EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT NELSON

CRI-2014-042-001168
[2016] NZDC 4892

THE QUEEN

V

ROGER SMALLMAN
PHILLIP WINEERA

Date of Ruling: 21 March 2016

Appearances: J M Webber for the Crown
S J Zindel and A N Gulbransen for the Defendant Smallman
R W Ord for the Defendant Wineera

Judgment: 21 March 2016

RULING 3 OF JUDGE A A ZOHRAB

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[1] The Crown make application to cross-examine their own witness, Mr McKinley. As a general rule cross-examination of the party's own witness is forbidden. The reasoning is that in adversarial proceedings the party calling the witness is offering that evidence as both reliable and credible.

[2] The exceptions to that rule are found in ss 37(4)(a) and s 94 Evidence Act 2006 ("the Act").

[3] A hostile witness goes beyond merely forgetful or unhelpful. The definition is found in s 4:

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

Meeting this definition of "hostility" is a prerequisite to the Crown being able to cross-examine Mr McKinley.

[4] Section 94 states:

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

[5] Here there is clearly a hostile animus of the old type, which used to be the requirement. He has indicated, from quite an early stage, that he takes exception to having to be involved in this process. Early on, even before getting to any of the action, he emphasised that he "did not see anything go down". When asked if he wished to look at his statement to assist in helping him remember what had happened, because the clear initial thrust of his evidence was that he was sleeping so could not possibly have seen anything go down, he responded on a couple of occasions that he simply did not care. He was also taking issue with the fact that he had been arrested, was worried about a potential criminal record for that. He was also worried about the fact that he had lost a day's pay.

[6] He emphasised, on a number of occasions, that he was asleep, and he also clearly indicated at a very early stage that he regarded Mr Thornicroft as a "nark". The matter has culminated basically in him clearly indicating that he does not recall, and does not want to talk about what had happened.

[7] He also taken issue with a number of aspects of the evidence, in particular the statement that he has been shown to refresh his memory. He takes exception as to whether or not it is his signature. He takes exception to whether or not there are his initials along the way, and notes the variations at various stages between them. He has noted that the police are well-known to be "dodgy" or similar, so effectively what I understood him to be saying is that he would be suggesting that if the officer who took the statement were to get into the witness box, that the officer would be perjuring himself.

[8] So not only is there a hostile animus here because he has clearly indicated that he is anti-Mr Thornicroft and also the prosecution, he has also attacked, in a roundabout sort of way, the veracity of the officer who might be called the support the statement. Also, I am conscious of the comments of Priestley J in *Penney v Police*, HC Auckland CRI-2008-404-301, 4 December 2008 at para [32] where Priestley J observed:

> In my judgment, although "manner" clearly covers such matters as the witness's demeanour, the word has a wider ambit. The nature of the inconsistencies is relevant to an assessment of manner. Relevant too would be the frequency of inconsistencies and their centrality to a party's case.

[9] The defence oppose the application. Mr Ord wonders whether or not the drugs that were mentioned might have explained his inability to be able to recall what had happened. Mr Zindel suggested that we had not yet reached the point whereby I could determine conclusively that the witness was hostile. He has also expressed a concern about what the outcome might be as far as fair trial rights are concerned, because if he is hostile to the Crown, he might cause difficulties for the defence.

[10] Clearly this man exhibits a hostile animus. He has indicated right from the start an unwillingness to be involved in the process. He has emphasised, on a number of occasions, he did not see anything go down. He also said he did not care if he was shown a statement which would assist him to remember what had happened. He has been shown the statement. He is now suggesting effectively that it is a forgery, and that the police have made this up. He is essentially suggesting he did not see anything, which is totally at odds with his reasonably concise and precise

description of what happened, and which is supportive, to a significant degree, of what Mr Thornicroft described happening.

[11] So in those circumstances, given that there is clearly a hostile animus, and clearly the inconsistencies here are extreme, he did not see anything according to him and does not want to be assisted in recalling what had happened, and yet he has given a very concise and precise description which is supportive of Mr Thornicroft, the man that he described as a "nark", so in those circumstances the application is granted. I bear in mind, obviously, your comments, Mr Zindel, but we will see where that takes us.

A A Zohrab
District Court Judge