nonetheless, both the trial Judge and the Australian High Court thought that the record demonstrated the cross-examination is suggesting that there had been a later contrivance subsequent to the underlying accident in issue, the case of course being about personal injury. Now, this finds

expression in more modern authorities. So, for example, in *Athwall,* a decision which is in our casebook behind tab 13, the English Court of Appeal in the murder trial noted that counsel for the appellants had said to the trial Judge that they were specifically trying to avoid the operation of the rule. Tab 13, the relevant paragraph, 35, this is towards the top of page 218, "We accept that Ms Karl," that's counsel for the appellant, "intended to conduct the cross-examination in a way that deliberately avoided the allegation of recent fabrication and that her approach was intended to be that Sarbjit, the witness, had invented her account and that she eventually gave it to the police as a result of pressure from her family. And the Court goes on to –

TIPPING J:

Just pause there. Does that not contain a very useful dichotomy between recent fabrication and invention? In other words, the very language of the Judge as here makes the distinction that Mr Shamy was suggesting to us.

MR DOWNS:

We know of no distinction between recent fabrication and recent invention.

TIPPING J:

No, I'm sorry, I didn't put that very well. In the one expression it doesn't matter whether it's fabrication or invention, it's recent.

MR DOWNS:

Yes.

TIPPING J:

In the other it's without the adjective.

MR DOWNS:

Yes. To stand back from the close textural analysis of this case, we accept that at common law it wasn't enough for there to be a general challenge to the effect, you're lying, there had to be something more, we accept. In other words, a cross-examination to the effect that, at some point or as a

consequence of some material event, you have either consciously or otherwise invented this account. *Felise*, the Court – I hope I'm saying that correctly, and forgive me if I'm not – *Felise*, the case, the New Zealand case in the New Zealand Law Reports, the Court of Appeal accepted there it didn't matter whether conscious dishonesty was being suggested or not, it was rather that subsequent to relevant events, in other words, after the date of the alleged offending, the witness for whatever reason had, in his or her mind, reached an account that was at variance with the true position. Now, where does all this take us? The answer, the Crown submits, is that whenever this is alleged, irrespective of the intent of the cross-examiner, a previous consistent statement at common law was admissible to rebut it. The appellant relies heavily on that feature and says at common law the previous consistent statement had to be truly previous in the sense of prior to, prior to the date of the alleged fabrication, or prior to the reason or motive for the witness to make things up. At common law we are forced to accept that that is so. It appears, with respect, to be clear both from *Nominal Defendant* and from subsequent authorities, including in this country, and it's also recognised in North America in the decision of *Tome* of the United States Supreme Court. But our contention, which is hopefully not a radical one, is that the Act merely provides that "recent invention" is the trigger point for the potential admission of a previous consistent statement. In other words, all of that concept is not necessarily carried over into the Evidence Act in determining whether a previous consistent statement is adduced to the jury.

ELIAS CJ:

So are you saying it doesn't have to meet the allegation?

MR DOWNS:

Not in terms of time is the way we've put our case. so in other words, if a previous subsequent statement, if that's not an oxymoron, if an out of court statement, if an out of court statement, subsequent to the date and time at which it is alleged that the witness has, for whatever reason, invented, consciously or otherwise, his or her proposed testimony that that, providing it is relevant, and is necessary to respond in terms of the section, is admissible.

Now we advanced this argument in part of the important, we say, definition used by the legislature of a previous statement. And I should note that under section 4 a previous statement means a statement made by a witness at any time other than the hearing at which the witness is giving evidence. So that in terms of section 35, section 35(1) renders prima facie inadmissible, any statement made by a witness at any time other than the hearing at which the person is giving evidence.

TIPPING J:

Will it respond to a claim of recent invention if it's not prior to it?

MR DOWNS:

Well our argument, for better or worse, is that it depends on context and this is a situation in which context and facts will be all important. We rely, in part, on at least the parts identified by the descent in *Tome* which recognised that a subsequent statement may, if it's made in relevant circumstances, logically tend to, or be capable, seen as answering the point. And if I can just turn to the facts, just so this isn't a very abstract proposition, the appellant's case at trial in essence was that this then teenage witness and complainant learned that her mother had received a large payment from ACC and that as a consequence of that she had decided to make a false complaint. The relevance and cogency of the statement to Mr Loos, which was in May 2006, and so we accept after the payment to the mother, is that the circumstances of that occasion provided a logical answer to the allegation of recent invention in that, on that very evening that the statement was made to Mr Loos by the complainant, her mother had attempted suicide by gassing herself, and so the statement of complaint that I have been – or the complainant said she said to Mr Loos sexually abused, he used the expression "rape" in his evidence, but that statement made in the immediate aftermath of a highly traumatic episode in which the complainant's own mother had attempted to take her own life, in circumstances where it had nothing to do with the immediate event but came, we would say, as a bolt from the blue, was a very powerful and rationally powerful answer to the contention that here is a vindictive young person who has made an allegation and come to the court because she is seeking to get,

as her mother did, lump sum compensation from the government courtesy of the ACC scheme.

ELIAS CJ:

Well it's a response to any suggestion of calculation, you say?

MR DOWNS:

And not just calculation but calculation really based on a pecuniary advantage. Put most bluntly it would be an extraordinary thing, we respectfully submit, for a teenaged complainant, a young person, to have money on his or her mind, in this case her mind, in the immediate aftermath of her own mother's attempt to take her life.

ELIAS CJ:

Was that the way it was used by the Crown in closing?

MR DOWNS:

Well I think I'm correct to say that it was the way –

ELIAS CJ:

Right.

MR DOWNS:

And this is the reason why timing wasn't explored at the trial. It would seem no one, with great respect to everyone involved, turned their mind to whether the common laws insistence that the previous statement precede the date of the alleged fabrication. No one seemed to turn their mind to that common law requirement. Instead the Crown assumed, I think I'm correct to say, that section 35(2) permitted its use of this material in this way and so –

TIPPING J:

Did the spontaneousness of the statement, in those particularly compelling circumstances, that you say –

MR DOWNS:

Yes.

TIPPING J:

– allows it to be used in an unconventional at common law manner?

MR DOWNS:

Well we have to go further and meet the realities of the common law. If common law continues to operate in its unadulterated form, this evidence was inadmissible.

TIPPING J:

Yes quite.

MR DOWNS:

We have to accept that. But what we do say is that common law, by virtue of the Evidence Act 2006, doesn't continue to operate in that way because Parliament has imported a different test. The concept of recent invention provides the trigger so that so long as it's suggested, or rather that is the effect upon the Tribunal, presiding Tribunal, that the person is being challenged as having made this up after the relevant events have come to an end, then any –

ELIAS CJ:

So recent, in your submission, is anything after the events have come to an end?

MR DOWNS:

Events as in date of the alleged offending has ceased.

ELIAS CJ:

Yes.

MR DOWNS:

So there's no difference in terms of common law, we understood that to be the position, that it was always the case that recent had a very broad elastic sense.

TIPPING J:

It could be the week after but you'd then have to point to a statement during that week.

MR DOWNS:

At common law you would, yes.

TIPPING J:

At common law.

MR DOWNS:

Yes, yes. We have to accept that reality in common law but what we do say is that on a close textual purpose of analysis of section 35 in its relevant statutory context, all that recent invention does there is provide the trigger. So hopefully this isn't an elliptical way of approaching but if we return to the section, section 35(2) says that if there's a challenge either to the witness' veracity or accuracy, based on a previous inconsistent statement of the witness, or on a claim of recent invention, this evidence is admissible to the extent that the statement is necessary to respond to that challenge.

WILSON J:

Mr Downs, just going back to submission as to the use that the Crown sought to make of Mr Loos' evidence. I think it's clear, if you look at the transcript of the prosecutor's closing at page 232 of the case, there's a sentence a few lines down page 232 and I quote, "This was a spontaneous utterance in very extreme circumstances." Which I think is really is consistent with the submission you've made.

MR DOWNS:

Yes. I'm grateful to the Court for that observation. That was how the Crown had used it. No one suggested at trial that the statement to Mr Loos preceded the date of the payment to her mother from ACC. We know from the record that it came, that this complaint to Mr Loos came later. It was rather the circumstances and nature of that event upon which the Crown based its case.

McGRATH J:

The circumstance of the disclosure, that context proved the necessity, is that the…

MR DOWNS:

Well what we say about whether something is necessary to respond will be, we respectfully submit, dependent on a multi-factorial approach. So long as there is a claim, there has to be a claim of recent invention or a challenge on a previous inconsistent statement because that's the other pathway of course. Once there is a challenge of the type Parliament envisages then it must be reason – sorry. It must be necessary to respond and we say that that may be determined by a number of things. For example, the nature and gravity of the challenge to the witness. One could imagine, for example, a witness of limited importance giving evidence about a matter and having a challenge to his or her veracity but in circumstances where although the criteria are met, simply the nature in the challenge is sufficiently peripheral that the Judge takes the view, well this material probably doesn't need to come in. but equally if there's a significant challenge to a witness, and more specifically there's a significant challenge to a witness whose credibility is essential to the case, then logic and fairness matters touched upon by the purpose of the Act, suggests that the Crown should be able to respond to those particular allegations.

TIPPING J:

It's also relevant that the concept of necessary is grammatically linked to the concept of to the extent to that. in other words it suggests that the control is more in relation to the contents of the statement rather than – obviously if it has no rebutting effect at all, it would get there, but if it's got a rebutting effect,

then the Judge controls it by saying well we'll have this much in but not that much, it's not really of much help.

MR DOWNS:

Indeed and I should observe that the Crown, with respect, is very anxious to make the point that we don't envisage that even if there's a claim of this seriousness, that that will simply the Crown be entitled the Crown to respond to every previous consistent statement that the complainant made to anyone at any time.

TIPPING J:

Quite.

MR DOWNS:

We couldn't responsibly contend that.

TIPPING J:

But the rationale, even at common law, was that it was unfair to the Crown, and to the witness, not to allow them to point to this rebutting material if they were challenged in this way.

MR DOWNS:

Yes. we accept that but what we also observe is that –

TIPPING J:

I mean that's in your favour. I'm putting that forward as a point –

MR DOWNS:

Yes.

TIPPING J:

– that helps the Crown.

ELIAS CJ:

He's trying to be fair.

MR DOWNS:

Yes and I'm taking it as such but I would observe that, I would also observe that in one sense the common law had its blinkers on by assuming that it had to be an earlier statement in order to be able to logically respond.

TIPPING J:

I appreciate that point but what I'm trying to suggest is that the concept of necessity is really substantially linked with the question of how much of the previous statement or statements.

MR DOWNS:

Precisely. And so there would have to be obvious probative value in the statement that was allowed to be adduced and we suspect that while timing will continue to be significant – I mean plainly if the statement to Mr Loos had been before the mother had even applied for compensation and so on then it would be a very, very powerful, if not complete, answer to the appellant's case. but simply because it came later, given the circumstances of the disclosure, we respectfully submit, doesn't mean to say that it can't have probative value and it can't be seen as logically responding and necessarily responding to a very grave allegation made to a young witness. So what we –

TIPPING J:

Is that the control that it must always logically respond to the complaint claim of recent alleged? It doesn't matters whether it's before or after, but it must always logically respond?

MR DOWNS:

Well we say that it must have probative value in responding to the allegation ventured and contained within the claim of recent invention. In some circumstances timing may give rise to that probative value. So in some

circumstances timing may be important in probative value but not necessarily we respectfully contend and again some –

TIPPING J:

What is it here that makes it have probative value? It's the context?

MR DOWNS:

Yes. It's context and circumstance in light of the imputation to the complainant. I mean we can't resile from this because it resounds from the record. The appellant's case was that, you're merely a liar, you're a liar for financial gain and that's why you've told this very wicked lie. The spontaneous disclosure to Mr Loos in the immediate aftermath of her mother's attempted suicide, we would have thought, logically met that contention. Whether it did so is obviously for the jury but we would say so long as it has a logic and probative value in response then it's necessary to respond.

McGRATH J:

Unless the concept of necessary necessity is one being linked with extent that controls how much goes in –

MR DOWNS:

Yes.

McGRATH J:

– to what is necessary?

MR DOWNS:

Yes. The Court will recall, the Law Commission was very concerned about, I think this is the correct phrase, voluminous amounts of repetitive material clogging Courts. It's not quite the phrase, but that was the gist of it. That simply because there's been a previous consistent statement, the people could come along and say, well, I told so-and-so on this occasion, which of course would be of no help to anyone, least of all the fact finder. But what we say is that this respects that very sensible view. It's only when there's a claim

that triggers it within the section, but providing that it's actually necessary means that it's admissible.

TIPPING J:

I think this approach is flirting with reliability. The context makes the statement – it's a bit like res gestae. I'm not saying that necessarily going to damage your submission, but I'd just like you to, if you can help me, because what you seem to me to be relying on is that the context in which it was made suggests inherently that it's likely to be reliable. Now, is that really what we're looking for here, likelihood of reliability as opposed to just rebutting per se?

ELIAS CJ:

It can't be, because subsection (3) introduces that concept. It must be the logical – it must be the relevance.

TIPPING J:

Well, subsection (3) is coupled with (b), it's an inability to recall, and that's when reliability –

ELIAS CJ:

Oh, yes.

TIPPING J:

Yes, but what is just intriguing me slightly is that we're mixing probative value with reliability in this approach, which may be perfectly okay.

MR DOWNS:

If it assists the Court, we see this operating as to the former, that is, probative value, rather than the latter, rather than reliability.

ELIAS CJ:

Yes.

MR DOWNS:

There may be crossover in case, of course, because sometimes probative value may arise by what is a seemingly set of reliable circumstances, but they are, obviously, analytically distinct.

TIPPING J:

Well, probative value is normally any probative value.

MR DOWNS:

Yes.

TIPPING J:

There must be, for your argument to run, I would have thought, sufficiently enhanced probative value.

MR DOWNS:

Yes, we have to accept that, for the reason that section 35(2) appears to presuppose it. If we stand back for a moment again, section 35(1) tells us that the Crown, or indeed any party, cannot call material of this nature. Section 35(2) says, well yes, you may do, if particular circumstances are at issue and if it's necessary to respond to a challenge that has been made in terms of the statute, and we see that as working in circumstances where there is probative value in terms of it actually responding to the challenge.

ELIAS CJ:

And it's why traditional recent complaint evidence isn't excluded by section 35. It has to come within the provisions of the section –

MR DOWNS:

Yes.

ELIAS CJ:

– but it's elastic enough to cover that.

MR DOWNS:

Yes, section 35(1) makes no general allowance for what we understood as recent complaint evidence –

ELIAS CJ:

No.

MR DOWNS:

– but it may nonetheless be received, we would submit, –

ELIAS CJ:

Yes.

MR DOWNS:

– if section 35(2) is brought into play and the relevant material has a probative force in terms of responding to the type of challenge in issue. So, to take a different example, if it's suggested that a witness has been inaccurate and that there has, that that claim is based, as the statute tells us, on a previous inconsistent statement, then either an earlier or later out-of-court statement tending to suggest that the witness is accurate in fact, but that there was simply a mistake in the one other statement, would mean that that material was potentially irrelevant because it was necessary to respond.

TIPPING J:

Is another way you're putting the point that timing is not inherent in that context, so it shouldn't be inherent as an absolute bar anyway, in the other context of recent invention?

MR DOWNS:

That is a point we make. What we do say about section 35 is that when we look at it, on the face of it it actually contains no temporal requirement at all. We know from the definition of a previous statement that it is effectively defined in a way as to mean any out-of-Court statement, any one other than the proceedings.

So in terms of, in terms of hopefully summarising our submission on this point we say that whether evidence is necessary to respond to one of the types of challenge that provide the requisite gateways in section 35(2), will depend upon the nature and gravity of the challenge, it's significance in terms of the matters in issue and the probative force, obviously, of the previous statement irrespective of when they're made but recognising that timing by itself may give rise to probative force.

In terms of the instant facts, we submit that this was a clear case involving a claim of recent invention and we can take the Court to those passages upon which we rely on to justify that particular proposition if it were thought necessary.

ELIAS CJ:

I think we probably, you've identified them –

MR DOWNS:

Yes.

ELIAS CJ:

– in your submissions and we're familiar with them.

MR DOWNS:

As the Court pleases. I wonder then if that logically actually takes us to the second question and that is the forensic effect of this type of testimony. In relation to this particular aspect we have five propositions. The first is that the reason that a previous consistent statement could only be used for credibility based purposes at common law, was because of the hearsay rule and we submit that that largely if not exclusively dominated the common law's view as to how material of this nature was to be used. It effected the gravitational pull upon how this material was to be used by the Tribunal of fact and that's a view helpfully identified by the Australian High Court in the *Papakosmas* decision, it's in our casebook, and made very clearly by that Court throughout.

ELIAS CJ:

Where's that? What, oh I see 17.

MR DOWNS:

Tab 17, may it please the Court.

ELIAS CJ:

Yes, thank you.

MR DOWNS:

And the first relevant passage is that in the joint judgment of Chief Justice Gleeson and Justice Hayne at paragraph 12 on page 302, Their Honours note that, at paragraph 12, "From ancient times the common law permitted a court to receive evidence of recent complaint in cases involving alleged sexual offences. However, if such evidence had then been treated as evidence of the truth of the facts asserted in the complaint, then it would have infringed the rule against hearsay." And Their Honours then go on to talk about *Lillyman*, which we've identified in our written submissions as recognising this necessary evidential effect by virtue of the dominance of hearsay at common law.

There are similar points made by Their Honours at paragraph 32, on page 309. Approximately four lines in their Honours note that, "It was pointed out that at common law the evidence in question…" I should interpolate the evidence in question there was recent complainant evidence, "…would only have been used for a purpose relating to the credibility of the complainant." Their Honours go on. "However, in the context of the statute that leads nowhere. The reason why at common law the evidence can only be used for a purpose relating to the credibility of the complainant was the hearsay rule." And there's a similar remark by other Judges of the same Court at paragraph 88 of the decision.

TIPPING J:

Was it very early on, as I recall it, you could give evidence of the fact of a complaint –

MR DOWNS:

Yes.

TIPPING J:

– but not of its contents –

MR DOWNS:

Yes.

TIPPING J:

– which caused all sorts of trouble. This is the sort of issue we may be faced with tomorrow?

MR DOWNS:

Yes indeed. So it was again the *Lillyman* decision recognising that the content of the complaint could and probably should be received by a Court but Justice Hawkins there observed, at page I think it was 178 of that decision, that it was only for the qualified purpose of consistency.

TIPPING J:

So they didn't take the plunge?

MR DOWNS:

No.

TIPPING J:

They appreciated that the awkwardness, if you like, of the first rule but they didn't go as far as, as is now suggested?

MR DOWNS:

Yes well I think it's fair to say that it's been Parliament, or common law Parliaments that have taken that plunge, certainly in Australia and we would respectfully submit, most importantly obviously, the New Zealand Parliament by virtue of the remodelled definition of hearsay in section 4. Because a hearsay statement in section 4 is one by a person who's not a witness in the proceeding and so it follows that so long as both parties to the transaction, if I can use that rather loose phrase, are in court giving evidence about it, or at least they're in court giving evidence, that anything said outside of court is no longer hearsay for the purposes of the operation of the rules evidence.

ELIAS CJ:

How does that then relation to section 18? What do the Australians do? Those provisions referred to at page 309 are they, is that in the same terms or do they make it more explicit?

MR DOWNS:

The Commonwealth in New South Wales legislation from memory have a similar, well we would say a similar evidential effect as –

ELIAS CJ:

Yes but is it expressed in – I can check that.

MR DOWNS:

Section 66 of the Commonwealth Act I think is the provision Your Honour is thinking of.

ELIAS CJ:

Yes.

MR DOWNS:

And with respect you may be quite right, that they do talk about the evidential effect –

ELIAS CJ:

Yes.

MR DOWNS:

– that this material may have, notwithstanding the earlier hearsay rule.

ELIAS CJ:

They may make it explicit.

MR DOWNS:

Yes.

ELIAS CJ:

But it's evidence as to the truth of its contents.

MR DOWNS:

Yes. I would need to check obviously the provision.

ELIAS CJ:

It's just that, sorry, I mean I asked you about section 18?

MR DOWNS:

Well section 18 is directed at a hearsay statement and obviously the preconditions of reliability that have to affix to that in order for a hearsay statement to be admitted in a court. Our point, admittedly thus far very poorly expressed, is that section 4 defines a hearsay statement in a particular way so that we wouldn't even reach the section 18 point –

BLANCHARD J:

Because this is not hearsay.

MR DOWNS:

Yes, for the fundamental reason it's not hearsay.

ELIAS CJ:

Yes, yes.

MR DOWNS:

So –

ELIAS CJ:

Oh yes I'd forgotten that twist.

MR DOWNS:

All of which is a very awkward way of making the submission that the common law's dominance of this area no longer has reason to operate by virtue of a new hearsay rule.

TIPPING J:

Is that point, put quite simply, that because it's no longer hearsay, it can and should be admitted for all purposes?

MR DOWNS:

With respect put more simply and better than begin advanced from the bar this far, it is our contention. That it's not hearsay and it's therefore referable by the Tribunal of the fact for the truth of its contents.

TIPPING J:

What about Mr Shamy's point that, if I recall, was that the context of 35, its being an exception to the general rule of inadmissibility of previous consistent statements, suggests that by implication it is only admissible for the purpose of the exception i.e. rebutting the recent invention claim?

MR DOWNS:

What we –

ELIAS CJ:

And therefore for veracity?

TIPPING J:

Yes.

MR DOWNS:

Well the difficulty is that, that has the effect of sustaining the very difficult common law distinction between veracity and credibility and truth of purpose which in a sexual case almost invariably collapses. I mean if I can illustrate it here for example, the appellant makes the point that, to the complainant, you're a liar and you're lying to gain money, it's assumed for the sake of argument that the evidence is properly admitted by the Court, it tends to respond to that. the jury are then told, well it's only relevant and logical to the response. It doesn't actually go to the content of the actual claim which was that I had been sexually abused. We are then thereby perpetuating, we respectfully submit, the very awkward common law proposition that existed because of the hearsay rule, which no longer operates according to section 4.

ELIAS CJ:

Well on that argument are the veracity provisions of the legislation directed only at collateral veracity rather than the veracity of –

MR DOWNS:

Yes, yes, I understand the question.

ELIAS CJ:

Yes.

MR DOWNS:

Yes. We submit we are. It's a filter to ensure that material of otherwise peripheral relevance operates in such a way that the Court isn't simply having to explore a whole variety of different points going only to veracity. Or put differently that section 35(2), the idea of being necessary to respond to a challenge, is a gateway rather than a command about its forensic effect and

we again repeat the point necessary to respond is to ensure that there isn't wholesale repetitive unnecessary, when borderline, material admitted.

The second point is that the Act, it is the evidence that contains relatively few, at least limited use provisions. There are some, we acknowledge, so for example under section 27 a defendant's statement is not admissible against a co-defendant. Equally the Act says in section 32 for example that an adverse inference can't be drawn from silence as a layperson might wrongly otherwise do. But in other words the Act, on its face, has very few examples where evidence is admissible but admissible only in a qualified or specific way.

The third point is that it does seem to have been the intent of Parliament to simply as best as one can the rules of evidence. For example, and perhaps the most important example, is that the new definition of section 4 in terms of hearsay was obviously intended to destroy that very difficult common law distinction. And secondly, section 124 which is directed at the purpose and use of a lie told by a defendant was obviously intended to deal with the very complex body of common law that had originated as to how that material could be used.

The fourth in that really probably inherent in our first point is the awkwardness of the distinction between truth of contents and credibility, at least in sexual cases.

And the fifth and final point is that the Law Commission, which was, at least the original architect of this phrase, used the relevant language that now appears in the statute and there has been no material change, legislative change to that particular phrase so that if there was thought to be ambiguity as to whether it was a gateway or a command about forensic effect then that extraneous material makes it, with respect, abundantly clear that that, at least, wasn't what was intended by the Law Commission.

TIPPING J:

Well the point is supposedly that Parliament has set up a bit of a trap because they've adopted the same language f the argument is against you, without meaning it to have the same effect as the Law Commission.

MR DOWNS:

Indeed. Indeed. Those are the fine points that we wish to ventilate in relation to the second question. Unless there are other matters those are the submissions on behalf of the Crown and the respondent.

ELIAS CJ:

Thank you Mr Downs.

MR DOWNS:

May it please the Court.

ELIAS CJ:

Yes Mr Shamy?

MR SHAMY:

Thank you Your Honour. On the admissibility point in my submission the effect of the Crown's argument is that in order to be admissible the previous consistent statement need only be relevant as to invention. It need not address the recent part of the phrase or it need not address the timing aspect. Put another way if the effect is the same as if the select committee had not amended the wording. The original wording being to the extent necessary to meet a challenge to that witness' truthfulness or accuracy. A spontaneous previous statement, because it looks like it couldn't have been cold-bloodedly made up, would be relevant and admissible. The Crown submission rather begs the question as to why there was a change and more particularly why Parliament inserted the word "recent" before the word "invention" because the effect of the Crown's argument is that any allegation of invention, recent or otherwise, would effectively – or if a previous

consistent statement would be probative as to the issue of invention, then it can come in, whether it's probative –

TIPPING J:

It's not quite the Crown's argument. The Crown's argument is that provided it qualifies as a recent invention as a trigger, then the response is not limited as to time.

MR SHAMY:

Yes. Effectively the response doesn't have to be, the response is directed at the invention not its timing.

BLANCHARD J:

No, it has to be directed at the recency as well as the invention.

MR SHAMY:

Well –

BLANCHARD J:

Which means that it will be comparatively rare that a subsequent statement will qualify but the Crown is saying that's no reason to rule them out all together and the section doesn't do so.

MR SHAMY:

Well –

BLANCHARD J:

It's a bit like, well the Crown is unashamedly, I think, approaching the matter in the same way as the descent in time.

MR SHAMY:

If one defines recent invention as an invention made at a particular time, a spontaneous utterance made whether before or after that time is relevant, because of its spontaneity, to the issue of fabrication. But the spontaneity

does not go to the issue of timing of the invention because it is the spontaneity that apparently rebuts the issue of invention as opposed to spontaneity rebutting the issue of timing. And so on the part of the appellant the issue is does the rebuttal have to be linked to both aspects of the recent invention, the invention and the timing, or need the rebuttal only be linked to the allegation of invention.

TIPPING J:

It's the timing of the rebuttal that is crucial to the Crown's submission. They don't want the Court to be tied to an inevitably must be prior. They accept that there's got to be a recent invention claim as the common law understands it. But they don't want to be constrained as to the timing of the rebuttal.

MR SHAMY:

Yes. And my submission, if there is no timing requirement to the rebuttal, it's the timing element of the rebuttal that links it to the timing element of the alleged motivation. If the timing of the rebuttal doesn't have to be linked to the timing of the motivation, then that's what the Crown is contending for, as in a change to the common law. The appellant's stance is that in order to address both the invention and the timing of the invention, that is the timing of the previous consistent statement, it does both. The consistency and the timing. If one removes the timing requirement then it doesn't really address the timing of the allegation that has been put. It merely addresses whether or not there has been an invention per se because if it had been put to this witness, you made it up then the spontaneity of the disclosure can be used to rebut that. If it's put to the witness, you made it up at a particular time, the spontaneity doesn't address that particular time allegation which is why the common law required it.

BLANCHARD J:

But it could address the fact that there has been a recent invention, even if it doesn't address the particular timing of it.

MR SHAMY:

It addresses the invention not the recency.

BLANCHARD J:

Well it depends what you mean by recency. If recency only has to mean something subsequent to the events giving rise to the charge, then it is addressing that, it's just not addressing the precise timing.

MR SHAMY:

It depends, I suppose, whether it has to address the allegation that has been put. You made it up at around about this particular time or does it just have to address the, you made it up part?

BLANCHARD J:

Well inherent in you made it up at around about this particular time is you made it up subsequent to the events in question and it's addressing that. That's, I think, the argument.

MR SHAMY:

Well the, the traditional linkage has always been obviously temporal. If you made it up in 2005, a statement in 2004 rebuts it. A statement to Loos in 2006 doesn't rebut that timing aspect. It may rebut the fabrication but it doesn't rebut the timing.

TIPPING J:

Is your point captured by this? That the removal of timing from the rebuttal effectively removes the timing element from the invention?

MR SHAMY:

Well perhaps put differently. If it's a requirement for this trigger that you put to somebody, A, you've invented it and B, at some particular stage, then logically the rebuttal would tend to rebut invention at that particular stage.

TIPPING J:

Yes, yes I think we're on the same wavelength.

MR SHAMY:

Whereas if rebuttal only has to say to rebut you invented it because you've given a crying previous statement, then it doesn't address, logically, the timing of it.

TIPPING J:

I understand your point.

MR SHAMY:

So it's a bolstering of the credibility generally but it isn't an on all fours response to that Parliament's inserting the word "recent" in "recent invention." So it's a linkage of the rebuttal back to both elements, or both requirements, of the recent invention allegation. And so it's really whether the rebuttal has to address both of those words or both of the limbs of the allegation or simply the one. And effectively the argument, as I've said, was addressed by the majority in the US Supreme Court. Unless the Court would have any other enquiries, obviously on admissibility I've dealt with that. In terms of direction the basic submission is that use is linked to rationale for admissibility. But aside from that, unless the Court has any enquiries, those are the submissions on the part of the appellant.

ELIAS CJ:

Thank you very much Mr Shamy. I'd like to say that I think the quality of the argument has been excellent and to thank all counsel for their submissions. We'll take time to consider our decision.

COURT ADJOURNS: 12.44 PM