NOTE: PURSUANT TO S 125 OF THE DOMESTIC VIOLENCE ACT 1995, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, SEE https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 87/2021
[2021] NZSC 126

BETWEEN	CODY HURITU Applicant
AND	NEW ZEALAND POLICE Respondent

Court:	William Young, Ellen France and Williams JJ
Counsel:	N P Chisnall and N T C Batts for Applicant M L Wong for Respondent
Judgment:	24 September 2021

JUDGMENT OF THE COURT

A **The application for an extension of time to apply for leave to appeal is granted.**

B **The application for leave to appeal is dismissed.**

C **The applications for leave to intervene by the Auckland District Law Society Inc and the Criminal Bar Association of New Zealand are dismissed.**

REASONS

Introduction

[1] The applicant, Mr Huritu, was convicted after a judge-alone trial of assault and breach of a protection order.[1] Following an unsuccessful appeal against conviction in the High Court,[2] Mr Huritu obtained leave to appeal to the Court of Appeal.[3] The Court of Appeal subsequently dismissed the appeal.[4] He now seeks leave to appeal to this Court.

Background

[2] The charges related to incidents involving Mr Huritu's partner. The two were in a long-term relationship, although on and off in nature.[5] The incident giving rise to the assault charge took place on 10 December 2018. When police visited Mr Huritu's address, the complainant reported an assault. An officer took photographs of her injuries and she made a formal written statement to the police.

[3] The matter was to proceed to trial on 18 July 2019 but the trial was adjourned after the complainant did not answer her witness summons and attend court. A warrant was issued leading to her arrest. She was bailed to attend the new trial date of 1 August 2019.

[4] On 1 August 2019, the complainant did not attend court. A warrant was issued and the matter set down to the afternoon so that the warrant could be executed. Efforts by the police to locate her were unsuccessful. The trial Judge heard evidence from the constable who had made those inquiries including two visits to her home. On the afternoon of 1 August, Judge Cooper granted an application by the police to admit her formal statement as hearsay evidence, on the basis she could not be found.[6] The trial

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1 *New Zealand Police v Huritu* [2019] NZDC 15221 (Judge Cooper).
2 *Huritu v New Zealand Police* [2019] NZHC 2560 (Jagose J) [HC judgment].
3 *Huritu v New Zealand Police* [2020] NZCA 208. The matter was referred to the Permanent Court for hearing.
4 *Huritu v New Zealand Police* [2021] NZCA 15 (Cooper, Courtney and Collins JJ) [CA judgment].
5 The relationship was characterised by an extensive history of family violence: HC judgment, above n 2, at [3].
6 *New Zealand Police v Huritu* [2019] NZDC 15660.

proceeded. The applicant elected not to call or give evidence. The Judge found the charges proved.[7]

The proposed appeal

[5] The proposed appeal is directed primarily to two grounds.[8] First, whether the Court of Appeal was correct to conclude that the complainant was "unavailable as a witness" on the basis that she could not "with reasonable diligence be … found" as contemplated by s 16(2)(d) of the Evidence Act 2006 so that her formal written statement to police could be admissible. Second, whether the Court erred in determining that the requirements in s 22(5) of the Evidence Act for dispensing with a hearsay notice applied.[9] The applicant submits that both issues raise questions of general or public importance.[10]

[6] On the first ground, the applicant submits that his right to a fair trial was impinged by the decision that the reasonable diligence test was met. The main arguments the applicant wishes to make in support of this submission are as follows:

(a) Reasonable diligence is a case-specific inquiry but one which means the doing of that which an ordinary prudent police officer would do having regard to all of the circumstances. In this respect the applicant seeks to rely on English authorities which he says, broadly speaking, place a positive obligation on police to maintain contact with witnesses.[11]

(b) The applicant says the Court was wrong to effectively prioritise resourcing concerns for the police.

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7 *Huritu*, above n 1.

8 Two other matters (reliability under s 18(1)(a) and the test under s 8 of the Evidence Act 2006) are referred to in the notice of application but not discussed in the submissions.

9 The Court of Appeal said that matter was raised for the first time in that Court: CA judgment, above n 4, at [54].

10 Senior Courts Act 2016, s 74(2)(a).

11 The applicant refers to *R v Adams* [2007] EWCA Crim 3025; *R v DT* [2009] EWCA Crim 1213; *R v Murphy* [2014] EWCA Crim 1457; and *Ranking v Ipswich Magistrates' Court* [2016] EWHC 2851 (Admin).

(c) The Court of Appeal's decision reflects a departure from the necessity test underlying the admission of hearsay evidence.

(d) The relative importance of the evidence of the proposed witness should be a relevant factor in assessing whether the steps taken to locate the witness are reasonable.

(e) There is a divergence in the (limited) authorities on this issue such that this Court's guidance is required.

[7] The applicant says the second point is interlinked with the first point on the proposed appeal. In this respect, it is said that the proposed appeal would provide an opportunity to reinforce the requirement that hearsay evidence will only be admitted where necessity dictates.

Our assessment

[8] As the Court of Appeal said, whether the reasonable diligence test was met required a factual inquiry. In reaching the view that the reasonable diligence test was met in this case, the Court of Appeal considered that the relevant circumstances included the fact that the complainant had not appeared at the initial trial date and had been located, arrested and released on bail to appear on the new trial date. The Court said there was "justification in the circumstances for the Judge to conclude that the complainant had deliberately failed to appear on the second occasion".[12] The Court's approach is captured in the following excerpt:

> [36] We accept [the submission for the Crown] that on a straightforward reading of the statutory test, the unavailability requirement had been met. The complainant's whereabouts were unknown. Reasonable efforts were made to locate her, all of which proved unsuccessful. The question of whether there was reasonable diligence was properly to be assessed on the basis not only of what took place on the day but also on the basis of the steps previously taken in connection with the first trial date. Further, in the overall circumstances, we do not consider it was necessary for there to be a further adjournment so that more time could be spent endeavouring to locate the complainant.
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> [37] We do not consider it either necessary or desirable for this Court to establish a set of principles such as those suggested by [counsel for the

12 CA judgment, above n 4, at [34].

> appellant] to guide trial judges in the application of the straightforward statutory language in s 16(2)(d) of the Act. The question of whether a witness is or is not able to be found is a simple question of fact.

[9] The Court also accepted the Crown's submission that in determining whether reasonable diligence test was met, a court should not be "influenced by a consideration of what role the witness will play in the trial" if they are located and give evidence.[13] The Court made the point that, where a witness is unavailable, it does not follow automatically that the hearsay statement of that person will be admissible. There are other aspects to the test for admissibility, including reliability[14] and whether the probative value of the statement is outweighed by the risk the statement would have an unfairly prejudicial effect on the proceeding.[15] The latter issue encompasses consideration of the right of a defendant to offer an effective defence.[16]

[10] The Court also considered all of the bases in the statute for dispensing with the hearsay notice applied.[17]

[11] While the applicant seeks to attach various riders to the factual assessment undertaken by the Court of Appeal, the challenge on appeal would ultimately require case-specific consideration, as is accepted. There may be room for differing views about the reasonableness of the steps taken by the police in this case in light of their responsibilities, the complainant's earlier non-appearance and the history of the relationship between the applicant and complainant. That possibility does not, however, detract from the factual nature of inquiry to be undertaken. Further, the assessment made here is one which, on the face of it, comes within the policy of the legislative scheme.[18] The second point concerning dispensation with notice, largely falls away if leave is not granted on the first point, but again the ultimate inquiry would be a factual one. In the circumstances, we do not consider the criteria for leave to appeal are met.[19]

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13 At [38].
14 Evidence Act, s 18(1)(a).
15 Section 8(1)(a).
16 Section 8(2).
17 Under s 22(5), the judge may dispense with a hearsay notice, broadly speaking, where no party is substantially prejudiced by non-compliance, or compliance was not reasonably practicable, or where the interests of justice so require.
18 *Singh v R* [2010] NZSC 161, [2011] 2 NZLR 322 at [23].
19 Senior Courts Act, s 74(2). The other two matters referred to in the notice of application are routine, case-specific issues.

Prospective interveners

[12] We add that applications for intervention in relation to this matter were received from the Auckland District Law Society Inc and the Criminal Bar Association of New Zealand. To the extent these applications are directed to intervention on the leave application, we note that the question of whether leave should be granted is a legal question involving the application of settled criteria. That legal question has been fully canvassed in the submissions of the existing parties. The applications otherwise fall away and are formally dismissed.

Extension of time

[13] The application is out of time, but the delay is explained and there is no objection made to our granting an extension of time.

Result

[14] The application for an extension of time to apply for leave to appeal is granted. The application for leave to appeal is dismissed. The applications for leave to intervene by the Auckland District Law Society and the Criminal Bar Association are dismissed.

Solicitors:
Haigh Lyon, Auckland for Applicant
Crown Law Office, Wellington for Respondent