Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

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MEDIA RELEASE

L (SC 80/2023) v THE KING

(SC 80/2023) [2024] NZSC 153

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest: www.courtsofnz.govt.nz.

Suppression

Publication of the name, address, occupation or identifying particulars of the appellant is prohibited pursuant to s 200 of the Criminal Procedure Act 2011.

Publication of the name, address, occupation or identifying particulars of any complainant under the age of 18 years who appeared as a witness is prohibited pursuant to s 204 of the Criminal Procedure Act 2011.

Publication of the name, address, occupation or identifying particulars of the complainant is prohibited by s 203 of the Criminal Procedure Act 2011.

What this judgment is about

This appeal is about when the statement of a proposed witness can be admitted as hearsay evidence when that person is outside of New Zealand and unwilling to give evidence via audiovisual link.

To admit hearsay evidence under the Evidence Act 2006, one requirement is that "the maker of the statement is unavailable as a witness". Under s 16(2)(b) of the Evidence Act, a proposed witness will be unavailable if they are "outside New Zealand and it is not reasonably practicable for [them] to be a witness". The key issue raised by this appeal is in what circumstances it will not be "reasonably practicable" for an overseas person to give evidence.

Background

The appellant, L, faced 14 charges of sexual abuse of the complainant. At trial, the appellant had intended to call C, a relative of the complainant, to give evidence. Among other matters, C's brief of evidence described that she and the complainant were close, that the complainant had denied any sexual offending against her by the appellant, and that the complainant wanted to find a way to get rid of him.

The intention was that C would give evidence remotely from Australia via audiovisual link, but the appellant's trial was postponed due to COVID-19 restrictions. By the new trial date, it became clear C would not give evidence because her mental health had declined, and her mother told trial counsel that she refused to come out of her bedroom or see a doctor. Counsel for the appellant sought adjournment of the trial to preserve the appellant's fair trial rights which was granted, and another new trial date was set. However, by this date the position had not changed and C remained unwilling to give evidence via audiovisual link. An application was made to admit C's statement as hearsay evidence on the basis that she was "unavailable as a witness".

The Courts below

The trial Judge declined the appellant's application finding that there was not enough evidence to find that C was unavailable. The trial continued without C's evidence, and the appellant was convicted on all charges.

The appellant appealed against his convictions to the Court of Appeal, arguing that C was unavailable and her hearsay statement should have been admitted. The Court of Appeal dismissed the appeal.

The Supreme Court granted leave to appeal the decision of the Court of Appeal in general terms as to whether the Court of Appeal was correct to dismiss the appeal, but asked counsel to concentrate on the applicability of s 16(2)(b) of the Evidence Act to the facts of this case.

Supreme Court decision

The Supreme Court dismissed the appeal against conviction by a majority, comprising Ellen France, Williams, Kós and Miller JJ although for differing reasons. Glazebrook J would have allowed the appeal.

Reasons

Majority

Ellen France, Williams and Miller JJ found that C was not unavailable as a witness under s 16(2)(b).

In reaching this conclusion, Ellen France, Williams and Miller JJ set out the correct approach to s 16(2)(b), noting that it is a contextual inquiry and requires the court to consider what is reasonably practicable in the circumstances of each case. This inquiry is primarily directed towards the practicalities and associated difficulties of a proposed witness who is located overseas giving evidence, but also must take into account the purposes underlying the general

exclusion of hearsay evidence (see at [69]–[70]). The factors to be considered in deciding whether it is "reasonably practicable" for a person to give evidence under s 16(2)(b) include, but are not limited to, the following:

(a) the steps taken to obtain evidence from the proposed witness and the steps that could have been taken, taking into account the means and resources available to the party who wants to call the proposed witness;
(b) the effort and cost involved in the proposed witness giving evidence;
(c) any resulting inconvenience to the proposed witness;
(d) the nature of the case; and
(e) the importance of the evidence to the case.

Some guidance on how these factors should apply was also provided including, among other matters, the fact that the reasonable steps to be taken to obtain evidence may differ between parties with different resources. Further, it was noted that assessing the importance of the evidence requires considering indicators of reliability of the evidence. While reliability is also a distinct inquiry in deciding when hearsay can be admitted, the reliability or unreliability of a statement will also be relevant when assessing what will be reasonably practicable. However, the mere fact that a statement is reliable is not enough on its own for a proposed witness to be considered unavailable (see at [70]–[82]).

Consideration was also given to how s 16(2)(b) applies to a proposed witness who remains unwilling to give evidence even after all reasonable steps have been taken to obtain their evidence, and it is practically possible for them to give evidence. While in some cases the unwillingness of the witness is relevant to the question of whether they are unavailable, what is "reasonably practicable" must be mainly focused on the logistics of obtaining someone's evidence because they are overseas. Like reliability, neither is unwillingness on its own sufficient for a proposed witness to be deemed unavailable (see at [83]–[106]). It was also noted that s 16(2) is exhaustive of the situations in which a proposed witness will be unavailable (at [99]).

Applying this test to this appeal, it was noted that there was no real effort, cost or inconvenience to C in giving evidence remotely. While the seriousness of the allegations, in terms of the nature of the case, supported admissibility, in the view of Ellen France, Williams and Miller JJ the importance of the evidence was much more finely balanced, and was reduced by the fact that key issues raised by C's statement were addressed at trial by other witnesses and forms of evidence. Consideration of reliability was limited because there were no findings on that point, but it was noted that a reliability warning may have been given in relation to the statement. This assessment led to the conclusion that C was not unavailable under s 16(2)(b), but rather that she was unwilling. Therefore, C's statement was correctly not admitted as hearsay, meaning there had been no miscarriage of justice under the Criminal Procedure Act 2011 (see at [107]–[119]).

Concurrence

Kós J, while agreeing with the result, disagreed as to these reasons. Kós J would have found that it was not reasonably practicable for C to be a witness under s 16(2)(b), and that C's statement should have been admitted as hearsay on the basis that she was unavailable. Specifically, Kós J disagreed with Ellen France, Williams and Miller JJ in how to deal with an

unwilling potential witness. Kós J considered that unavailability should be judged from the perspective of the party trying to call the person as a witness. Therefore, when all reasonable efforts have been made but the proposed witness still refuses to cooperate, and cannot practically be compelled due to being overseas, s 16(2)(b) will be satisfied. In the present case, as long as C refused to cooperate and could not be compelled to do so, it was not reasonably practicable for her to be a witness (see at [125], [142] and [143]).

However, because the most important matters raised by C's statement were admitted by the complainant in evidence and had been emphasised to the jury, Kós J considered there had been no miscarriage of justice and therefore agreed the appeal should be dismissed (see at [144]–[147]).

Dissent

Glazebrook J dissented. Glazebrook J agreed with Kós J that unavailability under s 16(2)(b) should be judged from the perspective of the party trying to call the person as a witness, and that this will be satisfied where all reasonable efforts are made, but the person remains unwilling and cannot be compelled. On this basis, Glazebrook J agreed with Kós J that C was unavailable under s 16(2)(b) (see at [148]–[150], and [160]–[163]).

Glazebrook J disagreed with Ellen France, Williams, Kós and Miller JJ that no miscarriage of justice had resulted from the exclusion of C's evidence, and therefore would have allowed the appeal. She considered that C's statement was important evidence corroborating the appellant's defence and different in nature to other evidence presented at trial (see at [151], and [178]–[183]).

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