IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 80/2023

CRI-2017-004-007073

BETWEEN	**L (SC 80/2023)**
	Appellant
AND	**THE KING**
	Respondent

Appellant Submissions

HUNTER DE GROOT
BARRISTER

Counsel Acting:
H G de Groot | M J McKillop
P.O. Box 714
Wellington 6011
+64 22 120 4385
hunter@hunterbarrister.com | matt@mckillop.co.nz

Counsel for the appellant certify that this submission contains no suppressed information and is suitable for publication

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SUMMARY

1. The appellant (**L**) was tried and convicted of sexual offending against his step-daughter (**N**). Before the trial (a retrial), one of N's cousins (**C**) came forward with evidence that tended to exculpate L and raise serious doubts as to N's credibility. A detailed brief of evidence was prepared and C was ready to give evidence *via* video-link from Australia when the trial was first scheduled. However, that fixture was vacated due to Covid-19 restrictions. At the next date, it was apparent that C had become mentally unwell, and the Judge had little difficulty adjourning on that basis. The same situation prevailed at the next call. Although C's mother was able to have her initial the brief, C would not appear at a trial. L made an application to read C's brief as hearsay, which was declined.

2. The appellant says that the Court wrongly concluded that C was available as a witness, and in doing so deprived him of critical exculpatory evidence and unduly limited his right to defend the charges. The result was an unfair trial and a miscarriage of justice that affects the safety of the convictions.

3. This appeal ought to be allowed, and the convictions quashed.

FACTUAL BACKGROUND[1]

First trial and appeal

4. The complainant, N, is L's biological niece, and also his step-daughter. When N's father (L's brother) died, the appellant and N's mother (**M**) started seeing each other, eventually marrying. Both had children from their previous relationships.

5. In the earlier phases of the relationship, N and her mother M stayed at the appellant's address in [redacted]. During the timeframe covered by the charge notice, the family moved to [redacted].

6. The charges spanned two periods, when N was aged 12 to 15. Charges 1 to 8 alleged varied sexual offending between May and December 2012,

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[1] These submissions adopt the anonymisation conventions used in the judgment under appeal. A key to the abbreviations used in these submissions has been provided separately to the Court. A partial family tree is provided at COA Exhibits 7.

at [redacted]. Charges 9 to 14 alleged varied offending (including rape) between December 2012 and December 2015 at the [redacted] address (charge 14 separately alleged a sexual assault in a vehicle).[2]

7. In December 2016, N moved to Brisbane to stay with an aunt and uncle. Another aunt, uncle and cousin (**C**) lived next door.

8. In January 2017, N told the aunt she was living with that L had sexually offended against her, although not in the same way as she later described to the Police. Shortly thereafter, N retuned to New Zealand for reasons apparently unrelated to the disclosures.[3]

9. A family meeting was convened in April 2017 by an uncle who was a serving police officer. Despite the uncle's leading questions, N did not say that L had raped her.[4] In May 2017, the uncle accompanied N to make a formal complaint to Police.[5]

10. L was interviewed and denied the offending. Matters progressed rapidly to trial in December 2017. L gave evidence. The jury found him guilty of all charges.

11. In 2019, L's convictions were overturned on the basis that the defence should have been permitted to cross-examine N under s 44 EA about allegations she had made about the appellant's son (**S**).

12. N had made disclosures about sexual conduct with S to a counsellor and HELP[6] in April 2014.[7] That conduct was said to have occurred between February 2013 and February 2014. CYFS (as it was then known) became involved. An investigation concluded that the sexual activity was consensual,[8] but the trial Judge had also inferred from the report that N had been taken advantage of.[9] The contents of the report were not adduced at (either) trial.

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2 COA Casebook 28.
3 N's aunt accepted that things "didn't really work out for [N] in Australia": COA Evidence 43 (NOE, at p 41 ln 31).
4 *L v R* [2019] NZCA 382, at [6].
5 COA Evidence 55 (NOE, at p 53 ln 1–5).
6 A sexual abuse support service.
7 Above n 4, at [2].
8 At [2]–[3].
9 At [18].

13. The Court of Appeal found that the Judge had misapprehended the purpose of the s 44 application and that limited permission ought to have been given to cross-examine. The investigation had afforded N a "good opportunity" to complain about the appellant, which was "sufficiently relevant to her credibility to require that limited questioning be permitted in the interests of justice."[10]

Retrial

14. Following the appeal, a further witness – C – came forward. C is the appellant's niece and N's cousin. She lives in Brisbane, next door to the house where N lived. N spent time with C when she was in Australia. At trial, N accepted that she and C were close and that she told C that she "hated" L but without alleging sexual offending."[11]

15. C told L's counsel that N had repeatedly told her that she "hated" L, that he was lazy, and that she wanted to do something to "get rid of him." C asked N on two occasions whether something had happened and N said "no." These conversations occurred in New Zealand in October 2016 and in Brisbane in December 2016.

16. C was briefed by defence counsel. A statement was prepared, and C signed the last page on 28 January 2021.[12]

17. In early February, minor additions were made to C's brief, further explaining the family structure. The updated version (still dated 28 January) was sent to C on 8 February.[13]

18. The retrial was scheduled for 15 February 2021. C was ready and available to give evidence *via* AVL from Brisbane. This is evident in the correspondence with counsel,[14] and confirmed in the affidavit of C's

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10 Above n 4, at [20].
11 COA Evidence 31 (NOE, at p 29 ln 15–39).
12 COA Additional Materials 5–8.
13 COA Additional Materials 9–12.
14 See Chronology.

mother (**A**)[15] filed on appeal.[16] However, the trial was adjourned due to Covid-19 restrictions, after three new community cases were detected in Auckland on 14 February 2021 (the day prior to the scheduled trial).

19. The trial was rescheduled for 19 April 2021. However, prior to that date, C had a mental breakdown, against the backdrop of pre-existing mental health difficulties. Counsel had not been able to speak with her since February. On 19 April, the Judge spoke with A in Chambers by phone. It was apparent that C was unwell. The Judge adjourned the trial, commenting:[17]

> … the right of Mr [L] to receive a fair trial would be compromised whereby it would almost be inevitable that if we proceeded to trial this week and the witness was not available, there would be a subsequent appeal on the basis of a miscarriage of justice. It seems to me that would have a very strong possibility of being granted.

20. The Judge said that if C's condition did not improve, a hearsay application could be pursued at a later date.[18]

21. The trial was again rescheduled for 6 July 2021. Counsel continued to pursue a signed brief. On 4 July 2021, C initialled the last page of her updated statement and, on 5 July, A emailed that page to counsel. On 6 July, A emailed the remaining pages, which had been initialled.

22. At the date of trial, C remained unwell. A provided an email for the Court though counsel confirming (*inter alia*) that C's condition had not changed, she was still refusing to seek medical care, was not sleeping, and was locking herself in her bedroom, and therefore she was not fit to be present at the trial.

23. The Judge refused a hearsay application. After summarising the relevant ss 16(2)(b) and (c) grounds,[19] the Judge found that there was insufficient evidence to find that C was "unavailable", principally due to the absence

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15 The judgment under appeal refers to two different people with the letter "A". This appears to have resulted from a confusion between the identities of two of N's aunts. The judgment first refers to the aunt N lived with in Brisbane as "A" (at [7]), then later refers to C's mother as A (at [12]). C's mother is also N's aunt. For the avoidance of doubt, these submissions refer only to C's mother as "A", and treat the other references to A in the Court of Appeal judgment as an inadvertent slip.

16 SC Casebook 37, at [2.1]–[2.2].

17 COA Casebook 49, at [7].

18 COA Casebook 49–50, at [9].

19 COA Casebook 83, at [26].

of medical evidence as to her condition.[20] The application therefore failed the unavailability test in ss 16 and 18 EA. The Judge did not go on to consider reliability. Nor did the Judge separately consider the test of unavailability contained in s 16(2)(b). The Judge also refused an application to adjourn the trial.

Parties' cases at retrial

24. The Crown case was that N was believable, her out-of-court and in-court evidence was consistent, and the appellant had the opportunity to offend against her.[21] The Crown said any dislike N had for the appellant would not have motivated complaints and pointed out that N had asked her aunt not to tell anyone about the offending. The prosecutor marshalled the evidence of distress while making the initial disclosures.[22] Of the failure to complain about the appellant when making disclosures about S, the Crown said that N had explained that she did not want her mother to find out about the offending.[23]

25. The defence case was that the evidence was uncorroborated and did not establish guilt to the criminal standard. Counsel noted that there was no obligation on the accused to prove a motive but pointed to the antipathy N expressed towards her stepfather, for reasons unrelated to the alleged offending. Counsel said that once N complained to her aunt in 2017, she was stuck with the allegations and, when confronted by family members, had no choice but to persist with them.[24]

26. Counsel drew attention to the stark inconsistencies between N's complaint to her aunt (January 2017), uncle (April 2017), and to Police (May 2017). Counsel emphasised the positive denial of rape to her aunt and the detailed differences between the accounts given to the family members and the account given to Police in relation to the first incident. Counsel said that the fact that N denied even making the inconsistent

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20 COA Casebook 85–86, at [31]–[33].
21 COA Casebook 90.
22 COA Casebook 91–93.
23 COA Casebook 98–99.
24 COA Casebook 104.

allegations was "bizarre" and that there was no reason to doubt the aunt and uncle's evidence.[25]

27. It was noted that, although N and her aunt shared a close relationship, N denied that L had raped her, even though she said to her aunt that she had been raped by S. Similarly, counsel pointed to the absence of any complaint against the accused when N had made disclosures to the school counsellor about the sexual relationship with S, her fears of pregnancy and her suicidal intent.[26] It was submitted that the explanations given for that, particularly the claim by N that she "just didn't put two and two together" in relation to risk of pregnancy from the charged rapes, were unsatisfactory.[27]

28. Counsel said that there were ample opportunities for N to have avoided being alone with the defendant, by going to school. Finally, counsel noted that there was no obligation on the accused to say anything but that he had chosen to give evidence in his defence.[28]

29. L was convicted on all of the charges.

Judgment under appeal

30. L appealed his convictions following the retrial. His grounds of appeal were that the hearsay application ought to have been granted and that limited-use directions should have been given in relation to the s 44 evidence.

31. The Court of Appeal rejected the appeal against refusal to admit the hearsay evidence of C. In relation to s 16(2)(b), the Court characterised C's refusal to appear as a witness as "unwillingness", while finding that her appearance nevertheless remained "reasonably practicable." The Court treated "reasonable practicability" as being focused on the arrangements for giving the evidence (that is, by video-link while C remained in Australia). The Court reasoned that such arrangements were "perfectly practicable", had C been willing to comply, and concluded that

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25 COA Casebook 105–108.
26 COA Casebook 108–109.
27 COA Casebook 109.
28 COA Casebook 109.

the real issue was her unwillingness. The Court distinguished *Solicitor-General v X* where there had been insufficient evidence of impracticability,[29] with the case here where there was plenty of evidence supporting practicability.[30]

32. In relation to s 16(2)(c), the Court said it was "sympathetic" to the difficulties that counsel faced marshalling evidence regarding C's condition,[31] but found that available evidence did not demonstrate that she was unfit to be a witness because of her mental condition.[32]

33. The other appeal point was dismissed,[33] and leave was not sought in respect of those findings.

ISSUES ARISING ON APPEAL

Background

34. This Court has granted leave in general terms to argue that the Court of Appeal was wrong to dismiss the appeal, but indicated in the leave judgment that counsel ought to primarily focus on s 16(2)(b) of the Evidence Act (**EA**) (unavailability due to absence from New Zealand).

35. The following matters do not appear to be at issue:

    35.1 The evidence was relevant in terms of s 7 EA. This much is clear because the evidence raises doubts about the credibility of the key prosecution witness.

    35.2 The circumstances in which the hearsay statement was made gave reasonable assurance to its accuracy, per s 18(1)(a) EA, since:

        35.2.1 the statement represents a written record of what the witness had said to the appellant's then-lawyers;

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29 *Solicitor-General v X* [2009] NZCA 476.
30 *L v R* [2023] NZCA 246 (**CA judgment**), at [33]–[39].
31 CA judgment, at [31]. Notably, C's father took her to hospital but was not allowed to accompany her inside due to Queensland's Covid-19 protocols, and she refused to go in alone.
32 CA judgment, at [24]–[27].
33 CA judgment, at [56]–[60].

35.2.2 the statement had been initialled and signed by the witness; and

35.2.3 the witness was prepared and ready to appear *via* video-link at the scheduled February trial date to give oral evidence for which the brief provided a basis.

35.3 The witness was outside New Zealand for the purposes of s 16(2)(b) EA.

36. The admissibility of the hearsay evidence must therefore rely upon one of the three following routes:

36.1 It was "not reasonably practicable for [C] to be a witness" in terms of s 16(2)(b) EA;

36.2 C was "unfit to be a witness" in terms of s 16(2)(c) EA; or

36.3 There is another statutory pathway to admissibility of exculpatory hearsay evidence, either by:

36.3.1 permitting a broader principled interpretation of "unavailable as a witness" under s 18(1)(b)(i) EA; or

36.3.2 recognising that s 25(e) of the Bill of Rights Act (**BORA**) provides for the presentation of exculpatory hearsay evidence, and thus is permitted by s 17(a) EA.

Summary of appellant's submissions

37. Given that outline of the legal issues, the appellant's position is as follows:

37.1 The "not reasonably practicable" test in s 16(2)(b) EA is a flexible standard that takes into account all the circumstances of the hearsay application, including the circumstances of the person who made the statement, the efforts of the applicant to secure their attendance, the identity of the party seeking to lead the evidence, the importance of the evidence to the case, and the rights of criminal defendants under s 25 BORA. The "not reasonably practicable" test was met by the appellant, and the evidence ought to have been admitted on that basis.

37.2 L no longer relies upon s 16(2)(c) as an independent ground on which the evidence might have been admitted. However, C's mental state is an important contextual factor when determining the extent to which the defence was obliged to attempt to force or persuade C to appear as a witness.

37.3 The EA does not purport to *exhaustively* define "unavailable as a witness" for the purposes of s 18(1)(b)(i). Section 18 EA effectively codified the Court of Appeal's principled approach to recognising hearsay exceptions based on unavailability in *R v Manase*. If the Court of Appeal's narrow reading of s 16(2)(b) EA were upheld (i.e. that the test of reasonable practicability is focused primarily on the witness and not the broader factors identified at paragraph 37.1 above), *Manase* could be relied upon to recognise a new category of unavailable witnesses who are both non-compellable due to absence from New Zealand *and* non-persuadable.

37.4 Furthermore, the right to present a defence affirmed by s 25(e) BORA also provides a last resort route for the admission of exculpatory evidence not provided for by the EA. If hearsay is not admissible under s 18 EA but is relevant to the defence of a criminal charge and does not have an unduly prejudicial impact on the proceeding, then under s 17(a) EA courts continue to have the power to admit defence hearsay as an element of that affirmed right.

37.5 Every comparable jurisdiction surveyed takes a contextual approach to admission of hearsay evidence in criminal proceedings, which reflects the different positions and interests of the prosecutor and defendant. The Court of Appeal judgment is out of step not only with established New Zealand case law, but common law practice more broadly.

37.6 Under any of the three routes to admissibility under the Evidence Act explored above (ss 16(2)(b), 18(1)(b)(i) or 17(a)), C's evidence was admissible and its absence resulted in a

miscarriage of justice. The appeal ought therefore to be allowed and the convictions quashed.

38. These routes to admissibility are addressed in turn below.

EVIDENCE ADMISSIBLE UNDER S 16(2)(B)

History of the unavailability rule in New Zealand

39. The common law rule excluding hearsay evidence was prone to give rise to injustice and has been substantially reformed in every comparable jurisdiction. The Evidence Act 2006 was enacted as part of a codification process that unified disparate enactments and common law rules. Hearsay admissibility is now governed by ss 16–18 EA.

40. The language of "reasonable practicability" has a long history in this area of law. Section 3(b) of the Evidence Amendment Act 1945 first permitted documentary hearsay in civil proceedings when the person who made the statement therein was dead, unfit, "beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success."[34]

41. Prior to the current Evidence Act, section 2(2) of the Evidence Amendment Act (No 2) 1980 provided a closed list of circumstances in which a person was "unavailable to give evidence" for the purposes of admitting documentary hearsay from an unavailable witness:[35]

> (2) For the purposes of sections 3 to 8 of this Act, a person is unavailable to give evidence in any proceeding if, but only if, he—
>
> (a) Is dead; or
>
> (b) Is outside New Zealand and it is not reasonably practicable to obtain his evidence; or
>
> (c) Is unfit by reason of old age or his bodily or mental condition to attend; or
>
> (d) Cannot with reasonable diligence be found.

42. The current form of "unavailable as a witness" found in s 16(2) EA is in every material respect identical to the Law Commission's 1999 Evidence

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34 This was an identical reproduction of s 1 of the Evidence Act 1938 (UK).

35 Such evidence could be admitted under the Evidence Amendment Act (No 2) 1980, s 3(1)(a).

Code proposal.[36] The "unfitness" ground was extended to youth, and the non-compellability ground now found in s 16(2)(e) was newly added. In relation to the grounds of relevance to this case, the Law Commission noted:[37]

> *Paragraph (b)* assumes that persons within New Zealand would not be prevented by practicalities from being witnesses. Advancing technology may mean that this will increasingly be the case for overseas residents as well. Trauma, or the severe impairment of a statement maker's emotional state will make it necessary for the judge to consider under *para (c)* whether the maker is unfit to attend because of his or her mental condition, particularly if the maker is a child.

43. Another change from the Evidence Amendment Act definition of "unavailable as a witness" was the removal of "if, but only if" from the definition when re-enacted as s 16(2) EA, without any replacement language to suggest that the new definition was also exhaustive. This appears to reflect the New Zealand position at the time the Evidence Act was enacted whereby new principled categories of unavailability were permitted to emerge, as recorded by the Court of Appeal in *R v Manase*. That Court recognised a "general residual exception" to the hearsay rule, which turned on the three requirements of "relevance" to the proceeding, "inability" to secure the witness' attendance in person, and "reliability" of the hearsay statement.[38]

Narrow approach to s 16(2) is out of step with established case law

44. The codification of exceptions to the hearsay rule does not mean that the policy problems that inspired reform have been solved once and for all. Nor does it mean that broader considerations cannot be a factor in interpreting the Evidence Act and making hearsay admission decisions. But in the judgment under appeal and in another recent case, the Court of Appeal has suggested the unavailability test is purely factual and party-neutral in its application:

    44.1 In the judgment under appeal the Court said unavailability was a "factual issue which should be determined in the same way regardless of which party will be affected by the presence or

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36 Law Commission *Evidence* (NZLC R55, 1999) Vol 2, at 46.
37 At 47.
38 *R v Manase* [2001] 2 NZLR 197 (CA), at [30].

absence of the witness."[39] There was "no justification … in the words of the statute, or in principle" for a differential approach based on party identity.[40] In relation to s 16(2)(b), the Court made a distinction between an "unwilling" witness and circumstances where it was not reasonably practicable to give evidence, and found the arrangements "perfectly practicable, had she been willing."[41]

44.2 In *Huritu*, which also concerned a flexible standard applied before unavailability can be established ("reasonable diligence" to find an absent witness under s 16(2)(d) EA), the Court expressly rejected the idea of establishing principles to guide trial judges faced with hearsay applications, saying that the unavailability test was "simple statutory language" and "a simple question of fact."[42] The Court rejected the idea that the importance of the evidence, for example, could require a more diligent search on the part of the Crown.[43]

45. These authorities collectively suggest that the test for unavailability under s 16(2)(b) EA in relation to an overseas witness primarily involves examining whether the physical arrangements for an alternative method of giving evidence are objectively "practicable", and that this assessment is a party- and context-neutral one that need not examine the applicant's persuasive efforts.

46. This inflexibility and party-neutrality is contrary to much prior New Zealand case law. By contrast to the Court of Appeal's recent narrow approach to unavailability, this case law establishes that:

46.1 Under s 16(2)(b), once it is established that a party is outside New Zealand and beyond compulsion, it is proper to focus on the conduct of the party seeking to admit the hearsay statement

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39 CA judgment, at [30].
40 At [30].
41 At [36] and [38].
42 *Huritu v Police* [2021] NZCA 15, at [37].
43 At [38].

to see whether they have done enough to try and persuade an unwilling overseas witness to attend; and

46.2 Relevant considerations in this respect include the nature of the case, the identity of the party seeking to admit the evidence, the importance of the evidence, and human rights considerations, in particular the rights of defendants under s 25 of the Bill of Rights Act.

47. In *R v M*, which predates both *Manase* and the Evidence Act, the Court of Appeal was required to apply the prior and identical "outside New Zealand" unavailability test under s 2(2)(b) of the Evidence Amendment Act (No 2) 1980. The complainant in a sexual case had left New Zealand and returned to her home country. After finding that the complainant was outside New Zealand, the first instance judge had interpreted the s 2(2)(b) test as requiring an examination of what further reasonable steps could be expected *of the Crown* to persuade her to return.[44] This approach was endorsed by the Court of Appeal.[45] The question therefore was not whether what was proposed by the Crown *could* work – it was whether the Crown had done enough to persuade a non-compellable witness to engage.

48. More importantly, the Court of Appeal in *R v M* concluded that "the nature of the case" and "the nature and significance of the evidence the witness could give" were relevant considerations, and that this had been established in New Zealand law as far back as 1959 when North J noted that reasonable practicability would include an assessment of "the nature of the suit, the importance of the evidence contained in the statement, financial and other relevant considerations."[46] The Court noted that this was a criminal trial where the complainant's evidence was of crucial significance, and therefore the rights of criminal defendants under s 25

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44 *R v M* [1996] 2 NZLR 659 (CA), at p 662 ln 14–23.

45 At p 662 ln 36–42.

46 At p 662 ln 25–42; quoting *Union Steam Ship Co of New Zealand Ltd v Wenlock* [1959] NZLR 173, at 196. *Union Steam Ship* addressed the statutory test in the 1945 Act, extracted above at paragraph 40.

of the Bill of Rights Act were "highly relevant" in assessing reasonable practicability.[47]

49. The Court of Appeal focused on the Crown's lack of persuasive efforts in *Solicitor-General v X*. The Crown had attempted to obtain evidence from a China-based witness through a mutual assistance regime, but the government's central authority had not responded. The Court of Appeal confirmed that "the matter cannot end there" and the Crown needed to take all efforts to persuade the witness:[48]

> Mr Zhou's contact details are known to the Crown. Yet no evidence was advanced to the District Court, or for that matter to this Court, as to why direct inquiries of the witness are no longer permissible or practicable, or that the witness himself was unresponsive.

50. The focus on a party's ability or attempts to persuade an overseas witness was recently confirmed by the Court of Appeal in *Gao v Zespri*. This was a civil proceeding. The appellants were accused of exporting a protected variety of kiwifruit to a Mr Shu, and purporting to licence him to exploit the variety throughout China. The Court had before it the evidence of a Zespri manager that Mr Shu had told her he would not give evidence unless Zespri entered into a commercial agreement with him (Mr Shu wanted to be Zespri's "man in China").[49] Mr Shu was in China and therefore beyond compulsion. The Court of Appeal upheld the trial judge's admission of Mr Shu's statements, noting that "the possibility that remote hearing technology might be used is beside the point" when it was clear from the Zespri manager's evidence that Mr Shu was not persuadable.[50]

51. Criminal defendant hearsay applications in respect of "unavailable" witnesses are rare. But the one relevant judgment identified by counsel also supports a differential approach to defendant applications in criminal proceedings. In *R v Foreman*, Simon France J rejected a defence hearsay application reluctantly because "one prefers to facilitate the calling of defence evidence",[51] but there had been a total failure to establish that

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47 Above n 44, at p 663 ln 15–20.
48 Above n 29, at [38].
49 *Gao v Zespri Group Ltd* [2021] NZCA 442, [2022] 2 NZLR 219, at [50].
50 At [53].
51 *R v Foreman (No 17)* HC Napier CRI-2006-041-1363, 21 May 2008, at [11].

the witness was unavailable which meant s 18(1)(b) EA could not be met. His Honour went on to hold that whilst "it is not unusual to bend rules or show more 'tolerance' in favour of defence evidence, there are limits, and the requirements of the Act cannot be brushed aside."[52]

52. This case law collectively demonstrates that the judgment under appeal, and *Huritu*, are outlier cases departing from the established approach to unavailability under s 16(2)(b) EA.

Principled basis for appellant's approach

53. The Court of Appeal found there was no justification in principle for the approach being urged by the appellant in this case.[53] But apart from the rich history of case law supporting such an approach, there is also a principled justification for a party-, context- and rights-sensitive approach to hearsay admissibility decisions.

54. First, New Zealand's statutory hearsay rules are proceedings-neutral. Unlike some comparable jurisdictions, ss 16–18 EA govern the admission of hearsay in both civil and criminal proceedings. Some flexibility in the application of "unavailable as a witness" is appropriate to recognise the importance of the issues at stake in criminal proceedings. It is difficult to reconcile a reasonably generous approach to admitting hearsay in a commercial dispute case like *Gao v Zespri* with the refusal to admit a criminal defendant's exculpatory evidence when liberty is at stake.

55. Second, flexible and evaluative standards like "reasonably practicable" ought to be read as incorporating only justified limitations on interests affirmed by the Bill of Rights Act. The overall interest that all of the s 25 minimum criminal procedure rights support is the right to a fair trial – an inviolable right that is often described as "absolute."[54] In other words, it is "not a relative right which must be balanced against other rights and interests recognised by law."[55]

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52 Above n 51, at [12].

53 CA judgment, at [30].

54 *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300, at [77]; *Randall v R* [2002] UKPC 19; [2002] 1 WLR 2237, at [28].

55 *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441, at [19] per Elias CJ. This was the minority judgment, but the same view was shared by the majority: see McGrath and William Young JJ at [158] where their Honours noted that the "special importance"

56. Third, the Court of Appeal wrongly equated fair procedures with fair trial rights.[56] It is trite that trial procedure must be fair to all participants. But criminal fair trial rights are only enjoyed by defendants – the rights are "a mechanism of *defence* (not *party*) empowerment."[57] This means that criminal trials come with a special set of rights and burdens that are not present in regular proceedings. In that context, it is entirely proper that a court considers the importance of a particular piece of hearsay evidence to the case, and the identity and legal burdens of the party seeking to introduce the evidence. Assuming a piece of hearsay evidence has central importance to a criminal trial, it is not objectionable to expect the Crown (obliged to prove a charge beyond reasonable doubt, and flush with resources to pursue witnesses) to do much more to meet the "reasonable practicability" test than the defendant (obliged only to raise reasonable doubt, often remanded in custody before and during trial, and often entirely reliant on a small team of publicly funded lawyers). On the other hand, if the same hearsay evidence were being introduced to make or bolster a point that is hardly in contention, it does not seem necessary in the interests of justice that either party need make such "ends of the Earth" efforts before the evidence can be admitted.

57. Fourth, contextual assessments of the importance of hearsay evidence to the proceeding are already familiar to judges under the other route for hearsay admission provided for by s 18(1)(b)(ii) EA. That section allows for any reliable hearsay statement to be admitted if a judge considers that "undue expense or delay would be caused if the maker of the statement were required to be a witness." It is well established that these are "elastic concepts whose meaning and application will depend on the particular

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of fair trial rights meant that other interests would have to give way to avoid the risk of an unfair trial.

56 "It hardly needs repeating that both prosecution and defence are entitled to a fair trial process in the interests of justice": CA judgment, at [30].

57 Henning and Hunter "Finessing the Fair Trial for Complainants and the Accused: Mansions of Justice or Castles in the Air?" in Roberts and Hunter (eds) *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Hart: Oxford, 2012) at 349.

circumstances."[58] This was also the Law Commission's view when the Evidence Code was prepared.[59] As one case put it:[60]

> If evidence is of little consequence to the issues in a trial, or formal or unassailable then the threshold to expense being undue will be relatively low. Conversely, if the evidence is of real significance to the issues in a trial and is contentious then the threshold will be higher.

58. Fifth, the same interest in presenting essential exculpatory evidence has driven other evidence law developments that ensure a fair criminal trial – namely the "innocence at stake" exception to privilege. This was a common law development now formalised by s 67(2) EA. It reflects the heightened interest in avoiding unsafe convictions by ensuring every relevant piece of exculpatory evidence is able to be placed before a criminal court.

59. The Court of Appeal's approach in the judgment under appeal, and in *Huritu*, was legalistic and unmoored from the underlying commitment to criminal defendants' procedural rights apparent throughout earlier case law. Those values properly require a party-, context- and rights-sensitive approach to hearsay admissibility decisions.

The proper application of s 16(2)(b) in this case

60. The proper approach to a defence hearsay application is to start with an assessment of whether the evidence is relevant and meets the threshold reliability requirement in s 18(1)(a).[61] Establishing this provides critical context to the need to make a rights-consistent decision about necessity under s 18(1)(b). The Court is informed by the s 18(1)(a) conclusion that the evidence could be influential in a defence to a criminal charge. This ought to inform the Court's assessment of whether reasonable steps have been taken to have the relevant witness give oral evidence. Had this step been taken by the trial judge or the Court of Appeal, it would have been apparent that the evidence was both relevant and reliable, for the reasons given at paragraph 35 above.

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58 *Awatere v R* [2018] NZHC 883, at [48].
59 Law Commission *Evidence* (NZLC R55, 1999) Vol 2, at 53.
60 *R v Leaitua* [2013] NZHC 2910, at [16].
61 This much is apparent from the ordering of s 18(1) of the Evidence Act; see also Winkelmann J's approach in *R v Key* HC Auckland CRI-2006-092-12705, 2 March 2009.

61. The next step was to consider whether C was "unavailable as a witness." It was incorrect for the trial judge and the Court of Appeal to regard C as being available as a witness. C was beyond compulsion, being in Australia.

62. The Court ought to have then turned to consider whether it was reasonably practicable for C to be a witness, by considering whether she was persuadable and whether L's counsel had done enough to persuade her in the circumstances. The centrality of C's hearsay statement to L's defence and the importance of preserving the right to bring that defence were relevant factors.

63. C was ready to give evidence by AVL on the original trial date in February 2021, but when Auckland went into lockdown that trial was adjourned. By the time of the rescheduled April 2021 date, and the further adjourned date of July 2021, there was little prospect of persuading C to give evidence in L's defence. C had been mentally unwell for several months by that point, and her parents had not been able to persuade her to seek treatment. C had initially discussed matters with defence counsel *via* telephone and email,[62] but C had not been reached by defence counsel for several months by the date of the trial, with all communication going through C's mother. C's mother had communicated shortly before the July 2021 trial that the trial should go ahead without C.[63] While the defendant no longer seeks to rely on s 16(2)(c), C's mental state is an important contextual factor when considering whether she was persuadable under s 16(2)(b).

64. A subpoena could have been sought for service in Australia,[64] but L's counsel was apparently unaware of this comparatively new power, and in any event this could not have been used to compel C's attendance at an Australian court during the trial.[65]

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62 Affidavit of Louise Freyer, at [12]–[14].

63 At [19].

64 Evidence Act 2006, s 154.

65 While it is a contempt of court to fail to comply with a New Zealand subpoena properly served in Australia, s 43 of the Trans-Tasman Proceedings Act 2010 (Cth) provides that the subpoena may only be enforced through contempt of court proceedings if leave to serve the subpoena and the certificate under s 161 of the Evidence Act 2006 has been granted by a New Zealand High Court Judge (rather than a District Court Judge).

OTHER ROUTES TO ADMISSIBILITY

65. In the event the Court does not accept that C's hearsay statement was admissible under ss 16(2)(b) and 18(1)(b)(i), the appellant says the statements were in any event admissible under the Evidence Act for other reasons. Those two routes are described in turn below.

Evidence directly admissible under s 18(1)(b)(i)

66. In *Manase*, the Court of Appeal recognised that the categories of unavailability that had come to be codified in s 2(2) of the Evidence Amendment Act (No 2) 1980 were not closed ones, and that further principled exceptions could be developed based on witness unavailability. This was despite s 2(2) saying that a person was unavailable "if, but only if" one of the exceptions applied.

67. Section 17 EA makes clear that exceptions to the hearsay rule must now only be found in the Evidence Act or another enactment. But rather than being abolished by the Evidence Act, the capacity for a principled *Manase* exception was in fact *codified* by that Act.

68. The reason for this is that the definition of "unavailable as a witness" in s 16(2) has lost its proviso – it no longer purports to be an exhaustive definition. The phrase "but only if" has not been re-enacted, nor has any similar language suggesting an exhaustive definition. As a result, principled categories of unavailability can continue to be recognised in accordance with *Manase* under s 18(1)(b)(i) directly, by recognising that there are broader circumstances in which someone might be "unavailable as a witness."

69. If the Court of Appeal's narrow focus was the correct interpretation of s 16(2)(b), there is nothing preventing this Court from recognising that, more broadly, an overseas witness who is provably unpersuadable is nevertheless "unavailable as a witness" under s 18(1)(b)(i).

Furthermore, there is no arrest power to require attendance at a court in accordance with the requirements of any New Zealand subpoena served in Australia.

Evidence admissible under an implicit exception to s 17(a)

70. The second of these two routes to admissibility relies on s 17, which provides:

> **17 Hearsay rule**
>
> A hearsay statement is not admissible except—
>
> (a) as provided by this subpart or by the provisions of any other Act; …

71. There are two ways of framing the argument that s 25(e) of the Bill of Rights Act provides a pathway to admissibility of critical exculpatory hearsay statements. The first is simply that s 17(a) recognises that the Evidence Act is not the exclusive repository of statutory hearsay rules,[66] and that such evidence is directly admissible under s 25(e) of the Bill of Rights Act when it is sufficiently reliable and non-prejudicial, having regard to EA ss 7, 8 and 9.

72. Another – better – way of conceptualising this argument is that the Bill of Rights Act requires courts to read s 17 EA as subject to an implied exception that avoids restrictions on the illimitable right to a fair trial. As this Court's judgment in *Fitzgerald* indicates, this is the appropriate interpretive approach under ss 4–6 of the Bill of Rights Act when confronted by a statutory provision that apparently infringes upon an illimitable right.[67] In *Fitzgerald* the right was s 9, regarded as so fundamental that Parliament cannot have intended to limit it under s 86D of the Sentencing Act 2002 without clear intention to the contrary. Here, the right is the fair trial guarantee in s 25.

73. This issue arose in the House of Lords case of *R v A*. That court was confronted with an overbroad "rape shield" evidential law that was apparently inconsistent with the guarantee of a fair trial affirmed by art 6 of the European Convention on Human Rights. A majority of the Lords concluded that the evidential law in question must be read as being subject to an implied exception permitting the admission of evidence or

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66 See for example Misuse of Drugs Act 1975, s 31; Land Transport Act 1998, ss 142–150.

67 *Fitzgerald v R* [2021] NZSC 62, [2021] 1 NZLR 551.

questioning that is relevant and is necessary to preserve the fairness of a trial.[68]

74. A similar approach was taken by the Canadian Supreme Court in *R v Seaboyer*,[69] discussed further at paragraph 85 below. One notable difference is that the power to strike down enactments inconsistent with the Charter of Rights and Freedoms means Canada lacks the same strong interpretive imperative as evidenced in *Fitzgerald* and *R v A*. The result in *Seaboyer* was to strike down an inconsistent evidential law, rather than reading in an implicit exception.

POSITION IN COMPARABLE JURISDICTIONS

75. Case law in comparable common law jurisdictions aligns with the following general principles:

75.1 The admission of hearsay evidence relies on party-neutral mechanisms as in New Zealand, but the tests applied have sufficient flexibility to take account the different positions of prosecutors and defendants in criminal proceedings.

75.2 Consideration of hearsay admission applications in criminal proceedings recognises a defendant's right to present vital and reliable exculpatory evidence.[70]

75.3 Each jurisdiction with a statutory "outside the jurisdiction" unavailability test equivalent to s 16(2)(b) EA (England and Wales, and Australia) requires a court to assess whether the applicant has done enough to persuade an unwilling overseas witness to attend.

76. Several jurisdictions are examined in turn below.

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68 *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45, at [13]–[15] per Lord Slynn, at [46] per Lord Steyn, at [136] per Lord Clyde, and at [163] per Lord Hutton.

69 *R v Seaboyer* [1991] 2 SCR 577.

70 Apart from in Australia, where counsel have not identified any case law that supports this particular point.

England and Wales

77. The traditional position was that there was no defence right to adduce exculpatory hearsay evidence.[71] Hearsay law has been substantially reformed in England and Wales, but the guiding presumption that the defence is not "structurally" favoured over the prosecution continues.[72] However, it is also clear that party identity and the avoidance of injustice are relevant considerations when applying flexible hearsay admission tests.

78. England and Wales has an unavailability test that includes absence from the jurisdiction under s 116 of the Criminal Justice Act 2003 (**CJA**), which is akin to s 16(2)(b) of our Evidence Act. But s 114(1)(d) of the CJA also creates a broad "interests of justice" exception to the hearsay rule. This interests of justice "safety-valve" was included following the England and Wales Law Commission's identification of several scenarios where defence hearsay could prove exculpatory.[73] Defence hearsay applications are rare in England and Wales, as they are everywhere, but are often assessed through this "interests of justice" lens.

79. The Court of Appeal has made clear that party identity may be relevant to this test, and that "it does not necessarily follow that the interests of justice will point in the same direction upon an application by the Crown as they might upon an application made by a defendant."[74] In *Horncastle* the Court of Appeal suggested that something approaching an "exculpatory evidence" rule had emerged, when (in relation to hearsay evidence relied upon by a defendant that tended to implicate a co-accused) it noted that adducing such evidence "could not" be refused "if it were necessary to develop his case in defending himself."[75]

80. The European Convention on Human Rights gives rise to a further limitation on the admission of Crown hearsay in criminal proceedings,

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71 *R v Thomson* [1912] 3 KB 19.

72 *R v Williams* [2014] EWCA Crim 1862, at [92].

73 The Law Commission *Evidence in Criminal Proceedings: Hearsay and Related Topics* (1997) LC245, at [8.147]. Some submitters went so far as to say that the safety-valve ought only be available to defendants (see [8.148]) but ultimately this approach was not taken.

74 Above n 72, at [92]. See also *R v Y* [2008] EWCA Crim 10; [2008] 1 Cr App R 34, at [59].

75 *Horncastle v R* [2009] EWCA Crim 964, [2009] 4 All ER 183, at [71].

due to the right of a criminal defendant to cross-examine any witness whose evidence is the only evidence led in support of conviction, or is evidence "of such significance or importance as is likely to be determinative of the outcome of the case."[76] This is commonly referred to as the "sole or decisive rule" of evidence, and arises from the fair trial and minimum criminal procedural rights affirmed by art 6 of the Convention. A conviction based solely or decisively on hearsay evidence will see a Court subject the proceedings to "most searching scrutiny" to ensure that there hasn't been a breach of the fair trial right in art 6(1).[77]

81. In relation to the "outside the United Kingdom" unavailability test in s 116(2)(c) of the CJA, the wording of that test of unavailability is near-identical to New Zealand's rule.[78] It is well established that the word practicable does not mean merely physically possible.[79] The question instead is whether a witness beyond the reach of English courts "can be persuaded to come voluntarily."[80]

Australia

82. Australia has a Model Uniform Evidence Act that has been enacted in a number of jurisdictions, which includes a definition of when someone is unavailable to give evidence in the "Dictionary" of the Act (the interpretation section, found at the end of the Act). That model enactment does not contain an express "outside of Australia" hearsay exception; instead, it focuses on what parties could have done to secure attendance:[81]

> (1) For the purposes of this Act, a person is taken not to be available to give evidence about a fact if—
>
> …
>
> (f) all reasonable steps have been taken, by the party seeking to prove the person is not available, to find the person or secure his or her attendance, but without success, or

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76 *Al-Khawaja and Tahery v United Kingdom* [2011] ECHR 2127, at [131].

77 At [147].

78 "… that the relevant person is outside the United Kingdom and it is not reasonably practicable to secure his attendance."

79 *R v Maloney* [1994] Crim LR 525.

80 Spencer, JR *Hearsay Evidence in Criminal Proceedings* (2008, Hart, Portland), at [6.16].

81 Case law about overseas witnesses beyond compulsion therefore applies an "all reasonable steps" standard to the hearsay applicant: see for example *R v TI (No 2)* [2015] ACTSC 208, which concerned a key witness who had gone to Singapore.

> (g) all reasonable steps have been taken, by the party seeking to prove the person is not available, to compel the person to give the evidence, but without success.

83. Case law establishes that the "reasonable steps" test is to be considered in light of the importance of the evidence to the case, given that the defence right to cross-examine will be impaired if the evidence is admitted. This effectively means a higher burden will be imposed on the Crown where the evidence is central to a prosecution.[82]

Canada

84. Canada does not have a statutory regime to permit hearsay evidence to be admitted in criminal proceedings, but courts have developed a regime permitting common law exceptions on a principled basis, once tests of reliability and necessity are met, and avoiding unfairness to the other party. The "necessity" criterion includes unavailability of a witness due to being outside of Canada.[83]

85. Of more interest is the Canadian approach to criminal defence rights. Section 11 of the Canadian Charter is roughly equivalent to ss 24–25 of the New Zealand Bill of Rights Act, but unlike s 25(e) the Charter does not articulate any explicit right to bring a defence. Canadian courts have however identified such a right as arising from s 7, which ensures deprivation of liberty will only occur "in accordance with the principles of fundamental justice." This includes the right to a fair trial, which in turn has been held to include a right to "make full answer and defence."[84] This has effectively given rise to an "exculpatory evidence" inclusionary test favouring defendants, as the Canadian Supreme Court explored in *Seaboyer*:[85]

> Canadian courts, like courts in most common law jurisdictions, have been extremely cautious in restricting the power of the accused to call evidence in his or her defence, a reluctance founded in the fundamental tenet of our judicial system that an innocent person must not be

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82 See *R v TI (No 2)* [2015] ACTSC 208, at [49]–[55]; *ZL v R* [2010] VSCA 345, (2010) 208 A Crim R 325, at [32]; *R v Kazzi* [2003] NSWCCA 241, (2003) 140 A Crim R 545 at [11]–[13] (the latter two cases being quoted in *TI*). The Australian Capital Territory, New South Wales, and Victoria have all enacted the Model Uniform Evidence Act.

83 *R v Martin* [1996] 3 SCR 1043, at [71].

84 See for example *R v Rose* [1998] 3 SCR 262.

85 *R v Seaboyer* [1991] 2 SCR 577, at 611 per McLachlin J.

> convicted … the circumstances where truly relevant and reliable evidence is excluded are few, particularly where the evidence goes to the defence.

86. David Paciocco (now an Ontario appellate judge) has noted how this approach has led to a more generous approach to admission of defence hearsay.[86] One example of a defence hearsay application is *Shrubsall* where the Nova Scotia Supreme Court noted the "novelty" of a defence hearsay application compared to the usual case where the Crown was seeking to prove something of consequence. The Court said that the right to make full answer and defence was a relevant consideration when a defence could "only be supported" by hearsay statements.[87] The right to make full answer and defence might also "warrant some relaxation of the reliability rules."[88]

United States

87. The admission of hearsay evidence in criminal trials is largely governed by the procedural codes of each state. But the United States' federal Constitution guarantees fair trials as part of the "due process" clauses,[89] including the "fundamental" right of an accused to present evidence in defence.[90] In *Chambers v Mississippi*, three defence witnesses were barred from giving evidence of another person's confession to a murder by the state's hearsay rule. The evidence had "persuasive assurances of trustworthiness" and was "critical to Chambers' defence." It was a breach of due process to prevent him from leading that evidence through the mechanistic application of Mississippi's hearsay rules.[91] Edward Imwinkelried summarises the impact of *Chambers* and subsequent case law as follows:[92]

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86 Paciocco, DM "Charter Tracks: Twenty-Five Years of Constitutional Influence on the Criminal Trial Process and Rules of Evidence" (2008) 40 Supreme Court LR (2d) 309, at 341–342.

87 *R v Shrubsall* (2000) 188 NSR (2d) 294, at [18].

88 At [43].

89 Fifth and fourteenth amendments to the US Constitution. The prohibition on loss of liberty other than by "due process of law" has its roots in a 1354 English statute (28 Edw III c 3) that prevented any person being "imprisoned…without being brought in answer by due process of the law." This original "due process" clause remains in force in New Zealand through two preserved imperial enactments (see the Civil and Criminal Justice Statute 1354, s 3; Petition of Rights 1627, s 4).

90 *Chambers v Mississippi* 410 US 284 (1973), at 302.

91 At 302.

92 Edward Imwinkelried "The Liberalisation of American Criminal Evidence Law – a possibility of convergence" [1990] Crim L R 790, at 793.

> When defence hearsay testimony is both vital and reliable, the trial judge may not exclude the testimony on the basis of a technical nicety of the hearsay doctrine.

MISCARRIAGE OF JUSTICE

88. If the hearsay evidence was properly admissible, the decision to exclude it occasioned a miscarriage of justice in the sense that it both:

88.1 resulted in an unfair trial;[93] and

88.2 created a real risk that the outcome of the trial was affected.[94]

Unfair trial

89. Neither the Crown nor Court of Appeal suggested that the convictions should stand in the event that the evidence was found to be admissible. The Court characterised C's brief as "…clearly potentially helpful to the defence…"[95] The trial Judge also recognised the significance of the evidence, noting on the April adjournment application that, if the trial proceeded, any convictions would likely be overturned on appeal.

90. The Court of Appeal has deliberately refrained from attempting to define the cases of "error, irregularity or occurrence" that will result in an unfair trial, noting that the category may be extensive.[96] However, it is well-established that where s 232(4)(b) unfairness is established, a court will ordinarily quash the convictions without further inquiry and without the need to demonstrate a real possibility that the verdicts were affected. This reflects the inviolability of the s 25(a) BORA right and the need to satisfy the public that convictions are only entered following fair trials.

91. The right under 25(e) BORA to be "present at the trial and to present a defence" is one of the suite of rights under ss 24 and 25 "in aid of the primary right to a fair trial."[97] It is intimately connected to the right to have "adequate time and facilities to prepare a defence." Both subsidiary rights recognise the value that the state places on the contribution of the

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93 Criminal Procedure Act 2011, s 232(4)(b).
94 Criminal Procedure Act 2011, s 232(4)(a).
95 CA judgment, at [23].
96 *Wiley v R* [2016] 3 NZLR 1; (2016) 27 CRNZ 668; [2016] NZCA 28, at [40].
97 *Attorney-General v Otahuhu District Court* [2001] 3 NZLR 740 (CA), at [47] (Richardson P).

accused to the determination of the charges, as a safeguard against wrongful conviction.

92. The calling of defence evidence is closely connected to the giving of evidence personally by the defendant; both are means to put evidential material before the jury. A finding that a defendant did not make a fully informed decision about whether to give evidence will ordinarily be dispositive. That is so even if the court concludes the same outcome would have followed if proper election advice had been given.[98] By analogy, illegitimate restrictions on the right to call or adduce important exculpatory evidence ought to be met with the same response.

93. It is submitted that, if in error, the exclusion of the hearsay evidence in this case axiomatically trespassed L's right to present a defence and overall right to a fair trial. The weight given to hearsay is a quintessential jury question, not a matter that can be assessed outside the context of trial, which tends to re-enforce that it is appropriate to view the error as first engaging s 232(4)(b).

Impact on the trial

94. It is also clear that the exclusion of the evidence "created a real risk that the outcome of the trial was affected", so engaging s 232(4)(a).

95. The Crown case depended entirely on N's credibility. The proposed hearsay evidence went directly to that central trial issue.

96. While there was some limited cross-examination on N's conversations with C,[99] L and the jury were deprived of the substance of C's brief.

97. L was unable to demonstrate that a family member close to N had co-operated with counsel to provide detailed information contradicting N's complaints. That context would have been significant in itself, as it would have been legitimate for the jury to infer that it would have been difficult for C to give evidence undermining N, given their previous closeness. Similarly, there was no indication of any illegitimate reason for C to come to L's forensic aid.

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98 *Hemopo v R* [2016] NZCA 398, at [75].

99 COA Evidence 31 (NOE, at p 29 ln 15–39).

98. C's evidence[100] was that N and C had a very close relationship, and that on at least two occasions in October 2016 and in or after December 2016:

98.1 N said to C that she hated L and "wanted to find a way to get rid of" him; and

98.2 In response to C's questions as to whether L had ever hit her or done anything to her, N said "no."

99. C's evidence also suggested that N had disclosed a very poor relationship with the aunt she lived with in Brisbane, which meant it was surprising to C that N disclosed the alleged sexual offending to the same aunt.

100. The defence were left unable to point to repeated statements N had made to a close relative that directly contradicted her allegations and established a motive for false complaint. Admission of these statements would have significantly strengthened the defence case and could plainly have resulted in acquittal.

CONCLUSION

101. For the reasons given above, the appeal ought to be allowed and the convictions quashed.

Chronology

102. A chronology of the key events relating to C's evidence is **annexed**.

List of authorities

103. A list of authorities is **annexed**.

Dated this 15th day of January 2024

H G de Groot | M J McKillop
Counsel for the appellant

100 COA Additional Materials 9–12.

TO: The Registrar of the Supreme Court

AND TO: The Crown Law Office

CHRONOLOGY

This chronology is based on email correspondence provided by the appellant's trial counsel, which was in turn provided to the Crown. That correspondence is not included in the Supreme Court or Court of Appeal casebook because it was not tendered as evidence.

There has been no dispute between the parties as to the accuracy of this chronology (which was also filed in the Court of Appeal and as an annexure to the leave submissions in this court).

Date (2021)	**Event**
22 January	Mr Taumihau files MOE application in respect of C.
22 January	Court confirms receipt of MOE application – Asnet Technologies / VMR options given – Mr Taumihau undertakes to make inquires of C.
26 January	Mr Taumihau confirms that C has the means to give evidence *via* VMR – Court confirms that VMR details will be provided closer to trial – VMR guidelines provided.
26 January	Mr Taumihau provides C VMR guidelines *via* email.
27 January	C emails Mr Taumihau: "I have gone through the video link and read through everything that has been stated. I will test the link provide once more, after I finish work this afternoon if that is okay. Also I will send through my signed statement again, as I'm not sure if it has come through to you."
28 January	C signs and sends last page of initial statement (dated 22 January) – does not initial other pages.
2 February	Mr Taumihau emails C: "I've just tried giving you a call. I still haven't received confirmation that there is nothing you wish to add to you brief or received a signed copy of it from you."
3 February	C sends one page of (first, 44 para) statement to Mr Taumihau – detail inserted at para 37.
8 February	Mr Taumihau sends C email attaching updated statement with new para 7 explaining relationships – further details about family structure requested (twice) (51 paras – still dated 22 January).
10 February	Mr Taumihau emails C requesting call.

12 February	Mr Taumihau emails C "Please have another look at your brief. If it is all correct and you do not want to make any more amendments then please sign it and return to me as we did last time."
11 February	Mr Taumihau emails Court following up VMR details – Court confirms that they will be provided on 12 February.
12 February	Mr Taumihau follows up VMR details by email – Court provides.
12 February	Mr Taumihau emails VMR details to C.
15 February	Trial date vacated due to Covid-19 restrictions.
22 February	Mr Taumihau emails C regarding new trial date asking her to email or call him back.
23 February	Mr Taumihau emails C new trial date and requests contact about "sending though a copy of your signed [updated] brief."
7 April	Mr Taumihau tries calling C – emails saying "we still haven't received a signed copy of your updated brief. We also haven't been able to talk to you since February.". Requests contact. Indicates he will try and call "tomorrow mid-morning (your time)."
13 April	Mr Taumihau emails C requesting urgent contact.
16 April	A emails Mr Taumihau saying that her daughter is unwell and she will not be able to attend court due to mental health issues – discusses attempts made to seek treatment. Sends apologies that C will be unable to be present.
16 April	Mr Freyer files and serves a hearsay application in respect of C attaching the statement signed on 28 January 2021 – Court replies that the Judge will deal with the matter on Monday morning.
18 April	Mr Taumihau emails A requesting further details.
18 April	A provides further details by email.
18 April	Mr Taumihau emails A requesting further details.
19 April	A replies to Mr Taumihau providing further details.
19 April	Second call of trial adjourned due to C's non-availability.
19 April	Mr Taumihau emails A regarding adjournment. Requests any medical documentation that is available. Requests that A have her daughter sign the statement attached.

21 April	Mr Taumihau emails A again attaching a statement "as discussed." Indicates that the trial is likely to be rescheduled for July.
30 June	A emails Mr Taumihau saying: "This is [A], [C's] mum. [C] has not been able to see our GP and still refuses to seek medical help and therefore is not fit to take any video or phone calls due to her mental state."
30 June	Mr Taumihau emails A requesting an affidavit from A.
2 July	Mr Taumihau emails A requesting contact.
4 July	C signs/initials last page of statement (still dated 22 January 2021 - 51 paragraphs).
5 July	A emails Mr Taumihau last page of statement signed on 4 July 2021 (dated 22 January 2021 - 51 paragraphs – begins para 45). Sends email at **COA Additional Materials 13**.
6 July	A emails Mr Taumihau pages 1 and 3 of statement, which have been initialed on 6 July (ending para 44).
6 July	A emails Mr Taumihau page 2 of statement, which has been initialed on 6 July (paras 16 – 30).
6 July	Third call of trial – proceeds.

LIST OF AUTHORITIES

Statutes

Civil and Criminal Justice Statute 1354, s 3
Criminal Procedure Act 2011, s 232
Criminal Justice Act 2003 (UK), ss 114, 116
Evidence Act 2006, Part 1, Part 2 subpart 1, ss 154–162
Evidence Amendment Act 1945, s 3
Evidence Amendment Act (No 2) 1980, ss 2-3
Land Transport Act 1998, ss 142–150
Misuse of Drugs Act 1975, s 31
New Zealand Bill of Rights Act 1990, ss 4–6, 24–25
Petition of Rights 1627, s 4
Trans-Tasman Proceedings Act 2010 (Cth), s 43

Cases

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Attorney-General v Otahuhu District Court [2001] 3 NZLR 740 (CA)
Awatere v R [2018] NZHC 883
Chambers v Mississippi 410 US 284 (1973)
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Horncastle v R [2009] EWCA Crim 964, [2009] 4 All ER 183
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R v A (No 2) [2001] UKHL 25, [2002] 1 AC 45
R v Condon [2006] NZSC 62, [2007] 1 NZLR 300
R v Foreman (No 17) HC Napier CRI-2006-041-1363, 21 May 2008
R v Key HC Auckland CRI-2006-092-12705, 2 March 2009
R v Kazzi [2003] NSWCCA 241, (2003) 140 A Crim R 545
R v Leaitua [2013] NZHC 2910
R v M [1996] 2 NZLR 659 (CA)
R v Maloney [1994] Crim LR 525
R v Manase [2001] 2 NZLR 197 (CA)
R v Martin [1996] 3 SCR 1043
R v Rose [1998] 3 SCR 262
R v Seaboyer [1991] 2 SCR 577
R v Shrubsall (2000) 188 NSR (2d) 294
R v Thomson [1912] 3 KB 19
R v TI (No 2) [2015] ACTSC 208
R v Williams [2014] EWCA Crim 1862

R v Y [2008] EWCA Crim 10; [2008] 1 Cr App R 34
Siemer v Solicitor-General [2013] NZSC 68, [2013] 3 NZLR 441
Solicitor-General v X [2009] NZCA 476
Union Steam Ship Co of New Zealand Ltd v Wenlock [1959] NZLR 173
Wiley v R [2016] 3 NZLR 1; (2016) 27 CRNZ 668; [2016] NZCA 28
ZL v R [2010] VSCA 345, (2010) 208 A Crim R 325

Other materials

Henning and Hunter "Finessing the Fair Trial for Complainants and the Accused: Mansions of Justice or Castles in the Air?" in Roberts and Hunter (eds) *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Hart: Oxford, 2012)

Imwinkelried, E "The Liberalisation of American Criminal Evidence Law – a possibility of convergence" [1990] Crim L R 790

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Law Commission (England and Wales) *Evidence in Criminal Proceedings: Hearsay and Related Topics* (1997) LC245

Paciocco, DM "Charter Tracks: Twenty-Five Years of Constitutional Influence on the Criminal Trial Process and Rules of Evidence" (2008) 40 Supreme Court LR (2d) 309

Spencer, JR *Hearsay Evidence in Criminal Proceedings* (2008, Hart, Portland)