IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA **SC 80/2023**

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

RESPONDENT'S SUBMISSIONS ON APPEAL

12 February 2024

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COUNSEL FOR THE RESPONDENT CERTIFIES THAT THIS SUBMISSION CONTAINS NO SUPPRESSED INFORMATION AND IS SUITABLE FOR PUBLICATION

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Introduction

1. Mr L was convicted of raping his teenage stepdaughter (**N**). At trial he unsuccessfully sought to adduce hearsay evidence from her cousin (**C**) living in Australia, who had agreed to give evidence by audio-visual link, received the "Virtual Meeting Room" (**VMR**) link, tested the VMR link, and responded to counsel's enquiries in the days before trial. On the day of trial, however, C's mother informed counsel she would not give evidence. A hearsay application was refused and the trial proceeded. N was cross-examined on the content of C's statement and largely agreed with it. Mr L appealed on the basis that C was "unavailable" as a witness in terms of s 16 of the Evidence Act 2006, and her statement should have been admitted. The Crown submits C was not "unavailable": she was simply unwilling to be a witness.

2. This Court granted leave to Mr L in general terms but with a direction to focus upon "the applicability of s 16(2)(b) of the Evidence Act 2006 to the facts of this case."[1]

Summary of Argument

3. Both parties agree that whether it is "reasonably practicable for him or her to be a witness" is a flexible test aimed at what it is reasonable to expect of the party seeking to adduce a hearsay statement. More might reasonably be expected of the Crown than a self-represented litigant, for example. That does not reduce the threshold test based upon which party is seeking to adduce the hearsay evidence.

4. Section 16(2)(b) is directed at the reasonable practicability of a person overseas giving evidence. Like each of the s 16(2) limbs, it addresses whether there is an established *need* to resort to hearsay evidence. Whether the statement maker can be *persuaded* to give evidence is not the test. If it was, the underlying concept of necessity would be usurped by one of convenience. Technological advancements have vastly

[1] *L (SC 80/2023) v R* [2023] NZSC 146 at [1] (SC Casebook at 6).

improved remote participation, making it reasonably practicable for most witnesses to give evidence from abroad.

5. The "other routes to admissibility" proposed by the appellant, under s 18(1)(b)(i) (extending the statutory definition of "unavailable") or as an implicit exception to s 17(a), are not consistent with the Evidence Act nor New Zealand's common law.

6. On the facts of this case, it was reasonably practicable for C to give evidence and she was not "unavailable as a witness". However, even if C's hearsay statement was wrongfully excluded, no miscarriage of justice occurred. As the appellant's submissions make clear, other evidence was led at trial of the complainant's dislike for Mr L and of her inconsistent disclosures to family members, and the content of C's hearsay statement was essentially confirmed by the complainant in cross-examination.

Suppression orders

7. The complainant's name and identifying details are automatically suppressed under s 203 of the CPA. The Court of Appeal suppressed Mr L's name and identifying details under s 200(2)(f).

Appellant's warning and Child Sex Offender Register status

8. Mr L was given a first warning upon his conviction for this offending.[2] Upon being sentenced to imprisonment he was automatically registered on the Child Sex Offender Register.[3]

Factual and procedural history

The offending

9. After N's father died, her mother married Mr L, N's uncle. When she was 12, Mr L asked N to massage his legs alone in his room. He put her hand on his penis, then pressed his fingers into her vagina and licked her vagina.[4] This happened again every few weeks or months. When the

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2 Case on Appeal ("CoA") at 87.

3 Sentencing notes at [35] (CoA at 165).

4 EVI at 2—3 (Volume of Exhibits ("Vol Ex") at 19—20.

family moved to a new house, his touching escalated to rape.[5] It stopped when she was about 15, in 2015, and told him she did not want to do it anymore.[6]

10. N's older brother gave evidence that N would massage Mr L in his room alone.[7]

11. While she was living with relatives in Australia in January 2017, N told her aunt F that Mr L had "touched [her] private parts".[8] She opened up to F, who was "like an older sister" to her, because they were "having a heart to heart conversation like about stuff like life in general and then I just thought oh it was like the perfect time to tell somebody because like I thought it was time to get if off my chest".[9] She also explained at trial that she felt "more safe" to talk about it in Australia.[10]

12. F remembered her conversation with N differently – in particular, that N had said outright that Mr L had never raped her, and that N had said her stepbrother raped her.[11]

13. This led to the whole family learning of N's allegations and a family meeting held in April 2017.[12] N made her Police complaint and EVI in May 2017. N's mother remained in a relationship with Mr L, telling N she did not believe her account.[13]

What C says N told her

14. After Mr L's first trial and appeal, N's cousin C gave a written statement. C said that N had told her several times (both in New Zealand and Australia) that she hated Mr L for being lazy and "she wanted to find a way to get

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5 EVI at 3 (Vol Ex at 20).

6 EVI at 4 (Vol Ex at 21).

7 Notes of Evidence ("NoE") at 39. Indeed, Mr L accepted this in his evidence: NoE at 66.

8 EVI at 27, ln 3 (Vol Ex 44). [redacted] evidence on this topic is at NoE 41—42.

9 EVI at 31, lnn 15—21.

10 NoE at 10.

11 NoE at 41 and 45—47. Evidence relating to N's sexual relationship with her stepbrother had been ruled admissible in the first appeal decision: *L v R* [2019] NZCA 382.

12 EVI at 27 (Vol Ex at 44); NoE at 31—33, 51—53.

13 EVI at 29, ln 18 (Vol Ex 46).

rid of" him.[14] N did not tell C about the offending despite C asking "if there was something that's happened between her and him."[15]

The lead up to trial

15. As noted in the Appellant's Chronology (which is agreed), trial counsel emailed C a VMR link on 26 January 2021. She confirmed she had tested it and appears to have been ready and willing to give evidence at the first scheduled trial, until it was vacated on 15 February due to Covid-19 restrictions.

16. In April 2021, shortly before Mr L's trial date of 19 April, C had a mental health crisis. On 19 April, Mr L applied to adjourn the trial. C's mother told the Judge by telephone that C was not well enough to give evidence, but no medical evidence was available because of the COVID-19 situation. Judge Bergseng adjourned the trial.[16]

17. C's condition appears not to have improved by the adjourned trial date of 5 July 2021. Nor had any medical evidence become available to substantiate her condition. Rather, the defence provided an email from C's mother as the basis for their hearsay application, which said C had signed her statement again on 4 July but was "not sleeping well and is still locking herself away in her bedroom therefore, she will not be fit to be present at the court hearing via Zoom".[17] C appears to have initialled a copy of her statement on 6 July 2021, with her mother emailing this to trial counsel. The hearsay application was refused by Judge Berseng that same day and the trial proceeded without C's evidence.[18]

18. Nevertheless, N was cross-examined about why she did not tell her cousin C about the offending. She agreed she had not told C and explained she was not as close to C at that point in her life:[19]

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14 Additional Materials ("AM") at 9.

15 AM at 10.

16 Minute of Judge Bergseng, 19 April 2021 (CoA at 48).

17 AM at 13.

18 *R v L* [2021] NZDC 13278 (CoA at 79).

19 NoE at 31.

> Q. Now I want to ask you about your cousin [C]. You said you saw her daily while you were in Australia?
>
> A. Correct.
>
> Q. And you were very close to her, weren't you?
>
> A. Correct.
>
> Q. And you would have told her that you hated [L]?
>
> A. Yeah, I remember telling her I hated [L].
>
> Q. But you didn't tell her that [L] had done sexual things to you, did you?
>
> A. No.
>
> Q. But this was somebody you were really close to, and you were free and feeling safer in Australia, so why –
>
> A. Okay.
>
> Q. – did you not tell [C] about all these things?
>
> A. I don't know. Probably 'cos me and [C], we were close, really close, but when I got there we just weren't as close as we were back then.

19. It was a short trial, beginning with N's EVI played on 6 July 2021 and ending with guilty verdicts on all counts on 9 July.

The Court of Appeal upheld the hearsay ruling and convictions

20. In the Court of Appeal Mr L's challenge to the hearsay ruling was primarily on the ground that C's mental condition made her unfit to be a witness (and therefore unavailable under s 16(2)(c)). There being no firm evidence of C's mental condition, that ground is no longer pursued.[20]

21. Mr L's secondary argument, that C was "unavailable as a witness" under s 16(2)(b), was also unsuccessful. The Court held that the arrangements made "would have overcome any difficulty caused by the fact that she was in Brisbane", and that there was "still time for appropriate arrangements for remote participation to be arranged" before the time for defence witnesses arrived.[21] Rather than it not being practicable for C to give evidence, the problem is that she was unwilling to cooperate with Mr L's defence.[22]

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20 See Appellant Submissions, 15 January 2023, at [37.2].

21 *L (CA631/2021) v R* [2023] NZCA 246 at [33] and [34] (SC Casebook at 19–20).

22 At [36] and [38] (SC Casebook at 20 and 21).

Admission of hearsay evidence when a witness is "unavailable"

22. Section 18 of the Evidence Act provides that:

> (1) A hearsay statement is admissible in any proceeding if—
>
> (a) the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and
>
> (b) either—
>
> (i) the maker of the statement is unavailable as a witness; or
>
> (ii) the Judge considers that undue expense or delay would be caused if the maker of the statement were required to be a witness.
>
> (2) This section is subject to sections 20 and 22.

23. Section 16(2) defines an "unavailable" witness as someone who:

> (a) is dead; or
>
> (b) is outside New Zealand and it is not reasonably practicable for him or her to be a witness; or
>
> (c) Is unfit to be a witness because of age or physical or mental condition; or
>
> (d) cannot with reasonable diligence be identified or found; or
>
> (e) is not compellable to give evidence.

24. To be admitted, hearsay evidence must also pass through ss 7 and 8 of the Evidence Act 2006: it must be relevant and its probative value must outweigh any risk that the evidence will have an unfairly prejudicial effect on, or needlessly prolong, the proceeding. When considering the prejudicial effect under s 8, "the Judge must take into account the right of the defendant to offer an effective defence".[23]

Hearsay is narrowly circumscribed for good policy reasons

25. Oral evidence is fundamental to the common law trial.[24] Hence for some three centuries admitting hearsay has been considered dangerous,[25] and

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23 Evidence Act 2006, s 18(2).

24 See, for example, *Taniwha v R* [2016] NZSC 123, [2017] 1 NZLR 116 at [1].

25 Edmund Morgan, "Hearsay Dangers and the Application of the Hearsay Concept" (1948) 62 Harv L Rev 177 at 181.

the Evidence Act states the "ordinary way" of giving evidence will be orally in Court. Under the Bill of Rights Act, every defendant has the right to examine prosecution witnesses.[26] Despite the extension of hearsay's admissibility, it will always be "necessarily second-hand and for that reason very often second-best".[27]

Section 16(2)(b) sets out a clear statutory test of general application

26. The appellant submits that the bar to admit hearsay evidence is lower for the defence than for the prosecution. That is incorrect. Section 18 must be party-neutral.

27. Sections 16 through 19 establish tests to admit hearsay evidence which apply uniformly irrespective of whether the application to admit is made by the Crown or by the defence. Both parties must meet the same threshold test where s 16(2)(b) is concerned, satisfying the Court that the intended witness is both outside New Zealand and it is not reasonably practicable for him or her to be a witness. If the defence advances the application, the Court should not lessen the statutory requirement nor look more favourably upon the application.[28]

28. That s 16(2)(b) admits no deviation based upon the applying party is evident from the following factors:

    28.1 The wording of the test, which applies to "any proceeding" and is expressed in party-neutral terms. In contrast, where the Evidence Act contemplates a different test to apply when the Crown or defence seeks to adduce evidence, it expressly articulates it.[29] Even within Subpart 1 of Part 2, the eight sections governing hearsay evidence, the Act explicitly provides different tests for certain statements made by or against the defendant in criminal proceedings.

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26 New Zealand Bill of Rights Act 1990, s 25(f).

27 *R v Riat* [2023] EWCA Crim 1509 at [3].

28 See the discussion of how s 25 interacts with the Evidence Act provisions at [54]ff below.

29 See for example evidence of a defendant's veracity: s 38(1) and (2) providing the different rule as

28.2 Section 16(2)(b)'s predecessor provisions initially applied to civil proceedings only (the 1945 Amendment Act) and were extended to criminal proceedings on the recommendation of the Tort and General Law Reform Committee which considered it "undesirable in criminal cases to have one evidentiary rule for the prosecution and a different rule for the defence".[30]

28.3 Section 25(f) of the Bill of Rights Act confirms the right of defendants to examine prosecution witnesses *and* "to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution". Both defence and prosecution rights to challenge witnesses are equally protected.

29. Nor is there any principled reason why this provision, which is expressed in clearly universal terms, should be read variably depending upon who seeks to rely upon it. The interests of justice require a uniformly cautious approach to admitting evidence without the ability to challenge the evidence-giver. It is for this reason the dual requirements of reliability and necessity underpin its admission. Both requirements must be established no matter who is doing the asking, because they provide appropriate safeguards to prevent the misuse of the hearsay provisions and to ensure that the fair trial process is not undermined. The fair trial process is at risk if the appellant's argument succeeds: it would require a court to read down the necessity requirement for a defence application, admitting hearsay evidence where the need to do so has not been established. Fairness in criminal justice is not limited to the defendant's rights:[31]

> There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking

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between defence and Crown; and propensity evidence about defendants: ss 41 and 43 providing the different rule as between Crown and defence.

30 The 1970 Hearsay Evidence Report expressed explicit observance of certain principles, including: "in general it is undesirable in criminal cases to have one evidentiary rule for the prosecution and a different rule for the defence. The only differentiation which we think justified is that already accepted by the cases, viz that the trial Judge has a discretion to reject evidence which, though technically admissible is likely to have a prejudicial effect on the jury out of all proportion to its probative value. This obviously operates in favour of the accused in criminal proceedings" (*Hearsay Evidence Report* (revised) [1970] NZTGLR Com 2 at [7](ii)) (Crown Authorities at **Tab 12**).

31 *Attorney-General's Reference (No 3 of 1999)* [2001] 2 AC 91 (HL) at 118.

> into account the position of the accused, the victim and his or her family, and the public.

30. Finally, there is no policy need to go beyond the plain words of s 16 in order to advance defence objectives. Other provisions can be used to ensure defence-specific needs are met on the facts when assessing a hearsay application. For example, resourcing difficulties can underlie a hearsay application under s 18(1)(b)(ii): instead of witness unavailability, hearsay may be admitted if "undue expense or delay would be caused if the maker of the statement were required to be a witness." And s 8, with its explicit reference to the right to offer an effective defence, will exclude unduly prejudicial hearsay evidence.[32]

Section 16(2)(b) requires a fact-specific enquiry into whether it is "reasonably practicable" for the statement maker to be a witness

31. Whilst the threshold of unavailability is party-neutral and does not fluctuate depending on who seeks to adduce the evidence, "reasonably practicable" is a fundamentally contextual concept which must be applied according to the circumstances of the party seeking to adduce the hearsay statement.

32. Where "reasonably practicable" or synonymous phrases appear in other statutory contexts, they are necessarily "fact orientated".[33] "Practicable" implies a narrower ambit than what is simply "physically possible".[34] It will require consideration of what was possible, the steps actually taken, and what means and resources were available to the person taking those steps.[35]

33. Whether it is "reasonably practicable" to secure the witness's attendance or obtain their evidence has been the consistent standard for admitting the evidence of an overseas witness as hearsay in s 16(2)(b)'s

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32 For example, to exclude unduly prejudicial Crown hearsay in *Li v R* [2020] NZCA 388 at [23]–[24].

33 *New Zealand Pork Industry Board v Director-General of the Ministry of Agriculture and Forestry* [2013] NZCA 65 at [66].

34 *Edwards v National Coal Board* [1949] 1 KB 704 (HL) at 712 (per Asquith LJ).

35 *Malone v R* [2010] NZCA 59 at [15]–[19] (considering the expression "as soon as practicable" in the context of s 45(3)(a) of the Evidence Act 2006).

predecessors.[36] In 1959 the Court of Appeal confirmed the focus was on whether it was "feasible" to bring the witness back to New Zealand to give evidence.[37] No divergence from that interpretation has ever been suggested as successive Parliaments carried the same phrase forward on the recommendation of various legal expert committees.[38]

34. In short, the respondent submits that if it is demonstrably feasible in the circumstances for someone to give evidence then it is reasonably practicable for them to be a witness.

35. Finally on this point, although the threshold test is party-neutral, the assessment of what is reasonable will inevitably bite differently for different parties with different resources available to them. Additional tools will often be available to the prosecution which are not so readily accessed by the defence.[39] Financial consequences will impact the parties differently. Such factors assume significance when the Court questions what steps a party has taken to have a witness available and, equally, what steps it has not. Naturally when the prosecution is doing what it can to "get its tackle in order" before applying to have hearsay admitted, it will often have more options available to it than the defence.[40]

What factors will make it "reasonably practicable" to give evidence?

36. Both parties agree an array of factors will go towards "reasonable practicability".[41] However, the usual factors identified in the case law are

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36 From 1945, s 3(1)(c) of the Evidence Amendment Act 1945 permitted the statement of a witness "beyond the seas" to be admitted as hearsay in a civil proceeding if it was "not reasonably practicable to secure his attendance". From 1980, s 2(2) of the Evidence Amendment Act (No 2) extended the possibility of admitting documentary hearsay to criminal trials, where the statement maker was "outside New Zealand and it is not reasonably practicable to obtain his evidence."

37 *Union Steamship Company of New Zealand Limited v Wenlock* [1959] NZLR 173 (CA) at 191 per Gresson P (Appellant Authorities at 1018).

38 The Torts and General Law Reform Committee *Hearsay evidence: report* (1967) at 25 (Crown Authorities at **Tab 11**); The Torts and General Law Reform Committee *Hearsay evidence: report (revised)* (1970) at 25, 28, 30 (Crown Authorities at **Tab 12**); New Zealand Law Commission *Evidence Law: Hearsay* (PP15, 1991) at 42 (Crown Authorities at **Tab 13**); New Zealand Law Commission *Evidence: Code and Commentary* (R55, 1999, vol 2) at 46 (Appellant Authorities at 1149).

39 For example, the prosecution is able to seek the formal assistance from foreign governments through the Mutual Assistance in Criminal Matters Act 1992 to locate people in foreign countries, ask them for voluntary statements, or take their evidence in a formal setting.

40 *R v Gonzales* (1993) 96 Cr App R 399 (CA) at 404.

41 Cf. Appellant Submissions at [37.1].

what measures were taken and could have been taken to obtain the evidence,[42] the time, effort and cost involved in giving evidence,[43] the inconvenience giving evidence would cause the witness,[44] the nature of the case,[45] and the potential impact of the evidence on the case.[46] Some of those factors had more significance historically, when the question turned on whether an individual should be required to travel to New Zealand for the purposes of being a witness, necessitating the time, cost and inconvenience of travel. Remaining in contact with witnesses who have moved overseas and providing evidence to the Court that reasonable steps have been taken to enable them to be a witness is key.[47] All these factors go to the practicalities of giving evidence: a witness remains available to give evidence if they are practically capable of doing so but nevertheless decide not to cooperate.

37. Videoconferencing technology and the courts' growing tolerance for witnesses giving evidence from outside the courtroom (by CCTV, VMR, AVL, or pre-recording) mean the practicability of an overseas witness giving evidence has increased in recent years. However, the fact that

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42 Pursuing purely legal channels will not likely suffice: in *Solicitor-General v X*, after mutual assistance requests to the Chinese central authority had gone unanswered, the Court of Appeal required further evidence that the Crown had contacted the witness directly (or evidence of why that was not permissible or practicable) before ruling him unavailable: *Solicitor-General v X* [2009] NZCA 476 at [38]–[39].

43 When returning from beyond the seas to give evidence required a steamship journey, this factor was more readily satisfied: see *Union Steamship Company of New Zealand Limited v Wenlock* [1959] NZLR 173 (CA) at 191 (per Gresson P) (Appellant Authorities at 1018).

44 Even a video-link may cause witnesses inconvenience if, for example, they are forced to travel to a hearing centre to join a trial by AVL and give evidence in the middle of their night: *Clout v Police* [2013] NZHC 1364 at [17] (Crown Authorities at **Tab 1**).

45 For example, at a trial for disorderly behaviour the Court justifiably dispensed with the appearance of two witnesses who heard the disturbance and had since returned to the United Kingdom: *Thompson v Police* [2012] NZHC 2234, [2013] 1 NZLR 848 at [34] (Crown Authorities at **Tab 2**).

46 A rape complainant's evidence is of "crucial significance": *R v M* [1996] 2 NZLR 659 (CA) at 663 (Appellant Authorities at 586).

47 For example, *Juskelis v R* [2016] EWCA Crim 1817 (witness deported to Lithuania before trial, zero enquiries made into his availability) (Crown Authorities at **Tab 3**); *R v Ti (No 2)* [2015] ACTSC 208 (witness willing, but could not give evidence on oath from Singapore without a mutual assistance request granted by the Singaporean authorities – DPP had failed to comply with those formalities in advance) (Appellant Authorities at 835); *R v Bath* 2010 BCSC 307 at [138] (witness only willing to give evidence on non-school days; Crown had not explored giving evidence outside school hours by videolink) (Crown Authorities at **Tab 4**); *R v Yu (Mei Hua) (No 2)* [2006] EWCA Crim 349 (four Chinese witnesses, unable to travel without passports and exit visas, facing obstacles of time difference and unfamiliarity to set up a video link (which had only just become available) in a short time frame before trial immediately after Christmas mean it was not reasonably practicable to secure their attendance) (Crown Authorities at **Tab 5**).

remote participation is theoretically possible is, of course, not enough. It must be demonstrably feasible in the circumstances. For example, the time difference or local internet stability might make it impossible or an unreasonable inconvenience.[48] Where the secure Court video link does not function, a witness giving evidence by WhatsApp or other less secure means may not be acceptable (particularly where it is unknown who is in the room with them as they give evidence).[49]

38. Whether a witness is "compellable" through some legal process is not part of the s 16(2)(b) test. Section 16(2)(e) confirms that anyone "not compellable to give evidence" will be unavailable, but that paragraph refers to the co-defendants, bank officers, Heads of State, Judges, and so on rendered legally non-compellable by specific provisions of the Evidence Act.[50] Any person is eligible to give evidence, and any person eligible is compellable to give evidence (unless named in ss 72 to 75 of the Evidence Act).[51] No-one beyond the jurisdiction of the New Zealand courts is *factually* a compellable witness in a New Zealand trial, but there is no *legal* barrier to their compellability.[52] That s 16(2)(b) explicitly refers both to the fact of the statement-maker being outside the jurisdiction *and* the reasonable practicability of being a witness illustrates the point. As was said of its predecessor section in the 1945 Act,[53] it should not be "read as meaning the compelling of his attendance as a witness at the trial by process of Court, because the mere fact that he is 'beyond the seas' would free him from compulsion."[54] Overseas witnesses become

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48 For example, in *R v Yu (Mei Hua) (No 2)* [2006] EWCA Crim 349 (Crown Authorities at **Tab 5**) the possibility of a video link on short notice was not even considered, because the time difference and short turnaround made it an impossible logistical exercise (in 2005).

49 *R v Kadir (Abdul)* [2022] EWCA Crim 1244 (a prospective defence witness was unable to give evidence by the court-approved system after technical difficulties in Bangladesh. An application to adduce his evidence by WhatsApp call was refused. The Court of Appeal agreed with the first instance Judge that the witness was, as a result, unavailable (though his statement was not admissible because it did not meet the threshold for reliability) (Crown Authorities at **Tab 6**).

50 Evidence Act 2006, ss 72–75; New Zealand Law Commission *Evidence: Code and Commentary* (R55, 1999, vol 2) at [C80] (Appellant Authorities at 1150).

51 Evidence Act 2006, s 71.

52 *Solicitor-General v X* [2009] NZCA 476 at [35] (Appellant Authorities at 998) and *Haunui v R* [2020] NZSC 153, [2021] 1 NZLR 189 at [37] (Crown Authorities at **Tab 7**).

53 Albeit noting the provision then read "beyond the seas and it is not reasonably practicable to secure his attendance": s 3(1)(c), Evidence Amendment Act 1945.

"unavailable" in the relevant sense not by virtue of that fact and their resulting factual non-compellability, but only if it is also not reasonably practicable for them to be a witness.

Uncooperative does not equate to "unavailable"

39. Taken literally, the appellant's submissions suggest that whether C was "persuadable" was the key factor determining her availability. However, the Law Commission expressly rejected including unwillingness to give evidence in its Evidence Code's definition of "unavailability":[55]

> [59] The Law Commission originally considered that a witness who refuses to give evidence should be considered unavailable for the purpose of the hearsay rule. However, the practitioners who attended the consultative seminar series were uneasy about admitting the hearsay statements of someone physically present in court who simply refuses to testify and be subjected to cross-examination. The Commission accepts that such an extension to the grounds of unavailability would tend to encourage witnesses to opt out of testifying for any reason at all, which is clearly undesirable.

40. This passage was affirmed in *Manase*, where the Court of Appeal agreed it would be:[56]

> … seldom, if ever, be appropriate to admit hearsay evidence simply because the witness would prefer not to face the ordeal of giving evidence or would find it difficult to do so. To adopt that approach would be to tilt the balance too far against the accused or opposite party who is thereby deprived of the ability to cross-examine.

41. Shortly thereafter the Court of Appeal affirmed again that exceptions to the hearsay rule require a "qualifying criterion of need to resort to hearsay evidence rather than one of mere convenience."[57] The Crown could not admit as hearsay the statement of a complainant who no longer wished to give evidence against her partner, to whom she was pregnant at the time of trial, just because it would be "very stressful" for her.[58] Any

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54 *Union Steamship Company of New Zealand Limited v Wenlock* [1959] NZLR 173 (CA) at 196 per Cleary J (Appellant Authorities at 1026).

55 New Zealand Law Commission *Evidence: Reform of the Law* (NZLC R55, 1999, vol 1) (Crown Authorities at **Tab 14**).

56 *R v Manase* [2001] 2 NZLR 197 (CA) at [30](b) (Appellant Authorities at 601).

57 *R v MT* CA269/02, 4 November 2002 (Crown Authorities at **Tab 8**); see Appellant's Submissions at [62] and [63].

58 *R v MT* CA269/02, 4 November 2002 at [4] (Crown Authorities at **Tab 8**).

inroad into allowing hearsay statements to be admitted in such circumstances should be a matter for Parliament.[59]

42. Given the Court's comments, it is telling that s 16(2), enacted some four years later, does not include an unwilling or unpersuadable witness, either in New Zealand or abroad, within its definition of unavailability.

43. Previous cases about overseas witnesses have from time to time referred to an overseas witness's "willingness". But that has been in the context of being willing to return to New Zealand to give evidence at inconvenience to themselves,[60] or of being willing to give evidence only on a condition unacceptable to the party seeking to call them.[61] Unwillingness to give evidence from overseas can only constitute unavailability where the statement maker has a good reason established on the evidence before the Court, and that good reason (such as inconvenience, but not mere reluctance or emotional difficulties) makes it unfeasible to give evidence.[62] Mischief could easily arise if sending a reluctant witness overseas were sufficient to ensure they were "unavailable" and their statement admissible as hearsay.

44. The appellant, while no longer arguing C was mentally unfit and thus unavailable via s 16(2)(c), also suggests that her mental health was nevertheless "an important contextual factor when considering whether she was persuadable."[63] First, the respondent reiterates that the statutory test is not one of persuasion. Second, mental health is specifically addressed in s 16(2)(c), with Parliament fixing the threshold for unavailability at "unfit to be a witness because of … mental condition." It would undermine the purpose of the legislation if an overseas statement-maker with some mental ill-health but no supporting

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59 At [35].

60 *Union Steamship Company of New Zealand Limited v Wenlock* [1959] NZLR 173 (CA) at 191 per Gresson P and 199 per Cleary J (Appellant Authorities at 1018 and 1026).

61 *Gao v Zespri Group Ltd* [2021] NZCA 442, [2022] 2 NZLR 219 at [52]–[53] (Appellant Authorities at 323–324).

62 Hence the court often decries the absence of evidence about the reasons for the proposed witness's change of heart: *R v M* [1996] 2 NZLR 659 (CA) at 663 (Appellant Authorities at 586); *R v C* [2006] EWCA Crim 197 (Crown Authorities at **Tab 9**).

evidence of it or its severity, who did not satisfy that threshold for unavailability, could nevertheless satisfy the preceding provision simply by simultaneously adopting an uncooperative attitude.

It was "reasonably practicable" for C to be a witness

45. It was demonstrably feasible for C to give evidence at Mr L's trial.

46. In January 2021 defence counsel emailed C the court VMR link, and she confirmed she had tested it.[64] C amended, signed, and scanned through her statement. On 4 July she signed her statement again.[65] On 6 July (the day the trial was due to start), she initialled each page and her mother emailed them to defence counsel.[66] Her mother's email to trial counsel implicitly confirmed she was home, albeit "not sleeping well and locking herself in her bedroom."[67] It necessarily follows that C was present in a location with established connectivity from which she was able to connect remotely to the proceedings via VMR.

47. In the circumstances of this case, appropriate steps had been taken enabling C to give evidence via permissible means using working technology, at an appropriate time and from a suitable location at minimal inconvenience to her. The converse of what s 16(2)(b) requires was therefore established. It was demonstrably feasible for C to be a witness at Mr L's trial. That she was not sleeping well and was locking herself in her bedroom does not negate the feasibility of her participation. Nor does the fact that she decided not to cooperate.

48. Because the respondent's overarching submission is that C was demonstrably available to give evidence, this is not a case which turns on what other steps the party seeking to adduce the hearsay evidence could have taken and the reasonableness of their omission. Strictly speaking, the Court does not need to ask itself what more could have been done,

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63 Appellant's submissions at [63].

64 See Chronology attached to Appellant's Submissions at 27 January.

65 CA AM at 12.

66 CA AM at 9–11.

67 CA AM at 13.

because sufficient steps had already been taken enabling C to effectively participate in Mr L's trial. With that said, because C was in Australia, defence counsel *could* have sought a New Zealand subpoena to serve on her under ss 154 to 156 of the Evidence Act which, potentially, might have added to the persuasive force of the requests that she cooperate.[68] However, it seems unlikely that this would have had any practical effect in circumstances where C (through her mother) was asserting ill-health as the basis for her refusal to cooperate.

No alternative "admissibility routes"

A. Unavailability of witness is exhaustively defined in ss 18(1)(b)(i) and 16

49. In a novel alternate claim to admissibility, the appellant suggests the Evidence Act "does not purport to *exhaustively* define "unavailable as witness" for the purposes of s 18(1)(b)(i), such that "a provably unpersuadable witness" can nevertheless be deemed unavailable in law.[69] This argument is based upon the omission of "if, but only if", a phrase which was not carried over from s 2(2) of the Evidence Amendment Act (No 2) 1980 into s 16(2). It also claims support from *Manase,* a 2001 decision of the full Court of Appeal, addressing a general residual exception to the hearsay rule at common law.

50. The first difficulty with this argument is that s 18 of the Evidence Act uses the term "unavailable as a witness". That term is defined in s 16(2) "for the purposes of this subpart" in five distinct ways using the equative term "is". "Is" as a definitional tool is restrictive, the practical equivalent of "means", which introduces a "complete and exhaustive definition" (in contrast to other terms, such as "includes").[70]

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68 Whilst such a subpoena may "require the witness to give evidence … at a place in New Zealand or Australia", its enforceability in Australia is less clear. Section 161 envisages that the (New Zealand) Court which issued the subpoena may issue a certificate stating that the witness failed to comply with it. But there does not appear to be any provision making it an offence in Australia to refuse to comply with a New Zealand subpoena; unlike the equivalent subpoena in Australian competition proceedings, which gives the New Zealand High Court the power to issue a warrant to arrest and fine a person who is certified to have failed to comply with an Australian subpoena (Trans-Tasman Proceedings Act 2010, s 89).

69 Appellant submissions at [37.3], [68], [69].

70 *Burrows and Carter Statute Law in New Zealand* (6th ed, 2021) at 567 (Crown Authorities at **Tab 15**). See for example, *R v Webb and McLauchlan* [1924] NZLR 934 (CA) at 941: "where a statute declares a

51. The omission of the phrase "if, but only if" speaks to the simplification and modernisation of statutory language. Removing this redundant phrasing should not be read as signalling Parliament's intention to expand the interpretation of an unavailable witness beyond the express terms of the section.[71]

52. Second, *Manase* does not indicate a permissive approach to admitting hearsay evidence. On the contrary, the Court in *Manase* favoured a precise, consistent and disciplined approach to the admission of such evidence, "to enable this part of the law to be administered in a way which is not only reasonably predictable, but also consistent and fair to the competing interests."[72]

53. The appellant's argument also fails to take account of the Evidence Act's drafting and enactment *after* the *Manase* decision, with the express purpose of drawing "together the common law and statutory provisions into one comprehensive scheme."[73] It was intended to codify hearsay law, whether derived from earlier statutes or from common law principles, in a single source. Had Parliament intended to incorporate a common law residual category, s 16 could be expected to say this in clear terms.[74] It does not.

B. There is no scope to imply a further exception into s 17

54. The appellant also suggests the Bill of Rights may be a direct route to evidence admissibility for "critical exculpatory hearsay statements",[75] or that it "requires courts to read s 17 EA as subject to an implied exception that avoids restrictions on the illimitable right to a fair trial".

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certain word or expression to "mean" so-and-so, the definition is explanatory and restrictive in contradistinction to the use of the word "includes," which is extensive."

71 As the Parliamentary Counsel Office *Plain Language Standard* suggests, redundant archaic terms should be removed from modern legislative drafting. One of the examples it gives lists "only if" as an equivalent to "is": Parliamentary Counsel Office *Plain Language Standard Checklist* at [8.10] ("Avoid archaic language"), available at: https://www.pco.govt.nz/8.10/.

72 *R v Manase* [2001] 2 NZLR 197 (CA) at [19] (Appellant Authorities at 598).

73 Ministry of Justice *Evidence Bill 2005 – Initial Briefing to Minister of Justice* (17 November 2005) at 1 (Crown Authorities at **Tab 16**).

74 See, for example, the UK residual category (discussed further below) in s 114 of the Criminal Justice Act 2003.

75 Appellant's Submissions at [71].

55. However, nothing in the Bill of Rights Act suggests it creates new routes for evidence admissibility. It was neither intended to do so nor has it ever been interpreted as doing so. As this Court held in *Morton:*[76]

> [64] The limitation of defences or evidence which might otherwise be available to a defendant is not necessarily inconsistent with s 25 [of the Bill of Rights Act] or, if it is, may be able to be justified under s 5. … Nor is it necessarily inconsistent with s 25 for the legislature to … place limitations on evidence which a defendant may wish to adduce (for instance along the lines of s 44 of the Evidence Act which we will discuss later). We do not see s 25 as automatically trumping admissibility rules merely because they may operate otherwise than in the best interests of a defendant.

56. Second, s 17 is already consistent with the right to a fair trial and to present an effective defence. The Evidence Act is designed to promote the rights guaranteed by the Bill of Rights Act.[77] As noted above, it explicitly recognises the right to present an effective defence in several sections.[78] If Parliament intended such a backstop exception for fair trial rights to apply to hearsay evidence, it could have made it equally explicit.

57. Third, the right to "be present at the trial and to present a defence" guaranteed by s 25(e) of the Bill of Rights Act is the right to a trial according to law.[79] Admissibility of hearsay is governed by the carefully crafted provisions of the Evidence Act. Section 6 of the Bill of Rights Act only requires a Bill of Rights Act consistent interpretation where the plain meaning is not already consistent. If it is, there is no requirement to strain language.

58. Fourth, the United Kingdom Parliament created a legislative catch-all category to the effect sought by the appellant, where hearsay not admissible under any other provision may be admitted if "the court is satisfied that it is in the interests of justice for it to be admissible".[80] This

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76 *Morton v R* [2016] NZSC 51, [2017] 1 NZLR 1 at [64].

77 Evidence Act 2006, s 6(b).

78 Evidence Act 2006, ss 8(2), 67(2), and 68(5).

79 The Bill of Rights Act 1990, s 25(c) provides the right to be presumed innocent "until proved guilty according to law".

80 Criminal Justice Act 2003, s 114(1)(d).

provision came into force before our Evidence Act; had Parliament intended to include such an alternative to the hearsay tests, it had an example available to it.

59. Of note, one of the mandatory factors an English or Welsh court must consider when deciding whether to admit hearsay under this residual provision is "whether oral evidence of the matter stated can be given and, if not, why it cannot."[81] The Court of Appeal has cautioned that test must not be used to circumvent the unavailability definition in s 116:[82]

> [24] … para (g) refers to the inability of the witness to give evidence, not her reluctance or unwillingness, understandable though her attitude may be. That is consistent with the restrictions in s 116. Cases must be rare indeed in which such significant potentially prejudicial evidence as that of D should be admitted as hearsay where the maker of the statement is alive and well and able, although reluctant, to testify, and her reluctance is not due to fear (ie the condition in s 116(2)(e) is not satisfied.

60. The Criminal Justice Act 2003 (UK) also provides an example of the legislature expressly extending the concept of an unavailable witness to an unwilling witness: but only where that unwillingness is "through fear", which must be objectively established.[83] Unwillingness per se does not equate with unavailability.

61. Finally, while the appellant relies upon Canadian and English rape shield cases in support of his argument, these address an entirely different situation, where the statutory admissibility rule had been too broadly drafted and was inconsistent with the right to a fair trial. It is not inconsistent with the right to a fair trial if inadmissible evidence is excluded.

62. To the extent the appellant relies upon the hearsay rules in Australia, Canada, and the United States, the reason for doing so is opaque. The Australian Evidence Act does not have a separate limb of unavailability for

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81 Criminal Justice Act 2003, s 114(2)(g).

82 *R v Z* [2009] 1 Cr App R 34 (CA) at [24] (Crown Authorities at **Tab 10**).

83 Criminal Justice Act 2003, s 116(e). The other unavailability subparagraphs largely mirror ours 16(2).

overseas witnesses,[84] but their general "reasonable steps" test is similar to our own.[85] Canada's common law test and its incorporation of their Constitutional rights does not assist with the interpretation of our Evidence Act.[86] In the United States, the Constitution permits the court to override the rules of evidence where the evidence is "vital" to the defence.[87] However, that line of authority emerged to counter that jurisdiction's antiquated, "complex, restrictive", evidence rules.[88] Given New Zealand's regular reviews of and amendments to the Evidence Act, there is no pressing need to read additional glosses onto its plain language to ensure fairness.

Even if C's statement were admissible hearsay, its exclusion has not caused a miscarriage of justice

63. If C's statement was erroneously excluded, an error at trial has occurred. But the Court can nevertheless be sure of the appellant's guilt; there was no real risk this error affected the verdicts.[89]

No miscarriage has occurred

64. C's evidence would have contributed very little to the trial overall. Its exclusion did not alter or materially impact the evidential landscape, nor the defence advanced at trial.

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84 Instead, a proposed witness will be unavailable if "all reasonable steps have been taken, by the party seeking to prove the person is not available, to find the person or to secure the person's attendance, but without success": s 4 of Part 2 of the Dictionary to the Evidence Act 1995 (Cth).

85 Contrary to the Appellant Submissions at [83], there is no "higher burden" imposed upon the Crown. As submitted above, the Crown can be expected to do more because it can do more to enable a witness to give evidence from overseas, and where evidence is less important to the proceeding fewer steps may be necessary.

86 It seems likely that *Shrubsall*, the only case cited to show the "more generous" approach to admitting hearsay evidence, would have been decided the same way in New Zealand: eye witnesses to an aggravated robbery had made Police statements, but could not be found by defence counsel before the defence case opened: *R v Shrubsall* (2000) 188 NSR (2d) 294 (Appellant's Authorities at 821). It could be said that not every trial Judge would have had the same attitude towards defence counsel who only sought witness subpoenas three weeks into the trial and only after that realised they were unable to locate the proposed witnesses.

87 Edward Imwinkelried "The Liberalisation of American Criminal Evidence Law – a possibility of convergence" [1990] Crim LR 790 (Appellant Authorities at 1097).

88 Ibid.

89 Criminal Procedure Act 2011, 232; *Wiley v R* [2016] NZCA 28, [2016] 3 NZLR 1 at [47], approved in *Haunui v R* [2020] NZSC 153, [2021] 1 NZLR 189 at [67] (Crown Authorities at **Tab 7**). Contrary to the Appellant's Submissions at [89], it was not conceded in the Court of Appeal that the convictions could not stand if C's evidence was found to be admissible.

65. There appear to be three matters of significance to the defence in C's statement. However, all were before the jury:

65.1 N hated the appellant and had told C that – which N accepted in her evidence.[90]

65.2 N did not tell C about Mr L's offending – which N accepted in her evidence, explaining that they were no longer "as close".[91]

65.3 N told C she wanted to get rid of Mr L – N was not asked about this in her evidence, but she was asked, and denied, wanting "to do something to get rid of him".[92]

66. The absence of C's evidence did not prevent Mr L from presenting an effective defence. He gave evidence denying the offending. His counsel emphasised that N hated him,[93] that her disclosures were inconsistent,[94] and that she was not a credible witness.[95] Defence counsel highlighted the fact that N disclosed rape by another person but when asked had said Mr L had not raped her.[96]

67. The substance of C's evidence would have made little impact at trial. Essentially all of it was before the jury through N's evidence: she had motive to make a false complaint and had not disclosed the offending to a cousin with whom she had previously been close. But N had also not disclosed the offending to her counsellor or to other close family members, as she explained in her evidence:[97]

> I knew it was going to be bigger. I didn't want my family to know, I didn't want my mum to know…I knew she wasn't going to believe me and I knew she was going to pick L anyway.

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90 NoE 23, 31. She also told F she hated him: NoE 27.

91 NoE 31.

92 NoE 23.

93 Defence closing, CoA at 103.

94 CoA at 105–107.

95 CoA at 107.

96 CoA at 108–109.

97 NoE 10.

68. The appellant claims that C giving evidence would also have shown the jury he had family members willing to come to his forensic aid and give evidence undermining N.[98] However, the jury would have understood that this was a divided family. N's own mother disbelieved her and remained a supporter of Mr L.[99] Against that backdrop, the continued support of an extended family member living abroad would have assumed little significance.

69. Mr L's defence was not materially impacted by the absence of C's evidence. There is no real risk that its inclusion could have led to different verdicts.

Erroneous evidential rulings do not, without more, create an unfair trial

70. The appellant contends that his convictions cannot stand if C's evidence was properly admissible because the erroneous exclusion of her evidence rendered his trial "unfair".

71. Erroneous evidential rulings do not typically lead to unfair trials. An unfair trial is one where an irregularity has so permeated the whole proceeding it is rendered irremediably unfair.[100] Admitting and excluding evidence is not that type of error, without more. Even where trial counsel is the cause of defence evidence not being called, an appeal court looks at whether the error created a real risk of affecting the trial outcome under s 232(4)(a).[101] One rare example where an evidential ruling made the trial unfair was *Haunui*.[102] It was not the strength the evidence might have added to a weak defence case that made its exclusion unfair, but that the Crown presented a case to the jury which it knew to be questionable and incomplete.[103] No such argument is available to this appellant. His suggestion that the absence of C's evidence "axiomatically trespassed L's

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98 Appellant's Submissions at [97].

99 EVI at 29, ln 18 (Vol Ex 46).

100 *Condon v R* [2006] NZSC 62, [2007] 1 NZLR 300 at [77]–[78].

101 *Hall v R* [2015] NZCA 403, [2018] 2 NZLR 26 at [9], citing *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730 at [65].

102 *Haunui v R* [2020] NZSC 153, [2021] 1 NZLR 189 (Crown Authorities at **Tab 7**).

103 At [77].

right to present a defence and overall right to a fair trial" does not withstand scrutiny.[104]

Conclusion

72. C was not unavailable as a witness and her hearsay statement was correctly excluded. In any event, there is no real risk it could have affected the outcome of the trial. The appeal should be dismissed.

12 February 2024

EJ Hoskin | RK Thomson
Counsel for the respondent

TO: The Registrar of the Supreme Court of New Zealand.

AND TO: The appellant.

[104] Cf. Appellant's Submissions at [93].