HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, KIRBY AND HAYNE JJ

GILBERT ADAM APPELLANT

AND

THE QUEEN RESPONDENT

Adam v The Queen
[2001] HCA 57
11 October 2001
S139/2000

ORDER

Appeal dismissed.

On appeal from the Supreme Court of New South Wales

Representation:

S J Odgers SC with C C Waterstreet and G A Bashir for the appellant (instructed by John B Hajje & Associates)

A M Blackmore with G E Smith for the respondent (instructed by S E O'Connor, Solicitor for Public Prosecutions (New South Wales))

CATCHWORDS

Adam v The Queen

Criminal law – Evidence – Whether trial judge erred in admitting prior inconsistent statements of prosecution witness – Relevance of prior inconsistent statements – Application of credibility rule – Exceptions to hearsay rule – Prior inconsistent statements as evidence of the truth of the representations.

Criminal law – Evidence – Unfavourable witnesses – Whether trial judge erred in granting prosecution leave to cross-examine its own witness – Unreliable evidence.

Evidence – Prior inconsistent statements – Relevance of such statements – Whether evidence of the truth of representations – Whether judge erred in granting leave to prosecutor to cross-examine its own witness.

Evidence Act 1995 (NSW), ss 38(1), 38(3), 38(6), 55(1), 59(1), 60, 102, 103, 192(2).

1 GLEESON CJ, McHUGH, KIRBY AND HAYNE JJ. The appellant, Gilbert Adam, and his brother, Richard, were charged with the murder of a police constable, David Carty, at Fairfield, New South Wales, on 18 April 1997. Both were also charged with some other offences. After a trial in the Supreme Court of New South Wales (before Wood CJ at CL and a jury) the appellant was found guilty of murder; his brother was acquitted of murder but found guilty of maliciously inflicting grievous bodily harm on Constable Carty.

The facts and course of proceedings

2 Constable Carty was attacked in the car park of an hotel. From about 11.00 pm he and other police officers had been drinking at the hotel after they had come off duty. Shortly after midnight a number of young men came to the hotel. As the night wore on, there were some exchanges between some of these young men and the off duty police officers. By about 2.15 am, three of the off duty police officers were still at the hotel (Constable Carty and two others – Constables Auld and Spencer). The three left the hotel and went out into the hotel's car park. One (Constable Spencer) drove off before the other two left.

3 Constable Carty then became involved in some sort of altercation which initially involved one other person. The altercation escalated; more young men became involved. Constable Carty suffered a fatal knife wound to the chest. Several members of the group of young men were seen to kick and stomp on him. Constable Auld tried to assist him but she was injured. At about the time of the altercation between Constable Carty and the other men, a young man named Thaier Sako suffered a knife wound to the neck.

4 The prosecution called Thaier Sako to give evidence at the trial of the appellant and the appellant's brother. The trial judge gave leave to the prosecution to cross-examine Thaier Sako and to elicit evidence from him of statements he had made to the police about what happened on the night Constable Carty died. This evidence was tendered to the jury as evidence of the truth of what was said in the statements. It was tendered against only the appellant. The Court of Criminal Appeal (Spigelman CJ, James and Bell JJ) dismissed the appellant's appeal against his conviction[1]. The question in this appeal is whether the Court of Criminal Appeal of New South Wales should have held that the trial judge erred in admitting the evidence of Thaier Sako's statements to police as evidence of the truth of what was stated in them. To understand the issues which arise, it is necessary to say something further about the facts and about the course of the trial.

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1 *R v Adam* (1999) 47 NSWLR 267.

5 Because of the wound he suffered, Thaier Sako was admitted to hospital on 18 April 1997 and police did not seek to interview him until 21 April. He declined to answer any questions and, on the next day, 22 April, he was charged with the murder of Constable Carty. (His brother, Thamir Sako, had already been charged with the murder.) About six weeks later (on 17 June 1997), police were told that Thaier Sako wished to be interviewed and on 2 July he was. The interview was recorded. Thaier Sako was then in custody. A little over a fortnight later (on 17 July 1997) the appellant was charged with murder.

6 Thaier Sako was again interviewed by police on 1 September 1997 and again the interview was recorded. By this time he had been released on bail. On 29 September 1997, the charge of murder that had been laid against Thaier Sako was withdrawn.

7 Thaier Sako had been present for some or all of the events which surrounded the death of Constable Carty. He had been severely wounded during those events and that may or may not be thought to have affected the extent or accuracy of the description he could give of those events but, on any view, he had been present during important parts of the events and in a position where he may have been able to observe what had happened. Indeed, according to some of the evidence at trial, it was Thaier Sako who was the man who first had an altercation with Constable Carty in the car park.

8 The version of events which Thaier Sako had given in his interviews with police was a version which supported the prosecution's case against the appellant. By the time the trial of the appellant had proceeded for a considerable time it was, it seems, apparent to the prosecution that Thaier Sako might not be willing to give sworn evidence at the trial that accorded with what he had told police in his interviews.

9 On the 36th day of the trial (on 24 November 1998), Thaier Sako was given a conditional indemnity against prosecution for common assault or "any associated offence" *except* murder in respect of matters relevant to the proceedings against the appellant and his co-accused and covered by his evidence in the proceedings. The conditions of the indemnity were that he "actively co-operate" in the proceedings against the appellant and his co-accused, and that his evidence at trial be true.

10 The trial judge decided that it was desirable to "review the situation of Thaier Sako, at least on the voir dire, on a Basha type of inquiry, in the absence of the jury, to determine what would happen if he were called". The reference to a "Basha type of inquiry" was to the practice of permitting an accused to

cross-examine a new witness, that is, one whose evidence had not been available at committal proceedings, on a voir dire before the witness was called at trial[2]. Thaier Sako had not given evidence at the committal proceedings in this matter. Because the indemnity which had been given to Thaier Sako excluded murder, the judge indicated that he proposed to give him a certificate under s 128 of the *Evidence Act* 1995 (NSW), the effect of which would be that evidence given by him, and evidence of any information, document or thing obtained as a direct or indirect consequence of his having given evidence, could not be used against him in any proceeding in a New South Wales court (except in a criminal proceeding in respect of the falsity of the evidence given)[3]. The judge said that he would do this before Thaier Sako was examined on the voir dire "so that I can rule upon whether the interests of justice require him to give evidence in the trial".

11 Thereafter, Thaier Sako was examined by the prosecution on a voir dire. In the course of that examination, counsel for the prosecution sought and obtained leave under s 38 of the *Evidence Act* to cross-examine the witness about the statement he had made to police on 2 July 1997[4]. Leave was granted on the basis that the evidence given on the voir dire was unfavourable to the prosecution case. Counsel for the appellant also cross-examined Thaier Sako on the voir dire.

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2 *Basha* (1989) 39 A Crim R 337.

3 *Evidence Act* 1995 (NSW), s 128(7).

4 Section 38 provides, in part:

> "(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:
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> (a) evidence given by the witness that is unfavourable to the party, or
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> (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
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> (c) whether the witness has, at any time, made a prior inconsistent statement.
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> …
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> (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."

12 Taken as a whole, the evidence given by Thaier Sako on the voir dire was evidence that would not assist the prosecution. In his interview with police, he had spoken of what had happened as if recollecting his own observations. The general tenor of his evidence on the voir dire was that he had seen nothing of any great moment and that what he had told police was what he had, in turn, been told by others after the events.

13 At the end of the voir dire, the judge said to counsel for the prosecution that he understood him to "seek leave in advance, in effect, to cross-examine [Thaier Sako], should he adhere to the evidence he gave on the voir dire" and to this counsel for the prosecution assented. The judge then heard argument on the question he had identified and on 3 December 1998 (the 41st day of the trial) he published very detailed reasons for concluding that, "leave should be granted to the Crown under s 38(1) and (3), and that the use of the evidence of the previous representations should not be confined under s 136 to the issue of credibility, but should also be available as going to proof of the facts asserted". The judge said that he was satisfied: first, that if Thaier Sako were called in the trial, the evidence he would give would be unfavourable to the prosecution; and, secondly, that Thaier Sako was not making (presumably in his evidence on the voir dire) "a genuine attempt to give evidence of matters concerning the events in the car park, of which he may reasonably be supposed to have direct knowledge" but rather was "attempting to assist the defence and to conceal what he must have seen". Each of the provisions of s 38(1)(a), (b) and (c) of the *Evidence Act*, in his Honour's view, being satisfied, and having regard to s 192(2)[5] and ss 135 to 137

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5 Section 192(2) provides that:

> "Without limiting the matters that the court may take into account in deciding whether to give the leave, permission or direction, it is to take into account:
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> (a) the extent to which to do so would be likely to add unduly to, or to shorten, the length of the hearing, and
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> (b) the extent to which to do so would be unfair to a party or to a witness, and
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> (c) the importance of the evidence in relation to which the leave, permission or direction is sought, and
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> (d) the nature of the proceeding, and
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> (e) the power (if any) of the court to adjourn the hearing or to make another order or to give a direction in relation to the evidence."

of the Act[6], the judge concluded that leave to cross-examine should be given and that the evidence of the prior statements should be admitted as evidence of the truth of what was said in them.

14 Thaier Sako was then called to give evidence before the jury. The indemnity against prosecution was read to the jury and tendered in evidence. The judge explained to the witness and the jury the effect of the certificate he had given under s 128 of the *Evidence Act*. After some evidence in chief had been elicited in the ordinary way, the prosecution asked the witness whether, before he fell over, after he himself had been wounded, he had seen anybody else (other, that is, than David Carty). Thaier Sako answered, "no". The prosecution then sought leave under s 38 to cross-examine the witness "as to a prior inconsistent statement" and the judge granted leave "both under s[38](1) and s 38(3) to cross-examine the witness". The further examination of the witness by the prosecution was extensive and it included examination about what he had previously told police. Again the general tenor of the evidence given was that he had indeed made statements to the police about what happened that night but that he had been merely repeating what others had told him.

15 Although no point now arises about the sufficiency of the trial judge's directions to the jury about Thaier Sako's evidence, it is as well to notice that the judge told the jury that the prosecution's case depended, essentially, upon the jury *believing* what three witnesses had said in Court (Tony Bakos, Dennis Oshana and the appellant's cousin, Mrs Salwa) and *disbelieving* any earlier inconsistent statements they had made to police. It depended, as well, upon the jury *disbelieving* what Thaier Sako (and another man, Bashar Hurmiz) had said in Court but *believing* at least part of what they had said on earlier occasions to police.

16 The judge gave the jury extensive and detailed directions about the care with which they needed to consider the evidence of, among others, Thaier Sako. The judge said the jury must approach his evidence "with the greatest of care" because he was a participant in the early stages of the event, he was in custody

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6 Section 135 provides a general discretion to refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might be unfairly prejudicial to a party, be misleading or confusing, or cause or result in undue waste of time. Section 136 provides a general discretion to limit the use to be made of evidence. Section 137 provides that, in a criminal proceeding, the court *must* refuse to admit evidence "if its probative value is outweighed by the danger of unfair prejudice to the defendant."

facing serious charges when he gave the earlier interviews, he had given totally inconsistent versions of events, and that, if he was doing no more than conveying information from others, it did not stand as evidence of the truth of those matters. Importantly, the judge pointed out to the jury that:

> "If, indeed, you reach the conclusion he was lying when he gave evidence here, it does not automatically follow, for the considerations I have just mentioned, that what he said on the prior occasion was true. It may be he has never told the truth to anybody about this case, it may be he was telling the truth. It is for you to determine."

17 Did the trial judge err in giving the prosecution leave to cross-examine Thaier Sako and in allowing the evidence of his earlier statements to police to be led as evidence of the truth of their contents? Most of the appellant's submissions on this issue turned upon the way in which a number of the provisions of the *Evidence Act* applied. Before dealing with those questions it is, however, convenient to deal with another, largely separate, argument that was advanced on the appellant's behalf.

Propriety of reception of a prior inconsistent statement

18 In *Blewitt v The Queen*[7] it was said that:

> "It is established that the calling of a witness known to be hostile for the sole purpose of getting before the jury a prior inconsistent statement which is inadmissible to prove facts against the accused is improper and might well give rise to a miscarriage of justice: see *R v Thompson*[8]; *R v Hall*[9]."

Here, so the appellant submitted, there was no doubt that the prosecutor's purpose in calling Thaier Sako was to get the content of his statement to police before the jury. Indeed, the trial judge had said, in the ruling he gave about granting leave to the prosecutor to cross-examine the witness, that the prosecution's "forensic purpose in calling him would be to get into evidence the substance of what he said [in the interviews with police] as proof of the facts there asserted". So much may be readily accepted. Further, before the witness was called to give evidence

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7 (1988) 62 ALJR 503 at 505; 80 ALR 353 at 355.

8 [1964] QWN 25.

9 [1986] 1 Qd R 462 at 465-466.

before the jury, the trial judge had (as noted earlier) found that the witness would give evidence that would not accord with what he had said in the interviews and would be unfavourable to the prosecution.

19 What is important, however, is that, under the Act, evidence of a witness's prior inconsistent statements will be admitted as evidence of the truth of what was said in them if the evidence is relevant for another purpose (that is, for a purpose other than proof of the truth of what was said in them[10]). If admitted as evidence of the truth of its contents in this way, there would be no tender of a statement "inadmissible to prove facts against the accused" and there would, therefore, be nothing improper in adopting the course proposed. This may be contrasted with the common law position where a prior inconsistent statement is not evidence of the truth of its contents, only evidence that the witness may not be telling the truth. It is with those circumstances that *Blewitt's* case was concerned, and to which it will still have application in the absence of statutory provisions of the kind now under consideration.

20 The question in this case thus becomes whether evidence of the prior inconsistent statements of Thaier Sako should have been received as evidence of the truth of their contents. If the evidence was properly received as evidence of the truth of its contents, *Blewitt* has no application. If the evidence was not properly received as evidence of the truth of its contents, it is clear that the trial has miscarried. Whether evidence of the prior statements should have been received as evidence of the truth of their contents turns on the way in which various provisions of the *Evidence Act* relate one to the other.

Relevance of the prior inconsistent statements

21 Evidence that is not relevant in a proceeding is not admissible[11]. The first question to be considered is, therefore, whether the evidence of the out of court statements of Thaier Sako was relevant. That is, was it "evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding"[12].

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10 *Evidence Act*, s 60. Section 60 provides:

> "The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of the fact intended to be asserted by the representation."

11 *Evidence Act*, s 56(2).

12 s 55(1).

22 Contrary to the appellant's contention, deciding whether the evidence was relevant neither required nor permitted the trial judge to make some assessment of whether the jury would or might accept it. Section 55(1), with its reference to "if it [the evidence in question] were accepted", requires that relevance be determined on the assumption that the tribunal of fact accepts the evidence. Relevance is demonstrated if, were the evidence to be accepted, it could rationally affect the assessment of the probability of the existence of a fact in issue.

23 Plainly, the evidence of the prior inconsistent statements related to whether Thaier Sako was to be believed on oath. But the evidence related to more than that question. It was not evidence which related *only* to his credibility[13]. If what was said in the prior inconsistent statements was accepted, that could rationally affect (in at least some respects directly, and in others indirectly) the assessment of the probability of the existence of several of the facts in issue in the proceeding. In his statements to the police, Thaier Sako had described the events that led up to the stabbing of Constable Carty. He told police who was standing where, and what they were doing. That evidence, if accepted, affected the assessment of the probability of the existence of some of the central facts in issue in the trial. The evidence of the prior inconsistent statements was, therefore, relevant. Its admissibility turned largely on the way in which the hearsay rule[14], the credibility rule[15], and the provisions about unfavourable witnesses[16] are to be understood as operating.

Leave to cross-examine

24 Clearly, the evidence of what Thaier Sako said to police was evidence of prior representations he had made. Unless one or other of the exceptions to the hearsay rule applied, it was, therefore, not admissible to prove the existence of the facts that Thaier Sako had intended to assert by the representations he had made[17]. The prosecution having called him as a witness, it could not, without the

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13 cf s 55(2)(a).

14 s 59.

15 s 102.

16 s 38.

17 s 59.

leave of the Court, question him as though it were cross-examining him about any of the three subjects identified in s 38(1):

> "(a) evidence given by the witness that is unfavourable to the [prosecution], or
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> (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."

Evidence that was relevant *only* to Thaier Sako's credibility was not admissible[18] but that rule, the credibility rule,

> "does not apply to evidence adduced in cross-examination of a witness if the evidence has substantial probative value."[19]

25 Did the trial judge err in granting leave to the prosecution to cross-examine Thaier Sako? If leave was properly given to cross-examine him, did the credibility rule preclude the leading of evidence of his prior inconsistent statements to police? If evidence of those prior statements was led, were they properly admitted as evidence of the truth of the representations they contained?

26 The prior inconsistent statements could be put to Thaier Sako if, and only if, the prosecution was given leave to cross-examine him. Having decided that the evidence was relevant, the next question to which attention must be directed is whether that leave should have been granted.

27 The trial judge said, when the application for leave was made in front of the jury, that he was satisfied that the provisions of s 38(1)(a), (b) and (c) were satisfied and he granted leave under both s 38(1) and s 38(3). As has already been noticed, the evidence which Thaier Sako gave to the jury did not assist the prosecution. The judge formed the view, on the voir dire, that he was not making a genuine attempt to give evidence and went so far as to find that the version he had given in the interviews "more probably than not reflected his observations on

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18 s 102.

19 s 103(1).

the night". It may be doubted that it was necessary for the judge to form a view about where the truth probably lay. The finding which his Honour made was, however, a finding which clearly bore upon the question presented by s 38(1)(b): was the witness, in examination in chief, making a genuine attempt to give evidence? Given that the witness had made prior inconsistent statements, there is no doubt, then, that pars (b) and (c) of s 38(1) were satisfied. It is not necessary in those circumstances to consider whether par (a) was also met. 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.

28 The judge, in considering whether to grant leave to cross-examine, took account of the several matters which the parties advanced as bearing upon that question. It is not necessary to notice the detail of them, beyond noting that the trial judge formed the view that if leave were given, the accused persons would not experience any unfairness. Not only, in the judge's view, was it to be expected that the witness would give a version of events in evidence in chief that was likely to be contradictory of the prosecution case and favourable to the accused, it was expected that he would be co-operative when cross-examined by defence counsel. The judge referred expressly to the various considerations mentioned in s 192(2) of the Act.

29 Although the appellant contended in this Court that the judge's discretion to grant leave miscarried, there is no basis for concluding that it did. The judge examined carefully all of the matters which, at trial, were said by the parties to bear upon the exercise of that discretion. The appellant contended that the judge was wrong to conclude, as he did, that there would be no unfairness in allowing the evidence to be led as evidence of the truth of what had been said to police. This was because, so the argument went, it was very hard for the defence to challenge the version of events Thaier Sako gave to police. Reduced to its essentials, the complaint was that the defence would be left to rely on the jury accepting the witness when he said, as he did, that he simply reported to police what others had told him. The defence could not, as an alternative attack on the witness, challenge the detail of what he had said to police.

30 It is right to say that the defence could not readily mount the second kind of attack on the witness's evidence without accepting at least the possibility that he had given a first-hand account of events to police. But as counsel for the appellant accepted in argument, it was no part of the defence case to put to this witness (or any other witness) some alternative version of the appellant's participation in the events that happened. The appellant could readily have sought to support the witness's contention that he had no first-hand memory of the events by cross-examining him as to his motive to give an account which

exculpated the witness and his brother, Thamir. It could have cross-examined him by suggesting that he had been too affected by drink or his wounds to give a proper account. In these circumstances there was no unfairness. The judge was right to conclude that the defence could test the evidence which was to be led.

Credibility rule

31 The principal thrust of the appellant's argument was that the credibility rule[20] applied to exclude the evidence of the prior inconsistent statements to police and that the exception to that rule, for evidence adduced in cross-examination which has substantial probative value[21], did not apply. These contentions depended upon distinguishing between the use of the evidence of the prior inconsistent statements to suggest that the witness should not be believed, and the use of the evidence as evidence of the truth of the assertions contained in the statements.

32 The central submission advanced in this respect was that evidence which tended to discredit Thaier Sako as a witness of truth could not have a substantial effect on the probabilities relating to the ultimate issues in the case. That is, it was contended that the admissibility of evidence directed to credibility must first be considered on the assumption that it is received, and can be used, for that purpose and no other. Only when it was demonstrated on that basis that the exception to the credibility rule was engaged, so the argument ran, did any question of the operation of s 60 of the Act arise.

33 These submissions should be rejected. They focus on the use that is to be made of the evidence. The relevant provisions of the Act direct attention, in the case of the credibility rule in s 102, to how the evidence is *relevant* and in the case of the exception in s 103 to the credibility rule, to whether the evidence has "substantial probative value". Section 102 deals with evidence "that is relevant *only* to a witness's credibility". Section 103 provides that that rule does not apply to evidence adduced in cross-examination if the evidence "has substantial probative value".

34 The appellant submitted that s 102 should not be read literally. That is, the appellant submitted that s 102 should not be understood as dealing only with evidence the sole *relevance* of which is its bearing upon the credibility of a

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20 s 102.

21 s 103.

witness. Rather, so it was submitted, it should be read as applying to evidence which is not *admissible* on any basis other than the credibility of a witness.

35 These contentions should be rejected. The criterion of operation of s 102 is the *relevance* of the evidence, not any question of its *admissibility*. The appellant's contention, that evidence not admissible on any basis other than credibility is excluded by the credibility rule, can be seen to amount to a proposition that evidence which is not admissible, is not admissible. That is not an informative proposition. Further, it is a proposition which, in effect, confuses or conflates questions of relevance and admissibility. The proposition that evidence is not admissible on any basis other than credibility, carries with it at least an implicit assumption about relevance when it speaks of the *basis* of admissibility. Rather than adopt this rewritten version of the statutory rule, effect should be given to s 102 according to its terms. Thus attention must be directed to how the evidence in question is relevant. Is it relevant *only* to a witness's credibility?

36 Reading the section according to its terms gives no absurd or, as the appellant contended, bizarre result. The example given by the appellant in aid of this contention was of a witness's prior inconsistent statements, relevant as bearing upon facts in issue in the proceeding other than the credibility of the witness, which would be inadmissible as evidence of the truth of its contents by operation of s 59, as hearsay. This, so the argument proceeded, would not be caught by s 102 and would, therefore, be admitted as evidence of the truth of its contents by s 60. That is, not being evidence relevant only to the witness's credibility, s 102 would have no operation. Because, however, the evidence would be relevant both for the purpose of considering the witness's credibility *and* proof of the facts which the witness had intended to assert in the out of court statements, the hearsay rule would not apply (s 60).

37 The operation of the Act on the appellant's example is correctly stated but the result that is obtained is not, as the appellant contended, odd or unexpected. It is true, of course, that the result differs from what would be the result at common law, the difference being that, by s 60 of the Act, the prior statements would be admitted as evidence of the truth of their contents. But that difference brought about by s 60 was one of the significant alterations in the rules of evidence that the Act was intended to effect. No longer were tribunals of fact to be asked to treat evidence of prior inconsistent statements as evidence that showed no more than that the witness may not be reliable. The prior inconsistent statements were to be taken as evidence of their truth. Thus far from the result

being, as the appellant asserted, bizarre or unintended, it is the intended operation of the Act[22].

38 The example which the appellant advanced in argument is, in effect, the situation which arose in relation to the evidence of Thaier Sako. Once it was decided that the prosecution could cross-examine him about his prior statements, the evidence of the prior statements was admissible as evidence of the truth of the contents of the statements.

Conclusions

39 That result follows from the following steps:

(a) The evidence that Thaier Sako had given prior inconsistent statements was relevant to his credibility.

(b) The evidence of what he had said in those statements related not only to his credibility but also to other issues in the case.

(c) The decision to grant leave to cross-examine Thaier Sako about his prior inconsistent statements was not attended by error.

(d) Because the evidence of what he had said in the earlier statements was relevant to more than his credibility (that is, it was not relevant *only* to his credibility) the credibility rule in s 102 was not engaged.

(e) It was, therefore, unnecessary to consider the operation of the exception to the credibility rule provided by s 103. It is unnecessary to consider what is meant by "substantial probative value".

(f) The evidence being relevant for purposes which included the attack on Thaier Sako's credibility, but extended to its direct relevance to the facts in issue, it was therefore within the exception to the hearsay rule provided by s 60 and admissible as evidence of the truth of the contents of the statements.

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22 Australian Law Reform Commission, *Evidence*, Report No 38, (1987) at 79 [144]; see also Australian Law Reform Commission, *Evidence*, Interim Report No 26, (1985), vol 1 at 170-173 [334], 375-376 [685].

(g) It was, therefore, unnecessary to consider other exceptions to the hearsay rule such as s 66.

Order

40 It follows that the appellant's attacks on the evidentiary rulings of the trial judge fail, as the Court of Criminal Appeal correctly held. The appeal should be dismissed.

41 GAUDRON J. The question that arises in this appeal is whether, in the appellant's trial on a charge of murder, leave should have been granted pursuant to s 38 of the *Evidence Act* 1995 (NSW) ("the Act") to the prosecution to cross-examine its own witness, Thaier Sako. The relevant facts, in the context of which that question must be answered, are set out in the joint judgment of Gleeson CJ, McHugh, Kirby and Hayne JJ. Save to the extent that I desire to say something more of the circumstances in which leave was sought and granted, it is unnecessary to repeat those facts.

42 Section 38(1) of the Act provides:

> " 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
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> (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."

By sub-s (3) of s 38, the cross-examination may be with respect to "matters relevant only to the witness's credibility".

43 Sub-sections (1) and (3) of s 38 define the ambit of the cross-examination which may, by leave, be permitted under that section. Sub-section (6) of that section is concerned with the considerations relevant to the grant of leave. That sub-section relevantly provides:

> " Without limiting the matters that the court may take into account in determining whether to give leave ... under this section, it is to take into account:
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> (a) whether the party gave notice at the earliest opportunity of his or her intention to seek leave, and
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> (b) the matters on which, and the extent to which, the witness has been, or is likely to be, questioned by another party."

44 It may at once be noted that I agree with Gleeson CJ, McHugh, Kirby and Hayne JJ, for the reasons that their Honours give, that the prior inconsistent statements elicited from Thaier Sako in cross-examination satisfied the test of relevancy set out in s 55 of the Act. Moreover, I agree with their Honours that

his cross-examination was about the matters set out in pars (b) and (c) of s 38(1). And in my view, the cross-examination was about a matter specified in par (a). In this regard, the import of Thaier Sako's evidence in chief was that he did not see the appellant or anyone else near Constable Carty at any time proximate to his stabbing. To the extent that he was cross-examined about that evidence, he was cross-examined about evidence that was unfavourable to the prosecution case.

45 It should be noted, however, that to the extent that Thaier Sako was cross-examined as to the content of his prior inconsistent statements, he was not cross-examined about his evidence in chief that was unfavourable to the prosecution nor on the question whether he had made a prior inconsistent statement. Nor was he cross-examined on matters relevant only to his credibility. Cross-examination as to the content of his prior statements could only be permitted pursuant to s 38(1)(b) of the Act. In this regard, however, it was not suggested in argument that his cross-examination travelled beyond what was permitted by that paragraph.

46 Because Thaier Sako's prior inconsistent statements were relevant and his cross-examination as to the content of those statements was about a matter specified in s 38(1)(b) of the Act, the outcome of this appeal turns on two quite narrow issues. The first is whether the trial judge erred in granting leave by reason that that leave resulted in the reception of relevant but inadmissible evidence. The second is whether, if the prior statements were admissible, the trial judge erred in the exercise of his power to grant leave under s 38 of the Act.

47 Before turning to the precise issues upon which the outcome of this appeal turns, it is convenient to say something of the purpose for which and the circumstances in which leave was sought to cross-examine Thaier Sako. In this regard, it is not in issue that the purpose for seeking that leave was to enable the prosecution to put into evidence the contents of prior statements made by Thaier Sako. In those prior statements, which were made to police investigating the murder of Constable Carty, he implicated the appellant. Moreover, it is clear that had leave not been granted, the hearsay rule, as formulated in Pt 3.2 of the Act, would have prevented the reception of his prior statements into evidence in proof of the facts therein asserted.

48 The question whether leave should be granted to cross-examine Thaier Sako arose before he was called as a witness. He did not give evidence in committal proceedings and the prosecution first gave notice of its intention to call him as a witness on the 27th day of the trial. When defence counsel objected to the calling of Thaier Sako, the trial judge indicated that he would conduct a *voir dire* examination of the kind known in New South Wales as a Basha

inquiry[23]. Presumably, the purpose of the inquiry was to ascertain what evidence Thaier Sako would give.

49 It emerged shortly before the *voir dire* examination commenced that Thaier Sako was an unwilling witness and the trial judge indicated that he would not permit him to be called unless he was first granted immunity by the Attorney-General. Immunity was later granted and, when the *voir dire* commenced, it became clear to the prosecution that Thaier Sako's account of events surrounding the murder of Constable Carty departed significantly from that given in his earlier statements to police.

50 It was in the course of the *voir dire* examination that the prosecution indicated its intention to seek leave pursuant to s 38 of the Act to cross-examine Thaier Sako. Initially, leave was granted to cross-examine him for the purposes only of the *voir dire*. However, during the course of the *voir dire*, the prosecution stated that it "would only call [Thaier Sako] in the trial if [the trial judge] had made a ruling that [he] would allow the prior inconsistent statement[s] to go to the jury." This was understood by the trial judge to be an application for "leave in advance ... to cross-examine the witness, should he adhere to the evidence he gave on the *voir dire*".

51 Before the *voir dire* commenced, an issue arose as to whether, if allowed to call Thaier Sako, the prosecution should also call Bashar Hurmiz whose evidence, it was believed, would favour the defence. After the *voir dire* concluded, a further issue arose as to the right of the prosecution to resist production of notes recording what occurred at a conference between Thaier Sako and/or his legal representatives and officers of the DPP which, presumably, related to his grant of immunity from prosecution. At that stage and before Thaier Sako was called as a witness in the trial, the trial judge indicated that, if defence counsel were given access to those notes and the prosecution were to call Bashar Hurmiz, he would grant leave to the prosecution under s 38 of the Act. Thaier Sako was then called as a witness and at the completion of his evidence in chief, leave was formally sought and granted for his cross-examination under s 38 of the Act.

52 There may be occasions where an "advance ruling" adds to the overall efficiency of a criminal trial and, thereby, serves the ends of justice. Advance rulings on difficult questions concerning the admissibility of evidence come to mind. In my view, however, the same cannot be said of the "advance indication" given by the trial judge in the present matter.

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23 See *Basha* (1989) 39 ACrimR 337 at 339 per Hunt J (with whom Carruthers and Grove JJ concurred).

53 Save, perhaps, where decisions depend on difficult questions as to the admissibility of evidence, the decision whether to call a person as a prosecution witness is entirely for the prosecution[24]. It is not a decision for the presiding judge. And it is not appropriate for the trial judge to be conscripted into the decision-making process by an application for an advance ruling of the kind involved in this case.

54 The appearance of impartiality is an essential aspect of the exercise of judicial power[25]. The making of an advance ruling or even, the giving of an "advance indication" of the kind involved in this case carries a grave risk that the trial judge will be perceived as other than impartial. For this reason, the prosecution should not have sought the advance ruling it did. Further, the trial judge should not have given the advance indication that he did. Technically, however, leave to cross-examine was sought and given after Thaier Sako had been called as a witness in the trial. Accordingly, the course adopted by the prosecution has no bearing on the question of the admissibility of Thaier Sako's prior inconsistent statements or the matters governing the grant of leave under s 38 of the Act.

55 So far as concerns the admissibility of Thaier Sako's prior inconsistent statements, it is convenient to begin with a consideration of the position at common law. Subject to certain limited exceptions[26] which, in the main, depend

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24 See, for example, *Richardson v The Queen* (1974) 131 CLR 116 at 119; *R v Apostilides* (1984) 154 CLR 563 at 575-576; *Wakeley v The Queen* (1990) 64 ALJR 321 at 326; 93 ALR 79 at 87; *Maxwell v The Queen* (1996) 184 CLR 501 at 534 per Gaudron and Gummow JJ.

25 See, for example, *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259 per Lord Hewart CJ; *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 262-263 per Barwick CJ, Gibbs, Stephen and Mason JJ; *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 351-352 per Mason J; *Webb v The Queen* (1994) 181 CLR 41 at 47 per Mason CJ and McHugh J, 67-68, 72 per Deane J; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 22, 25 per Gaudron J; *Nicholas v The Queen* (1998) 193 CLR 173 at 187-188 [19]-[20] per Brennan CJ, 208-209 [74] per Gaudron J; *RPS v The Queen* (2000) 199 CLR 620 at 652 [95] per Callinan J; *Johnson v Johnson* (2000) 201 CLR 488 at 492-493 [11]-[12] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ, 502-503 [41]-[42] per Kirby J; *Ebner v Official Trustee in Bankruptcy* (2000) 75 ALJR 277 at 279 [6]-[7] per Gleeson CJ, McHugh, Gummow and Hayne JJ, 289-290 [80]-[81] per Gaudron J; 176 ALR 644 at 647, 662 respectively.

26 Common law exceptions to the hearsay rule included statements in public documents, admissions by a party against that party's interests, voluntary confessions of criminal conduct, evidence given in earlier proceedings involving

(Footnote continues on next page)

on the inherent reliability of an out of court statement[27], the common law does not permit the reception of hearsay evidence in proof of the facts thereby asserted. Thus, at common law, a person might be cross-examined as to a prior inconsistent statement, but the prior statement is admissible only as to the credit of the witness and not in proof of the facts asserted in it. This has implications with respect to the cross-examination of hostile witnesses. Accordingly, it was said in *Blewitt v The Queen*:

> "the calling of a witness known to be hostile for the sole purpose of getting before the jury a prior inconsistent statement which is inadmissible to prove facts against the accused is improper and might well give rise to a miscarriage of justice"[28].

56 The prosecution contends that by reason of s 60 of the Act, which altered the law in respect of prior inconsistent statements, *Blewitt* has no application to the present case. Section 60 is one of a number of exceptions to the hearsay rule, which is set out in s 59(1) of the Act. Section 59(1) provides:

> " Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by the representation."

Section 60 of the Act provides:

> " The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of the fact intended to be asserted by the representation."

57 One purpose which underlies s 60 of the Act is to overcome the common law position, which the Law Reform Commission regarded as anomalous, whereby a prior inconsistent statement was admissible only as to credit and not in

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the same parties and similar issues, evidence of age, ancient documents produced from proper custody, expert opinion evidence (particularly as to the sources on which the expert opinion was based) and postmarks. See *Cross on Evidence*, 6th Aust ed (2000) Ch 17. See also *Pollitt v The Queen* (1992) 174 CLR 558 as to a more recent common law exception to the hearsay rule in relation to the identity of parties to a telephone conversation.

27 See *R v Benz* (1989) 168 CLR 110 at 143 per Gaudron and McHugh JJ and the material there cited.

28 (1988) 62 ALJR 503 at 505; 80 ALR 353 at 355.

proof of the facts thereby asserted[29]. It is clear that, with the enactment of s 60, that is no longer the position[30]. However, that does not answer the question whether Thaier Sako's previous inconsistent statements were admissible.

58 For a prior inconsistent statement to be admissible under s 60 of the Act, it must be "relevant for a purpose other than proof of the fact intended to be asserted by [that statement]". The only other purpose for which Thaier Sako's prior inconsistent statements could be relevant was to attack his credit. Although s 102 of the Act provides that "[e]vidence that is relevant only to a witness's credibility is not admissible", s 103(1) of the Act provides that that "rule does not apply to evidence adduced in cross-examination ... if the evidence has substantial probative value".

59 The dictionary to the Act defines "probative value" to mean "the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue". That definition echoes the substance of s 55(1) of the Act which provides that "evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding". It is to be noted that the dictionary definition differs from s 55 in that it is not predicated on the assumption that the evidence will be accepted.

60 The omission from the dictionary definition of "probative value" of the assumption that the evidence will be accepted is, in my opinion, of no significance. As a practical matter, evidence can rationally affect the assessment of the probability of a fact in issue only if it is accepted. Accordingly, the assumption that it will be accepted must be read into the dictionary definition. And on that assumption, for the reasons given in the joint judgment, the prior inconsistent statements of Thaier Sako had substantial probative value. That being so, the combined effect of ss 103(1) and 60 of the Act was to make those prior inconsistent statements technically admissible in proof of the matters therein asserted.

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29 Australian Law Reform Commission, *Evidence*, Interim Report No 26, (1985) vol 1 at 170-172 [334], 375-376 [685]; Australian Law Reform Commission, *Evidence*, Report No 38, (1987) at 79 [144].

30 See *Lee v The Queen* (1998) 195 CLR 594 at 601 [28] per Gleeson CJ, Gummow, Kirby, Hayne and Callinan JJ where it was said:

> "the representations made by [the witness] to the police ... were relevant for a purpose referred to in s 60: the purpose being to prove that [the witness] had made a prior inconsistent statement and that his credibility was thus affected. The hearsay rule was rendered inapplicable to [the witness's] representations".

61 The mere fact that Thaier Sako's prior inconsistent statements were technically admissible in proof of the matters therein asserted does not, in my view, bear on the question whether leave should have been granted to the prosecution to cross-examine its own witness. *A fortiori*, the grant of leave cannot render admissible evidence that is inadmissible. It follows, therefore, that the hypothesis against which the question whether leave should be granted is to be answered is that the evidence in question is admissible.

62 Nor in my view, does the fact that the cross-examination will satisfy the requirements of pars (a), (b) or (c) of s 38(1) bear on the grant of leave. As already indicated, those paragraphs specify and, thereby, limit the matters as to which cross-examination may be permitted. They do not specify the matters by reference to which it is to be decided whether or not leave should be granted. To a limited extent – but only to a limited extent – that function is performed by ss 38(6) and 192(2) of the Act.

63 Section 38(6) of the Act which is set out earlier in these reasons, specifies only two matters which a Court must take into account in deciding whether to grant leave to a party to cross-examine its own witness, namely, whether notice was given at the earliest opportunity and the matters on which and the extent to which the witness is likely to be questioned by another party. However, that specification is without limitation to "the matters that the court may take into account".

64 Section 192(2) of the Act also specifies a number of matters that, without limitation to other matters, must be taken into account on the question whether leave should be granted. That sub-section relevantly provides:

> " Without limiting the matters that the court may take into account in deciding whether to give the leave ... it is to take into account:
>
> (a) the extent to which to do so would be likely to add unduly to, or to shorten, the length of the hearing, and
>
> (b) the extent to which to do so would be unfair to a party or to a witness, and
>
> (c) the importance of the evidence in relation to which the leave ... is sought, and
>
> (d) the nature of the proceeding, and
>
> (e) the power (if any) of the court to adjourn the hearing or to make another order or to give a direction in relation to the evidence."

65 To the extent that legislative provisions are silent as to the matters that may or must be taken into account in the exercise of a power of discretion – and to some extent ss 38(6) and 192(2) of the Act are silent in that regard – those matters must be ascertained from the subject-matter, scope and purpose of the statute itself[31]. That, however, is not an entirely fruitful exercise in the case of legislation designed to codify the rules of evidence. Rather, it seems to me that the primary consideration in determining whether leave should be granted to a party to cross-examine its own witness should be the legal character of the evidence which it is sought to elicit.

66 So far as concerns the evidence elicited and intended to be elicited from Thaier Sako, its legal character was twofold. In the first place, it was evidence that the Act expressly recognises is potentially unreliable, being in terms of s 165(1)(d) of the Act "evidence given in a criminal proceeding by a witness ... who might reasonably be supposed to have been criminally concerned in the events giving rise to the proceeding". In this regard, it may be noted that, at the time he made his statements to the police, Thaier Sako, himself, was the subject of a charge that he had murdered Constable Carty.

67 Further, as has already been indicated, the legal character of Thaier Sako's prior inconsistent statements was that it was hearsay evidence which, subject to the exceptions set out in Pt 3.2 of the Act, is not admissible in proof of the facts thereby asserted. The primary reason why hearsay evidence is not admissible is that it is not on oath and its reliability cannot be tested in the same way as evidence given on oath in court[32]. That rationale also explains the common law exceptions to the hearsay rule which, in general terms, allow the admission into evidence of out of court statements in proof of the matters thereby asserted if the statements are made in circumstances that render them inherently reliable.

68 Leaving aside s 60, the various statutory exceptions to the hearsay rule embodied in s 59(1) of the Act render admissible hearsay statements which, in the main, may be taken to be inherently reliable. Thus, they include business

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31 See *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 504-505 per Dixon J; *R v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd* (1979) 144 CLR 45 at 49.

32 With respect to the provisions of the Act, see *Papakosmas v The Queen* (1999) 196 CLR 297 at 310 [35] per Gleeson CJ and Hayne J, 322-323 [84]-[85] per McHugh J. With respect to the position at common law, see *Pollitt v The Queen* (1992) 174 CLR 558 at 566 per Mason CJ, 573 per Brennan J, 593 per Deane J, 603 per Dawson and Gaudron JJ, 610 per Toohey J, 620 per McHugh J; *Papakosmas v The Queen* (1999) 196 CLR 297 at 322 [84] per McHugh J. See also *Lejzor Teper v The Queen* [1952] AC 480 at 486 per Lord Normand.

records[33], the contents of tags or labels placed on an object in the course of business for the purpose of describing or identifying that object[34], contemporaneous statements as to health, intention, knowledge or state of mind[35], reputation as to marital status, age and relationships[36], reputation as to the existence of a public or general right[37] and, for the limited purposes of proving the date of sending and the identity of the sender and recipient, electronic and similar messages[38]. Inherent reliability and the ability to test the evidence in question, respectively, underlie the exceptions in ss 65(2) and 66(2) of the Act which relate specifically to criminal trials. Section 65(2)[39] applies if the person who made the previous representation is not available to give evidence but has made a statement of the kind that he or she has a duty to make, or that is made in circumstances that make it inherently reliable or that is against his or her interests. Section 66(2)[40] applies only if the maker is available and the statement was made when the event in issue was fresh in his or her memory.

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33 Section 69.

34 Section 70.

35 Section 72.

36 Section 73.

37 Section 74.

38 Section 71.

39 Section 65(2) provides:

> " The hearsay rule does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if the representation was:
>
> (a) made under a duty to make that representation or to make representations of that kind, or
>
> (b) made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication, or
>
> (c) made in circumstances that make it highly probable that the representation is reliable, or
>
> (d) against the interests of the person who made it at the time it was made."

40 Section 66(2) provides a further exception to the hearsay rule:

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69 In his reasons for granting leave to the prosecution to cross-examine Thaier Sako, the trial judge stated that he had weighed various matters advanced by the prosecution and the defence very carefully. The matters advanced by the defence included:

> "(i) the passage of time between the events and the interview;
>
> (ii) the interest [of Thaier Sako] in protecting himself and his brother, each of whom were facing charges of murder[ing Constable Carty], at the time of the interviews [with police];
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> ...
>
> (v) the practical difficulty the defence might face in unravelling or attacking the accuracy of the version given in the earlier interviews;
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> ...
>
> (x) the fact that the interviews, although recorded, were unsworn, whereas the evidence here would be sworn".

They are all matters which go to the legal character of the evidence as hearsay and, also, as evidence which is potentially unreliable.

70 The trial judge gave four reasons for granting leave to the prosecution to cross-examine Thaier Sako. The first was that "it would not be unfair to the accused for leave to be given". Seemingly, his Honour based his conclusion in

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> " If [a] person has been or is to be called to give evidence ... of [a] representation that is given by:
>
> (a) that person, or
>
> (b) a person who saw, heard or otherwise perceived the representation being made,
>
> if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation."

Note that the exception is qualified by s 66(3) which provides:

> " If a representation was made for the purpose of indicating the evidence that the person who made it would be able to give in an Australian or overseas proceeding, subsection (2) does not apply to evidence adduced by the prosecutor of the representation unless the representation concerns the identity of a person, place or thing."

this regard on the fact that, if the prosecution were granted leave under s 38 of the Act, it could benefit from that leave only by calling Bashar Hurmiz and by producing the notes of the conference relating to the grant of immunity. His Honour regarded the notes as "directly relevant to an assessment of [Thaier Sako's] reliability", in the sense that they would provide a basis for testing him "as to whether or not his earlier answers, as well as his current answers, are true, and whether or not he had any motive then, or now, for giving an untrue version".

71 So far as concerns the calling of both Thaier Sako and Bashar Hurmiz, his Honour said that "[t]he ultimate assessment of their reliability ... is quintessentially a jury question." His Honour added that "[a]ny concern as to the reliability of their evidence can be countered by appropriate directions and warnings ... and by a specific direction that if the jury concludes that either or both is lying here, that does not of itself necessarily establish the prosecution case".

72 The second reason given by the trial judge for granting leave was that the points identified by the prosecution were "persuasive". The third was that his Honour had "formed the conclusion that [the prior inconsistent statements] more probably than not reflected [Thaier Sako's] observations on the night". Finally, and, in his Honour's view, "more importantly", if Thaier Sako were cross-examined by the prosecution and if Bashar Hurmiz were made available for cross-examination by the defence, it would "enable the jury to hear from the two persons who are perhaps best placed of all to state what did in fact occur."

73 Apart from an argument that "the accused [would] not experience any unfairness, since [Thaier Sako] ha[d] not taken [a] lack of memory line", the matters identified by the prosecution which the trial judge found to be "persuasive" were all directed to establishing that the account given by Thaier Sako in his earlier statements was probably true. In this regard, the prosecution pointed to its consistency with the accounts given by disinterested lay witnesses and the inconsistency of his account given on the *voir dire* with that of other witnesses, the fact that he was well placed to see the events in question and the details contained in the prior inconsistent statements which, it argued, "were unlikely to have been conveyed to him through second hand hearsay".

74 In addition to matters positively pointing to the probable truth of the account contained in his earlier statements, the prosecution raised various matters directed to countering particular motives Thaier Sako might have had for lying, including "to protect himself or his friends". Further, the prosecution sought to counter the possibility that Thaier Sako had fabricated the account given in his prior inconsistent statements by argument that "there [was] no suggestion that [his legal representatives had] acted other than properly in referring potential

witnesses to the police, and similarly no basis for assuming that [they] coached or encouraged anyone to place a false version of events on the record".

75 It was in the context of "[t]he points identified by the [prosecution]" that the trial judge concluded that the prior inconsistent statements "more probably than not reflected [Thaier Sako's] observations on the night". And it is clear from his Honour's reasons that this was the main reason that leave was granted to the prosecution to cross-examine Thaier Sako.

76 In my view, the conclusion by a trial judge that, as a matter of fact, a prior inconsistent statement is probably true is not relevant to a determination whether leave should be granted to cross-examine a witness so as to put an otherwise inadmissible hearsay statement before the jury. In this regard, in very many cases a trial judge will not be able to reach that conclusion without hearing all the evidence in the case. Moreover, in some cases it may involve the trial judge in forming and expressing a view as to matters bearing directly on the ultimate issues to be decided by the jury and thereby putting the appearance of impartiality at risk.

77 Where the issue is whether leave should be granted to cross-examine a witness so that hearsay evidence which is otherwise inadmissible may be put before a jury, the primary consideration, in my view, is whether that evidence is inherently reliable or, if it is not, whether a jury can safely find that it is necessarily reliable because, for example, a finding that the witness is untruthful in some particular aspect of his or her evidence necessarily entails the consequence that his or her earlier statement is true. The second matter to which regard should be had is whether the truth and accuracy of the statement can properly be tested.

78 So far as concerns the present matter, Thaier Sako's prior inconsistent statements were not of a kind that are inherently reliable. Rather, they were statements of a kind that the Act treats as potentially unreliable. Moreover, they were not statements that could be found to be necessarily reliable if Thaier Sako's evidence in chief or some part of it were rejected. In this regard, there was always the possibility that he was not giving a completely honest and accurate account either in his evidence in chief or in his prior statements to the police.

79 Further, Thaier Sako's prior statements to the police were not statements that could properly be tested by the defence. It may be accepted that the defence could question Thaier Sako as to possible motives for lying and, also, as to the opportunity he had to witness events surrounding the murder of Constable Carty. However, once he asserted that he did not see anything of relevance, it was impossible to question him effectively as to the detail of what was recorded in his prior inconsistent statements.

80 Because the trial judge did not consider that Thaier Sako's prior inconsistent statements were potentially unreliable, his Honour erred in the exercise of his power to grant leave under s 38 of the Act. Further, because the grant of leave necessarily resulted in the admission of potentially unreliable evidence that could not effectively be tested, leave should not have been granted.

81 The appeal should be allowed. The order of the Court of Criminal Appeal of the Supreme Court of New South Wales dismissing the appeal against conviction should be set aside and, in place thereof, the appeal to that Court be allowed and a new trial ordered.