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UNIFORM EVIDENCE LAW

S38 – UNFAVOURABLE WITNESSES

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UNIFORM EVIDENCE LAW

S38 – UNFAVOURABLE WITNESSES[1]

by Christopher Beale QC[2]

AUTHORITIES

Evidence Act 2008 (UEA) ss 32, 38, 42, 43, 60, 101A, 102, 103, 128, 135, 136, 137, 142, 165, 192, s192A
Jury Directions Act 2013, 11 to 15 inclusive
Second Reading Speech for UEA
ALRC 26, 102

Adam, Gilbert [1999] NSWCCA 197
Adam, Gilbert [2001] HCA 57; (2001) 207 CLR 96
Anyang (Ruling No. 1) [2011] VSC 31
Aslett [2006] NSWCCA 49
Ayoub [2004] NSWCCA 209
Bourbaud [2011] VSC 103
Col [2013] NSWCCA 302
Fowler [2000] NSWCCA 142
GAC [1997] NSWCCA, unreported 1.4.97: BC9701000
Gilham [2012] NSWCCA 131
Glasby [2000] NSWCCA 83: 115 A Crim R 465
Hadgkiss v CFMEU [2006] FCA 941: 152 FCR 560

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205 William St
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Hogan [2001] NSWCCA 292
Kanaan [2006] NSWCCA 109
Klein (No 3) [2008] NSWSC 337
Klewer v Walton [2003] NSWCA 308: BC200306051
Kneebone (1999) 47 NSWLR 450: [1999] NSWCCA 279
Lane [2013] NSWCCA 317
Le [2002] NSWCCA 186; 54 NSWLR 474
Le [2001] NSWSC 174
Lee [2009] NSWCCA 259
Lozano NSWCCA, 10.6.97: BC9702441
McRae [2010] VSC 114
Milat [1996] NSWSC, No. 70114 of 1994; BC 9607720
Nair [2009] ACTCA 17
Petroulias (no 29) [2007] NSWSC 1005
Parkes [2003] NSWCCA 12;147 A Crim R 450
Randall [2004] TASSC 42: 146 A Crim R 197 (Tas CCA)
Razzak [2008] NSWCCA 304
Rees [2000] NSWSC 643
Ronen [2004] NSWSC 1298
Santo [2009] NSWCCA 269
Souleyman (1996) 40 NSWLR 712 (Smart J)
Stevens v McCallum [2006] ACTCA 13
Tran (Ruling No. 3) [2013] VSC 183 (Lasry J)
White [2003] NSWCCA 64;140 A Crim R 63:

Anderson & Bayne *UEL: Text & Essential Cases* (2nd ed) Fed Press
Beale *Pocket Evidence Law* Foley's Website
Gans & Palmer *Uniform Evidence* OUP
Judicial College of Victoria *Criminal Charge Book, Chapter 4.17*
Odgers *Uniform Evidence Law* (10th ed) Thomson Reuters
Smith & Holdenson *Comparative Evidence: The Unhelpful Witness* (1998) 72 ALJ 720

LAW

Exclusionary rule (s37(1)) – party may not xxn (ask leading questions of) own witness– rationale for exclusionary rule – promotes better fact finding.

Exceptions under s 37 - limited in scope - with & without leave.

Exception under S 38 – leave always required – 3 (alternative) preconditions for grant of leave – If precondition(s) satisfied, discretionary considerations as to whether or not to grant leave - Rationale for s 38 – improvement of fact finding process by ensuring courts not deprived of relevant evidence[3] and that evidence is tested - Fact

[3] NSWCCA – *Lozano* at BC pp 6-7
VSC – McRae at [21]

finding process also enhanced by P calling all material witnesses, which s 38 encourages[4].

Common law exception - s38 abrogates[5] common law re "hostile" Ws, that is, W's unwilling to tell the truth in response to non- leading questions.

Comparison with old common law exception - major changes re (i) preconditions for leave to xxn own W; (ii) guidance provided re exercise of discretion; and (iii) use that can be made of prior favourable statements - not necessary to establish W is "hostile" or that W has motive to lie[6] - use of prior favourable representations - 38 & 60 - W's previous favourable representations adduced under s38 xxn may be used for their truth, unless limiting order made (s 136). P may also tender documents containing favourable previous representations (eg police statements)[7], even if W admits having made them - s 43 does not prevent this[8].

Relevance and admissibility — in chief, W says can't remember event in question – cases include examples where prior favourable statements admitted in such circumstances [9] - but if evidence is neutral ("I can't remember"), how does prior favourable statement pass test of relevance - difficult to see how impugning credit by adducing evidence of prior favourable statement is relevant on a credibility basis - prior favourable statement may be relevant on a hearsay basis but is it admissible on a hearsay basis - s 60 would not be applicable unless admissible first on a non hearsay basis (eg a credibility basis) - unless another exception to hearsay rule applicable (eg s 66), prior favourable statement arguably not relevant and admissible.

Ethics – not improper for P to call a W expected to be unfavourable in order to adduce evidence of previous favourable representations by W[10] - Consistent with P's duty to assist court to find the truth – The obligation on P to call material witnesses does not mean P is obliged to accept W's evidence[11]

Tactics – Where P relies on parts of W's evidence that are favourable, may be wise not to seek to challenge those parts of W's evidence that are unfavourable[12]

Preconditions for grant of leave – s 38(1)(a), (b) & (c)

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[4] ALRC – Report No. 26 at [625]
[5] NSWCCA – *Kanaan* [2006] at [83]
ALRC – 26 at [625],
[6] ACTCA - *Nair* at [43]
[7] HCA – *Adam*
NSWCCA – *GAC*
VSC - *McRae*
[8] NSWCCA – *Col* [2013] at [36], *Aslett* [2006] at [76]
[9] NSWCCA – *Lozano* (1997), *GAC* (1997)
VSC – *McRae* (re witness McGillivray)
[10] HCA – *Adam* [2001] at [18 -19];
NSWCCA: *Fowler* [2000] at [120], Hogan, Le, Razzak
[11] NSWCCA – Le [2002] at [68]
[12] NSWCCA – *Le* [2002] at [61]

(a) - Unfavourable - There is a broad view of the meaning of "unfavourable" ("not favourable", which includes neutral evidence[13]) and a narrow view ("adverse"[14]) - As Curtain J observed in *McRae*, the broad view is generally preferred[15] - JCV Charge Book reflects that fact[16] - s 38(1) (a) is apt if W has or may have genuinely forgotten events in question - If W is feigning forgetfulness, s 38 (1)(a) & (b) apply[17].

s 38(1)(b) – Not making a genuine attempt to give evidence[18]

s 38(1)(c) - Prior Inconsistent Statement - UEA Dictionary, part 1: *"prior inconsistent statement* of a witness means a previous representation that is inconsistent with evidence given by the witness"

Discretionary considerations

Relevant considerations are set out in statutory provisions and the case law.

Key statutory provisions are s 38(6) and s 192 - must also consider s135 and 137[19]

Unfair prejudice to D – Examples - shifting focus of trial to whether W's change of story instigated by D[20]

Case law indicate other relevant considerations include: whether P called a witness pursuant to *Apostilides* (unfair to deny P opportunity to xxn W[21]) *;* whether preponderance of evidence is against the evidence given by W[22]; whether the

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[13] NSWCCA - *Kanaan* [2006] *at* [83] (obiter), *Fowler* [2000] at [120-1] (obiter), *Lozano* (1997) (BC970244) at p6-7 (obiter);
NSWSC - *Petroulias (No. 29)[2007]* at [11] (obiter), *Ronen* [2004] at [49] (obiter), *Le* [2001] at [15] (obiter), *Souleyman* (1996) at p715 (ratio);
VSC - *Tran (Ruling No. 3)* at [29] (obiter), *Bourbaud* at [29], *McRae [2010]* at [24] (obiter);
TEXTS- ALRC 102 at [5.46]; Anderson & Bayne (2nd ed) at [6.460] ;
MISC - There are a number of cases on s 38 which, though sometimes cited in support of a particular view re meaning of unfavourable, are inconclusive including the High Court's decision in *Adam(2001)* at [27]

[14] NSWCA - *Klewer v Walton* at [20] (but note that this case was decided exparte);
NSWCCA- *Kneebone;*
FCA - *Hadgkiss v CFMEU* at [9] (decision of a single judge, Graham J);
TEXTS - *Gans & Palmer* at p42, [2.3.3.3], *Odgers* (10th ed) at p129 [1.2.3260]
[15] *McRae* at [24].In *Tran (Ruling No 3)*, Lasry J helpfully discusses the competing views, expresses a preference for the broad view but did not need to decide the matter.
[16] JCV Charge Book, Chapter 4.17, Bench Notes, [11, footnote 2]
[17] ACTCA - *Steven v McCallum* at [151-4];
NSWCCA - *Lozano* at p6 of BC9702441, *GAC* (leave granted under s38(1)(b); NSWSC - *Rees* (Bell J);
VSC - *McRae* at [26];
TEXTS - ALRC 26 at [627]
[18]NSWCCA – *GAC*;
NSWSC - *Rees*
[19] NSWCCA - *Hogan* at [73], last sentence.
[20] NSWCCA – Hogan at [5]
[21] NSWCCA - *Kaanan* at [84] – [85]
[22] TASCCA - see *Randall* at [16]

evidence of the W after cross examination under s 38 is likely to be neutral and thus of limited probative value.[23]

Irrelevant considerations include: the fact that it is not unexpected that W gives unfavourable evidence; [24] the fact that P called W for the express purpose of cross examining into evidence W's prior favourable statements[25] ; whose version of events is the truth.[26]

Unreliability - Fact that prior favourable statements made by accomplice in a ROI not fatal to s 38 application.[27]

Scope of xxn under s 38

P should outline proposed ambit of xxn in seeking leave under s38[28] - A *Basha* is a good way beforehand of working out the proposed parameters of s 38 xxn before a jury[29]

If leave is granted to cross examine, the xxn must be "about" the matter(s) which found(s) the grant of leave. It is not "open slather"[30] but s 38 xxn may be directed at the improbability of W's testimonial version of events and the probability of version of events for which P contends[31] - Question about a motive for W to lie is permissible[32]

Fragmentation of proceedings - it is not desirable to "distribute small dollops of leave in response to repeated small scale applications"[33] under s 38

Procedure

Timing of s 38 application – Where W expected to be unfavourable - P will normally cross examine W under s 38 before D cross examines W - order may vary if P's application to cross examine W is not made until re-examination[34] or if the Court so directs - example of P deliberately waiting until re-examination before applying successfully for leave under s38 is *Parkes.*

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[23] NSWCCA – *Fowler* (2000) at [126] & [130]
[24] NSWCCA - *Razzak* at [69]
[25] HCA – *Adam* at [19-20]
[26] TASCCA - *Randall* at [24]
[27] HCA – *Adam*
NSWCCA – *GAC*
VSC – *McRae*
[28] NSWCCA – *White* at [68]
[29] HCA – *Adam*
VSC - *McRae*
[30] NSWCCA – *Hogan* at [80-81]
[31] NSWCCA – *Le [2002]* at [67]
[32] NSWCCA – *Le* [2002] at [89]
[33] NSWCCA – *Le* [2002] at [73]:
[34] NSWCCA -*Parkes*

TJ should not to say anything to jury to suggest TJ thinks witness is not to be believed. Telling jury P has been granted leave to xxn because W's evidence is unfavourable to P does not offend[35]

Jury Directions

According to JCV *Criminal Charge Book*[36], where s 38 xxn occurs, directions may be required about: TJ's decision to grant leave under s38; prior inconsistent statements; the unreliability of the evidence (under s 165 or common law).

Sections 11 to 15 of the Jury Directions Act 2013 require directions if directions are sought and there is no good reason not to give directions or directions are necessary to avoid a substantial miscarriage of justice.

On Appeal

Failure by the TJ in granting leave to refer to considerations in s38(6), s192, s135 & s137 may cause a conviction to be quashed but not if leave to cross examine would have been granted anyway[37].

If P failed to call a material witness (W), the fact that P might have obtained leave to cross examine W under s38 may be significant on appeal[38]

Miscellaneous

Interplay with rule in *Apostilidies* –existence of s 38 doesn't mean Prosecutor is obliged to call a W whom he reasonably believes is not a witness of truth[39] but, as stated recently in *Gilham* [2012], "the greater availability of cross-examination of a Crown witness by the Crown Prosecutor has placed more emphasis on the Crown's obligation to call relevant witnesses"[40] - The fact finding process may be better served by P not calling a material witness s/he reasonably believes is not a witness of truth, notwithstanding the existence of s 38 - Not calling the witness deprives D of the opportunity to xxn and forces D, if he wants to adduce evidence from W, to call him and ask non leading questions.

Interplay with rule in *Browne v Dunn* – if going to invite jury to reject evidence of unfavourable W, would be breach of rule not to seek to xxn W under s 38[41] – failure to do so could lead to direction by TJ in his charge that jury been deprived of opportunity to see how W responded to challenge and defence been deprived of opportunity to elicit further evidence in support of W's version

[35] NSWCCA - *Lee* [2009] at [38].
[36] JCV Criminal Charge Book, Chapter 4.17, Bench Notes, [12 - 13]
[37] NSWCCA – *Le* [2002] at [49-50]
[38] NSWCCA – *Gilham* [2012] at [406], *Santo* [2009]
[39] NSWCCA – *Lane* at [164-165]
[40]NSWCCA – *Gilham* [2012] at [406], also Le
[41] NSWCCA – *Kanaan[2006]* at [69-106], *Le* [2002] at [85]

NOTES[42]

Second Reading Speech for Evidence Act 2008
"Unfavourable witnesses"
The common law currently requires that a witness be declared hostile before they can be cross-examined by the party who called them. The test for determining whether a witness is to be declared hostile requires the party to show that the witness is deliberately withholding material evidence.

The bill allows for a party who called a witness to question that witness as though they were cross-examining them, with the leave of the court, where the witness has given evidence unfavourable to that party. This will, for example, make it easier for prosecutors to cross-examine uncooperative witnesses who may not meet the higher common law test. In combination with other sections, it will also allow them to lead evidence of the witness' original statement to police, and for those statements to be available to the jury as evidence of what happened."

ALRC 26

[625] "Hostile Witness – Proposal. It is proposed that the law relating to 'hostile' witness be abrogated. The criticisms of the law, and the absence of any satisfactory rationale justifies this course. Further the need for accurate fact finding and considerations of fairness justify allowing a party to test by cross-examination that part of a witness' testimony that is unfavourable to the case of the party whether the witness was called by the party or not. If the party does not test such evidence it is likely that no one will. The proposals may also encourage parties to call witnesses, often the most credible available. The major danger with such an approach is that it may add to the time and cost of litigation. Several factors will minimise this danger:

ALRC 102

5.40 Section 38 of the uniform Evidence Acts made a significant change to the law of evidence. It states:

> *(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.*

[42] Footnotes are omitted from all quotations in section headed NOTES

5.41 Under the common law, a party cannot cross-examine its own witness unless the witness is declared hostile. To be declared hostile, the court must find that the witness is deliberately withholding or lying about material evidence.

5.42 In the previous Evidence inquiry, the hostile witness rule was criticised as irrational and anachronistic. The ALRC found that there was no satisfactory rationale for such a stringent test and proposed that a party be permitted to cross-examine its own witness where the evidence being given is unfavourable to that party.

5.43 Justice Tim Smith and Paul Holdenson QC have discussed the limitations of the common law in dealing with unhelpful witnesses.

> *Trial counsel have all found themselves in the unenviable position of having called a witness only to find that the witness gives evidence which is either damaging to the client's case or assists in the case of the other party. Other situations arise. It may be that there are witnesses, for example, that the Crown would rather not call because they do not assist the Crown to advance its case against the accused. It may be that witnesses are called who gave detailed statements about the events in question but at the trial claim to have no recollection.*

5.44 As Smith and Holdenson point out, apart from a limited procedure of putting facts set out in the statement of the witness to the witness in the form of leading questions with the court's leave, at common law there is no remedy for this problem other than calling further witnesses to contradict that witness or convincing the court that the witness is hostile.

5.45 The effect of having a witness declared unfavourable under s 38 is significant. With the leave of the court, an unfavourable witness may be questioned as if being cross-examined. That is, they can be asked leading questions, given proof of prior inconsistent statements, and asked questions as to credit. However, s 38 is limited to cross-examination on the areas of testimony in which the witness is unfavourable, and does not create a general right to cross-examine. Leave can be granted to cross-examine a witness on only part of his or her evidence, even though the rest of the witness' evidence is favourable to the party that called him or her. Section 38 is a discretionary section and the factors listed in s 192 must be considered in granting leave.

5.46 The term 'unfavourable' has been interpreted simply as meaning 'not favourable', rather than the more difficult test of hostile or adverse. In R v Lozano, it was accepted that s 38(1)(a) allows a witness to be declared unfavourable and cross-examined even when he or she genuinely cannot remember the events in question.

5.47 There are numerous examples of the use of s 38 to admit evidence which would not be admissible under the common law. In Randall v The Queen, the complainant alleged that she was sexually assaulted by the accused in a room with 10–12 men present. The Crown's case was that the complainant had been given drugs by the accused and was, in effect, comatose at the time of the offence and incapable of consenting to sexual intercourse. A number of the men present gave evidence consistent with the view that the complainant appeared comatose. Two witnesses gave

evidence that suggested the complainant was alert and consented. As witnesses to the alleged offence, the Crown was obliged to call them. Without the ability to have the witnesses declared unfavourable under s 38, the Crown could not have cross-examined them, nor would they have been cross-examined by the defence, as their evidence was favourable to the accused.

5.48 In Saunders v The Queen, a friend of the accused gave evidence at the trial that was substantially different to the story he gave police when they arrived on the scene of the alleged assault. The friend was called by the prosecution and, when he gave the inconsistent version, an application was made to have him declared an unfavourable witness under s 38. The application was successful and his earlier statement was brought into evidence. The view was put to the Inquiry that, as this statement to police was contemporaneous, it held strong probative value and should be heard by the jury.

5.49 In R v Milat, Hunt CJ at CL considered that s 38 was important in covering the situation where the Crown is obliged to call a witness at the request of the accused, notwithstanding that the evidence given is likely to be unfavourable. In such a case, it was found to be unjust for the Crown not to be given leave to cross-examine such a witness. Hunt CJ at CL stated in Milat that the effect of s 38 would probably prove to be one of the most worthwhile achievements of the uniform Evidence Acts.

5.50 A prosecutor is under a duty to call any witnesses whose evidence may assist in determining the truth of the matter at issue. Dawson J said in Whitehall v The Queen:

> *All available witnesses should be called whose evidence is necessary to unfold the narrative and give a complete account of the events upon which the prosecution is based. In general, these witnesses will include the eye-witnesses of any events which go to prove the elements of the crime charged and will include witnesses notwithstanding that they give accounts inconsistent with the Crown case. However, a prosecutor is not bound to call a witness, even an eye witness, whose evidence he considers to be unreliable, untrustworthy or otherwise incapable of belief.*

5.51 As noted above, s 38 is not limited to the situation where a witness unexpectedly gives hostile evidence, or unexpectedly appears not to be making a genuine attempt to give evidence. Therefore the section allows a party (in practice, most likely to be the prosecution) to call a witness they know to be unfavourable, for the sole purpose of having them available for cross-examination and getting an inconsistent out-of-court statement admitted into evidence under s 38(1)(c). The prior inconsistent statement is only admissible if it satisfies the requirements of Part 3 of the Acts.

5.52 The use of s 38 in this way was considered by the High Court in Adam v The Queen. In Adam, the trial judge permitted the Crown to cross-examine a witness as an unfavourable witness under s 38(1)(c), in relation to prior inconsistent statements made to police by the witness. The use of the statements had two purposes. First, it related to the credibility of the witness. Second, and importantly, once admitted for that purpose, the statements were admissible also for their hearsay purpose under s 60, and, used in that way, they incriminated the accused. The majority considered that such a practice was proper under the Evidence Act 1995 (NSW) and had not resulted

in unfairness to the defence in that case as the defence was free to cross-examine the witness on the prior inconsistent statement.

5.53 The discretions under ss 135, 136 and 137 may be employed to prevent questioning under s 38. In R v GAC, it was argued that leave should not be given to cross-examine the witness on the ground that it was unfairly prejudicial to the accused to allow the witness' prior statement into evidence, because his professed lack of memory meant that the defence could not cross-examine him on his earlier version of events given to the police. However, after finding that the witness' memory loss was founded on a desire to help the accused, the New South Wales Court of Criminal Appeal stated:

> *[H]aving regard to the circumstances of the interview, including its proximity to the critical events, what C said to the police was likely to be a good deal more reliable than what he said in court. For my part, I would not regard the probative value of the interview as being outweighed by unfair prejudice to the appellant; nor do I consider that there was substantial unfairness of the kind relied upon by the appellant.*

Submissions and consultations

5.54 Two views of s 38 emerged in submissions and consultations. One is that the test to have a witness declared 'unfavourable' is too lenient and unfairly allows a party to call a witness solely to allow a prior inconsistent statement into evidence that would not be admitted any other way. The other view is that expressed in Adam—the practice ensures all relevant evidence gets in, and the availability of that witness for questioning by the other party overcomes any unfairness.

5.55 In DP 69, the Commissions concluded that the guiding principle under which s 38 was first recommended—improvement in fact-finding by enabling a party who calls a witness to challenge unfavourable evidence by cross-examining that witness—has been upheld by the operation of the section over the last 10 years. While there has been some criticism of the section, there has also been strong judicial support, as in the Adam and Milat judgments noted above. On that basis, it was proposed that no change be made to s 38.

5.56 The CDPP supports the current operation of s 38, believing it operates well in practice. However, the CDPP argues that circumstances in which the section is available should be expanded. In its view, there should be greater certainty as to when leave should be granted to cross-examine the witness. The CDPP favours a structured discretion where the starting point is that leave shall be granted unless there are overriding considerations to the contrary. The CDPP also suggests that a witness should be able to be cross-examined by the party calling the witness where: unfavourable evidence is given; there is not a genuine attempt to give evidence; or, the witness has made a prior inconsistent statement. The restriction that the cross-examination be confined to the area specified in paragraphs 38(1)(a), (b) or (c) should be removed so the witness can be cross-examined generally about all aspects of their evidence.

5.57 In contrast, the NSW PDO maintains the view that the worst aspect of the uniform Evidence Acts is the approach to the evidence of an unwilling witness.

By a number of different routes, the Crown is able to tender the statement of the witness as evidence of the fact, even if the witness is not prepared to adopt the statement as the truth. This leaves the accused's lawyer with the impossible task of cross-examining a witness whose starting position is that the earlier statement was not the truth.

5.58 One of these routes is where the witness is unwilling to testify, and is discussed in Chapter 7. The second method nominated by the NSW PDO as problematic is the situation in Adam, where the Crown can make an application to cross-examine a witness on their prior inconsistent statement under s 38. If this application is successful, the operation of s 60 will admit the witness' prior statement as evidence of the asserted fact. The NSW PDO believes that on this basis, s 38(1)(a) of the uniform Evidence Acts should be repealed. This would limit applications to cross-examine a witness to those witnesses who do not appear to be making a genuine attempt to give evidence, or who have made a prior inconsistent statement.

5.59 The Criminal Bar Association of Victoria is also concerned about the connection between ss 38 and 60.

Under s 60 hearsay statements may be admitted for another purpose but, once admitted into evidence may be used as to the truth of their contents. The danger is particularly highlighted by the VLRC proposal that s 60 should be amended to make it clear that the provision applies to both firsthand and remote hearsay.

5.60 The Criminal Bar Association also argues that when cross-examination is allowed on a prior inconsistent statement, leave must be limited to cross-examination on the facts recorded in the earlier statement.

5.61 VLA maintains that the effect of s 38 has been that witnesses whose evidence may only be considered 'neutral' have been declared unfavourable and been allowed to be cross-examined on the basis that some of their testimony contradicts an earlier statement. VLA maintains that

> *[t]he prosecution will routinely lead the records of interview of persons involved in, or suspected of being involved in, the offending. It is often the case that a person who is unwilling to give evidence helpful to the prosecution, is called as a witness solely for the purpose of proving the contents of the interview. The NSW courts have held this to be quite proper.*

5.62 VLA submits that this practice leaves in the mind of the jury the implication that the witness has been interfered with by the accused, when it may simply be a matter of innocent memory loss or a changed story. On that basis it proposes that leave for the prosecution to cross-examine its own witness be given only where the court is satisfied that there can be no prejudicial implication drawn by the jury that the accused has interfered with a witness (where there is no evidence to make out the allegation).

5.63 The Litigation Law and Practice Committee of the Law Society of New South Wales agrees with the Commissions' conclusion in DP 69 that s 38 should remain unchanged.

The Commissions' view

5.64 In ALRC 26, it was considered whether the operation of s 38 should be limited by a requirement that the unfavourable evidence be unexpected. The ALRC rejected this approach on the basis that it would enable criminals to defeat prosecutions by suborning key witnesses. The ALRC also noted the argument that the prosecution receives a tactical advantage because, where a prior statement is used, it will go into evidence. ALRC 26 considered that the prosecution in that case has already suffered the tactical disadvantage of having to call a witness to prove its case and that witness has supported the defence. Furthermore, if the operation of s 38 means that evidence could be admitted which is unfairly prejudicial within the meaning of ss 135, 136 and 137, that evidence can be excluded or its use limited by the exercise of those discretions.

5.65 Smith and Holdenson have noted:

> *Much depends on the view that is taken about the importance for the credibility of trials, be they civil or criminal, that there be a genuine attempt to establish the facts on which the final decision will be based. The ALRC view was that that attempt was of fundamental importance.*

5.66 The Commissions note the suggestion of the CDPP that s 38 be amended to include a structured discretion which provides that leave shall be granted unless there are overriding considerations to the contrary. However, no other bodies have indicated to the Commissions that there have been cases where the discretion to cross-examine has not been exercised properly. A suggestion that leave should always be granted, unless there are overriding considerations to the contrary, would appear to favour the prosecution unnecessarily in these matters. The three bases on which cross-examination may be permitted in paragraphs 38(1)(a), (b) and (c) are clear, and the Commissions are not convinced greater certainty is required. In ALRC 26, it was foreshadowed that there would be cases where the unfavourable evidence is not of major importance and the attack on credibility of little weight. In that case, the judge should retain the ability to not allow the cross-examination.

5.67 In relation to the suggestion that cross-examination should be permitted across all of the witness' testimony, and not only those matters on which the witness is unfavourable, the Commissions are unconvinced that any benefits to the trial process would be achieved by such an amendment. The ALRC limited the original proposal to the unfavourable evidence on the basis that the advantages of allowing a party to cross-examine their own witness more generally (which is likely to be only more general attacks as to credit) was of debatable advantage and risked wasting time and cost. It is noted that in R v White, Smart AJ suggested that there may be cases where, in practical terms, because of the width of the material on which the witness may be questioned, a more general form of leave to examine could be granted without departing from the intention of s 38.

5.68 Whilst the concerns of the VLA are noted, the Commissions remain supportive of the reasoning behind the enactment of s 38 and its practical application. Should a judge feel that the jury might draw an incorrect inference from the cross-examination, a judicial comment should be sufficient to overcome this problem. The Commissions do not agree with the views of the NSW PDO and others regarding the unfairness caused by the interaction between ss 38 and 60. These criticisms do not address the underlying policy on which the section is based. The Commissions are of the view that prior inconsistent statements should be allowed into evidence through s 38, as they tend to have strong probative value. Section 38 has made a significant change in allowing highly relevant and probative evidence to be placed before the court. The granting of leave to cross-examine under s 38 is subject to the matters prescribed by s 192(2), which includes the extent to which to do so would be unfair to a party or to a witness, and also to the discretions to exclude or limit evidence under ss 135 and 137.

5.69 The guiding principle under which s 38 was first recommended—improvement in fact-finding by enabling a party who calls a witness to challenge unfavourable evidence by cross-examining that witness—has been upheld by the operation of the section over the last 10 years. While there has been some criticism of the section, there has also been strong judicial support, as in the Adam and Milat judgments noted above. On this basis, the Commissions recommend no change to the section.

***Adam (Gilbert)* [2001] HCA 57; (2001) 207 CLR 96**
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 under (a), (b) & (c) – evidence that W gave on voir dire and before jury was "neutral" - 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).

Gleeson CJ, McHugh, Kirby and Hayne JJ said:

[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] **……..** *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) and ss 135 to 137 of the Act, 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.

[18] In Blewitt v The Queen 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; R v Hall."*

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 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). 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.

[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.…… 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.

[27] ……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. <u>It is not necessary in those circumstances to consider whether par (a) was also met</u>. 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.

Gaudron J thought that, while 38(1)(a)(b) & (c) were satisfied, leave should not have been given under s 38 to cross examine because of the unreliability of Sako's prior inconsistent statements, and the inability to properly test them:

[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.

[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] ……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.

***Aslett* [2006] NSWCCA 49**

Criminal law - breaking entering and committing the serious indictable offence of robbery in circumstances of special aggravation - sexual intercourse without consent in company with deprivation of liberty -inciting complainant of sixteen years of age to commit an act of indecency -Criminal law-evidence of accomplice- whether direction to jury adequate - whether trial judge obliged to direct jury that evidence uncorroborated - Criminal law -Crown opening- in opening to jury Crown Prosecutor mistakenly misstated the effect of witness' evidence -whether trial judge ought to have discharged jury- whether miscarriage of justice - Criminal law - whether evidence identifying appellant wrongly admitted -Criminal law-obligation of counsel objecting to admission of evidence to identify legal basis of objection and evidence relevant to that basis - Criminal law - whether prior inconsistent statements of Crown witness wrongly admitted - Criminal law -irrelevant evidence wrongly admitted whether proviso should apply - Criminal law -remarks of Crown Prosecutor whether miscarriage of justice - Criminal law -whether verdicts unreasonable and inconsistent with evidence

Barr J, with whom Spigelman CJ and Howie J, agreed:

[19] Bonham decided to plead guilty. He also indicated that he would give evidence against his co-offenders. Accordingly, investigating police officers visited him on 26 September 2003 and invited him to read transcripts of the interviews he had given on 20 August and confirm that they correctly recorded what had been said. He signed a statement to that effect.

[20] However, Bonham changed his mind. Although he maintained his plea of guilty he withdrew his offer to give evidence against the others. That was his position when the appellant was committed for trial. Giving evidence on his own sentence, Bonham would not say who his companions were.

[21] Bonham was called to give evidence at the appellant's trial. He said that he, Steven and Jamie Aslett had taken part in the robbery but that the appellant had not and that in that respect at least the interviews made at Lismore did not correctly record the facts. The Crown was granted leave to cross-examine Bonham and in the course of doing so tendered the two Lismore transcripts and the transcript of the interview in which Bonham had told the police that the Lismore transcripts correctly recorded what had been said. Audiotape recordings of the Lismore interviews were received into evidence as well. (Attempts to videotape the interviews were unsuccessful because the equipment did not work properly). So it came about that the principal pieces of evidence identifying the appellant as a participant in the robbery and the sexual attacks on SA were what Bonham had told the police at Lismore. Against them the jury had to put any weight they might give to Bonham's subsequent denials. There was evidence supporting the truth of the Lismore accounts but it is convenient to defer consideration of it.

[55] Briefly, the sequence of events was as follows. The events giving rise to the charges happened on 17 July 2003. On 25 July Steven and Jamie Aslett were arrested and Bonham admitted to his mother and father that he had been involved. He ran away. On 20 August he was arrested and interviewed and made admissions against his own interest. He gave an account which, if accepted, identified the appellant as the leader. On 26 September he was indicating his preparedness to give evidence against the appellant. At some later time that has not been precisely identified he changed his mind. The first time he was called to give evidence in the case against the appellant he refused to take the oath. On the next occasion when he went to court, being the committal hearing for Jamie Aslett, he took no objection to being sworn. He said that he had taken part in a home invasion and a sexual assault with three other people but that he did not know who they were.

[69] Audiotapes and transcripts of Bonham's two Lismore interviews and the statement he signed on 26 September were admitted into evidence over the objection of defence counsel. It was submitted on appeal that the statement of 26 September was made to indicate the evidence that Bonham would be able to give, so s66(3) applied. When Bonham signed that statement he also signed each page of the transcripts of the interviews held on 20 August. The result, it was submitted, was that those transcripts also became indicators of the evidence Bonham would be able to give. So subs(3)

applied to them as well. Because of subs(3), subs(2) did not apply and the evidence was caught by the hearsay rule and inadmissible.

[70] The Crown's response at trial and in this Court was that, whatever the effect, if any, of subs(3) and subs(2) on the evidence, it was independently admissible under ss38, 103 and 60 Evidence Act…..

[71] The circumstances were similar to those that arose in Adam v The Queen (2001) 207 CLR 96. A witness, having knowledge of the events giving rise to the charges and probably concerned in them, made a statement that assisted the prosecution. At trial it was apparent that he was unwilling to assist the Crown by giving evidence in accordance with the statement. The Crown obtained leave under s38 to cross-examine him. His statement was tendered on the question of his credit and was admitted by virtue of s103. The effect of s60 was to make the contents of the prior statement available to prove the truth of the assertions in it. See generally the judgment of the majority of the Justices of the High Court of Australia at 105 -109.

[72] The trial judge held the evidence admissible on that basis. In my opinion his Honour was correct. Section 66 is one of a group of sections dealing with circumstances in which hearsay evidence may become admissible as an exception to the hearsay rule. In its context and by its terms the section does not purport to concern itself with all the circumstances in which the Act makes hearsay evidence admissible notwithstanding s59. Nothing in s66 or in the Part in which it lies, Part 3.2, purports to limit the effect of ss38, 103 or 60.

[73] Counsel for the appellant also relied on s43 Evidence Act, which is in the following terms -

> *(1) A witness may be cross-examined about a prior inconsistent statement alleged to have been made by the witness whether or not:*
>
> > *(a) complete particulars of the statement have been given to the witness, or*
> >
> > *(b) a document containing a record of the statement has been shown to the witness.*
>
> *(2) If, in cross-examination, a witness does not admit that he or she has made a prior inconsistent statement, the cross-examiner is not to adduce evidence of the statement otherwise than from the witness unless, in the cross-examination, the cross-examiner:*
>
> > *(a) informed the witness of enough of the circumstances of the making of the statement to enable the witness to identify the statement, and*
> >
> > *(b) drew the witness's attention to so much of the statement as is inconsistent with the witness's evidence.*

(3) For the purpose of adducing evidence of the statement, a party may re-open the party's case.

[74] It was submitted that the effect of subs(2) was that evidence of Bonham's prior inconsistent statements made at Lismore became admissible only if Bonham did not admit making them. He did admit making them. They were therefore inadmissible.

[75] Section 43 lies in Chapter 2 of the Act, which is concerned with adducing evidence. The sections dealing with the hearsay rule and its exceptions fall within Chapter 3, which is concerned with the admissibility of evidence. Section 43(2) is not intended to cover every instance of reliance on a prior inconsistent statement of a witness or to deal in general terms with its admissibility. The purpose of the section is to ensure that if a party intends to adduce evidence of a prior inconsistent statement "otherwise than from the witness" that the witness refuses to acknowledge, that party may only do so after drawing to the witness' attention the circumstances of the statement so that the witness can identify it and the inconsistency the cross-examiner is asserting. The purpose is to ensure that such a witness has a proper opportunity to consider precisely what he or she is asserted to have said and precisely how that is asserted to be inconsistent with what the witness now says. Subs(2) is in its terms limited to the things that must happen when a witness does not admit having made an inconsistent statement. It says nothing about what may or must or must not happen in other circumstances, for example, where the witness admits having made a prior inconsistent statement.

[76] Subs(2) draws on pre-Evidence Act 1995 law about the use of prior inconsistent statements. Before the commencement of the present Evidence Act such statements, when admissible, were relevant only to the credit to the witness who made them. If their making was admitted, therefore, there was no purpose in tendering them: Alchin v Commissioner for Railways (1935) 35 SR (NSW) 498. Under the modern law, on the other hand, there is a purpose in tendering such statements beyond any attack on credibility, namely proof of the facts asserted: s60. Nothing in s43 is directed to the admissibility of any prior inconsistent statement to prove the truth of its assertions. All subs(2) does is ensure that a witness who is about to be attacked on credit is fairly dealt with. Nothing in s43 purports to limit the effect of ss38, 103 or 60.

[77] This ground of appeal has not been made good.

***Bourbaud* [2011] VSC 103**

Criminal Law - Homicide –Ruling of Lasry J - Evidence Act 2008 – Section 38 – Unfavourable witnesses – Application by prosecutor to cross-examine prosecution witnesses whose anticipated evidence was likely to support defence of self defence – Earlier pleas of guilty by witnesses (D's father, mother, friend) to assault preceding stabbing – Evidence inconsistent with pleas – after pleas, witnesses made statements inconsistent with pleas, then gave evidence at Basha and before jury at prior aborted trial before T Forrest J in accordance with those statements – Defence did not dispute that s 38(1)(a) and (c) were satisfied or that leave should be given to cross examine – Fundamental defence objection related to whether evidence adduced in xxn under s 38 should be permitted to be used for a hearsay purpose as well as a credibility purpose

Whether evidence only relevant to credit – Whether to limit use of evidence (to credibility purpose) under section 136 was deferred (and apparently not revisited[43]).

Lasry J said:

[8] The Evidence Act defines a "prior inconsistent statement" of a witness as a previous representation that is inconsistent with evidence given by that witness. In this case, the prosecution has sought leave to cross examine these three Crown witnesses about their pleas and the extent to which they can be taken to have adopted the summary of facts on which they were sentenced, rather than on the basis of some prior inconsistent first-hand narrative of their own. Both the prosecution and defence agreed that to the extent that the three witnesses accepted the factual basis on which they were sentenced, as put by the Crown at their plea, any evidence that they give in the trial of the accused about them acting in self-defence will amount to a prior inconsistent statement.

[29] On any view, such evidence is unfavourable to the prosecution. As has been noted on many occasions, s 38 does not require that the evidence or the witnesses themselves be adverse or hostile or uncooperative with the prosecution. The section requires only that one of the three conditions be met. As Curtain J said in DPP v McRae at paragraph 24:

> *The word "unfavourable" does not mean adverse or hostile. It is taken to mean "not favourable" as was held by Smart J in R v Souleyman ("Souleyman's case") and subsequently followed by the courts in New South Wales. Although the Federal Court in Hodgkiss v Construction, Forestry Mining and Energy Union ('Hodgkiss's case') characterised "unfavourable" as having "to detract from the case of the party calling the witness", it appears from my reading of the authorities that the approach of Souleyman's case is generally preferred and I would apply that definition. Nonetheless, even on the more restricted approach as stipulated in Hodgkiss's case, Flaherty and Connally would meet the requirements of unfavourable.*

[36] Section 38 of the Evidence Act and its significant change to the common law in relation to "hostile witnesses" is obvious. In a careful and thorough ruling in this Court, Curtain J summarised that policy in DPP v McRae:

> *In R v Lozano ('Lozano's case'), it was acknowledged that the purpose of the section was to ensure that the courts are not deprived of relevant testimony which had previously been excluded by operation of the hostile witness rule. The Australian Law Reform Commission, in its report of 2005, refers to the guiding principle under s 38 as "improvement in*

[43] Note that Austlii does not contain any further rulings by Lasry J in *Bourbaud*, only his sentencing remarks. It is not known whether Lasry J was required to rule on the s 136 point. Bourbaud was ultimately acquitted of murder but convicted of manslaughter

fact-finding by enabling a party who calls a witness to challenge unfavourable evidence by cross-examining that witness", and the report comments that the principle has been upheld by the operation of the section over the ten years since its inception, as it then was, and that despite some criticism, it had received strong judicial support. (citations omitted)

***Col* [2013] NSWCCA 302**

Conviction Appeal - offence of causing grievous bodily harm with intent to cause grievous bodily harm - appellant threw methylated spirits onto bed where victim lay and ignited bedclothes – when in hospital for her burns unable to talk, and visited by a friend, V wrote an inculpatory version of what happened on 3 sheets of paper – those notes were given to police to whom she later made an incuplatory statement, based partly on what was in the 3 pages of notes - defence conceded he'd thrown methylated spirits but only after fire accidently started in bed where victim lay and, mistakenly thinking it was water with which he could douse the flames - shortly before trial victim retracted inculpatory statement to police, claiming earlier statement was based on things others had told her when she was heavily medicated– her new version suggested incident was an accident – P given leave under s 38 to xxn V – P also allowed to tender inculpatory police statement even though under s38 xxn, V admitted she had made it– no issue re s 38 grant of leave but was an issue on appeal as to whether trial judge erred in allowing the tender V's earlier statement to police - whether use of V's earlier statement to police resulted in miscarriage of justice - appeal dismissed

Latham J, with whom the others agreed, said:

[22] On 28 July 2011, the victim faxed a handwritten statement to the Office of the Director of Public Prosecutions and to the legal representatives of the appellant. The victim claimed that she had been heavily sedated and not fully conscious at the hospital when her friends and family had "told [her] what they thought had happened on the night". She also wrote that her statement to police was "not the truth" and that she had no recollection of the events described upon reading it again.

[23] During the trial the victim was cross-examined by the prosecution as an unfavourable witness pursuant to s 38 of the Evidence Act 1995. She maintained that the appellant did not douse her with methylated spirits and set her on fire and that the version in the police statement was not the truth even though she believed it was when she provided the statement. The victim was cross-examined on the contents of her statement and versions of events she had given to the ambulance officer, family and friends.

Grounds One and Two - Error in Admitting into Evidence the Victim's Statement to Police and Miscarriage of Justice Arising from its Use.

[26] It is convenient to deal with these two grounds together. Ground one complains of error in admitting the physical document as an exhibit. During the hearing of the appeal, contrary to what the appellant appeared to be submitting in writing, the appellant acknowledged that the contents of the statement were relevant and admissible in cross-examination as a prior inconsistent statement. However, it was submitted that the jury would have given disproportionate weight to the victim's statement in the circumstances of the trial and that a miscarriage of justice thereby arose (Ground two).

[27] The handwritten notes compiled in the hospital were admitted (without objection) as Exhibit A. The victim's police statement and the victim's statement of retraction were tendered by the Crown and became Exhibits O and P respectively. The decision to admit the police statement over objection was made on the basis of the High Court's decision in Adam v The Queen [2001] HCA 57. Consideration was not given to the effect of the amendment of the Evidence Act 1995 (the Act) by the Evidence Amendment Act 2007.

[28] At the time of the trial, s 101A of the Evidence Act relevantly provided :-

> *Credibility evidence, in relation to a witness or other person, is evidence relevant to the credibility of the witness or person that:*
> *(a) is relevant only because it affects the assessment of the credibility of the witness or person, or*
> *(b) is relevant:*
> *(i) because it affects the assessment of the credibility of the witness or person, and*
> *(ii) for some other purpose for which it is not admissible, or cannot be used, because of a provision of Parts 3.2 to 3.6.*

[29] The appellant submitted that the victim's police statement was 'credibility evidence' as defined in s 101A(b) of the Act because it affected the credibility of the victim and was relevant for an inadmissible purpose, namely a hearsay purpose. The appellant maintained that the statement did not fall within an exception to the hearsay

rule. In particular, it did not fall within the exception where the maker of the representations was available to give evidence (s 66), because the representations were made for the purpose of indicating the evidence the person would be able to give: s 66(3).

[30] The appellant conceded that the representations contained in the statement were admissible as an exception to the credibility rule, since the statement fell within the exception contained in s 103. It was adduced in cross-examination of the victim by the Crown Prosecutor pursuant to the leave granted under s 38. It could not be seriously contested that the evidence substantially affected the assessment of the credibility of the victim.

[31] In addition, the contents of the statement were admissible pursuant to s 106 as a prior inconsistent statement. The Crown Prosecutor complied with the requirements of s 106(1) and the victim denied the substance of the evidence, that is, whilst agreeing that she had received burns after she had been doused with methylated spirits which was ignited, she denied any knowledge of how that occurred and that the conduct of the appellant was deliberate : see R v Michael Anthony Ryan (No.7) [2012] NSWSC 1160 ; 218 A Crim R 384.

[32] Once the contents of the statement were admissible for a non hearsay purpose, the representations constituted evidence of the facts : s 60.

[33] Counsel at trial invoked s 137 of the Evidence Act to justify the exclusion of the victim's police statement, essentially on the same basis as that advanced on the hearing of the appeal, namely, that the jury would apportion too much weight to the statement. How that consideration constituted a danger of unfair prejudice was not entirely made clear, given that it was never submitted that there was a risk that the jury would misuse the contents of the statement and the exercise required by s 137 is not concerned with the attribution of weight by the tribunal of fact : R v XY [2013] NSWCCA 121 at [66], [68], [163] - [168]. The contents of the statement were clear and unambiguous. There was no room for competing inferences arising out of the contents of the statement. The only conceivable use of the statement was to cast doubt

on the reliability of the victim or to prove the commission of the offence. In either case, it was not relevantly prejudicial.

[34] The probative value of the statement was considerable if accepted by the jury as a truthful version of events. It included material that was wholly consistent with forensic evidence at the scene.……..

[35] A submission that the judge erred in admitting the statement must be determined on the basis of the material available at the time of the decision and the reasons that were advanced against its admission, not by a retrospective analysis of what use was made of it and what prominence it may have assumed. If the evidence was correctly admitted at the time of the ruling, the only remaining question is whether a miscarriage of justice arose from its admission, having regard to other evidence adduced at trial : R v Fletcher [2005] NSWCCA 338, [36] - [42] per Simpson J (McCllelan CJ at CL agreeing).

[36] No submission was advanced at trial that s 43(2) of the Evidence Act precluded the admission of the statement, on the basis that the victim admitted that she had made a prior inconsistent statement. That submission was advanced on the hearing of the appeal. In so far as the victim acknowledged that she had made the statement, but that she was merely relying upon what others had told her, it may be accepted that she was acknowledging that her police statement was inconsistent with her evidence at trial. However, that does not of itself render the statement inadmissible. As Barr J explained in R v Aslett [2006] NSWCCA 49 (Spigelman CJ and Howie J agreeing) at [76] :-

> *[Under the Evidence Act] there is a purpose in tendering such statements beyond any attack on credibility, namely proof of the facts asserted: s60. Nothing in s43 is directed to the admissibility of any prior inconsistent statement to prove the truth of its assertions. All subs(2) does is ensure that a witness who is about to be attacked on credit is fairly dealt with. Nothing in s43 purports to limit the effect of ss38, 103 or 60.*

[37] In my view, there was no error in admitting the statement. It had very substantial probative value and there was no risk of unfair prejudice.

[38] The appellant next submitted that admission of the victim's statement as an exhibit gave rise to a risk that it would be given undue weight (Driscoll v The Queen (1977) 137 CLR 517 at 542; Butera v DPP (Vic) (1987) 164 CLR 180 at 189 -190). It was submitted that the risk was heightened by the formal nature as well as the comprehensive and detailed content of the statement.

[39] The appellant argued that the risk of undue weight had to be assessed in the light of the emphasis given to the exhibit in the Crown Prosecutor's closing address and in the absence of any warning from the judge not to attribute disproportionate weight to the statement. These factors in combination were said to create a real risk that it would be given disproportionate weight relative to other evidence in the trial (R v NZ [2005] NSWCCA 278 ; (2005) 63 NSWLR 628 at [11]; Gateley v The Queen (2007) 232 CLR 208 at [95]).

[40] In my view, this argument is misconceived. The victim's statement was not the basis of the evidence she gave at trial. It was not a record of her evidence given at trial. By admitting the statement as an exhibit, the jury were not given access to a reiteration of her evidence. To the contrary, the jury were given an entirely different account to that advanced by the victim at trial. The authorities of NZ and Gately are distinguishable on that basis alone.

[41] There was no dispute as to the authenticity of the statement : cf Driscoll. The victim agreed that she had signed the document after reading it in order to acknowledge the truth of what had been written. In Butera, at 198, Dawson J referred to this aspect of Driscoll (that the accused claimed that the record of interview was a fabrication) in determining that the transcript of audio recordings did not attract the same considerations as a document, the veracity of which was disputed.

[42] The submission that there is a reasonable possibility that the use made of the victim's statement may have affected the jury's verdict, causing a miscarriage of justice ought be rejected. The discussion in Baini v The Queen [2012] HCA 59 ; 246 CLR 469 at [53]-[56] and in Lee v R [2013] NSWCCA 68 at [29]-[34] demonstrates that, for the appellant to succeed on ground two, he must establish a causal

connection between the admission of the statement and the verdict, in the sense that, but for the admission of the statement, the appellant might have been acquitted. The principal impediment to success on this ground is that there was no error in admitting the statement and there was other copious evidence originating from the victim of the appellant's deliberate conduct leading to the ignition of the bedclothes. Exhibit A fell into that category. In addition, the jury had the advantage of weighing the police statement against the victim's retraction.

[43] The trial judge gave appropriate directions…

[44] Defence counsel did not request any further directions at the end of the Summing Up. The absence of a warning from the trial judge against attributing too much weight to the statement was not necessary and was not sought. Rule 4 applies.

[45] Disregarding the victim's statement, the accounts given by the victim to medical personnel, members of her family and friends, Exhibit A and the objective evidence in combination amounted to a strong Crown case. The retraction by the victim only four days before the commencement of the trial and the victim's evidence at trial did very little to undermine it.

[46]I would dismiss grounds one and two.

***Fowler* [2000] NSWCCA 142**
Criminal law —conviction appeal — murder of brother in law — rejection of defence evidence — directions to jury — sufficiency of directions on motive — whether McKinney direction or warning required — providing the jury with transcript of trial — sufficiency of directions concerning lies — leave to cross examine witnesses under s38 (a), (b) & (c) Evidence Act — use of the term "dock statement" — whether Weissensteiner direction appropriate.

Wood CJ, with whom Hulme and Barr JJ relevantly agreed, said:

[120] Blewitt, upon which the appellant relied, was decided prior to the Evidence Act, being a decision concerned with the position at common law so far as witnesses reasonably anticipated as being hostile were concerned, and with the common law principle that cross examination on a prior inconsistent statement was relevant only to the issue of credibility. S38 of the Evidence Act now permits a party, by leave, to cross examine a witness who meets any of the criteria identified

in subs(1). Its exercise is, however, subject to a number of discretionary considerations, so as to prevent its abuse, and is a section that needs to be applied with some care in criminal trials. So it is that before leave is granted, the trial Judge must give consideration to the matters specified in s38(6), s135 to s137, and s192 of the Act.

[121] What is now clear is that it is to be given its full effect, and that it is not to be confined to the situation where a party calling a witness is confronted unexpectedly *by evidence that is "unfavourable" as that expression has been explained in Souleyman (1996) 40 NSWLR 712 (Gilbert Adam 47 NSWLR 267); or, I would add, where such a party is confronted with the situation where the witness unexpectedly gives evidence that is inconsistent with prior statements or* unexpectedly *appears not to be making a genuine attempt to give evidence.*

[126] The question that now arises needs to be considered in the light of the concession, made in the Crown submissions on appeal, that the "overall impact of both witnesses ... would have been slight", and that their evidence in the end would have been "fairly neutral". If that is a correct analysis of the position, then it would follow that the probative value of the evidence each had to offer was slight, and that all the learned Crown Prosecutor had achieved, in substance, was to put them up and knock them down.

[130] I am not persuaded that there was an appellable error in the grant of leave under s38 of the Act, once a decision was made to call these witnesses. Rather, it appears to me that, in all the circumstances, once objection was taken, and once an assessment was made that their evidence, after cross examination, would be most likely to be neutral, then consideration should have been given to s135 and s137 of the Evidence Act, provisions to which no one at the trial appears to have directed their attention, at least in this context.

***GAC* [1997] NSWCCA, unreported 1.4.97: BC9701000**

Criminal law — Murder – old man lured into park by group of youths , bashed and robbed, died – W, aged 11 at time, was one of group – A couple of days after incident, W, claiming he did not participate in assault, implicated accused and W's half brother J in ROI (saw them striking V)– W, who was originally charged with murder too, pleaded guilty to robbery, dealt with in Children's Court – called by Crown at trial and claimed complete loss of memory re incidents in park – TJ gave leave to P under 38(1)(b) to xxn W about his ROI – at one point, W admitted under s 38 xxn that what he had told police was truth but generally claimed loss of memory of events in park during chief – TJ also allowed tape of ROI to be admitted into evidence (together with transcript as an aide memoire) – W's memory of what happened in park appeared to improve when xxn by Defence - evidence — prior inconsistent statement — cross-examination by crown of crown witness -whether trial judge erred in applying s38, s60, s66, evidence act 1995 — s135, s137, s192 considered - held - trial judge did not err, in applying the provisions of s38, s60, s66 of the evidence act 1995, when he permitted the crown to cross-examine a witness who had made a statement to the police about a homicide but who professed at the trial to have no memory of the events, and to tender in evidence the witness's prior statement to the police.

Gleeson CJ, with whom the others agreed, said:

BC 9

In oral argument, counsel for the appellant, challenged two relevant decisions of Ireland J: first, the decision under s38 of the Evidence Act 1995 to give leave to the Crown Prosecutor to cross-examine C about his electronically recorded interview; and second, the decision to admit the video tape of the interview into evidence as part of the Crown case.

No complaint was made at the trial, or on this appeal, as to the way in which Ireland J directed the jury as to the use they could make of the evidence concerning what C told the police in his interview. On the contrary, the argument advanced at the trial against the relevant decisions, and the argument advanced on this appeal, assumed that, if leave were given to cross-examine C about the interview, and if the record
BC9701000 at 10

of interview were admitted in evidence, the effect of the Evidence Act 1995 would be that the jury could use what C said to the police as evidence of the facts surrounding the attack on Mr Baker.

BC 12

…….The essence of the unfairness relied upon by the appellant, both in relation to the granting of leave to cross-examine C, and in relation to the decision to admit the recording of the interview, lay in what was said to be trial counsel's practical inability to challenge the version of events given by C to the police, because C was professing to have no recollection of the central events in question. The appellant never adopted, or made any admission concerning, the account of events given by C to the police in his interview. If relied upon as evidence of the facts surrounding the attack upon Mr Baker, then
BC9701000 at 13

what C told the police was hearsay. There were questions as to its reliability, having regard to C's interest in minimising his own role in the affair, and, perhaps, that of J (although what C said to the police was adverse to J). It was unsworn, and, it was argued, in a practical sense it was not capable of being tested in cross-examination because, although C was available to be cross-examined by trial counsel for the appellant, he was pretending to have lost his recollection of many of the events about which he had told the police.

Other aspects of unfairness relied upon were the age of C, and the leading nature of some of the questions that were put to him by the police in the interview.

All these considerations were. taken into account by Ireland J in making the decisions under challenge. It is argued on behalf of the Crown that, even allowing for all the considerations referred to above, the present was a very strong case for the granting of leave to cross-examine a witness under s38. C was an eyewitness to the conduct that resulted in the death of Mr Baker. He gave the police an account of what happened within a couple of days of the events. About a year later, at the

trial, he was professing not to be able to remember much of what happened. His professed lack of recollection did not extend to the whole of the events of the relevant evening. He was able to tell the court about a number of things that had happened right up until the critical time. His memory failed him only when he was asked about the attack on Mr Baker. The finding of Ireland J, that he was not making a genuine attempt to give
BC9701000 at 14

evidence about the matter of which he may reasonably supposed to have knowledge, is not challenged. The matter about which the Crown sought to cross-examine him went directly to the central issues at the trial. In those circumstances, there was a very strong case for permitting the Crown to question him about the fact that, shortly after the events in question, he had given the police a detailed account of what had happened, and also to put to him questions based on what he had told the police.

Taking into account the considerations relied upon as constituting unfairness, nevertheless Ireland J's decision to permit the Crown to question C by confronting him with the fact, and the contents, of his interview with the police was a proper decision. The interests of justice required that the jury should be made aware of what the witness, who was now pretending to be unable to remember a lot of what he saw and heard during the fatal attack on Mr Baker, had told the police three days after the attack.

That still left open the question of whether the record of interview would find its way into evidence, and of the evidentiary significance of the contents of the interview.

In that respect, the Crown relied principally upon the provisions of s60 and s66 of the Evidence Act. Those sections are both exceptions to the hearsay rule, which is contained in s59.

BC9701000 at 18

evidence. By virtue of s60 and s66 of the Evidence Act, the contents of his earlier statements to the police were admissible in evidence, subject to considerations of unfairness or unfair prejudice. The probative value of what C said to the police, when interviewed on 8 November 1994, fell to be considered in the light of the warnings given about accomplices, his age, his interest in protecting himself and, perhaps, his half brother, and also in the light of his reliability as demonstrated by his performance in the witness box. Nevertheless, the jury could well have considered that, having regard to the circumstances of the interview, including its proximity to the critical events, what C said to the police was likely to be a good deal more reliable than what he said in court. For my part, I would not regard the probative value of the interview as being outweighed by unfair prejudice to the appellant; nor do I consider that there was substantial unfairness of the kind relied upon by the appellant.

In relation to the decision to admit the video tape of the interview, in circumstances where a substantial part of the contents of the interview had already been put before the jury in questioning by the Crown Prosecutor, Ireland J had to consider an argument that it was unfair for the Crown to have the benefit of the added weight which would come from the jury having the tape, as well as the impression

of the oral evidence. His Honour took this into account, but pointed out that it was desirable that the jury should have available the full context of the interview so that they could evaluate questions and arguments concerning the manner in

BC9701000 at 19

which the interview was conducted. The conclusion that it was proper to admit the video tape has not been shown to be an error.

The first ground of appeal must fail.

***Gilham* [2012] NSWCCA 131**

"The applicant's parents and his brother were all three killed, minutes from each other, in their home on 28 August 1993. All three were stabbed to death; the parents upstairs were incinerated. The applicant admitted killing his brother on the basis of being provoked by his brother killing his parents. In 1995, the applicant was charged with the murder of his brother. He pleaded guilty to manslaughter on the basis of provocation. The Crown accepted his plea and he was sentenced to three years imprisonment, which was deferred on a good behaviour bond of fiveyears. In 2006, the applicant was charged with the murder of his parents. It was the Crown's case that the brother was never upstairs. The jury was unable to agree on a verdict in his first trial. His second trial commenced before the same judge in October 2008. He was convicted by jury after eight days of deliberation and sentenced to life imprisonment"[44]. There were 18 grounds of appeal against conviction, one of which related to Crown's decision not to call an expert witness Professor Cordner whose views about the similarities of injuries was at odds with the Crown Case. It was in this context – namely the Crown's obligation to call material witnesses that there was a discussion of the significance of s 38

The Court said:

[404] There is a more fundamental defect in the Crown's decision not to call Professor Cordner because it was, in part, expressly based on the fact that he held a different opinion from that advanced by the witnesses the Crown intended to call. The Crown is simply not entitled to discriminate between experts, in particular between those whose views they have sought, calling only those that advance the Crown case, any more than it is entitled to call some lay witnesses and not others for some perceived tactical advantage. The fact that there is disagreement between the experts from whom the Crown have sought an opinion provides no basis for the Crown to elect to call only those experts who will give evidence that supports the Crown case, or whose views are consistent with the Crown case theory, and to refuse to call those

[44] Headnote extract is from 224 A Crim R 22 headnote, which omits [158-702] from the Report and hence the A Crim R does not include the discussion of the s38 ground of appeal.

witnesses whose views do not support the Crown case. This is particularly so where the subject matter about which the opinions are expressed is controversial. The Crown Prosecutor's obligation is to call all relevant evidence at his or her disposal. That obligation is a continuing obligation which persists until the Crown case is closed. The Apostilides principles are not the rules of a game. They are rules designed as a protection against unfairness or the abuse of prosecutorial power (see R v Gibson [2002] NSWCCA 401 (Sully J at [49], Wood CJ and Howie J agreeing)), quoting Randall v The Queen [2002] 1 WLR 2237 at 2243).

[405] The expert witness has independent obligations to the Court under the Expert Witness Code of Conduct (see Schedule 7 to the Uniform Civil Procedure Rules 2005). The paramount duty of the expert witness is to the Court and not to any party to the proceedings. An expert is not an advocate for a party. It is in the discharge of the different but allied obligations of the expert and the Crown Prosecutor that the jury is educated and informed about matters in issue between the Crown and the accused which are beyond the jury's experience. Where the views of the experts differ, the extent and basis for disagreement can then be tested, if necessary, with the Crown seeking leave to cross-examine where the evidence might prove to be unfavourable under s 38 of the Evidence Act (as occurred in Velevski). It is in that process that the interests of justice are preserved and advanced. The assertion by the Solicitor for Public Prosecutions that it is not appropriate to utilise s 38 for the purpose of calling an expert witness who the Crown intends to discredit by obtaining leave to cross-examine is not soundly based, whether in the context of this case or generally. On the appeal it was only faintly suggested that this approach to the construction of s 38 provided justification for the Crown's decision not to call Professor Cordner.

[406] As noted by Ipp JA in R v Parkes [2003] NSWCCA 12; (2003) 147 A Crim R 450, there is ample authority that the use of s 38 is not limited to circumstances where the unfavourable evidence is unexpected. And as noted by Hunt AJA, Buddin and Hoeben JJ in Kanaan v R [2006] NSWCCA 109 at [84], the greater availability of cross-examination of a Crown witness by the Crown Prosecutor has placed more emphasis on the Crown's obligation to call relevant witnesses. Their Honours noted the remarks of Whealy J in R v Ronen [2004] NSWSC 1298 at [32]:

> *"...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..."*

[407] Ipp JA observed in Parkes at [71]:

> *"Special considerations, however, may arise in regard to s 38 in circumstances where the applicant well knows that the witness is likely to give unfavourable evidence on a particular issue (but wishes to elicit evidence from the witness on other issues), deliberately refrains from asking about the unfavourable evidence, and when it emerges in cross-examination, makes the application."*

[408] His Honour recognised the Court's disapproval of the use of s 38 (by the Crown) as a tactical or forensic device, that is, the deliberate use of s 38 to manipulate trial procedure so as to gain an unfair or forensic advantage that, but for s 38, would not arise.

[409] There could have been no resistance to an application by the Crown for leave to cross-examine Professor Cordner at trial, to explore what the Crown thought was a persisting bias or imbalance in his approach. This is assuming the Crown Prosecutor maintained that view after leading evidence from him concerning the question of similarity or the pattern of injuries, and after giving his views the careful consideration they deserved.

[410] Finally, the criticism that Professor Cordner's opinions are argumentative, with nominated paragraphs of his report cited to exemplify that criticism, is baseless.

***Hadgkiss v CFMEU* [2006] FCA 941: 152 FCR 560**

Evidence —trial ruling - application to question a witness called on subpoena ad test as though cross-examining him under s 38(1)(a), 38(1)(b) and/or 38(1)(c) of the Evidence Act — meaning of 'unfavourable' in s 38(1)(a) — permitted scope of questioning as though cross-examining under s 38(1)(c) where there has been a prior inconsistent statement made by the witness.

Graham J said:

[9]……I do not think that 'unfavourable' should be construed, as suggested by Smart J, as simply 'not favourable'. (see also R v Lozano *unreported, NSWCCA, 10 June 1997 per Hunt CJ at CL,* R v Glasby *(2000) 115 A Crim R 465 at [59] and* R v Taylor *[2003] NSWCCA 194 at [74]). As I see it, for evidence to be characterised as*

'unfavourable' it would have to detract from the case of the party calling the witness. I would prefer the approach taken by Hodgson JA with which Meagher JA agreed, in Klewer v Walton *[2003] NSWCA 308 at [20] (and [30]) where his Honour expressed the view that evidence which was simply 'neutral' did not come within the word 'unfavourable' as used in s 38(1)(a).*

***Hogan* [2001] NSWCCA 292**

Criminal law – conviction appeal in serious assault case – V assaulted by ex boyfriend (D) of his girlfriend (W)–W initially made statement that she witnessed D assault V – W resiled from that prior to first trial, claimed account she gave to police part of conspiracy with V to get money from D – W expected to be unfavourable to P – on appeal, complaint re leave given by TJ to P to cross-examine several unfavourable witness – held that grounds for leave made out - also complaint re scope of xxn permitted and directions given by TJ – complaint re scope of xxn allowed upheld - failure of TJ to have regard to ss 38(6), 135, 137, 192 - matters to be considered on grant of leave - extent of leave - ambit of cross-examination - prejudice - risk of shifting focus of trial to whether witness lied to protect D - importance of adequate directions – Conviction appeal successful – new trial ordered

Giles JA said:

[4] It cannot realistically be doubted that, had there been regard to the s.192(2) matters, leave would have been given to question Rachel Golby as if cross-examining. But the leave would by no means have permitted the unfettered and wide-ranging questioning which was undertaken, apparently because all of the trial judge, the Crown Prosecutor and counsel for the appellant considered that there were no restrictions on what Rachel Golby could be questioned about and in particular that her credit could be attacked. The extent of questioning led or contributed in turn to the calling of evidence from Rebecca Jones, Kerry Francis, Mrs. Kim Robertson and Detective Senior Constable Robinson about what Rachel Golby had been doing on the afternoon of 21 June 1998, what she had said to them, her drug habit, and Rebecca Jones' relationship with the complainant.

[5] The result was to convert the focus of the trial from whether the appellant maliciously inflicted grievous bodily harm on the complainant to whether Rachel Golby was lying to protect the appellant - a proposition put to her on more than one occasion in the course of her questioning by the prosecution. The risk of prejudice to the appellant was high, particularly when the jury might have held Rachel Golby's lying against the appellant. There was nothing to suggest that she was lying to protect him at his instigation.

Greg James J, with whom others agreed, said :

[19] Shortly, it was contended for the Crown that Matthew Gray, the complainant, while visiting his girlfriend, Rachel Golby, at her home in Umina, was assaulted by the appellant[45] in the backyard of that home. The complainant asserted that he was struck with a post, and hit three to four times on the arm and the leg, occasioning him severe injuries; he recognised his assailant; he called for Rachel as he was being assaulted; he saw Rachel's mother, father and brother in the backyard and recalled them telling the appellant to leave; he was screaming to Rachel's brother for assistance; he was carried to Rachel's mother's car and driven by Rachel and her mother to Gosford Hospital. He complained to his mother the next morning at the hospital and asked her to ring the police. He informed the police on their attendance that he had been bashed by the appellant.

[45] Ex boyfriend?

[24] Rachel Golby's evidence in chief plainly diverged substantially and in many respects from an original statement she had given to police. It was clearly open to the trial judge to consider that her evidence was, in a number of those respects, at least, to be unfavourable as well as inconsistent with her prior accounts.

[54] It was submitted that the trial judge had erred in permitting the cross-examinations I have referred to in failing to have regard to various sections of the Evidence Act 1995, including s.192 (matters to be considered on the question of leave), ss.135 and 137 (rejection in discretion of prejudicial evidence), ss.102 and 103 (inadmissibility of credit evidence) and s.60 (hearsay evidence). Further, that his Honour failed to have regard to s.38(6) and to restrict cross-examination to those areas to which s.38 refers.

[55] When one examines his Honours' reasons, there was no advertence to those matters and particularly those which s.192 of the Evidence Act 1995 provides nor was there any limitation such as is suggested by s.38 on the ambit of cross-examination expressed by his Honour or observed by the Crown Prosecutor. Indeed, the matters which may be taken into account under s.38(6) were not adverted to.

[56] The cross-examination of necessity raised questions as to whether or not Rachel Golby might have committed such criminal offences as were involved in attempting to mislead the police. But no reference was made to the prospect of having to inform her of her right to object under s.132 and her rights in respect of possible self-incrimination under s.128.

[76] The cross-examination was general in nature. It included cross-examination about what the witness had had to drink, whether or not she had taken heroin, whether she was on drugs and what drugs, including heroin, speed and "pills" such as Serapax and Valium and marijuana she had taken. It developed into a wholesale attack on credit as well as dealing with those matters in relation to issues that were at least peripherally relevant at the trial or might have been relevant to the witness' opportunities and capacity to observe what had occurred. She was specifically cross-examined on a number of occasions by the proposition being put to her that she was lying to protect the accused. The questioning asserted the content of prior inconsistent statements whether relevant to issues or on credit. Much of the cross-examination was prejudicial to the appellant.

[80] The important matter is not whether such cross-examination might have elicited, amongst other evidence, evidence which might properly have been used in the trial. The issue, rather, concerns whether or not the questions as to such matters as were explored should have been permitted to be asked. It is necessary, when giving consideration to the grant of leave, to have regard to the effect on the trial of the ambit of questioning and of the matters that might be raised. It is essential when considering the grant of leave to consider how far, at least initially, cross-examination might be permitted to extend, having regard to the bounds set by s.38, to the matters to which regard must be had when granting leave in s.38(6) and s.192 and to whether prejudicial matters to which ss.135 and 137 might apply might be raised.

[81] Leave might be further extended as a consequence of a further application, but lest the cross-examination should divert the focus of the trial as, in my view, it did here, it is necessary for a trial judge to take considerable caution in considering the matters the legislation and says the High Court has held he or she must consider and to give consideration to those matters by confining, at least initially, leave to that then seen as necessary, reconsidering the ambit in accordance with the criteria, if further leave is sought.

[95] At the conclusion of the cross-examination, it was put to the witness, Rachel Golby, that she had said:-

> *"As he [the appellant] left, he said to me, 'If Matt dobs on me, I'll kill his mother, sister and him'."*

[96] She denied it was said. The question contained an asserted statement which reflected badly on the appellant. In the context, the jury might have considered they could use it to his detriment. That statement only exemplifies the prejudice occasioned by the course the trial took. In particular, in my view, the summing up was not such as to have removed the effect of a question so couched.

***Kanaan* [2006] NSWCCA 109**

Assassination of head of criminal organisation by members of that organisation — joint criminal enterprise — Crown case relied principally on evidence of former member of organisation who might reasonably be supposed to have been criminally concerned in that enterprise — witness given undertaking by Attorney General that, provided the evidence he gave was the truth, his evidence would not be used against him. - Bases on which "accomplice" evidence may be unreliable — extent to which judge required to warn jury about matters not within their general experience and understanding — except in relation to identification evidence, judge required to do no more than put the respective cases for the Crown and the accused accurately and fairly to the jury. - Direction that dangerous to convict on uncorroborated evidence of "accomplice" unnecessary but not prohibited — whether independent support for evidence of "accomplice" may be found in evidence of another "accomplice". - Evidence of negative identification by Crown witness — no application by Crown prosecutor to cross-examine witness — Crown prosecutor asks jury to disbelieve her evidence — whether leave to cross-examine would have been given — whether accused lost opportunity to call evidence supporting negative identification made — Defence did not lose any real opportunity to xxn Crown Witness or call other evidence to buttress her credibility because of breach of rule in Browne v Dunn - nature of directions concerning negative identification - The appeal against conviction by each of the appellants was dismissed.

The Court said:

[75] It was submitted on appeal that the remarks by the Crown prosecutor were unfair, in that they clearly invited the jury to conclude that the evidence of Mrs Zahabe, his own witness, was not truthful. The Crown prosecutor, it was submitted, should have made it clear when Mrs Zahabe gave her evidence that the Crown challenged her negative identification, and by not doing so denied her (and the appellants) the opportunity to explain or to qualify the matters raised by the Crown prosecutor in his final address: Browne v Dunn (1894) 6 R 67 at 70-71, 76-77, 78-79.

[76] The report of Browne v Dunn is not readily available and, at the invitation of the appellants, reference is made to Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation [1983] 1 NSWLR 1 at 16-23 (Hunt J) in which Browne v Dunn and the decisions which have followed it are fully discussed. That discussion has been referred to with approval in a number of appellate decisions: Archer v Richard Crookes Construction Pty Ltd (BC9705329), Court of Appeal, 22 October 1997, at 7; Flower & Hart v White Industries (Qld) Pty Ltd (1999) 87 FCR 134 at 148 (Full Federal Court); Regina v Pye [2000] NSWCCA 544 at [54]; Southern Area Health Service v Brown [2003] NSWCA 369 at [102]–[103]; Markem Corporation v Zipher Ltd [2005] EWCA Civ 267 at [57]–[61] (English Court of Appeal); and Townsville

City Council v Chief Executive, Department of Main Roads [2005] QCA 226 at [54]. See also Seymour v Australian Broadcasting Commission (1977) 19 NSWLR 219 at 224-225 (Court of Appeal) and Regina v Birks at 689-690 (Court of Criminal Appeal).

[77] The Crown has disputed that any "positive assertion" was made by the Crown prosecutor that Mrs Zahabe should not be believed. That is so, but his intention is not relevant in this appeal, nor is the appellants' allegation that his conduct was improper. It is the effect of the Crown prosecutor's conduct, not its propriety, which may cause a miscarriage of justice: TKWJ v The Queen at [25], [79], [97], [101], [107]–[108]; Nudd v The Queen [2006] HCA 9 at [10]–[19], [24], [64], [68], [157]. The relevant issues in this case are how those submissions by the Crown prosecutor would have been interpreted by the jury, whether that interpretation prejudiced the appellants (either procedurally or otherwise), and whether that prejudice resulted in a miscarriage of justice.

[78] Notwithstanding the care with which the Crown prosecutor appears to have formulated his submissions to the jury concerning Mrs Zahabe, those submissions, in our opinion, would inevitably have been interpreted by the jury as an invitation to disbelieve her evidence. It is difficult to see how his remarks could have been understood in any other way. The final address by counsel for Kanaan obviously sought to meet the submissions by the Crown prosecutor as an attack on the truthfulness of his own witness. The judge in his summing-up described the Crown prosecutor's remarks as having been directed to the credibility of Mrs Zahabe and as suggesting that her evidence was improbable. The Crown prosecutor made no objection that this had not been his intention.

[79] The references by the Crown prosecutor to the witness's familiarity with the three accused — in themselves quite justifiable in the context of dealing with her evidence — may well also have been understood by the jury in the context of that invitation as a suggestion of bias on her part in favour of the accused. The reference to the men pulling out guns in a brightly lit area could have been understood by the jury as a suggestion that it was unlikely that the shooters would have done so in such an area. The repeated reference to the imprecision of the time Mrs Zahabe said she observed the three men may have been understood as another attack on the truthfulness of her evidence. It was claimed on appeal that the Crown prosecutor's address may also have been interpreted as a suggestion that Mrs Zahabe was exaggerating the time she had been watching the three men in order to give her own evidence greater credibility, but it is doubtful that the jury would have reached that particular conclusion unaided.

[80] Before turning to what the Crown prosecutor should have done before attacking the credit of his own witness, it is important to emphasise that the Crown does not warrant the truthfulness of its witnesses, and it is not obliged to embrace and accept whatever the witnesses say: Regina v Le (2002) 54 NSWLR 474 at [68]. That is because the Crown has the obligation to present its case conformably with the dictates of fairness to the accused: Richardson v The Queen (1974) 131 CLR 116 at 119. That obligation is imposed on a Crown prosecutor as an incident of his or her position as a "minister of justice": Regina v Puddick (1865) 4 Foster & Finlayson

497 at 499 [176 ER 662 at 663]. See also Regina v Thursfield (1838) 8 Carrington & Payne 269 at 269-270 [173 ER 490 at 491-401]. It is the usual practice in criminal trials that, subject what is said in the following paragraph of this judgment, the Crown accepts an obligation to call witnesses whose evidence is relevant to the Crown case when requested by the accused to do so. When doing so, the Crown prosecutor is always entitled to say to the jury that the Crown has not put that particular witness forward as a witness of truth. The Crown's obligation to call such witnesses has been stated more firmly in Regina v Le at [68]. (The duties of a Crown prosecutor are discussed in an address to the Student's Union of the Inns of Court in 1955, by the then Senior Prosecuting Counsel at the Old Bailey in Great Britain, Mr Christmas Humphreys, of which a shortened version has been published under the title "The Duties and Responsibilities of Prosecuting Counsel" in [1955] Crim LR 739.)

[81] In determining whether such a witness should be called by the Crown, rather than leaving it to the accused to do so, the Crown prosecutor — at least where the evidence of that witness is central to the unfolding of the Crown case — may take into account, inter alia, the credibility and truthfulness of the evidence to be given by that witness and whether in the interests of justice it should be subjected to cross-examination by the Crown: Richardson v The Queen at 119. The Crown prosecutor's decision has been described as a lonely but also a heavy one: The Queen v Apostilides (1984) 154 CLR 563 at 576-577. A refusal to call a particular witness within this category may be justified only by reference to the overriding interests of justice; such occasions are likely to be rare. The unreliability of the evidence will be a sufficient basis for a refusal to call the witness only where there are identifiable circumstances which clearly establish such unreliability; it will not be enough that the prosecutor merely has a suspicion that the evidence to be given by the witness will be unreliable: Ibid at 577. In order to avoid any suggestion that a tactical advantage is sought by not calling a particular witness, it is advisable for the Crown prosecutor to confer with the witness to form an opinion as to the witness's reliability: Regina v Kneebone (1999) 47 NSWLR 450 at [49]–[53].

[82] No basis on which the Crown prosecutor could have refused to call Mrs Zahabe has been suggested in this appeal. But the Crown's obligation to call all relevant witnesses even where their evidence does not support the Crown case does not deny the Crown prosecutor the opportunity to discredit the evidence of a Crown witness.

[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].

[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].

[85] Where the Crown prosecutor fulfils such an obligation, it would be unjust to the Crown (which prosecutes on behalf of the community) to refuse leave to cross-examine in relation to the unfavourable evidence given, subject of course to the usual discretions such as provided by s 137 of the Evidence Act: Regina v Milat (BC9607720), Hunt CJ at CL, 23 April 1996, at 5-6. (See Evidence Act, s 192(2).) Leave must also be sought to cross-examine the witness about matters "relevant only" to the witness's credibility: s 38(3); and it should be noted that the credibility of a witness includes the witness's ability to observe or remember facts about which the witness has given evidence (that is, the reliability of his evidence): Evidence Act, s 3 Dictionary. In the present case, however, leave would not have been needed pursuant to s 38(3) for that particular purpose, because the prior statement made by Mrs Zahabe said to be inconsistent with her evidence was also relevant to a fact in issue, the identification of the men involved in shooting the deceased. To that statement we will turn shortly.

***Lane* [2013] NSWCCA 317**

Criminal law – conviction appeal –murder et al - victim 2 day old daughter – family & friends didn't know D was pregnant – discharged herself from maternity hospital 2 days after birth – baby not seen again – concealed fact from family and friends that she'd given birth – much later, claimed she'd given baby to several person including an Andrew Morris or Norris who at the time resided at a particular block of flats in No 10 – P's case was that there was no such person - a witness Peter Clark who lived at No 11 initially indicated no knowledge of an Andrew Morris or Norris but subsequently made statements that he'd seen mail addressed to him - several grounds of appeal against conviction, including whether error in leave granted pursuant to s 38 Evidence Act 1995 to P to xxn Clark re his evidence about the mail - like TJ, CA

found Clark's statements about mail were inconsistent (disputed) and in part unfavourable (not disputed) - appeal dismissed.

The Court said:

[161] The appellant's trial counsel accepted that Mr Clark's evidence was unfavourable. However, he submitted that the application ought be refused under s 192 of the Evidence Act because to grant leave to the Crown to cross-examine Mr Clark would be unfair to the appellant (s 192(2)(b)) in that it would undermine the general principle that the Crown is obliged to call all relevant witnesses in this case unless the prosecutor concludes that the witness is not credible or truthful.

[162] The trial judge considered that the imposition of conditions on the grant of leave that the cross-examination be limited to the issue of the mail, that it not extend to matters solely relevant to Mr Clark's credibility and that it take place before defence counsel was required to cross-examine Mr Clark would be sufficient to avoid unfairness.

[163] The appellant submitted in this Court that the trial judge inappropriately permitted cross-examination that impugned the credibility of Mr Clark and that this course was inconsistent with the Crown's duty of fairness to her. The appellant appeared also to rely on the argument put by defence counsel at trial that a grant of leave to permit a prosecutor to cross-examine a Crown witness was inconsistent with the requirement of prosecutorial fairness and that the leave ought to have been refused by reason of s 192(2)(b).

[164] As a matter of general principle it is for the prosecutor alone to decide what witnesses will be called for the prosecution. However, it is appropriate that the prosecutor exercise that discretion so as to call all relevant witnesses, unless the prosecutor concludes that such witnesses are not credible or truthful, so that the defence counsel has the opportunity to cross-examine them: Richardson v The Queen [1974] HCA 19; 131 CLR 116 at 120-121.

[165] In our view, s 38 does not create an inconsistency with the general principle referred to above or in any way interfere with the duties of prosecutors. It provides a

mechanism whereby the party calling a witness is, with leave, permitted to cross-examine its own witness, in circumstances that include where the witness is unfavourable or has made a prior inconsistent statement. A grant of leave does not remove the right of the other party, in this case the appellant, to cross-examine the witness.

***Le* [2001] NSWSC 174**
Criminal Law —Trial ruling of McClellan J in a homicide case- leave sought to cross examine witnesses under s38(1)(a) Evidence Act 1995 (NSW) about evidence of a witness likely to be unfavourable – Application made before P called W, anticipating that defence likely to elicit from W in xxn (as it had done with a previous witness) evidence to the effect that someone other than the accused had stabbed V — meaning of "unfavourable" discussed — no suggestion of W having made a prior inconsistent statement - leave granted

McClellan J said:

[9] In the present matter the application made by the Crown today appears to me to fall relevantly within the principles set forth by Hunt CJ at CL in those passages[46]*. However, it has been submitted by counsel for the accused that a more narrow view of the word "unfavourable" should be accepted by this Court and that that word could never extend to encompass evidence coming from a witness which may be contrary to the Crown theory as to how a crime may have been committed. In any case it is submitted that the word "unfavourable" must mean more than evidence which is inconsistent with the Crown's theory.*

[10] Justice Smart commented on the meaning of the word "unfavourable" in R v Souleyman (1996) 40 NSWLR 712. Having reviewed the history of s38 in Australia and its equivalent in the United Kingdom, his Honour said:

"When the word "unfavourable" was used in s38 the draftsman probably had as a background the history of the English legislation and selected the alternate word "unfavourable" used by Williams J in Greenough v Eccles."

[11] His Honour had already referred to other words than "unfavourable" which were available to the draftsperson being adverse or hostile which he, in my opinion, appropriately identified as having been consciously rejected by the adoption of the word "unfavourable." He went on to say:

"The word "unfavourable" in s38(1)(a) does not mean adverse. It means "not favourable". That construction could have wide ranging ramifications but the Court is given a discretion and will carefully examine the circumstances to see how the discretion should be exercised."

[12] Justice Greg James referred to this issue in R v Kneebone (1999) 47 NSWLR 450 where, at p461, he collected the decisions which had by then, considered the meaning of unfavourable in s38 of the Evidence Act. He draws attention to the

[46] That is, passages from *Milat* [1996]

necessity to exercise care in the application of the section, indicating that at that point there was much about the section which was still to be resolved.

[13] The issue was also addressed by Adams J in R v Pantoja, unreported, Court of Criminal Appeal, 5 November 1998, where his Honour raised the question of whether truthful evidence could ever be unfavourable from the Crown's point of view. His Honour said:

"It seems to me that some attention will need to be given in due course to the meaning of 'unfavourable' so far as the Crown case is concerned. The Crown case is, in essence, the truth, wherever that might lead and even if it leads to reasonable doubt about guilt, I am far from persuaded that merely because a witness declines to give evidence supporting the theory of the facts for which the prosecution contends or, indeed, gives evidence that contradicts that theory or contention, his or her evidence may thereby be regarded as' unfavourable'."

[14] It must be accepted, as Adams J identified that the relevant provisions of the Evidence Act should be construed to ensure that the ultimate purpose of the trial is facilitated. With respect to s38 that purpose, as identified in the earlier authorities, is to ensure that the Court is not denied evidence which might be relevant to enable the truth to be ascertained. As Hunt CJ at CL pointed out, one of the concerns which, no doubt, led to s38 being enacted, was that because the Crown may be unable to contradict evidence which it is required to call, in some cases the Court may be denied evidence which could be relevant to ascertain the truth.

[15] Adopting this approach to the section, in my opinion, the word "unfavourable" should be given a broad meaning thereby ensuring that in the course of any criminal trial the Court would not be denied evidence as to any relevant issue and would not be denied the opportunity for that evidence to be appropriately tested. Only this approach will allow the jury to have the opportunity of coming to an informed view about whether or not the evidence called by the Crown should be accepted.

***Le* [2002] NSWCCA 186; 54 NSWLR 474**
Criminal law - prohibited drug - heroin - supply - Evidence - witnesses - unfavourable witnesses – leave to cross-examine - Evidence Act 1995 (NSW) ss 38, 60, 102, 103, 135, 137, 192 – prior inconsistent statement by W in ERISP - considerations relevant to exercise of discretion to grant leave - whether grant of leave vitiated by error of law - appropriate time for granting leave - scope of leave - Practice - trials - questioning - Evidence Act 1995 (NSW) ss 38, 192 - granting of leave - manner - scope - effect on nature and outcome of trial

Heydon JA, with whom the others agreed, said

[8] [Prosecution] Counsel's point was that in the record of interview …..the witness had said that the appellant had sold her heroin every day for two weeks and used heroin himself. She also said that he concealed heroin in his underwear. Yet in chief she said the appellant had not used heroin for six months, that she had never obtained heroin from him, that she had never seen him with heroin in his underwear, and that she could not recall telling the police that she had.

[49] However, the conviction could still stand if the Crown could establish that the trial judge could not reasonably have refused to grant the prosecution's

application under s 38 even if all relevant provisions had been taken into account: Stanoevski v R (2001) 202 CLR 115 at [56] per McHugh J.

[50] Had the trial judge considered s 192, it is likely that he would have reasoned, and reasoned legitimately, as follows. In relation to s 192(2)(a), though a s 38 order would obviously lengthen the hearing, it would not do so unduly: the s 38 examination in fact only took up eleven pages of transcript. In relation to s 192(2)(b), leave to cross-examine at least on the differences between the evidence in chief and the record of interview would not have been unfair to either the witness or the appellant. As to s 192(2)(c), the evidence was very important. As to s 192(2)(d), the nature of the proceeding was a neutral fact. There was no relevantly useful power of the type referred to in s 192(2)(e). Turning to s 137, the probative value of concessions by the witness about what she had said to the police (in an electronically recorded interview) was potentially very high; that value might be reduced by any explanation given by the witness, but that was a matter for jury evaluation. The potential probative value wholly outweighed the danger of unfair prejudice to the appellant; and if the evidence turned out to be of low probative value, there would be no unfair prejudice to the appellant. The application of s 135 could not lead to any different outcome.

[55] There is an assumption underlying the appellant's submissions which, though not clearly articulated, is important. The submissions start with the incontrovertible proposition that leave under s 38 does not justify general cross-examination, using the leading questions (s 42) and aggression characteristic of cross-examination, on any subject relevant to an issue or to credit. Section 38 permits the party who obtains the leave to question "as though the party were cross-examining a witness", but only "about" the three subjects described in paragraphs (a)-(c).

[61] In the Interim Report, para 625, which appears after a discussion of the narrowness of the test for hostile witnesses under the then law, the Commission said:
……. "Tactical. A party will be reluctant to attack the credibility of a witness where it wishes to rely on the test of that witness' evidence. Thus, it is likely that the witness will be challenged only where there is a significant conflict of evidence and any challenge would be restricted to the evidence given and would not extend to the general issue of the character or credibility of the witness. To so extend the attack would damage the credibility of the testimony as a whole".

[66] One purpose of a s 38 examination must be to enable counsel calling the witness to demonstrate that the evidence in chief which led to the s 38 order is false. Another must be to enable counsel to demonstrate that any prior statement inconsistent with it is true. That latter purpose is assisted by s 60, which permits a prior inconsistent statement to be considered as evidence of what is represented, not merely as a matter affecting credibility. But s 60 by itself is not wholly effectual unless the questioner is able to interrogate with a view to demonstrating

the truth of the prior inconsistent statement. There would be little point in permitting s 38 examinations otherwise and no point in the existence of s 38(3). The purposes described can be assisted by obtaining concessions from the witness about matters tending to indicate the falsity of the impugned evidence. One of these is the lateness with which the impugned story is advanced. Another is the inherent improbability of the impugned story. These purposes must also be capable of being assisted by the eliciting of evidence tending to show the truthfulness of prior statements inconsistent with the impugned evidence, such as the fact that they were made under conditions conducive to accurate recollection and expression and conducive to sincerity.

[67] 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.

[68] ……The obligation to call a witness does not create an obligation to embrace and accept whatever that witness says: the very existence of s 38 reinforces an obligation to test what is said in the interests of justice

[72]Further, the position of counsel must be considered. Though counsel conducting questioning under s 38 are not strictly cross-examining, the witness being questioned is ex hypothesi a witness over whose credibility there is a cloud and who may give quite unpredictable answers. It is not easy for counsel to be sure, at the time when any s 38 application is made, whether the terms of the leave requested will be adequate to cover all circumstances. Section 38 questioning, like cross-examination, must be permitted to have a measure of freedom. Truth will often out when counsel who is asking the questions turns out to be a little more quick-witted than the witness. The legitimate exploitation by counsel of any advantages they have in this respect is wrongly impeded if their questioning is artificially interrupted, whether by events external to the trial, or non-responsive answers from the witness, or captious objections, or the need to seek further grants of leave under s 38 at short intervals. Counsel questioning pursuant to s 38 must be able to adjust to meet new circumstances quickly, without the witness being able to take advantage of intervals in which new s 38 applications are made as opportunities to have a rest or reconsider the posture to be adopted in manoeuvring to meet the different challenges made by the questioner.

[73] The technique advocated by the appellant cuts across all these considerations. No doubt it will often not be right to grant leave to ask s 38 questions on the widest possible basis at the outset. But it will often not be right for the court to distribute small dollops of leave in response to repeated small-scale applications. That would produce a stop-start approach to questions which is likely to be ineffective, likely to distract the jury as they go in and out, likely to

lengthen the trial, and likely to make it more complex. It is a question of judgment to be made in the circumstances of each case what the extent of a particular grant of leave should be, and how far the questioner should be forced to make more than one application.

[76] The trial judge, though he erred in the process by which he decided to grant leave under s 38, did not err in granting leave on too wide a basis. It was legitimate to grant leave which would permit an examination of what was said and what was not said on particular occasions, what the circumstances affecting the various occasions were, and what particular reasons the witness might have for having behaved in particular ways on particular occasions.

[85] ……... What the Crown prosecutor did was no more than to explore possible reasons why the version may have changed. Further, the fact that the appellant and Amber O'Brien changed their versions in a manner paralleling each other must have given rise to a suspicion of collusion. The Crown was entitled to rely on that. The Crown submitted to the jury that there was collusion, aided by the gift of the car. If the Crown was to make that unsurprising submission of the obvious, namely that there was collusion, and give it concreteness by reference to the car evidence, it was obliged to put that line to Amber O'Brien as a matter of fairness, as it also did in relation to the accused. In short, the whole history of the matter left it open to the jury to ask: Why have both stories changed so radically? The Crown tactics in the s 38 examination and in address were fair, rather than unfair, because they brought out into the open, for consideration by Amber O'Brien and the appellant, and exposed for the jury one possible explanation of a specific kind.

[89]……. Here the issue of the appellant's guilt and the witness's allegedly lying evidence in chief were much more closely linked. If she was telling the truth on oath, he was innocent. If she was lying on oath but telling the truth on 18 July 1997, he was not innocent. Whether she was lying was an issue partly turning on whether she had a motive to.

[90] …….. *Section 38 permits the testing of the evidence in chief with a view to establishing the probability of the truth of the matters asserted in the prior inconsistent statement. Hence it permits examination of the witness on matters of credit with a view to the jury accepting the prior inconsistent statement and rejecting the later sworn evidence. It also permits an examination of the background at the time with which the statements are dealing, the background at the time when the prior inconsistent statement is made, and the background at the time when the witness moves to a version different from the prior inconsistent statement. It permits an inquiry into the possible reasons for the change, including the motives for the change. Judicial rulings which prevented these techniques being employed where application is made for leave to question under s 38 would not be giving full effect to the section. Hence the failure of the trial judge to take account of s 192 or s 135 or s 137 is immaterial. So is the fact that the trial judge did not grant the leave in small, precisely defined segments. So is the possible extent to which the questions asked went beyond the leave actually given, for they were within the leave which could have*

been given. Independently of whether the parties raise the question, account must always be taken of s 192 and, in criminal cases, of s 137. In practice account will usually also be taken of s 135, though in criminal cases its operation overlaps very significantly with that of s 137. If leave is granted under s 38, the recipient should not go beyond it without a further application for leave

Lozano [1997], NSWCCA, 10.6.97: BC9702441
Conviction Appeal – D found guilty at trial of disposing of stolen property - witness called by the Crown asserted that she had no memory of the events which she had recorded in her police statement within days of those events. The trial took place less than eight months after those events. The witness had given evidence in the committal proceedings three months before the trial. The Crown applied for leave to cross-examine the witness pursuant to s38(1) of the Evidence Act 1995 – Held: The cross-examination was permissible pursuant to para(b) of s38(1).Distinction between para(a) and para(b) discussed.

Hunt CJ at CL, with whom Barr J agreed, said at p6-7 of BC970244:

"S38 was intended by the Law Reform Commission to abrogate the common law relating to hostile witnesses, and the Act has been successful in doing so. The word "unfavourable" which is used in the section (and which is not defined in the Act) should not therefore be interpreted as necessarily requiring either the witness or the evidence itself to be hostile or adverse to the case of the party calling the witness, in the sense that the evidence denies that case or attacks other evidence upon which that party relies. In Regina v Souleyman, Smart J adopted a dictionary meaning of unfavourable as "not favourable". I am content, too, to adopt that meaning.
Where, however, the witness has (as in the present case) asserted that he has no memory of events recorded at a time when the events were fresh in his memory, despite being given the opportunity pursuant to s32 to revive his memory from the record, there may be a distinction to be drawn so far as s38(1) is concerned between whether the evidence which he has given is not favourable and whether the attitude which he has displayed towards the party calling him is not favourable. Both would appear to provide a basis for leave to cross-examine pursuant to subs(1), as the intention of the Law Reform Commission was to ensure that the courts are not deprived of relevant testimony which had been excluded by the operation of the old hostile witness rules. Thus, if the judge accepts that the witness genuinely does not recall those events, then the evidence is not favourable, and para(a) of subs(1) is the appropriate basis upon which to grant leave. If the judge is satisfied that the witness does not genuinely have any such recollection, then para(b) is the appropriate basis upon which to grant leave." (footnotes deleted)

***McRae* [2010] VSC 114**
Trial Ruling - Joint criminal enterprise (JCP) – Murder – McRae not perpetrator of shooting but alleged party to JCP – Perpetrator of shooting (Flaherty) already pleaded guilty to murder, as had his girlfriend (Watson) who drove car into the boot of which victim was bundled after being assaulted at his home by inter alia McGillivray and McRae – after assault and placing of V in boot, McRae accompanied Flaherty and Watson in the car as they took V to Connelly's farm where V was put into a ute, taken to remote bush track and shot in the head by Flaherty – Flaherty, Watson , McGillivray and Connelly unfavourable witnesses – Prior inconsistent statements –

Application to cross-examine several witnesses pursuant to s 38 *Evidence Act 2008* (Vic) – Admissibility of statements made to police and audio visual recordings of interviews and listening device recordings as evidence – Unfair prejudices – ss 38, 60, 135, 136, 137 and 192 *Evidence Act 2008* (Vic) – Appliciations granted – Prosecution permitted to tender interalia, ROI of Flaherty, LD recording of Flaherty and Watson & police statements made by them.

Curtain J said:

[17] [The prosecutor]……..relied upon the following in support of his application.

> *(1) The rule against calling a witness for the express purpose of hostiling that witness does not apply under the provisions of the Evidence Act. There is, therefore, nothing improper in the course proposed by the Crown.*
> *(2) Each of the witnesses proposed to be cross-examined meets the requirements of s 38, whether it be unfavourable, not making a genuine attempt to give evidence or having made a prior inconsistent statement.*
> *(3) Although the parameters of cross-examination are limited to the matters giving rise to the pre-conditions in s 38(1)(a), (b) and (c), the authorities permit cross-examination with the view to demonstrating the implausibility of the version which the Crown contends should be rejected.*

[18] As to the exercise of the discretions, [the prosecutor] submitted the following.

> *(1) Regard must be had to s 38(6)(a) and (b), and ss 135, 136, 137 and 192(2) of the Evidence Act.*
> *(2) Section 137 of the Evidence Act replicates the Christie discretion. In assessing the probative value of the evidence, the court must assume its reliability*[47]*. Reliability only becomes an issue if no reasonable jury could accept the evidence.*
> *(3) The fact that the previous statements were not made contemporaneously with the events does not justify exclusion.*
> *(4) The defence bears the burden of proving the risk of prejudice outweighs the probative value.*
> *(5) The prejudice affected by the evidence must be more than strengthening the Crown case; there must be a risk that the jury will misuse or overvalue the evidence.*
> *(6) The previous representation of the witnesses fit together; in particular, Flaherty and McGillivray both say that McRae struck Witham at the house. Flaherty and Connally both say McRae went with them in the four wheel drive up to Campbells Road, being the remote location; and Watson says that Flaherty and McRae got out of her car at Connally's property and both returned to it some time later.*
> *(7) There is conflict in the subsequent statements of Flaherty and Connally as to the role of McRae. Flaherty claims that it was he who struck*

[47] No longer the case due to the subsequent decision of *Dupas* [2012] VSCA 328; (2012) 218 A Crim R 507

Witham with the bat at the house and the Crown contends that his explanation that he did not say that in the record of interview because it sounded cruel is implausible given his later actions in shooting Mr Witham. Flaherty also describes Mr McRae as staying behind and Connally going with him up to Campbells Road. The current version is implausible, the Crown submit, and that is emphasised by the variations in the witnesses' respective accounts.

(8) [The prosecutor] would not pursue a line of cross-examination which suggested Mr McRae put the witnesses up to lying. The variation in their accounts suggests the contrary.

(9) The risk of impermissible reasoning can be addressed by appropriate directions.

(10) Flaherty, in his record of interview, was not trying to shift the blame onto anyone else and, hence, this is not a situation where he was trying to maximise the role of others and limit his own.

(11) The authorities suggest there is no numerical limit as to the number of witnesses who can be cross-examined by the Crown pursuant to s 38; and

(12) The prosecution case is a strong one.

[19] [The prosecutor] conceded that his purpose in calling Flaherty and Connally is to get into evidence their previous statements as proof of the facts. Likewise, the account given by Mr McGillivray as he now claims a lack of recollection of the events. Jodie Watson falls into a different category because the prior inconsistent statement that the Crown seeks to cross-examine her about is not her previous record of interview, which substantially conforms with her most recent statement, but rather her taped conversation with Flaherty made on 4 November 2007.

[20] There is no criticism to be made of such a course; it was not criticised by the High Court in Adam's case and, in any event, it is consistent with the prosecutor's duty to call all relevant witnesses, nor is there anything improper in the course proposed by the Crown. Section 38 applies in circumstances where it may be anticipated that the witness will be unfavourable. It is not confined to a situation where a party calling a witness is confronted unexpectedly by evidence which is unfavourable or by a witness who unexpectedly appears not to be making a genuine attempt to give evidence. So much is apparent from the decision of the High Court in Adam's case and R v. Petroulias (No.29). Further, as s 192A of the Evidence Act provides for advance rulings and as a Basha inquiry has been held in respect of each of these witnesses, both the Crown and the defence know what the witnesses will say if they give evidence before the jury in the same terms as they did on the Basha inquiry. I can see no impediment to a ruling in advance and no unfairness to the accused in so doing.

[21] Section 38 and s 60 of the Evidence Act represent a fundamental change to the common law. The principles of Blewitt's case are no longer applicable in light of these statutory provisions. In R v Lozano ('Lozano's case'), it was acknowledged that the purpose of the section was to ensure that the courts are not deprived of relevant testimony which had previously been excluded by operation of the hostile witness rule. The Australian Law Reform Commission, in its report of 2005, refers to the guiding principle under s 38 as "improvement in fact-finding by enabling a party who calls a witness to challenge unfavourable evidence by cross-examining that witness",

and the report comments that the principle has been upheld by the operation of the section over the ten years since its inception, as it then was, and that despite some criticism, it had received strong judicial support. Further, the defence here was put on notice that the Crown would seek leave to cross-examine Flaherty and Watson in respect of their records of interviews in December 2009 and most recently on 27 January 2010. The defence having been put on notice in respect of Watson and Flaherty, the provisions of s 38(6)(a) have been met in respect of those applications, and the defence have had notice since the Basha inquiry in respect of Connally and McGillivray that applications would be made in respect of their testimony.

[24] The word "unfavourable" does not mean adverse or hostile. It is taken to mean "not favourable" as was held by Smart J in R v Souleyman ("Souleyman's case") and subsequently followed by courts in New South Wales. Although the Federal Court in Hodgkiss v Construction, Forestry, Mining and Energy Union ("Hodgkiss's case"), characterised "unfavourable" as having "to detract from the case of the party calling the witness", it appears from my reading of the authorities that the approach of Souleyman's case is generally preferred and I would apply that definition. Nonetheless, even on the more restricted approach as stipulated in Hodgkiss's case, Flaherty and Connally would meet the requirements of unfavourable.

***Milat* [1996] NSWSC, No. 70114 of 1994; BC 9607720**

Backpacker Murders – Trial ruling of Hunt CJ at CL – Coincidence evidence relied on by P re identity of offender – At D's request, P agreed to call two W's whose evidence was unfavourable to P - Application by P under s 38(1)(a) to xxn those 2 witnesses whose evidence was unfavourable to P - Application not opposed – Directions to effect that P would call 2 witnesses and simply ask them name, address and occupation, D would xxn them eliciting evidence unfavourable to P, P would then xxn them under s 38, D would be permitted to further xxn them, P would then rxn them.

Hunt CJ at CL said:

BC 9607720 at 2
The issue in relation to s 38 of the Evidence Act 1995 is the subject of the present judgment.…….
That issue arose somewhat tangentially to another issue in the trial. The Crown seeks to rely upon the evidence of the witness Paul Onions that it was the accused (Mr Ivan Milat) who kidnapped him just outside the Belanglo State Forest as "coincidence" evidence — together with other circumstantial evidence (based in the main upon the discovery of property belonging to the murder victims and ballistics material relating to their deaths either in premises occupied by the accused at relevant times or in those occupied by members of his family) in support of its case that it was the accused who also murdered the seven victims whose bodies were found in that Forest….In order to establish such similarity, the Crown relies upon a "signature pattern" which it says can be seen from the circumstances in which all eight offences were committed. An important ingredient of the pattern upon which
BC9607720 at 3

the Crown relies for this purpose is that each of the victims (all of whom, including Mr Onions, being backpackers who intended to travel south from picked Sydney) had been pick up as a hitchhiker from somewhere on the Hume Hwy in the vicinity of Liverpool.

The accused has sought to meet the Crown case in relation to this ingredient of the pattern by the evidence of witnesses who have identified one of the victims (Simone Schmidl) leaving the train in Albury on the day following her departure from Sydney (with the expressly stated intention of hitchhiking from outside Liverpool), and two other victims (Joanne Walters and Caroline Clarke)in the south Coast region on the day of their departure from Sydney (with the same expressly stated intention). The Crown had not intended to call these witness, whose evidence is clearly inconsistent with its case upon this issue.
BC9607720 at 5
……..…When the Commission was discussing this proposal in its Final Report, specific reference was made to the function of the Crown to act fairly and, in doing so, to present all relevant testimony. Clause 41 of the Bill proposed by the Law Reform Commission was relevantly not significantly different to s 38 of the Act. The draft Explanatory Memorandum described the provisions of that clause as constituting a "new approach" in lieu of the law relating to hostile witnesses.

In my opinion, the situation where the Crown is obliged to call a witness at the request of the accused, notwithstanding that the evidence of that witness is unfavourable to its case, falls directly within the contemplation of s 38. In the present case, the Crown prosecutor proposed simply to call the witnesses, to obtain their name and address and to leave them for cross-examination by the accused. Then, after the unfavourable evidence had been given in the course of that cross-examination, it proposed that leave should be granted to it (pursuant to subs (1)) to question the witness about that evidence as though cross-examining that witness. The Crown intended by such cross-examination to demonstrate that the identifications made by these witnesses were unreliable, and thus (because of the extraordinary width of the definition of "credibility" in the Dictionary to the Act) such evidence would be relevant to the credibility of those
BC9607720 at 6
witnesses.…… In my view, as the reliability of the evidence of such witnesses would certainly not be tested by the accused, and as the Crown was obliged to call the witnesses only out of fairness to the accused, it would be unjust to the Crown (which prosecutes on behalf of the community) to refuse leave to cross-examine in relation to the unfavourable evidence given. It was very fairly — and correctly — accepted by the accused that no argument could be mounted to the contrary.
BC9607720 at 7
…..In my opinion, the reform effected by s 38, when applied in a more general way to witnesses called by the Crown, will probably prove to be one of the most worthwhile achievements of the Evidence Act.

***Parkes* [2003] NSWCCA 12;147 A Crim R 450**
Criminal law - evidence - claim of right - whether judge erred in striking out as irrelevant part of Crown witness' testimony favourable to defendant's claim - whether judge erred in not allowing defendant to cross-examine on evidence that was struck out - Evidence - hearsay - whether evidence admissible at common law as a prior

consistent statement - whether admissible under s 65 or s 66 of the Evidence Act 1995 - where evidence admissible under s 66 of the Evidence Act - where evidence not significant - whether exclusion gave rise to a miscarriage of justice - Evidence Act - whether trial judge erred in making appellant aware in the presence of a jury the effects of s 128 of the Act - whether trial judge contravened s 132 of the Act - Criminal trial - forensic tactics - where Crown used s 38 of the Evidence Act as a forensic device - whether unfair or improper advantage - whether abuse of section - whether judge's failure to refer to s 192 of the Evidence Act an error of law - where Crown case is strong - whether cumulative effect of errors result in a lost chance of defendant being acquitted - Criminal Appeal Act 1912 s 6(1) - appeal dismissed.

Ipp JA, with whom the others agreed vis a vis the s 38 issue, said:

70 There is ample authority that an application to question a witness under s 38 may be allowed where unfavourable evidence is led in cross-examination: it is sufficient to refer to ***R v Milat*** *(unreported, NSWSC, Hunt CJ at CL, 23 April 1996);* ***R v Pantoja*** *(unreported, NSWCCA, 5 November 1998);* ***R v Mansour*** *(unreported, NSWSC, 19 November 1996). There is also ample authority to the effect that s 38 is not limited to circumstances where the unfavourable evidence is unexpected: it is sufficient to refer to* ***R v Esho*** *[2001] NSWCCA 415;* ***R v Fowler*** *[2000] NSWCCA 142.*

71 Special considerations, however, may arise in regard to s 38 in circumstances where the applicant well knows that the witness is likely to give unfavourable evidence on a particular issue (but wishes to elicit evidence from the witness on other issues), deliberately refrains from asking about the unfavourable evidence, and when it emerges in cross-examination, makes the application.

72 Judges have disapproved of the use of s 38 as a tactical or forensic device: See ***R v Mansour*** *(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).*

73 This disapproval must be seen against the context of the cautionary warnings in regard to the grant of leave under s 38 that were expressed in ***R v Fowler*** *[2000] NSWCCA 142 by Wood CJ at CL, who stated at para 120:*

> *"Section 38 of the Evidence Act now permits a party, by leave, to cross-examine a witness who meets any of the criteria identified in sub-section (1). Its exercise is, however, subject to a number of discretionary considerations, so as to prevent its abuse, and is a section that needs to be applied with some care in criminal trials. So it is that before leave is granted, the trial judge must give consideration to the matter specified in s 38(6), s 135 to s 137, and s 192 of the Act".*

74 Section 192(2) of the Evidence Act is relevant in this regard. That section provides that where a court may give any leave, the court must first take into account "the extent to which to do so would be unfair to a party or to a witness".

75 The antipathy that courts have expressed to allowing s 38 to be used as a forensic device stems from the potential of unfairness to a party or a witness. It is necessary to focus in this regard on what is meant by a forensic device. In this context, in my opinion, it means the deliberate use of s 38 for the purposes of manipulating trial procedure so as to gain an unfair or improper forensic

advantage that, but for s 38, would not arise. The qualities of unfairness or impropriety are critical in determining whether an application under s 38 should be refused on this ground.

76 The present question involves a deliberate forensic decision to call a witness (Harris) so as to question him, in chief, on certain issues but to refrain from asking him about three particular issues because of a reasonable fear that he might give unfavourable evidence in regard thereto.

77 The Crown could have asked Harris in chief about the three issues and, having received unfavourable replies, sought leave to cross-examine him under s 38. There were inherent disadvantages to the Crown in this course. Firstly, the Crown would thereby forego the chance that the defence might not ask the witness about the issues (and indeed counsel for the appellant asked no questions in cross-examination in regard to the minute of 24 October 1994). Secondly, were the Crown to regard the witness as inherently unreliable (as was this case), the Crown would be uncertain as to how the witness would reply to questions so asked. Thirdly, unfavourable evidence from the witness elicited by the Crown might have a greater impact on the jury than evidence elicited by the defence in cross-examination. Fourthly, having elicited the evidence, the Crown might not be granted leave under s 38.

78 What would have been the unfairness to the appellant in the procedure postulated in the preceding paragraph? The answer, in the context of the legislation, must be nil; an application under s 38 at the time and on the grounds postulated is the very procedure that the section contemplates as being the most appropriate. This is to be inferred from s 38(4) which provides:

> *"Questioning under this section is to take place before the other parties cross-examine the witness, unless the Court otherwise directs".*

There is little doubt that, in the particular circumstances, such an application by the Crown, prior to cross-examination by the appellant, would have been granted.

79 The advantages to the Crown in the course it in fact adopted were that it did not have to suffer first three disadvantages to which I have referred, and, in any event, it was granted leave under s 38. So, it had the best of both worlds. It obtained the benefit of the evidence in chief that it wanted, it avoided all the problems of questioning an unreliable witness in chief about areas on which unfavourable evidence might have been given, and it obtained leave to cross-examine when on one of the issues unfavourable evidence was in fact given.

80 What was the unfairness to the appellant in the procedure so adopted? Mr Stratton suggested that it lay in the fact that, had the appellant known that a s 38 application was to be made after Harris' cross-examination, the appellant would have conducted his case differently. I am not persuaded by this submission. Mr Stratton did not suggest how the case could have been differently run, and I cannot think of anything that Counsel for the appellant might have done differently, in any material way.

81 It may be argued that some unfairness lay in the fact that the Crown, by the procedure it adopted, obtained the best of both worlds, a result far removed from the situation that would have obtained under traditional adversarial processes. But s 38 does have the potential for transforming the traditional procedure; this lies at the very heart of the section. Accordingly, it seems to me, the mere fact that this actually occurred and the Crown was allowed to cross-examine on evidence brought out in cross-examination by the defendant, startling as it may seem to those brought up on more old-fashioned ways, is not enough to constitute unfair manipulation.

82 Then, it must be asked whether that there was abuse of the section, and resulting impropriety or unfairness to the appellant, because the Crown made a deliberate decision not to question Harris about the three issues (and the number of invoices, in particular) and made a deliberate decision to take its chances in applying under s 38 after Harris had been cross-examined.

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,

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.

85 Accordingly, I have come to the conclusion that, although the deliberate decisions taken by the Crown have to be classified as falling into the basket of forensic tactics, they did not lead to the Crown's application under s 38 being an abuse of the section.

***Petroulias* (no 29) [2007] NSWSC 1005**

Criminal Law - Trial ruling— nature of charges against accused not clear from ruling but it appears it was a Cth prosecution and the accused conduct whilst an employee of the ATO was the subject matter of the trial - application by Crown for leave to cross-examine witness (a fellow employee of the ATO) under s 38 Evidence Act 1995 — evidence unfavourable to Crown — appears the evidence was adverse to Crown, not neutral - prior inconsistent statements made by witness at previous trials — factors relevant to exercise of discretion — s 38(6) and s 192 Evidence Act 1995 — s 137 Evidence Act 1995 — application granted concerning seven specified topics under both 38(1) (a) & (c).

Johnson J said:

[11] The word "unfavourable" in s 38 (1)(a) of the Act does not mean "adverse"; it means "not favourable" to the party making the application: R v Souleyman *(1996) 40 NSWLR 712 at 715;* R v Lozano *at p 6;* R v Fowler *at [121];* R v Ronen *[2004] NSWSC 1298 at [49].*

[17] It is necessary to keep in mind the risk that s 38 cross-examination may convert the focus of the trial from the guilt of the accused for the crime charged to whether the witness is lying to protect the accused: R v Hogan *[2001] NSWCCA 292 at [5], [76];* R v Le *at 492–493 [89];* R v Ronen *at [32], [72]. The Court should be alert to*

the risk of being sidetracked into collateral issues by way of grant of leave under s 38: R v Ronen *at [32]*.

[18] Before moving to the specific topics to which this judgment relates, it is useful to describe shortly the way in which the Crown places Mr Aivaliotes as a witness in the Crown case. At all relevant times between 1997 and 1999, Mr Aivaliotes was an officer in the Australian Taxation Office ("ATO"). It is the Crown case that the Accused effectively manipulated Mr Aivaliotes over a period of time, taking advantage of his limited experience in the areas which are the subject of these proceedings and his relative subservience (T2544–2545).

[19] The Crown submits that Mr Aivaliotes has altered his evidence in a number of significant respects from that given by him at the first trial before Sully J and a jury in 2005. Put shortly, the Crown submits that, contrary to what he said at the 2005 trial, the evidence of Mr Aivaliotes in the present trial has been to the effect that much of the work was done by him and that he acted in a way which reflected his own views on matters, rather than following the views given to him in drafts which had been prepared by the Accused (T2544.54). In substance, the Crown contends that Mr Aivaliotes has altered his evidence so as to elevate his own role, in relevant respects, from that of an officer with limited knowledge and experience acting at the direction of the Accused to a person exercising his own skill, knowledge and judgment in reaching an independent view of the issues under consideration.

***Randall* [2004] TASSC 42: 146 A Crim R 197 (Tas CCA)**
Criminal law — General matters — Ancillary liability — Complicity — Aider and abettor — Present and inactive — Co-owner permitting use of nightclub office for rape of customer - Criminal law — Jurisdiction, practice and procedure — Witness — Cross-examination — Generally — Leave to cross-examine — Witness giving unfavourable evidence — Test for "unfavourable evidence" — Evidence as to complainant's capacity to consent to sex.

Cox CJ, with whom the others agreed, said:

[23] Given the support for the complainant's claim to have been incapacitated by alcohol or drugs at the time of intercourse which can be gleaned from the evidence of the men who saw her at about that time, the evidence of both Touber and Davies was clearly inconsistent with the Crown case of incapacity to give a free and rational consent to that intercourse and unfavourable to the Crown. Many of the cases to date have not been confined to situations where reliance was based only on s 38(1)(a), but rather on the fact that a prior inconsistent statement had been made (s 38(1)(c)) or that the witness was not in examination-in-chief making a genuine attempt to give evidence (s 38(1)(b)). In Adam v R *(2001) 207 CLR 96, evidence in a prior inconsistent statement of a Crown witness was held relevant because, if accepted, it affected the assessment of the probability of the existence of some of the central facts in issue in the trial. Furthermore, the trial judge found that the witness was not making a genuine attempt to give evidence. At 106, the majority judgment of Gleeson CJ, McHugh, Kirby and Hayne JJ contains the following statement:*

> *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.*

[24] The granting of leave under s 38(1)(a) in no way depends upon some objective assessment by the trial judge when the application is made of the truthfulness of the evidence, the subject of the application for leave to cross-examine on. Indeed, it is only at the conclusion of all the evidence that any proper assessment of the truth can be made by the court. As the Crown's concern should always be to place the truth before the jury, where there is a reasonable basis for presenting a particular version consistent with the guilt of the accused, there is much to be said for the proposition that a material witness such as an eye-witness to the actus reus should be subjected to testing if he or she advances evidence quite inconsistent with that version. In my view, the evidence of both Touber and Davies was unfavourable to the Crown which had called them as witnesses and that opened the way to the learned trial judge to permit their cross-examination under s 38(1)(a). Furthermore, it was clear from a previous aborted trial that if the Crown did not test the evidence of these witnesses, it would not be contested by the defence and might assume an unwarranted probative value because it was led by the Crown.

[25] The Crown has an obligation to call available material witnesses. In Whitehorn v R *(1983) 152 CLR 657 at 674, Dawson J said:*

> *All available witnesses should be called whose evidence is necessary to unfold the narrative and give a complete account of the events upon which the prosecution is based. In general, these witnesses will include the eye-witnesses of any events which go to prove the elements of the crime charged and will include witnesses notwithstanding that they give accounts inconsistent with the Crown case. However, a prosecutor is not bound to call a witness, even an eye-witness, whose evidence he judges to be unreliable, untrustworthy or otherwise incapable of belief.*

The prosecutor in this case carried out his obligation to call Touber and Davies because their evidence, though inconsistent with the Crown case, was not apparently judged by him to be incapable of belief. The Act now gives a prosecutor, faced with unfavourable evidence which it is his or her duty to call, the opportunity to cross-examine upon that evidence and upon the witness' credibility in respect thereto. It is not the prosecutor's obligation to espouse or adopt that evidence and it is in the interests of justice that in circumstances such as these, the truth be ascertained by a proper testing of the evidence by permitting the Crown to cross-examine upon it.

Ronen [2004] NSWSC 1298

Criminal trial ruling – Income tax fraud case - Unfavourable witness — application under s 38 Evidence Act — The changing nature of accounting evidence — Prejudice and collateral disadvantage

Whealy J said:

"Section 38 — Principles to be applied

[49] I now propose to set out my understanding of the principles of law that I consider apply to the application. Section 38 was introduced as an important part of the changes brought about by the Evidence Act 1995. The section has been the subject of a number of decisions of the New South Wales Court of Criminal Appeal. The following propositions may be said to have been authoritatively determined as a result of those and other decisions:

*1. Section 38 of the Evidence Act now permits a party, by leave, to cross-examine a witness who meets any of the criteria identified in subs 1. Its exercise is, however, subject to a number of discretionary considerations so as to prevent abuse. The section is one that needs to be applied with some care in criminal trials. So it is before leave is granted that the trial Judge must give consideration to the matters specified in ss 38(6), 135 to 137 and 192 of the Evidence Act. (*R v Fowler *(2000) NSWCCA 142 at para 120).*

2. The section is to be given its full effect and is not to be confined to the situation where the party calling a witness is confronted unexpectedly by evidence that is "unfavourable", as that expression was explained in Souleyman *(1996) 40 NSWLR 712. (See also Gilbert Adam 47 NSWLR 267[48]). In Souleyman, Smart J held that the word "unfavourable" in 38(1)(a) does not mean adverse. It means "not favourable". The report of the Law Reform Commission in this regard supported the introduction of a less demanding test than that related to the old concept of "a hostile witness". Moreover, Smart J's approach was endorsed in (R v Fowler at para 120).*

*3. There is ample authority that an application to question a witness under s 38 may be allowed where unfavourable evidence is led in cross-examination. (*R v Parkes *(2003) NSWCCA 12 at 70).*

*4. While leave under s 38 does not justify general cross-examination, that is using leading questions and the aggression characteristic of cross-examination on any subject relevant to an issue on credit, nevertheless it does permit questioning provided the questioning is specifically directed to one of the three subjects described in s 38(1). Further, it may be 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' 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 testing the witness' credibility on the s 38(1) subjects. (*R v Le *(2002) 54 NSWLR 474*

Note that *Ronen* was mentioned favourably in *Kanaan* at [84]

[48]This is in fact a reference to the NSWCCA case of Richard, not Gilbert Adam but note that neither of those cases deal with the competing views regarding the meaning of "unfavourable"

***Santo* [2009] NSWCCA 269**
D convicted of robbery in company. She was a sex worker whose "cousin"(D2) beat up a client just before D took money from him. D2 pleaded guilty pretrial to assault. P did not confer with or call D2, who was called by defence. Failure to call D2 was a ground of appeal - Conviction upheld.

Hidden J, with whom the others agreed, said:

[26] Of course, Richardson and Apostilides were decided before the enactment of the Evidence Act 1995. The observation in Richardson, also cited above, that a prosecutor's decision about calling a witness might be influenced by whether the evidence should be subject to cross-examination by the Crown was made in the light of the law as it then stood. In Kneebone it was recognised that that landscape may have changed because of the discretion conferred on a Court by s 38 of the Act to allow a party who has called a witness to cross-examine that person if his or her evidence proves unfavourable to the party: per Greg James J at [54] – [55] and Smart AJ at [104].

[27]The issue was considered later in Kanaan & Ors v R [2006] NSWCCA 109 at [80] – [85]. Among other things, the Court said:

> *"[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. …*
>
> *[85] Where the Crown prosecutor fulfils such an obligation, it would be unjust to the Crown (which prosecutes on behalf of the community) to refuse leave to cross-examine in relation to the unfavourable evidence given, subject of course to the usual discretions such as provided by s 137 of the Evidence Act: …"*

[28] In the present case, relying on these authorities, Ms Hickleton noted that no statement had been taken from Mr Seiden, and the prosecutor had decided not to call him without having conferred with him to assess the reliability of any evidence he might give. She argued that he was the closest eyewitness to the events giving rise to the charge against the appellant, and his observations were essential to the narrative

underlying the Crown case. She submitted that there is no rule of law that the Crown may refuse to call an eyewitness simply because he or she had been dealt with as a co-offender with the accused, although neither she nor the Crown prosecutor in this Court referred us to any authority on that point.

[29] There has been a miscarriage of justice, she argued, because the defence, being left to call Mr Seiden, lost the advantage of cross-examining an important eyewitness. Further, because he was called as a witness in the appellant's case, the jury might for that reason alone have seen him as being "in the camp of the defence". She conceded that the prosecutor would have been entitled not to call him if, after conferring with him, it appeared that he clearly was in the defence camp and, for that reason, was unreliable.

[30] No doubt, the fact that a witness was criminally involved in the matter giving rise to the trial would be relevant to a determination of his or her reliability. However, whether a prosecutor would normally be justified in refusing to call a witness for that reason alone need not be determined for present purposes. Nor is it necessary to comment upon the appropriateness of the prosecutor's behaviour in this case. It should be said that the affidavit material discloses that he and his instructing solicitor acted conscientiously. In particular, their reluctance to confer with Mr Seiden arose out of concern that he might make admissions about his own behaviour which could expose him to further prosecution arising from this incident. The prosecutor conveyed this concern to defence counsel and arrangements were made for Mr Seiden to obtain independent advice.

[31] A reading of the evidence Mr Seiden gave conveys to me that Ms Hickleton's concession was appropriate. He did appear to be in the defence camp and the reliability of his evidence was questionable. In examination-in-chief he described his relationship with the appellant as "my cousin and my sister … she's my blood cousin". Indeed, the appellant's evidence was that he was like a brother to her. He presented as having a selective memory of what occurred in the lounge room. He said in chief that he had been drinking "heaps" that evening, that he was not aware of "anything anyone said, or anything anyone did" and was aware only of his own actions, that is, his beating the complainant. In cross-examination, he confirmed that

his assault upon the complainant was the only thing that he could remember in any detail. Otherwise, he said, "I remember bits and pieces. I remember the violence, I remember that bit." Asked where Mr Cushman and Ms MacIntosh were at that time, he replied, "Wouldn't have a clue where they were. I was too busy punching him …"

[32] The question for this Court is whether, in the context of the trial as a whole, the refusal of the prosecutor to call Mr Seiden caused a miscarriage of justice. I am not persuaded that it did. Mr Seiden gave evidence and, as the Crown prosecutor before us put it, the appellant had the benefit of that evidence, such as it was. No doubt, defence counsel called him only after a sober assessment of the value of his testimony. True it is that the prosecutor, having elected not to call him, enjoyed the opportunity of cross-examining him. However, if he had been called in the Crown case and given the same evidence, it is likely that the prosecutor would still have been able to cross-examine him by leave under s 38 of the Evidence Act. Moreover, the appellant also had the benefit, perhaps limited, of Mr Cushman's recorded interview.

[33] I do not find this ground established.

***Souleyman* (1996) 40 NSWLR 712 (Smart J)**

Criminal law -Trial ruling of Smart J– Charges not indicated in report but concerns armed robbery on a service station or service station owner(s) where it appears people were shot– D worked at the petrol station and allegedly provided information to co-offender(s) re when owner(s) would take moneys to the bank – Appears that P sought leave under s 38(1)(a) and (c) in advance to xxn brother of accused (W) after W had given some evidence in chief – In support of application, P tendered W's statement to police –D opposed s 38 application, noting that W had indicated at committal that he had not read his police statement (before signing it) -— TJ consider there was a failure by W to come up to his police statement in significant respects — TJ emphasises liberal view of "unfavourable" meant discretion under s 38 important—— TJ also found there were some inconsistencies between testimony and police statement - appears that leave was given partially under s 38(1) (a) and partially under s 38(1)(c) .

Held: (1) The word "unfavourable" in s 38(1)(a) of the *Evidence Act* 1995, means"not favourable": it does not mean "adverse" in the sense of "hostile".

Greenough v Eccles (1859) 5 CBNS 786, considered.

(2)Accordingly, where there was a prior statement and the witness did not come up to that statement in significant respects, the evidence was "not favourable".

Smart J said at p715:

It is useful to indicate my view as to the meaning of "unfavourable" in s 38(1)(a) of the Evidence Act. *Section 38 was enacted after a thorough review of the law by the Australian Law Reform Commission. The Act does not define what"unfavourable" means. In the* Macquarie Dictionary *unfavourable is defined as meaning "not favourable, not propitious, disadvantageous, adverse". It is a word of variable meaning.*

The Shorter Oxford English Dictionary*, 3rd ed (1959), defines "unfavourable" as "(1) not favourable in various senses, (2) ill-favoured, unprepossessing, rare". More help is obtained from the* Macquarie Dictionary.

Shortly after s 22 of the Common Law Procedure Act *1854 (UK) was enacted, a question arose as to the meaning of the word "adverse". The section required the judge to form an opinion that the witness was adverse before an attempt to contradict or prove that he had made inconsistent statements could be made. In* Greenough v Eccles *(1859) 5 CBNS 786 at 803-804, Williams J had to consider whether the word "adverse" meant hostile or unfavourable.*

In the context of that section, the meaning of "hostile" was preferred. It appears from various editions of Archbold, Pleading, Evidence and Practice in Criminal Cases *that s 22 of the 1854 Act was re-enacted in s 3 of the* Criminal Procedure Act *1865 (UK). Archbold notes that the word "adverse" in the section means "hostile", and not merely "unfavourable".*

When the word "unfavourable" was used in s 38 the draftsman probably had as a background the history of the English legislation and selected the alternate word of "unfavourable" used by Williams J in Greenough v Eccles.

The word "unfavourable" in s 38(1)(a) does not mean "adverse". It means "not favourable". That construction could have wide ranging ramifications but the Court is given a discretion and would carefully examine the circumstances to see how the discretion should be exercised. A far fetched example would be if a witness said he could not remember something that happened three years ago. The discretion is important and designed to prevent any form of abuse in the administration of the more liberal test of "unfavourable".

The Law Reform Commission noted that the previous rule had excluded a lot of useful testimony. Where, as here, there is a prior statement and the witness in significant respects does not come up to that statement, his evidence is "not favourable" in that respect. The question of discretion then arises.

There are, in this particular case some instances of inconsistency.

[After further evidence leave was granted.]

***Tran (Ruling No. 3)* [2013] VSC 183**

Criminal law – Trial ruling of Lasry J - Trial of Crown Casino security officers re serious assaults on patrons of Crown Casino – A security officer to be called by P was anticipated to give evidence which would support the accused's defence of self defence -Application by prosecutor to cross-examine own witness – Section 38(1)(a)

of the *Evidence Act 2008* – Whether evidence "unfavourable" – Advanced ruling pursuant to s192A of the *Evidence Act 2008* – No unfairness – Application granted – TJ expressed support for the broad view of the term "unfavourable" but, even on the narrow view, found the evidence of a Crown Security Officer was "unfavourable".

Lasry J said:

[28]The situation confronting me in DPP v Bourbaud has some parallels to the situation in this case. In that case the prosecutor sought leave under s 38 to cross-examine three witnesses including the parents of the accused and a friend of the family. They were involved in the fracas that led to the death of the deceased. There had been an earlier trial before T Forrest J at which they had given evidence on the issue of self-defence favourably to the accused. Unlike this case, counsel for the accused accepted that the evidence was unfavourable. The problem was that they had pleaded guilty to offences and their evidence was now inconsistent with their pleas. The residual question was how the evidence of their pleas of guilty would be able to be used. Mr Carter reminded me that in that case I referred to what Curtain J had said in McRae as a "careful and thorough ruling". He is correct about that and I respectfully reiterate that view. My comment was made in the context of citing that which her Honour had referred to about the purpose of s 38 of the Act and, in particular, where her Honour said:

> *In R v Lozano ('Lozano's case'), it was acknowledged that the purpose of the section was to ensure that the courts are not deprived of relevant testimony which had previously been excluded by operation of the hostile witness rule. The Australian Law Reform Commission, in its report of 2005, refers to the guiding principle under s 38 as "improvement in fact-finding by enabling a party who calls a witness to challenge unfavourable evidence by cross-examining that witness", and the report comments that the principle has been upheld by the operation of the section over the ten years since its inception, as it then was, and that despite some criticism, it had received strong judicial support.*

[29]I have highlighted a portion of her Honour's ruling because it is an important means by which to understand how s 38 should operate. "There is no question that the section represents a fundamental change in the law since the principles of hostile or adverse witnesses. As Smart J said R v Souleyman, "unfavourable" does not mean adverse. "It means not favourable". My attention was drawn to the observations of Graham J in Hadgkiss v CFMEU where his Honour suggested that to be unfavourable, the evidence must have "an unhelpful quality about it, as opposed to a neutral quality." For the purpose of this application I am content to consider whether or not Turner's evidence has an "unhelpful" quality to it."

Judicial College of Victoria *Criminal Charge Book*, Chapter 4.17

Bench Notes

"[11, fn 2] *Under s38(1)(a), a judge may grant leave where the witness gives*

evidence that is 'unfavourable' to a party. Evidence is 'unfavourable' for this purpose when it is 'not favourable'. This includes evidence of a witness who has genuinely forgotten the events in question (R v Lozano, NSWCCA, 10/6/97, R v Souleyman (1996) 40 NSWLR 712; R v McRae [2010] VSC 114)".