The curse of the uncooperative Crown witness

1. I suspect like many of you, recently many of my trials have involved witnesses called by the Crown who either refuse to give evidence, give evidence inconsistent with their original statements, or give evidence obviously unfavourable to the Crown. Ironically, the Crown witness who clearly "switches" sides to the defence, is often more damaging to the defence case, than if they stuck to their original story. In truth there are few things that frustrate me more, than having prepared my line of attack for an important crown witness, only to have that witness give a version totally favourable to the accused, which is then all undone by the Crown cross-examining in all the good bits for the Crown case from the original statement. Suddenly the original flawed account to police looks far more credible, particularly compared to the nonsense the witness has sprouted in oral evidence. The sudden change in memory explained by an assertion that when they made their statement, they were off their head on ice.

2. So, this paper is the culmination of me flicking frantically through the *Evidence Act*, in a usually vain attempt to resist a Crown application to cross-examine their own witness, or to tender a statement or play a recorded interview. The aim of this paper is to outline the boundaries of the Crown's capacity to do those things, and what arguments we can mount in opposing or at least limiting the scope of those applications.

3. The paper will cover three common scenarios:

    1. The witness who gives evidence inconsistent with their police statement. This includes a witness who has "forgotten" some or all of the events which are significant in proof of the Crown case.

    2. The witness called by the Crown in the expectation that they will give evidence unfavourable to the Crown case (and/or favourable to the defence case)

    3. The witness who simply refuses to give evidence, or alternatively gives some evidence but refuses to continue to answer questions beyond a certain point.

The inconsistent witness:

4. A convenient starting point is the case of *Adam v The Queen* [2001] HCA 57[1], both because the events which gave rise to the issues in the appeal are not uncommon, and

[1] 207 CLR 96; 183 ALR 625

because it provides a useful guide as to the mechanics of the *Evidence Act* to the issues likely to arise. Understanding how evidence is admissible assists in understanding how to limit or oppose it.

5. In summary Gilbert Adam, and his brother, stood trial for the murder of an off-duty police officer, Constable David Carty, who was stabbed in the carpark of a hotel. Constable Carty had attended the hotel with some colleagues after completing his shift. During the course of the evening the off-duty police and some other patrons in the hotel exchanged unpleasantries. Later, as he left the hotel, the officer had an altercation initially with one male, but it quickly escalated into a fight with multiple males, during which he was fatally stabbed. The identity of the males involved in the fight, as well as the identity of the person who stabbed Mr Carty, were at issue in the trial.

6. During the events of that night a young man called Thaier SAKO was stabbed in the neck. There was some evidence that Mr Sako was the person who was involved in the initial altercation with Constable Carty (the deceased) and was stabbed somehow in that altercation. It was not likely to have been by Constable Carty.

7. Mr Sako and his brother were initially charged with the murder of Constable Carty. Some months after he was charged, he agreed to participate in an interview with police. In that interview, he nominated Gilbert Adams (the appellant) as the person who stabbed the deceased. The murder charge against Mr Sako was later withdrawn, and he was released on bail with the expectation that he would be called as a witness in any future court proceedings. Mr Adams was subsequently charged with murder, stood trial, and was convicted.

8. At the trial the Crown formed the view that Mr Sako, who was to be called as a witness, might not adhere to the version of events given in his interview with police. This proved to be accurate. At a *Basha enquiry* Mr Sako said in evidence that he had no recollection of the events relating to Constable Carty's death, and that the information provided to police in his police interview was based on what other people had told him. He gave similar evidence in the trial, so the Crown sought leave pursuant to section 38 of the *Evidence Act* to cross-examine Mr Sako (the Crown gave notice of this at the conclusion of the *voir dire).*

9. Section 38 is as follows:

> **38 Unfavourable witnesses**
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> (1) A party who called a witness may, with the leave of the court, question the witness, as though the party were cross-examining the witness, about—

(a) evidence given by the witness that is unfavourable to the party, or

(b) a matter of which the witness may reasonably be supposed to have knowledge and about which it appears to the court the witness is not, in examination in chief, making a genuine attempt to give evidence, or

(c) whether the witness has, at any time, made a prior inconsistent statement.

(2) Questioning a witness under this section is taken to be cross-examination for the purposes of this Act (other than section 39).

(3) The party questioning the witness under this section may, with the leave of the court, question the witness about matters relevant only to the witness's credibility.

Note—

The rules about admissibility of evidence relevant only to credibility are set out in Part 3.7.

(4) Questioning under this section is to take place before the other parties cross-examine the witness, unless the court otherwise directs.

(5) If the court so directs, the order in which the parties question the witness is to be as the court directs.

(6) Without limiting the matters that the court may take into account in determining whether to give leave or a direction under this section, it is to take into account—

(a) whether the party gave notice at the earliest opportunity of his or her intention to seek leave, and

(b) the matters on which, and the extent to which, the witness has been, or is likely to be, questioned by another party.

(7) A party is subject to the same liability to be cross-examined under this section as any other witness if—

(a) a proceeding is being conducted in the name of the party by or on behalf of an insurer or other person, and

(b) the party is a witness in the proceeding.

10. For the application to succeed the applicant must satisfy the court that any one of the conditions set out at section 38(1) are made out.

11. Before looking at the issues in *Gilbert Adam*, it is worth noting that while section 38 provides a mechanism by which a party can cross-examine their own witness, it limits the scope of the cross-examination to the matters set out in section 38(1), and which are subject to the grant of leave. The section however also allows, again subject to a grant of leave, questioning on matters relevant only to the witness's credibility (section 38(3)). It follows that careful attention should be paid to the basis on which leave is granted, albeit there is often substantial overlap between the various categories (e.g. Where leave is granted to cross-examine a witness about a prior inconsistent statement, the evidence which the witness has given is also likely to have been unfavourable to the party who called him).

12. In *Adam* the application to cross-examine Mr Sako was granted on the basis that all three pre-conditions in section 38(1) were met, the trial judge having found that given the information provided in his police interview, Mr Sako was not making a genuine attempt to give evidence about things of which he may reasonably supposed to have knowledge; and that his claim to not remember the events leading to Constable Carty's death were inconsistent with his account in his previous interview. It would follow, then that the evidence that Sako had given was unfavourable to the Crown case. In this regard, while not explicitly making a finding that the evidence was unfavourable, the majority in the High Court observed[2]:

> *"There appears much to be said, however, for the view that to give evidence which, at best, is unhelpful to the party calling it, and to do so without "making a genuine attempt to give evidence", is to give evidence "unfavourable" to that party."*

13. In fact, in making its application to cross-examine Mr Sako, the Crown indicated that if it could not cross-examine hiim, and also rely on the evidence of the prior inconsistent statement as to the truth of what happened, then the Crown would not call him as a witness.[3] The trial judge granted leave for the crown to cross-examine Mr Sako, and directed the jury that they could accept the representations made in the police interview as proof of the truth of the facts asserted.

14. In the High Court the issues raised were whether leave ought to have been given to cross-examine the witness, and secondly whether it was an error to allow evidence of his earlier statements to be led as evidence of the truth of their contents.

15. The resolution of the matter turned on the interplay between section 38, the credibility rule in section 102 (as it was then defined), section 103, and the operation of section 60 (Evidence relevant for a non-hearsay purpose).

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[2] *Adam v R* at [27].

[3] *Regina v Gilbert Adam* [1999] NSWCCA 197 at [96].

16. Given what had passed at the *voir dire* the Crown's only purpose in calling Mr Sako was to get before the court the representations made by Mr Sako in his original interview. Those representations, having being made out of court, would ordinarily have been inadmissible as proof of the facts asserted therein pursuant to the hearsay rule (s59 *Evidence Act*). Further, pursuant to the *credibility rule* in section 102[4] evidence relevant *only* to credibility was not admissible. However, since the out of court representations were *relevant* to the facts in issue (i.e. who stabbed Constable Carty), they were not caught by the credibility rule as then defined in the Act. Nonetheless, the fact that Mr Sako had previously made a prior inconsistent statement could be used to discredit his oral evidence at trial. It follows that it was therefore admissible for a purpose other than as proof of an asserted fact, so that it fell within the exception to the hearsay rule at section 60, so in turn could be then relied upon as proof of the facts asserted in the out of court representation[5].

17. To help unscramble that reasoning, careful attention should be paid to the wording of each provision. In doing so it is worth remembering that there is a difference between whether something is admissible, and whether it is relevant.

18. In her dissenting judgment, Gaudron J provided a far more elegant explanation for why the evidence was "technically" admissible[6]. As leave was granted to "question the witness as though the party were cross-examining"[7], the admissibility of the evidence was governed by section 103 of the *Evidence Act,* which is an exception to the credibility rule, providing the evidence could substantially affect the assessment of the credibility of the witness (and her Honour found that it would).

19. As the evidence was then relevant and admitted for a non-hearsay purpose, the hearsay rule did not apply (section 60 *Evidence Act).* The Crown could then rely on the representations in Mr Sako's record of interview (which were inconsistent with his oral evidence) both to discredit Mr Sako's oral evidence, and as proof of the truth of the facts asserted in the out of court representations.

20. It should be noted that subsequent to the handing down of the decision in *Adams* the *Evidence Act* has been amended by the insertion of section 101A. That amendment to the definition of the credibility rule would mean that the prior inconsistent statement would now be caught by the credibility rule in section 102, as it was relevant but not

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[4] Note: This section has since been amended by the introduction of section 101A

[5] Note: the relevant sections of the *Evidence Act* are annexed to this paper.

[6] Her Honour held that for discretionary purposes, the application to cross-examine the witness should have been refused.

[7] See section 38(2) *Questioning a witness under this section is taken to be cross-examination for the purposes of this Act (other than section 39).*

admissible for a hearsay purpose. However, as the *Evidence* would be adduced in cross-examination, it would fall within the exception to that rule set out in section 103. It follows that the approach of Gaudron J, set out above, would still provide the mechanism by which the prior inconsistent statements could be admitted as proof of the facts asserted by the representation. It follows that the insertion of section 101A into the *Evidence Act*, is unlikely to have changed the outcome of the appeal in *Adam*, or the answer to the question as to whether the evidence of the earlier statements could be led as proof of the truth of their contents.

21. It does however give a basis, in the proper case, to object to an application by the Crown to cross-examine their own witness. To be admissible as proof of the truth, the prior inconsistent statement would have to be capable of "*substantially affecting the assessment of the credibility of the witness*" as per section 103. If the inconsistency goes to an issue peripheral to the main facts in issue in the trial, or alternatively, the inconsistency is of no great significance, then it is unlikely to fall within the exception to the credibility rule at section 103, and so not capable of being used as proof of the facts asserted by operation of section 60. The evidence would then be inadmissible either as to the credibility of the witness, or as proof of the facts asserted.

22. Before leaving this topic, it is worth noting that the source of the inconsistent statement, need not come from the witness themselves (e.g. from a police statement or interview). The source may be what another witness asserts was said to them by the first witness (e.g. Witness A provides a statement that witness B told her, "I just saw Bob stab Bill"). If witness B later says in evidence that they did not see Bob stab Bill, then arguably the prior inconsistent statement to witness A may be the basis for an application to cross-examine witness B about that evidence[8].

The unfavourable witness:

23. In the context of a criminal trial, the calling of a witness by the Crown who gives evidence unfavourable to the Crown usually arises where the witness' evidence is relevant to the proceedings, but the Crown is only calling the witness to comply with the duty of the Crown to assist the court in finding the truth. This is accompanied by an assertion by the Crown that the witness is being called, "in fairness to the accused." It may also arise where a witness gives evidence that is unexpected but adverse to the Crown's interest in the trial.

24. There has been some discussion as to what is meant by the term unfavourable for the purposes of section 38, and it has generally been held to mean evidence which is "*not*

[8] This involves the interplay between section 38, section 106 and section 60 of the *Evidence Act.*

favourable"[9] or evidence which is "*unhelpful*" to a party[10]. It is deliberately meant to have a wider meaning than hostile or adverse.

25. It has been held that evidence which is said to be 'neutral' is not unfavourable.[11] Although it should be noted that that comment was made in the context where an unrepresented litigant was seeking to appeal against the refusal of a magistrate to allow her to cross-examine a police officer called by her in a private prosecution for assault. The court held that the purpose of the application was to cross-examine the police officer about "admissions" said to have been made to him by the alleged assailant. The court was of the view that the oral evidence of the officer was not inconsistent with his statement, and in any event the words in the statement attributed to the alleged assailant were not an admission. It followed that the evidence of the officer was not unfavourable because the evidence sought to be adduced neither assisted nor harmed the case for the appellant.

26. In practical terms it is hard to think of many instances where a party would seek to cross-examine a witness to rebut neutral evidence, so that nice questions about whether evidence is "not favourable" or "unhelpful" or merely neutral, are unlikely to arise very often.

27. In *Adam* and many cases since then, it is apparent that the Crown called the witness knowing that they were likely to give evidence unfavourable to the Crown case. This is generally not a barrier to the Crown being given leave to cross-examine the witness. In *KH v The Queen* [2014] NSWCCA 294, the accused was charged with sexual assault in company. The Crown took the unusual step of calling as a witness one of the persons said to have been "in company" with the accused at the time of the offence; that person having not been charged with the offence (and denied participation in it). The Crown called the witness "in fairness to the accused" but sought to cross-examine the witness to put the complainant's version to him. On appeal a complaint was made that adopting this process of calling a witness in anticipation that an application would be made to cross-examine the witness in respect of unfavourable evidence was to; *"…. alter the fundamental nature of the adversarial system*". In rejecting this ground of appeal, Leeming JA noted that adopting this course was, "…*precisely what was contemplated by the Act*."[12]

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[9] See e.g. *R v Souleman* (1996) 40 NSWLR 712 at 715.
[10] *Adam v The Queen (1999)* 207 CLR 96; 183 ALR 625 [2001] HCA 57 at [27]
[11] *Klewer v Walton* [2003] NSWCA 308 per Hodgson JA at [20]
[12] *KH v The Queen* [2014] NSWCCA 294 at [28].

28. For some context, historically, there was a view that when a party called a witness, they were calling them as a witness of truth. The introduction of section 38 puts an end to any such suggestion.

The grant of leave:

29. Before a party can cross-examine its own witness it must obtain the courts leave to do so. Before granting leave the court must consider the matters set out in section 38(6) and the matters set out in section 192 of the Act. Neither list is exhaustive.

30. Insofar as section 38(6) requires notice "at the earliest opportunity", this may, as things unfold in court, mean that notice is given immediately after the unfavourable evidence is given, assuming that it was not expected. The provision of itself is unlikely to be a reliable basis to object to the application, not least because a simple remedy may be to stand the matter down for a short period to allow further instructions to be sought, or to prepare further cross-examination. Of course, if time is needed by the other party to investigate the new information, that may be a basis to object to leave being given to cross-examine on the basis that it would add unduly to the length of the hearing (s192(2)(a)), or was otherwise unfair to the party (section 192(2)(b).

31. In respect of section 38(6)(b) *The matters on which, and the extent to which, the witness has been, or is likely to be, questioned by another party.* I suspect that within the context of a criminal trial this is most likely to arise where there are multiple co-accused, and where the interests of those accused do not align. An accused may wish to prevent the Crown from "stealing their thunder" by cross-examining a witness who is favourable to the case of one accused, but unfavourable, or inculpatory of another. I have not yet been able to locate a case where this provision has been explored at length, notwithstanding that it is a mandatory consideration under the Act[13].

32. As noted above before granting leave under the section, the Court must consider the matters set out in section 192 of the Act.

33. The first matter to be considered prior to detailed consideration of section 192, is a reminder that cross-examination is limited to the matters in section 38(1), and, if leave is granted, evidence as to the witness's credit (section 38(3)). It follows that the basis for the application and the matters on which the applicant seeks to cross-examine the witness should be clearly set out, so that it is clear what falls within the scope of the

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[13] For what commentary I could find see: Abbas [2019] VSC 855 per Beale J at [675]; McMaster [2019] NTSC 44 per Kelly J at [16]; Odisho [2018] NSWCCA 19 per Hamill J at [189]; Fletcher [2015] NSWSC 1692 Button J at [3]; Debresy [2016] VSC 643 at [18] per T Forrest J – under heading Conclusion; Ashton [2003] TASSC 140 per Underwood J at [26]-[29].

application[14]. If leave is granted to cross-examine a witness on a prior inconsistent statement for example, it is likely that that would extend to questions aimed at whether the witness has a motive to lie, or a particular bias. This may be the case irrespective of whether the has been a specific grant of leave to cross-examine on credit pursuant to section 38(3). In *R v Le* (2002) 54 NSWLR 474, Heydon J said:

> *"In my opinion, on the true construction of s 38, leave may be granted under s 38 to conduct questioning not only if the questioning is specifically directed to one of the three subjects described in s 38(1), but also if it is directed to establishing the probability of the factual state of affairs in relation to those subjects contended for by the party conducting the questioning or the improbability of the witness's evidence on those subjects. In establishing the probability or improbability of one or other state of affairs, the questioner is entitled to ask questions about matters going only to credibility with a view to shaking the witness's credibility on the s 38(1) subjects."*

34. In the same judgment Heydon J noted that while it was essential to identify the matters for which there is leave to cross-examine, it is undesirable to require the Crown to make a fresh application for leave each time something unexpected happens[15].

Fairness:

35. I suspect most objections made against granting the Crown leave to cross-examine their own witness rely on a submission that to allow the cross-examination would be unfair to a party[16]. In *Regina v Parkes* [2003] NSWCCA 12, Mr Parkes appealed against his conviction in part relying on a ground that the trial judge erred in allowing the Crown to cross-examine a Crown witness. The chief complaint was that the Crown sought leave to cross-examine the witness *after* he had been cross-examined by defence counsel.

36. Section 38(4) provides, "*Questioning under this section is to take place before the other parties cross-examine the witness, unless the court otherwise directs.*

37. In *Parkes* the trial judge referred to this section when granting the Crown the leave sought, simply noting, "*…questioning under this section is to take place before the other parties cross-examine a witness, unless the Court otherwise directs. So I for that purpose am otherwise directing."*

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[14] See eg *R v White* (2003) 140 A Crim R 63; [2003] NSWCCA 64 per Smart J at [68].
[15] *R v Le* at [73].
[16] See section 192(2)(b) *Evidence Act.*

38. Mr Parkes was accused of defrauding a company of approximately $160,000. His principal defence was that the money paid to him (or to companies associated with him) were payments made for work done pursuant to a management agreement with the defrauded company. He relied on evidence that there were some invoices between his company and the defrauded company, as well as an assertion that there were another 20-30 "missing" invoices. The witness subject to the section 38 application was a Mr Harris, who was a friend of the accused, and employed by him. He had previously given evidence at the committal, that he had in fact seen the management agreement being executed; witnessed an officer of the defrauded company sign a minute which purported to authorise the entering into the management agreement by the defrauded company; and had also seen a number of the "missing" invoices sent from Mr Parkes' company to the defrauded company. Obviously, this evidence, if adduced, would have been unfavourable to the Crown case.

39. At trial when the Crown called Mr Harris, they did not ask any questions in chief about any of the above. In cross-examination by defence counsel Mr Parkes gave evidence of the existence of the management agreement, but did not say he saw it executed, nor was he asked questions about the minute. He did give evidence about the 20-30 invoices that had been raised by Mr Parkes' company against the defrauded company.

40. The Crown sought leave to cross-examine Mr Harris about the management agreement and these invoices, including the fact that he had given inconsistent statements about the number of invoices purportedly raised.

41. The decision to not adduce evidence in chief about the management agreement, the minute authorising the agreement, or the missing invoices was conceded to be a forensic decision by the Crown, as it was not part of their case, and the Crown was uncertain as to whether the defence would pursue the evidence. It was thought that to introduce the evidence in chief, then seek leave to cross-examine on the evidence, may in fact introduce evidence before the jury that they may not otherwise hear (and as it turned out, this was correct). On appeal it was said that to allow the Crown to cross-examine the witness after he had been cross-examined by defence counsel, in particular, to obtain a forensic advantage, was both unfair and inconsistent with section 38(4).

42. Courts have previously been critical of the Crown using section 38 as a tactical or forensic device.[17] In this instance trial counsel submitted that the Crown was on notice

[17] See *R v Mansour* (unreported, NSWSC, 19 November 1996) (per Levine J), ***R v Nguyen*** [2002] NSWSC 59 (per O'Keefe J), ***R v Kingswell*** unreported, NSWCCA, 2 September 1998 (per Studdert J, with whom Hidden J agreed); ***R v Pantoja*** (per Adams J).

of the evidence Mr Harris may give, and the fact that it was unfavourable, and so should have sought leave to cross-examine prior to defence cross-examination. He submitted that had that occurred he would have conducted his case differently. However, when pressed, defence counsel could not articulate what that different approach would have been.

43. In rejecting the submission that the process was either unfair or improper in the course adopted Ipp JA said:

> *83 Unfairness to the appellant, as I have previously indicated, has to be judged in the context of the legislation. I see nothing in the section that prohibits, expressly or impliedly, the course that the Crown adopted. What in fact occurred was that the Crown was allowed to cross-examine Harris and water down the effect of the evidence he had given. There was nothing unfair in the cross-examination. The result was that a truer picture of the situation was presented to the jury than would have been the case had the Crown been refused leave to cross-examine. This is the very purpose underlying s 38. It was not contended for the appellant that any kind of unfairness resulted from the procedure adopted, other than that referred to in paragraph 81 above,*
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> *84 The decisions taken by the Crown were based on reasonable grounds; that is to say, the situation that the Crown faced in regard to Harris was such that it was reasonable, forensically, for it to wait to see whether Harris would give unfavourable evidence in cross-examination and then to apply under s 38. The point being that it was completely uncertain, as far as the Crown was concerned, whether or not Harris would be asked about the three issues and what replies he would give (although the Crown knew that there was a potential for some or all of the replies to be unfavourable). I see nothing improper in the Crown adopting the procedure that it did.*

44. Unfairness has also been raised in the context of a witness who has previously provided a statement or participated in a record of interview, however at trial asserts that they have no memory of the events relevant to the trial (or the offence charged). The unfairness stems from the inability of defence counsel to cross-examine a witness on a prior inconsistent statement, the contents of which the witness asserts they have no memory. *R v Rossi-Murray; R v Byrnes* [2019] NSWSC 479 is such a case. In that case the witness to be called by the Crown had provided an induced statement implicating one of the accused in the offence charged. At the trial the witness claimed that as a result of a head-injury from being assaulted in gaol, he no longer had any memory of the events the subject of the trial, and no memory of making the statement. He could not even give evidence as to whether the representations made in the induced statement were true at the time of making them.

45. Whilst Rothman J ultimately rejected the application to cross-examine the witness for other reasons, he made the following comment (at [35]):

> *Lastly, I deal with the provisions of s 137 of the Act. I accept the Crown submission that the fact, if it be a fact, that the witness cannot be cross-examined would not in ordinary circumstances and of itself give rise to an unfair prejudice, or danger of unfair prejudice, such as to outweigh the probative value of the evidence.*
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> *That is because the Act itself allows for statements to be made and admitted without cross-examination in certain circumstances, including, for example, the death of a witness, who may have given exactly the same evidence as that which is sought to be tendered in this case. However, the adducing of such evidence would also be subject to any ruling on the application of s 137 of the Act.*

46. Whilst his Honour dealt determined the matter of "unfairness' in the context of section 137 of the *Evidence Act* there is no reason to think that the same considerations would not apply to considerations of unfairness in section 192(2)(b).

47. However, Rothman J noted that because of the asserted lack of memory of both the relevant events and the making of the statement, in order to cross-examine the witness to undermine the truth of the assertions made in the induced statement the Court:

> *"…would be putting the accused in the position of establishing the probative value of the evidence of the witness (or his memory or his capacity to give worthwhile evidence) in order to destroy it. That seems to me to be a bizarre effect, notwithstanding any direction I might give, that is inconsistent with the notion of a fair trial, and the basis on which this material can be adduced."*

48. In addition, his Honour noted that that the process was different from a statement being read to a jury, and that the overwhelming impression to a jury would be that the witness simply does not wish to give evidence[18]. His Honour formed the view that the combination of those factors meant that the evidence should be excluded pursuant to section 137.

49. It follows that mere inability for an accused person to cross-examine a witness because of faulty memory, would not be sufficient to prevent leave being granted to the Crown to cross-examine in a prior inconsistent statement, which is inculpatory of the accused. However, that situation may be different if the original statement

[18] In his reasons, Rothman J had previously found that the witness recalled more than he was willing to admit.

contained representations that were themselves unreliable, or self-serving, and where the accused can point to a significant forensic unfairness by the introduction of unreliable evidence.

50. Finally, the majority of what I have said above is neatly summarised in the extract of the judgment of the court in *Kanaan v R* [2006] NSWCCA 109 at [83]:

> *[83] Section 38 of the Evidence Act abrogated the common law relating to hostile witnesses, by enabling a party calling a witness to obtain leave to question his own witness as though cross-examining that witness about evidence which is unfavourable to that party - in order, for example, to establish that the witness has made a prior inconsistent statement. The word 'unfavourable' means merely 'not favourable', and it is no longer necessary for the party seeking leave to demonstrate that either the witness or the evidence given is hostile to that party:* ***Regina v Souleyman*** *(1996) 40 NSWLR 712 at 715; or that the unfavourable evidence was unexpected:* ***Regina v Adam*** *(1999) 47 NSWLR 267 at [99]. Leave to cross-examine, once granted, does not permit the Crown to undertake a general cross-examination; it is restricted initially to the ground on which leave was granted:* ***Regina v Le*** *at [55]. However, it may range more widely: Ibid at [59], [63]. In the present case, for example, it would have permitted not only cross-examination on any prior inconsistent statement made by Mrs Zahabe in order to prove that the prior statement was true and that the evidence given was false, and also to suggest that bias in favour of the appellants was the reason for the inconsistency: Ibid at [67].*
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> *[84] The greater availability of cross-examination of a Crown witness by the Crown prosecutor pursuant to s 38 has obviously placed more emphasis on the Crown's obligation to call witnesses whose main relevance is the availability of their evidence unfavourable to the Crown case. Section 38 is living up to its potential for transforming the traditional procedure in criminal trials:* ***Regina v Parkes*** *(2003) 147 A Crim R 450 at [81], [141]. In* ***Regina v Ronen*** *[2004] NSWSC 1298 at [32], Whealy J observed that the increasingly common use of s 38 has often demonstrated its value in getting to the truth of the matter, although great care must be taken to ensure that the trial does not become side-tracked by a collateral issue carrying with it the real possibility of prejudice to the accused. That observation was correct, but attention is drawn to the accepted interpretation of "unfairly prejudicial" in ss 135-136 and of "unfair prejudice" in s 137, that prejudice to the accused is not unfair merely because the evidence tends to establish the Crown case:* ***Regina v BD*** *(1997) 94 A Crim R 131 at 139;* ***Papakosmas v The Queen*** *(1999) 196 CLR 297 at [29], [91], [98]."*

51. This is all perhaps a very long way of saying that successfully opposing a section 38 application is difficult, and probably unlikely to succeed. However careful attention should be paid to the scope of the cross-examination allowed, the subject matter, and how it is proposed the evidence is used if admitted. It may be that that approach will provide some guide as to how to a least limit the extent of the matters which fall within the application granted.

The witness who refused to talk:

52. What options does the Crown have when a witness, who has previously provided a statement or participated in an interview with police, refuses to even get into the witness box? The Crown can't avail themselves of section 38, because the witness will not answer any questions. The now well-known case of *R v Suteski* [2002] NSWCCA 509 provides a fairly straightforward answer.

53. Ms Suteski was charged with murder. The allegation being that she had recruited three people to harm a work colleague to prevent him from disclosing to her employer that she had been stealing from the employer. Ms Suteski wanted her colleague out of the way just long enough so she could steal a bit more money, then quit her job. Of course, the assault on the colleague went too far, and he was stabbed to death.

54. Mr Sakisi, who had assisted Ms Suteski in this enterprise, had participated in an ERISP after his arrest for accessory before the fact to malicious wounding with intent to do GBH. In the course of that interview he detailed a number of inculpatory conversations he had with Ms Suteski about the assault on the deceased. However, Mr Sakisi refused to give evidence at Ms Suteski's committal and did so again at trial.

55. Given Mr Sakisi's stance, the Crown submitted, and it was accepted, that Mr Sakisi was unavailable pursuant to section 65 of the *Evidence Act*, as all reasonable steps had been taken to compel the person to give evidence[19].

56. While the trial judge had doubts that representations made in an ERISP by an accomplice could be described as a representation that was, "*made in circumstances that make it highly probable that the representation was reliable."*[20] He did consider that representations that were incriminatory of Mr Sakisi were "*against the interests of the person who made it at the time it was made."*[21]

[19] See the definition of unavailable in the dictionary to the Act.
[20] Section 65(2)(c) *Evidence Act.*
[21] Section 65(2)(d).

57. As a result of that finding, the ERISP video of the interview was played to the jury, with the only edits being matters that were either incapable of being against the interests of Sakisi, or answers which amounted to second hand hearsay.

58. In *Sio v The Queen* [2016] HCA 32 the High Court dealt with a similar situation, in which a co-accused, Mr Filihia, who had been sentenced previously, refused to give evidence in Mr Sio's trial. In that case the trial judge had admitted Mr Filihia's ERISP, having found that it contain representation that were against his interests[22], and were made in circumstances that make it highly probable that the representation was reliable[23].

59. The High Court was critical of both the trial judge and the Court of Criminal Appeal for taking a compendious approach to the contents of the ERISP stating relevantly:

> *"The Court of Criminal Appeal seems to have regarded earlier authority, including the observations in **R v Suteski** by Wood CJ at CL, with whom Sully and Howie JJ agreed, as allowing or requiring a compendious inquiry as to the overall reliability of the hearsay statements made by Mr Filihia over the course of 24 and 25 October 2012. In **Suteski**, Wood CJ at CL considered, rightly, that representations relied upon should be considered in context so as to determine whether, when read together, they "constitute an admission or answer against interest". But these observations do not support a compendious approach to the reliability of the whole of a hearsay statement inculpatory of the accused, nor do the other authorities referred to by the Court of Criminal Appeal in this context."*

60. It follows that each representation relied upon by the Crown in an ERISP, statement or interview, should be identified, and then consideration given as to whether that particular representation, and any contextual material, falls with an exception to the hearsay rule pursuant to section 65 of the Act.

61. A further variation on that them arose in the recent case of *RC v R* [2022] NSWCCA 281. RC was charged with the sexual assault of various children, being a niece (CG) and two nephews. The evidence in relation to each complainant was both cross-admissible and admissible as tendency evidence.

62. The events at the hearing were somewhat complex. And while the circumstance that arose in RC are somewhat peculiar to themselves, the decision nonetheless highlights the need to fully understand the mechanism by which hearsay evidence of an unco-operative

[22] Section 65(2)(d)
[23] Section 65(2)(c)

Crown witness is admissible, to ensure that you don't miss an opportunity to object to the admission of evidence that is not admissible.

63. At trial CG was reluctant to give evidence, telling the court:

> "*I wish to drop the charges…honestly I want to drop the charges because I miss my family. I want my family. I want my family. I'm alright though."*

64. At the time CG was in custody serving a sentence.

65. In front of the jury the witness refused to be affirmed, telling the court inter alia, *"I'm out on the streets by myself. I have no-one. I want to go home…."*

66. In response to a question, CG agreed she had made a statement. But when asked, *"Did he do those things?"* she told the court that she would *"rather not speak on the subject*." She repeated the same answer to further questions about her statement.

67. Ultimately the Crown made an application pursuant to section 38 to cross-examine the witness. The application was granted (unopposed) on the basis that the witness was not making a genuine attempt to give evidence, and that her evidence was unfavourable to the Crown case.

68. Once that process was commenced the witness agreed that she had made a statement, identified her signature, and agreed that when she spoke to police, she was telling the truth. The Crown then commenced to read through some preliminary matters in the statement, However witness denied that the relevant words were hers. She later said, *[Senior Constable] Binnes did not read anything to me before I signed anything. I didn't read anything…."*

69. By the time the Crown got to the 14th paragraph of her statement, which was before the part of the statement dealing with the subject matter of the charges, the witness told the court:

> "*I'd like to go back to my cell. Now. I'm done with this shit….I'm done with it. I'm not going to Court for it ever again."*

70. The matter was adjourned at which point the Crown indicated that he intended to call evidence from SC Binnes in relation to the making of the statement, then he intended to tender CG's statement pursuant to section 65, on the basis that the witness was unavailable. This was opposed.

71. After lunch the trial judge referred the Crown prosecutor to section 106 of the *Evidence Act*, pointing out that the Crown would need to take the witness to the paragraphs of the

statement relevant to the charges, the *substance of the evidence*. His Honour told the Crown that if she denied the substance of the allegations then the statement could be tendered. It is difficult to see how this approach could fit with an application by the Crown that the witness was unavailable. If the witness was unavailable, then further questioning for the purposes of satisfying section 106, was not possible.

72. Once the witness was back before the court the Crown attempted to take her to various parts of her statement, however the witness was unresponsive. A typical example of the exchange went like this:

Crown	*Do you agree that that appears in your statements?*
CG	*I agree that you are fucking wankers.*

73. As a further part of the statement was read, the witness simply left the AVL suite.

74. When she returned to the suite sometime later, she remained silent in the face of further questioning (which largely amounted to questions as to whether she had told police certain things).

75. During the course of legal argument which then followed, defence counsel objected to the tender of the statement, noting that the witness had not made an inconsistent statement, she simply didn't answer questions. The statement was nonetheless admitted over objection, as according to the trial judge, the statement contained a prior inconsistent statement, was relevant to the witness' credibility, and the substance of the evidence was put to the witness. His Honour therefore ruled that the statement was admissible pursuant to section 106. Once admitted for that purpose, it could also be used as proof of the truth of the facts asserted within it pursuant to section 60.

76. The trial judge also found that that the witness failure to answer questions of the Crown in respect of the facts in issue, meant that she was an "unavailable witness", and therefore section 65 was enlivened. His honour found that section 65(2)(a) and (c) were made out, and so found that was another basis on which the police statement could be admitted.

77. RC appealed to the CCA on grounds asserting error in the admission of the statement of CG. In oral argument the Crown did not rely on section 106. Nonetheless Yehia J went into some detail as to the availability of section 106 in the circumstances. She noted that in respect of any representations relevant to the allegation of sexual misconduct towards CG, or complaint evidence relevant to both CG and her brothers which were contained in the statement of CG, and read to the witness in cross-examination, CG remained silent or non-responsive. Yehia J concluded (at [102]):

In the circumstances of this case, it cannot be inferred that CG, by her silence or unresponsiveness, was denying, or failing to admit or agree to, the substance of the evidence. That inference is not available in this case for the following reasons:

i. Firstly, CG stated that what she told the police was the truth.

ii. Secondly, she explained that the reason she wanted to "drop the charges" was so she could reconnect with her family.

iii. Thirdly, CG did not give an inconsistent account in the trial. Indeed, she gave no account at all about the specific allegations.

In these circumstances, it cannot be inferred that CG's silence or unresponsiveness constituted a denial of, or a failure to admit or agree to, the substance of the evidence. The only inference that could properly be drawn was that she was reluctant to give evidence because she wanted to re-establish contact with her family and feared that giving evidence about the allegations would further strain her relationships.

Furthermore, the statement, as far as it dealt with the allegations of sexual misconduct, was not material relating to credibility. In truth, the admission of the statement placed before the jury the only account of the allegations. Put another way, the purpose of admitting the statement into evidence was to prove the truth of the facts asserted therein, contrary to the hearsay rule.

78. In respect of the admission of the statement pursuant to section 65 of the evidence Act, Yehia J was not satisfied that the Crown had proven that all reasonable steps had been taken to compel the witness to give evidence. What constitutes all reasonable steps will depend on the circumstances of a particular case. Her Honour noted that the witness was a young aboriginal woman who was estranged from her family, who wanted to drop the charges so she could see her family again. At the time she gave evidence she was in custody. Despite telling the court she wanted to drop the charges, she also said that she told the truth when she spoke to police.

79. In addition, there was no evidence that CG had been provided with an opportunity to speak with a witness assistance officer consistently with ODPP guidelines.

80. Nor was there an application by the Crown to stand the matter down so he could speak with the witness. And The court was not asked to warn the witness of the risk of contempt proceedings, or time given to allow the witness time to get legal advice in respect of such proceedings.

81. In giving her reasons Yehia J said (at [116]):

> *"It should be borne in mind that it is "no light thing" to admit hearsay evidence inculpating an accused: see* R v Tarantino *[2019] NSWSC 939 (***Tarantino***) at [22]. The serious consequences of the successful invocation of s 65 emphasises the need for compliance with the conditions of admissibility prescribed by the section*: see *Sio v The Queen* [2016] HCA 32 (***Sio***) at [60]-[61]; *R v Omar* [2022] NSWSC 371 at [72]; *Tarantino* at [22].
>
> *In* ***R v Ryan*** *[2020] NSWSC 1394, Button J reiterated the importance of the decision in* ***Sio****. His Honour stated at [14]:*
>
> > *"The High Court at [60] emphasised the strictness with which such the statutory exceptions need to be approached. The point was made that the admission into evidence of a hearsay statement adverse to an accused has serious procedural consequences, first and foremost the inability to cross examine the maker of the statement if it is incorporated. I think respectfully, as a matter of common sense, the rule against hearsay is something that has been part of our jurisprudence for hundreds of years, and I believe it is the objective intention of Parliament that exceptions have been carved out by Parliament be approached with a degree of rigour, and with appreciation of the consequences."*

82. Those words of Button J cited by her Honour can only be given full effect if defence counsel have a detailed understanding of the *Evidence Act*, and the manner in which the different provisions within the Act work with each other.

83. That is not to say that the issues that arise are not complex; and may not result in defence counsel being successful in resisting Crown applications to adduce hearsay evidence to overcome the reluctance of a witness to either give evidence, or to remain faithful to a previous version of events. I suspect that I will still find myself in the future flicking through the *Evidence Act* in a vein attempt to prevent a damning statement being cross-examined in or tendered over objection. But at least in writing this paper, I may have a better understanding as to why opposing the Crown's application is so damned hard.

Antony Evers

Public Defenders Chambers