

**NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF ANY PERSONS UNDER THE AGE OF 18 YEARS WHO APPEARED AS A WITNESS PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011. SEE**

**<http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360352.html>**

**IN THE SUPREME COURT OF NEW ZEALAND**

**I TE KŌTI MANA NUI**

**SC 60/2018  
[2018] NZSC 92**

BETWEEN YUSUKE (DAVID) SENA  
Applicant  
AND NEW ZEALAND POLICE  
Respondent

Court: Glazebrook, O'Regan and Ellen France JJ

Counsel: D P H Jones QC for Applicant  
J E L Carruthers for Respondent

Judgment: 10 October 2018

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**JUDGMENT OF THE COURT**

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- A Leave to appeal direct to this Court, against the High Court's judgment (*Sena v New Zealand Police* [2017] NZHC 2319), is granted.**
- B The approved ground of appeal is whether the High Court was correct to dismiss Mr Sena's appeal against conviction brought under s 232(2)(b) of the Criminal Procedure Act 2011.**
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**REASONS**

[1] After a Judge-alone trial, Mr Sena was found guilty on five charges of assaulting two children.<sup>1</sup> He appealed unsuccessfully against conviction and sentence

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<sup>1</sup> *R v Sena* [2017] NZDC 3564 (Judge Henwood).

to the High Court.<sup>2</sup> Leave to bring a second appeal in relation to his conviction having been declined by the Court of Appeal,<sup>3</sup> leave is sought to appeal directly to this Court.

[2] In dismissing the application for leave, the Court of Appeal did not accept the submission for Mr Sena that, on an appeal under s 232(2)(b) of the Criminal Procedure Act 2011 following a Judge-alone trial, he was entitled to the High Court Judge's "own assessment of the evidence".<sup>4</sup> "Rather", the Court of Appeal observed, "the function the Judge undertook – that of review – is precisely what the relevant authorities require".<sup>5</sup>

[3] The proposed appeal to this Court would raise a question as to the correct approach to be taken on an appeal under s 232(2)(b). That section provides that a first appeal must be allowed where the Court is satisfied that, "in the case of a Judge-alone trial, the Judge erred in his or her assessment of the evidence to such an extent that a miscarriage of justice has occurred".

[4] The approach to appellate review under s 232(2)(b) is a question of general and public importance. It is also unclear when the question may arise again for determination in this Court given the issue will likely be determined in the same way if raised again in the Court of Appeal. In the circumstances, this is one of those rare, and exceptional,<sup>6</sup> cases where leave to appeal should be granted notwithstanding the decision of the Court of Appeal to decline leave.

Solicitors:  
Croftfield Law, Auckland for Applicant  
Crown Law Office, Wellington for Respondent

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<sup>2</sup> *Sena v New Zealand Police* [2017] NZHC 2319 (Downs J).

<sup>3</sup> *Sena v New Zealand Police* [2018] NZCA 203 (Miller, Ellis and Woolford JJ).

<sup>4</sup> At [10].

<sup>5</sup> At [10].

<sup>6</sup> See, for example, *Burke v Western Bay of Plenty District Council* [2005] NZSC 46, (2005) 18 PRNZ 560 and *Clarke v R* [2005] NZSC 60.