ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION AND IDENTIFYING PARTICULARS OF APPELLANT PURSUANT TO S 200 OF THE CRIMINAL PROECEDURE ACT 2011.

NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY SS 203 AND 204 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA631/2021
[2023] NZCA 246

BETWEEN	L (CA631/2021) Appellant
AND	THE KING Respondent

Hearing:	14 February 2023
Court:	Cooper P, Ellis and Churchman JJ
Counsel:	H G de Groot and E T Blincoe for Appellant R K Thomson for Respondent
Judgment:	19 June 2023 at 11.00 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B We make an order suppressing the appellant's name, address, occupation and identifying particulars pursuant to s 200(2)(f) of the Criminal Procedure Act 2011.

REASONS OF THE COURT

(Given by Cooper P)

[1] Following a successful appeal against conviction,[1] the appellant L was tried for a second time on charges of sexual offending against his step-daughter and niece, N. He faced seven charges of doing an indecent act on a young person under 16 (four of which were representative charges), six charges of sexual violation by unlawful sexual connection (of which four were representative charges) and one representative charge of sexual violation by rape.

[2] He was again found guilty, on all 14 charges. He now seeks to appeal against his convictions alleging that the trial Judge erred in two respects:

(a) by refusing to admit hearsay evidence that was crucial to the defence; and

(b) by failing to give appropriate directions about evidence that was admitted under s 44 of the Evidence Act 2006.

Background

[3] Some of the relevant background was set out in this Court's decision allowing L's previous appeal against conviction.[2] That appeal was allowed on the basis that the trial Judge incorrectly refused permission to cross-examine N about her alleged sexual mistreatment by S, the appellant's son.[3] In allowing that appeal, this Court set out a narrative giving the background of the offending which we can adopt for present purposes:[4]

> **Narrative**
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> [2] The appellant's offending is said to have happened between 2012 and 2015, when the complainant was aged between 12 and 15 years. The period of sexual activity between her and [S] is said to have been between February 2013 and February 2014.
>
> [3] In April 2014 the complainant disclosed to a school counsellor that she had been involved in sexual activity with [S]. She reported fear and embarrassment, and concern at potentially being pregnant. Oranga Tamariki

1 *[L] v R* [2019] NZCA 382 [Court of Appeal judgment].
2 Court of Appeal judgment, above n 1.
3 At [20]–[21], [24] and [43]–[44].
4 Footnote omitted.

was called in. An investigation concluded that the sexual activity was consensual.

[4] The complainant did not disclose at this time that she was also involved in sexual activity with the appellant. In her evidence at trial she said that she was scared to complain because she feared her mother would hate her. It appears that this concern was not without justification, because her mother did side with the appellant and the complainant is now estranged from her.

[5] The complainant's disclosure about [S] led to her going to live with her grandmother, but she subsequently indicated a desire to return to her home, where the appellant lived, and did so. She was sometimes truant from school, apparently preferring to be at home where he routinely was as he did not work. His alleged offending is said to have ceased when she threatened to tell.

[6] About 18 months later the complainant disclosed the appellant's offending to her aunt, with whom she was staying in Australia. When asked, she denied that the appellant had raped her but said [S] had done so. She then returned to the family home although she could have gone to her grandmother's. Other family members were told of her allegations and she was "interviewed" by an uncle who is a police officer. Despite his leading questions she did not say that the appellant had raped her. She then went to the police in May 2017. The appellant was interviewed. He denied the offending. In due course charges of unlawful sexual connection (by oral sex and digital penetration), indecency with a young person, and rape were laid. Some charges were representative.

[7] The appellant's police interview was not played at trial. He gave evidence, denying any sexual contact. He said that he did not know why she was making the allegations. He said they had a close relationship in which she would confide in him. In closing, defence counsel highlighted inconsistencies in her accounts and her late and gradual disclosures culminating in the allegation of rape. Counsel also emphasised that she had also chosen to stay with the appellant instead of avoiding him. He was convicted on all 14 charges he faced. We record that there is no complaint about the summing up, in which the Judge cautioned the jury that the defence did not have to show why she might have made it up.

[4] It is relevant to note that N was both L's biological niece (being the daughter of L's brother) and his step-daughter. When his brother died, L and N's mother (M) began a relationship and eventually married. Both had children from a previous relationship.

The hearsay evidence ground

[5] For the second trial the Crown sought to rely on a hearsay statement by N's cousin, C. C was the daughter of M's brother, B.

[6] C was residing overseas when she made her statement. In the statement she referred to occasions when, both in New Zealand and overseas, N had spoken to her about not liking L and wanting to get rid of him. When C asked her to explain why she felt that way, N denied anything had happened between them, but said he was lazy, that he expected M to cook and clean for him, that M did everything he asked, and N hated him for this. Similar discussions took place between N and C on a number of occasions. When C asked again whether anything had happened, N repeated her denial, confirming that she could not stand seeing her mother work and do the same things over and over while he just sat and watched TV. N claimed she told M to tell the appellant to get a job. N told C that she hated the appellant and he was not her real father, but her real father's brother. During the recounted conversations N made no mention of the allegations she was later to make concerning the appellant.

[7] Later, C learned from her parents that N had made allegations to an aunt, A, that the appellant had molested her. She said she was shocked and confused by this since N had previously told her she hated A, because of A's conduct towards N when they lived in the same household. The statement then detailed some disagreements affecting the wider family, resulting from N's allegations. The disagreements led to N and her parents losing contact with the other family members. C had tried to reach out to N via various messaging platforms, but she was blocked by N. She described how she only learned of the appellant's first trial after it was over. She had not come forward earlier, because she had not realised there was a trial. Had she known, she would have made a statement or contacted the appellant or M.

[8] After delivery of the Court of Appeal judgment, Ms Freyer, who was acting with Mr Taumihau for the appellant, learned through M that C might be able to give relevant evidence at the retrial. Ms Freyer swore an affidavit for the purposes of this appeal. Counsel were eventually able to make contact with C and a brief of evidence was settled between Mr Taumihau and C. It was signed by her on 28 January 2021. In early February, some minor additions were made and the updated version forwarded to C in Brisbane on 8 February. It was intended that she give evidence remotely from Brisbane at the retrial, which had been scheduled for 15 February 2021, and defence counsel understood that she would cooperate to that end. She was not summoned to appear, because she was living in Brisbane.

[9] However, the trial had to be adjourned because of the COVID lockdown in Auckland. A new date was set for 19 April 2021. According to Ms Freyer, very shortly before the trial, counsel learned that C was depressed, would not come out of her bedroom and refused to see a doctor. She was living with her parents, but they could not persuade her to seek help. Ms Freyer decided in the circumstances to seek an adjournment of the trial, or in the alternative, an application that her statement be admitted and read at the trial.

[10] These applications came before Judge Bergseng on 19 April. He was able to hear from C's mother A in Brisbane by telephone in his chambers. She told the Judge about C's mental state in a manner that was consistent with what M had said in an affidavit. The Judge decided to adjourn the trial. His reasons for doing so were set out in a minute issued that day in the following terms:

> [1] [L]'s trial was due to commence this morning. He applies to adjourn the trial.
>
> [2] The allegations he faces involve his stepdaughter. They are from 2012. His first trial was in 2017. That resulted in guilty verdicts on all charges, but there was then a successful appeal in respect of a s 44 issue.
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> [3] The matter has since then been given two firm trial dates. Unfortunately, both of those trial dates have been affected by the COVID-19 restrictions and the inability of the court to operate during those times.
>
> [4] The basis of the application is that there is an important defence witness, [C] who is unavailable. She is the complainant's cousin. Her evidence is in respect of dealings that she had with the complainant in late 2016 into early 2017. The evidence that she proposes to give is important evidence for the defendant, and without that evidence it would impact on his ability to receive a fair trial.
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> [5] The issue that has arisen is that on 11 April, it seems very unexpectedly, [C] became mentally unwell. She has a history of mental illness going back to 2015.
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> [6] I have spoken this morning with her mother. This witness is based in Brisbane. She is now 20 years old. In the past, her parents have still retained guardianship rights, which have enabled them to force the issue of treatment. At this stage, [C] is refusing treatment. Her mother describes her as presenting with suicidal thoughts. Her mother is of the view that she would not be well enough, even later this week, to give evidence.
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> [7] I am conscious of the length of time that this matter has been before the Court, and just as a defendant has a right to receive a fair trial, a complainant has a right to expect an expeditious hearing. However, in the case that I am faced with, the right of [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.
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> [8] The application is opposed by the Crown, on the basis of perhaps a lack of detail in terms of the medical situation of the witness. That has been explained by her mother, in that [C's] father attempted to take her to hospital on Sunday the 11th. Because of the COVID-19 situation that was present in Brisbane at that time, they refused to admit her to hospital and the family has not been able to progress the matter since then.
>
> [9] Accordingly, I am vacating this week's trial. I would ask that the registry, in conjunction with the jury trial liaison judge, look to give the rescheduling of this matter some priority, given the length of time it has been before the Court. However, that needs to be balanced against the availability of [C] as a defence witness. It may be that if her situation does not improve, then the application for her statement to come in as a hearsay statement could be further pursued. But that is for another day, not today.

[11] A new trial date was established for 6 July 2021. C initialled her amended brief and this was forwarded to defence counsel on that day. But on the new trial date C remained unwell. Her mother had sent an email to defence counsel on 5 July that was provided to the Court by counsel. The email stated that C's mental health had not improved since Judge Bergseng granted the first application to adjourn the trial on 19 April. Relying on the email, defence counsel advanced an application that C's statement be admitted in her absence on the basis that she was unavailable as a witness. Judge Bergseng, who was again to preside at the trial, rejected the application, and an application for a further adjournment that was then made. The trial proceeded without C's evidence.

[12] The Judge gave reasons in writing for rejecting the applications, on 29 July.[5] He set out the email from C's mother, A. C was still refusing to seek medical care, not sleeping well, and "locking herself away in her bedroom". Her mother claimed that C would not be fit to give evidence remotely at the hearing. Since she was an adult, her parents could not force treatment on her in circumstances where she was not deemed to be a threat to herself or members of the family. A could offer no timeline for when C might decide to seek medical help.[6] Counsel told the Judge that they had not been able to speak to C directly since 11 February, although they had spoken to

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5 *R v [L]* [2021] NZDC 13278 [District Court reasons judgment].
6 At [18].

her before then for the purpose of preparing her brief of evidence.[7] Counsel also told the Judge that there was no medical evidence available, and that C had not been summonsed for the trial.[8]

[13] The Judge referred to ss 16 and 18 of the Evidence Act and discussed the decision of Wylie J in *R v Alovili*.[9] He considered that there was an insufficient evidential foundation upon which he could find that C was unavailable.[10] He said:[11]

> [31] The only evidence regarding [C's] unavailability comes from her mother who was also unavailable to respond to any queries in respect of her daughter. At its highest, she describes her daughter as having been mentally unwell when she was 15. That her latest mental health issues came on suddenly and on 11 February 2021 her father took her to a local hospital, although she was not admitted. Since then she has been at home spending most of her time in her bedroom. It is her mother's opinion that she wouldn't be able to give evidence at the trial. There is no medical evidence of the type that was considered by Wylie J in *Harmer*.
>
> [32] I note that [C] was available to sign her statement on 4 July 2021 some two days before the trial was due to commence. She also initialled each of the pages of her statement on 6 July 2021. She makes no mention in her statement of her mental health issues.

[14] In the circumstances the Judge considered it unnecessary to consider whether there was a reasonable assurance that C's statement was reliable.[12] Turning to the adjournment application, the Judge noted it had been advanced on the basis the trial date should be adjourned to an unspecified date when C could give evidence.[13] But the trial had been "long outstanding", the complainant had already given evidence at a trial and been cross-examined, she was ready to give evidence on 19 April and was again ready to, and did give that evidence on 6 July.[14] It was in the interests of justice that the trial proceed. The Judge recorded that there would still have been time to call C's evidence remotely, since defence evidence would have begun no earlier than Wednesday 8 July.[15]

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7 At [20].
8 At [21].
9 At [24]–[30], citing *R v Alovili* HC Auckland CRI 2007-404-162, 27 June 2008.
10 At [33].
11 Mr de Groot told us the Judge's reference to C becoming unwell should been to April, not February, but nothing turns on that.
12 At [35].
13 At [36].
14 At [38].
15 At [39].

The argument on appeal

[15] Mr de Groot, for L, submitted the Judge's refusal to allow C's statement to be admitted in evidence at the trial was wrong. The Judge also erred in deciding that C was not unavailable as a witness. She was unavailable in accordance with both s 16(2)(b) and (c) of the Evidence Act, because she was outside of New Zealand and it was not reasonably practicable for her to be a witness, and she was unfit to be a witness because of her mental condition.

[16] Mr de Groot dealt with C's mental condition first. As to this, he distinguished *R v Alovili* on the basis that it had concerned a Crown witness whose mental health was at risk of deteriorating if required to give evidence, not a defence witness whose mental health was such that she was unable to attend the court. Mr de Groot submitted the Judge erred by finding there was no medical evidence to support the application: the Evidence Act did not require that evidence establishing a mental condition be proved to a specific standard or through any particular form of evidence. A proper consideration of the available evidence should have led the Judge to a different conclusion, like the one he had previously made on 19 April. He had then concluded that C was "mentally unwell', and it was contradictory to take a different approach in July. Given C's ongoing refusal of medical treatment the Judge's approach in imposing a requirement for medical evidence created an insurmountable evidential hurdle for the defence. This was not justified by the terms of the Evidence Act.

[17] Mr de Groot also argued the Judge had been wrong to be influenced by the absence of a reference in C's statement to her mental health issues and that she had not been summonsed. As to the former, her brief had been prepared in February before the relevant mental issues arose. As to the latter, while s 154 of the Evidence Act allowed for the service of a subpoena on a witness in Australia, there would have been no means of compelling attendance. In any event, whether attempts had been made to summons C was irrelevant to the test in s 16(1)(c) of the Evidence Act. That was a matter of evidence, and the only available inference on the facts was that her mental health had rendered her unable to attend court.

[18] Alternatively, Mr de Groot submitted that C was unavailable under s 16(1)(b) of the Act. Counsel had made efforts to engage with C and to ensure her attendance which were proportionate in the circumstances, namely by contacting her directly and through her mother. The fact that C was briefed and ready to give evidence by February showed that counsel had done what they reasonably could and, on the approach taken by this Court in *Solicitor-General v X*, the Judge should have concluded the unavailability threshold had been met.[16] Similarly, in accordance with the reasoning in *Gao v Zespri Group Ltd*, the Judge could have concluded that C was unwilling, effectively "beyond compulsion" and therefore unavailable.[17]

[19] For the respondent, Ms Thomson submitted the Judge correctly held C was not "unavailable" and her hearsay statement was not admissible under s 18 of the Evidence Act. She emphasised, relying on *Anderson v R*, that establishing unavailability due to a mental condition required a high threshold to be met.[18] Evidence commensurate with this high threshold was required and had not been provided here. The evidence from C's mother was insufficient, even putting aside the fact that it was itself hearsay. There was simply no evidence that C was incapable of giving evidence. Nor could it be said that was not "reasonably practicable" for C to give evidence. C's mother had previously given evidence remotely from their home about C's mental condition. The issue was that C was unwilling to give evidence.

Decision

[20] We are not satisfied the Judge erred by rejecting the claim that C was unavailable to give evidence on either of the bases claimed.

[21] Section 18 of the Evidence Act provides that a hearsay statement is admissible in any proceeding if the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and either (i) the maker of the statement is unavailable as a witness, or (ii) undue expense or delay would be caused if the maker of the statement were required to be a witness. The issue for us is that of unavailability.

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16 *Solicitor-General v X* [2009] NZCA 476.
17 *Gao v Zespri Group Ltd* [2021] NZCA 442, [2022] 2 NZLR 219.
18 *Anderson v R* [2020] NZCA 106, [2020] 3 NZLR 429.

[22] Section 16(2) of the Act defines the phrase "unavailable as a witness". It provides:

> (2) For the purposes of this subpart, a person is **unavailable as a witness** in a proceeding if the person—
>
> (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.

[23] Our present concern is with para (c), in particular whether C was unfit to be a witness because of her mental condition. It is noteworthy that the concept is unfit because of mental condition rather than *unwilling* because of mental condition. So, the focus must be on a mental condition that makes the witness unfit. In the present case that issue has to be considered against the background that C was able to confer with counsel to put together a coherent brief, which she later altered and was quite happy to initial as her own right up to the date of the trial as adjourned. The logic of the brief, which was clearly potentially helpful to the defence, the plausible explanation she gave for not coming forward earlier, and her cooperation with counsel for the purpose of giving evidence, do not provide any basis for finding her to be mentally unfit to give evidence. Until the problem arose on 19 April counsel cannot have had any intimation that she was unfit to give evidence because of a mental condition.

[24] The language of the statute explains why some of the cases have focused on the question of whether the witness will have some difficulty, related to mental illness, in giving evidence. Such a link was never established in this case. Taking her mother's evidence at face value, C was mentally unwell and would not seek treatment or leave her room. It could be inferred that because she was mentally unwell, she would not cooperate for the purpose of giving evidence. But that falls short of what must be established under the statute: it does not demonstrate she was unfit to be a witness.

[25] In *Anderson* this Court observed that "the inquiry into whether a witness is unavailable is an intensely factual one", and although previous decisions were of "limited relevance", they served to show that the threshold before it can be said a person is unavailable as a witness because of a mental condition was a high one. The Court said "it will only be in rare cases that the risk of exacerbating a pre-existing mental condition by giving evidence can impact on a person's availability to be a witness".[19] The threshold was met in that case, where the issue concerned the mental condition of the complainant, on the basis of evidence from a psychiatrist and two clinical psychologists, all of whom had been involved in the treatment of the complainant. She had been diagnosed as suffering from post-traumatic stress disorder, major depressive disorder and dissociative disorder. All three experts agreed that the complainant was incapable of giving evidence.[20]

[26] It can readily be seen that this case is very different. There is no expert evidence about C's mental condition. Further, she has engaged with counsel for the purpose of settling an apparently rational and coherent statement brief of evidence. While we accept Mr de Groot's submission that expert evidence may not be necessary in every case where it is sought to establish unfitness to give evidence, we expect those cases will be exceptional. Here there is only the evidence of C's mother that C is unwell and is locking herself away in her room that forms the basis of the claim she is unfit. We think the Judge was right to reject this as insufficient to rule her unavailable due to her mental condition.

[27] The threshold for unfitness is rightly a high one. Where the evidence of the witness is significant, whether for prosecution or defence, it will be important for the witness to be available for cross-examination unless there is very good reason why that cannot occur.

[28] As noted above Mr de Groot referred to *R v Alovili* which he endeavoured to distinguish because the application to admit the hearsay evidence in that case was made in respect of a Crown witness who was one of the complainants and whose

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19 At [52].
20 At [34]–[36].

mental health was at risk of deteriorating if they were required to give evidence.[21] The case involved charges of attempted murder and serious assault against two defendants. The Crown sought to rely on a statement given to the police by one of the victims. It called extensive evidence from a specialist forensic psychiatrist who interviewed the victim and considered reports prepared by other doctors and clinical file notes from district health boards.[22] This established to the Judge's satisfaction that the witness had a severe psychiatric disability, paranoid schizophrenia, which had proven resistant to treatment for some years. This meant the victim suffered from "social phobia", and he had clear anxiety symptoms including both anticipatory anxiety and phobic avoidance of circumstances likely to place him under scrutiny. If he could not manage his anxiety, a relapse of his psychotic symptoms could occur. Giving evidence would markedly increase his anxiety, because being in the courtroom would significantly increase his social phobic symptoms.[23] The need to recall stressful memories would "greatly reduce" his capacity to give evidence and have a major impact on his mental health.[24]

[29] Notwithstanding the strength of the evidence about the victim's mental condition, the High Court was not satisfied that his mental condition was sufficient to override the fundamental requirement that the accused should have a fair trial.[25] The charges were serious, and there were issues on which the defence should have the right to cross-examine.[26] Many of the stresses that the victim would suffer in giving evidence were similar to stresses which are often suffered by persons giving evidence at a trial, and while the stresses involved might affect the quality of the evidence that was not a justification for allowing his hearsay statement to be admitted.[27]

[30] Whether or not the correct outcome was reached in that case is not for us to decide, but the judgment does show that strong evidence is needed to establish

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21 *R v Alovili*, above n 9.
22 At [14].
23 At [15]–[16].
24 At [16]–[17].
25 At [33].
26 At [32].
27 At [27]–[28].

unfitness in terms of s 16(2)(c).[28] To the extent that Mr de Groot suggested there should be some difference in approach according to which party is seeking to rely on the evidence in question we can find no justification for such a distinction in the words of the statute, or in principle. The availability of a witness raises a factual issue which should be determined in the same way regardless of which party will be affected by the presence or absence of the witness. It hardly needs repeating that both prosecution and defence are entitled to a fair trial process in the interests of justice.

[31] Nor do we see the relevance of a distinction between, on the one hand, a claim that a witness' mental health will suffer if they are required to give evidence, and on the other, a claim that a witness' mental health is such as to render them unable to attend court. In either case, the statutory threshold needs to be met. That will generally require expert evidence, unless the case is exceptional. While we are sympathetic to the difficulties defence counsel faced in adducing evidence of C's mental condition, without any evidence beyond that of C's mother, we are unable to accept the Judge erred by not finding her to be unfit because of her mental condition.

[32] We see nothing in the other issues raised by Mr de Groot criticising the Judge's approach. We do not accept his decision on the fitness issue was influenced by the fact C had not been summonsed, or the absence of reference to mental issues in her brief. It was of course relevant to note, as we have done, that she had participated in the preparation of the brief. In summary, the Judge's conclusion that the statutory test in s 16(2)(c) was not satisfied cannot be impeached.

[33] Turning then to s 16(2)(b), the issue for decision is whether the Judge should have found C was unavailable as a witness because it was not reasonably practicable for her to be a witness. Arrangements were able to be made for her to give evidence remotely, which would have overcome any difficulty caused by the fact that she was in Brisbane. That is evidently the basis on which the defence had intended her evidence be given all along. Whatever the reason, she would not cooperate for that purpose.

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[28] Other cases illustrating the strength of the evidence needed to establish unavailability on the basis of unfitness were referred to by Ms Thomson, namely *R v Downes* [2021] NZHC 3034; and *R v Duncan* [2022] NZHC 701, [2022] 3 NZLR 254.

[34] It is not clear that the Judge was asked to find that she was unavailable on this ground. Having rejected the defence's unfitness argument the Judge turned to the question of whether he should adjourn the trial — a different issue from whether C was unavailable on the basis that it was not reasonably practicable for her to be a witness. As the Judge said when declining the adjournment, there was still time for appropriate arrangements for remote participation to be arranged. That did not occur. There is no evidence about any further attempt that may have been made before the conclusion of the trial.

[35] The issue now is to be approached on the basis that C would not give evidence. Counsel must have been aware that this was a possibility given what had previously occurred in April, although we accept defence counsel may have been expecting C to cooperate as a result of the interactions concerning her brief. Possibly a subpoena might have been persuasive if served in advance of the hearing, although C being out of New Zealand meant there would be no practical means of ensuring compliance with it.

[36] In the end, the problem was that C was unwilling to give evidence, not that it was not reasonably practicable for her to do so. This case is very different from the authorities on which Mr de Groot sought to rely. In *Solicitor-General v X* the defendants were charged with dishonestly using a document and money laundering, contrary to ss 228 and 243 of the Crimes Act 1961.[29] The Crown sought to rely on a hearsay statement from a witness who was in China. In response to a request made by the New Zealand Central Authority to China's Central Authority under the Mutual Assistance in Criminal Matters Act 1992 (Mutual Assistance Act) Chinese law enforcement officials interviewed the witness. His evidence, if accepted, would establish the defendants were offering a dishonest defence to the charges.[30] Under s 12 of the Mutual Assistance Act, the Attorney-General requested assistance from the Chinese authorities in arranging for the attendance of the witness at a preliminary hearing in Christchurch, but there was no response. A further request was made for assistance to secure the attendance of the witness at the trial, either in person or by a

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29 *Solicitor-General v X*, above n 16.
30 At [21]–[23].

video-link. But the witness refused to attend, for unknown reasons which were not conveyed by the Chinese authorities.

[37] This Court considered that the Crown had failed to demonstrate that it was not reasonably practicable for the witness to give evidence.[31] It was significant that there was no evidence about why direct inquiries of the witness were no longer permissible or practicable or that the witness himself was unresponsive. It was insufficient for the Crown to simply assert that the Chinese authorities had not responded.[32]

[38] Here, there was the hearsay statement of C's mother that C was unable to give evidence because she was mentally unwell. It was not because it was not reasonably practicable for her to do so. Unlike *Solicitor-General v X* this is not a case of insufficient evidence to establish impracticability: it was perfectly practicable, had she been willing.

[39] The other case relied on by Mr de Groot was *Gao v Zespri Group Ltd,* a civil proceeding which concerned rights in respect of the sale of reproductive material and propagation of golden kiwifruit varieties under the Plant Variety Rights Act 1987.[33] A finding that a witness in China was unavailable as a witness was upheld in circumstances where the witness (who was a co-conspirator with the defendant) was refusing to cooperate unless a commercial agreement were entered into.[34] The circumstances of that case are so removed from these that we do not find it helpful in the present context.

[40] For all these reasons we reject the hearsay evidence ground of appeal.

Section 44 directions

[41] L's previous appeal against conviction was allowed on the basis that the trial Judge incorrectly refused permission for the defence to cross-examine N about her alleged sexual mistreatment by the appellant's son, S. This Court held that the alleged

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31 At [37].
32 At [38]–[39].
33 *Gao v Zespri Group Ltd*, above n 17.
34 At [53].

offending against N by S was sufficiently relevant to her credibility to require that limited questioning be permitted in the interests of justice. Accordingly, the trial Judge's decision was not justified under s 44 of the Evidence Act.[35]

[42] N told a counsellor that she had a sexual relationship with her cousin S, L's son. Although she later claimed L was sexually assaulting her at that time, she had not disclosed his offending to the counsellor. At the retrial, N was asked to explain why she did not tell her counsellor in 2014 about L's offending against her. In her evidence-in-chief she said:

> I didn't tell her 'cos I was more worried about what was going on for me and [S], what we were doing with each other. I didn't really feel the need to open up to the school counsellor about what was happening with [L].
>
> …
>
> I think I was just scared, I mean just scared.

[43] Asked why she was scared, she responded:

> Because then I knew it was going to be bigger. I didn't want my family to know, I didn't want my mum to know.
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> …
>
> I didn't want her to know because um, I knew she wasn't going to believe me. Sorry, I knew she wasn't going to believe me and I knew she was going to pick [L] anyway.

[44] N was cross-examined about her disclosures to the counsellor, and her decision to return to live with L and her mother after spending time staying with her grandmother.

[45] N's first disclosure about L's conduct was to her aunt, A. In cross-examination A said that she and N had a close relationship and that she believed N would confide in her. A said that N told her that L had sexually molested her but that he did not rape her. Instead, N had told her that S had raped her when she was around 13 or 14 years of age and that she had thought that she was pregnant.

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35 Court of Appeal judgment, above n 1, at [20]–[21].

[46] When A's account was put to her by defence counsel, N said she could not remember telling A that S had raped her. She stated that she only told her that L had touched her inappropriately, rather than disclosing the full extent of his offending. She said:

> I didn't tell her that [L] raped me because I couldn't get the words out. I was so stuck on he touched me inappropriately, I couldn't get to the next point. We both started crying, there was a lot of tears and then that's when she took over and told me her story 'cos I was still crying.

[47] In cross-examination, N also accepted that while she was very close to C, she did not tell her about L's offending when she was in Australia. When asked why that was, she responded:

> 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.

The defence relied on the fact that N had been prepared to tell A that S had raped her, but had not made a similar allegation against L.

[48] In summing up, the Judge reminded the jury of the importance of approaching its task influenced by prejudice or sympathy for or against L or N or any of the other witnesses who had given evidence. He continued:

> [9] The nature of this trial can easily raise issues of emotion, sympathy and prejudice. As judges you must put aside such feelings, not let them play any part in your decision making process. Any reactions to either unpleasant or pleasant behaviour or matters are irrelevant and dangerous to take into consideration. The reason for this is that they can make your minds and reasoning, or take your mind and reasoning process away from the evidence and the very specific job that you have to do.
>
> [10] When you are considering your verdicts you are judges and must never allow yourselves to be influenced by feelings of prejudice or sympathy or emotion. …

[49] Later in the summing up the Judge summarised the defence case about what inferences the Jury could draw from the evidence about S. He said:

> [81] Mrs Freyer asks that you consider carefully these different versions which have been given to different people by [N] over a relatively short period of time when you consider if she is a credible witness, that is one that you can believe. Or did she make things up, embroider afterwards, change details or

> make things more dramatic? In these circumstances, Mrs Freyer poses the question for you: "What can you believe?"
>
> [82] Mrs Freyer reminds you of the evidence in relation to [S], [N's] stepbrother. The issues regarding this evidence highlighted by Mrs Freyer are first that there are inconsistencies between what [N] said she told the school counsellor and what she later told [A] about her discussion with the counsellor. This relates to [N] telling [A] that she was raped by [S].
>
> [83] Second, if [N] was comfortable enough with [A] to tell her about [S], that is thinking she may be pregnant and was suicidal, but when asked if [L] had raped her she said "No." Mrs Freyer is effectively posing the question: "Does this evidence have a ring of truth about it?"
>
> [84] Third, if [N] was worried that she was pregnant to [S], then why was she not worried she was pregnant to L if he was raping her? Again Mrs Freyer is effectively raising the issue: "Does this sound credible?"
>
> [85] Mrs Freyer poses the question for you: "When you consider this evidence how can you be sure of what [N] says about being raped by [L] or about other acts she has complained of? How can you be sure that they even happened when you consider the issues that she has identified with [N]'s evidence?"

The argument on appeal

[50] Mr de Groot submits that the Judge erred by failing to give tailored directions regarding the evidence adduced under s 44 of the Evidence Act about N's sexual relations with S. He noted that defence counsel had been permitted to question N regarding the sexual conduct with S and that this Court had envisaged the questioning would be limited, saying that questions about S's behaviour could have been limited to establishing that N had spoken to a counsellor at Oranga Tamariki because she had complained about his sexual behaviour toward her.[36] But in fact, a broader narrative focusing on S's conduct toward N had emerged at the trial, to the effect that, in summary:

(a) N was raped by S (although she neither affirmed nor denied this at trial).

(b) S was excluded from the address where the two of them had lived together, "shoring-up" the inference that whatever occurred was improper.

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[36] Court of Appeal judgment, above n 1, at [20].

(c) S was the appellant's son, linking the two.

(d) The rapes said to have been committed by S were contemporaneous with the sexual offending alleged against the appellant.

(e) N feared pregnancy.

(f) N was suicidal.

(g) L could be said to have accepted at trial some responsibility for S's behaviour. He gave evidence that N had disclosed S's conduct to him and he had responded saying what had happened was not her fault, that S was older and should have known better, and he had "taught him a few things on his journey growing up".

[51] Mr de Groot submitted that the evidence ranged far more widely than this Court contemplated in allowing the conviction appeal and carried with it significant risks that required firm and tailored directions from the Judge, controlling the risks of prejudice, sympathy and improper reasoning. Specifically, Mr de Groot argued that:

(a) All of the elements comprising the narrative of interactions between S and N created prejudice against the appellant while creating sympathy for N.

(b) The father-son connection between S and L may have led the jury to draw inferences about the likelihood the latter was also guilty of sexual offending.

(c) The evidence might have suggested that N was inherently vulnerable to sexual offending, which itself could be taken as probative of the Crown's case.

(d) The jury might have inferred that N's concerns about pregnancy might have been attributable to actions of L and may have been again taken to be probative of the Crown's case.

(e) The jury might also have inferred that N's suicidal ideation was attributable to offending by L as well as S.

(f) If L was seen as taking some responsibility for S's behaviour that might have generated inferences about his own attitudes towards sexual relationships.

[52] Mr de Groot did not argue that the decision by defence counsel to elicit the evidence was an error, and conceded that the detail surrounding S's conduct made it all the more significant that N had not complained about the alleged contemporaneous offending by L. But he submitted that, at a minimum, the Judge's directions should have included:

(a) expanded comment on the relevant forms of prejudice and sympathy and their irrelevance to fact-finding;

(b) a direction that the evidence could only be used to show that N had failed to complain about L's conduct when making disclosures about S; and

(c) a caution that the evidence could only be used to the benefit of the defence and could not be used in support of the Crown's case.

[53] In response, Ms Thomson submitted that the evidence of N's relationship with S was only used in legitimate ways at the trial. In closing, both sides addressed N's explanation as to why she initially made disclosure about S and not about L. Defence counsel pointed, for example, to the facts that N did not make disclosures to her counsellor about L's offending against her and that N never had a good answer as to why she was not afraid of pregnancy due to L raping her. These were the points repeated by the Judge in his summing up. He did not otherwise refer to the evidence about S.

[54] Moreover, the defence used the evidence about N's relationship with S for the reasons this Court accepted it could. The jury were also told about the legitimate ways

that the evidence could be used, including by defence counsel, unlike in *Couper v R*, a case to which Mr de Groot had referred.[37] Ms Thomson submitted that rather than clarifying matters, raising other, illegitimate lines of reasoning based on the evidence might have put those very lines of reasoning in the jury's minds.

[55] The Crown says that general directions given at trial were sufficient to guard against the risk the jury might reason improperly. Limited use directions cannot be required in every case where evidence is given under s 44; that section, unlike others in the Evidence Act, does not expressly adopt "specific use" limitations.[38] In this case, the s 44 evidence was straightforwardly relevant to N's credibility and so limited use directions were not necessary — unlike in other cases where the evidence might be relevant to one limb of the relevant legal test but not others.[39]

Decision

[56] Mr de Groot was correct that in the Court of Appeal judgment this Court held it would be legitimate for N to be questioned about her failure to complain to Oranga Tamariki about L, and it was said that questions about S's behaviour could have been limited to establishing that N had seen a counsellor at Oranga Tamariki because she had complained about S's sexual behaviour towards her.[40] But this Court went further, stating:

> [21] … we also accept that the defence ought to have been able to establish that when she first complained about the appellant she said that [S] had raped her but the appellant had not. In cross-examination she was asked about her denial of rape by the appellant, but could not be asked why she made a partial disclosure only while simultaneously making a full disclosure against [S].
>
> [22] To avoid any inference that she was in the habit of making false complaints, it would have been necessary to specify that the defence did not say her complaints about [S] were false.

[57] The Court also contemplated cross-examination of N about the fact she had confided in L about the situation with S which counsel contended would be unusual if he was also abusing her, about why she wished to return to L's home and about why

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37 Citing *Couper v R* [2021] NZCA 632 at [28].
38 Citing *Hart v R* [2010] NZSC 91, [2011] 1 NZLR 1 at [54].
39 Citing *Pegler v R* [2015] NZCA 260 at [24]–[32].
40 Court of Appeal judgment, above n 1, at [20].

she feared she was pregnant to S but not to L.[41] While we accept that the evidence in fact given at the re-trial about S's conduct may have been more extensive than this Court contemplated in the Court of Appeal judgment, to the extent that occurred it was largely the result of questions asked by defence counsel. There is, and could not be, any suggestion of counsel error in pursuing this strategy. In any event, we do not consider that this Court was intending to place limits on the extent of the evidence that could be given, which would be an issue to be controlled by the trial judge.

[58] Ms Thomson was right to point out that evidence admitted pursuant to s 44 of the Evidence Act is not subject to any statutory limitation as the use to which it can be put once admitted. Here, the evidence was deployed in a way that was intended by defence counsel to advance L's defence that N was falsely accusing him. It was directly relevant to N's credibility. Both defence and prosecution dealt with the evidence in those terms and the Judge summed up accordingly. A direction that the evidence could only be used to show that N had failed to complain about L's conduct when making disclosures about S might have risked diminishing the importance of the evidence for the defence. This was not a case like *Couper* where it was argued that the full implications of the evidence were not put before the jury.[42]

[59] We also consider there is force in Ms Thomson's submission that dealing with the risks identified by Mr de Groot in the summing up might have been counter-productive by raising possible illegitimate lines of reasoning which would otherwise have been adequately covered by the general direction dealing with prejudice and sympathy.

[60] We reject this ground of appeal.

Result

[61] The appeal is dismissed.

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41 At [13(b)–(d)] and [23].
42 *Couper v R*, above n 37.

[62] N's name and identifying details are automatically suppressed under ss 203 and 204 of the Criminal Procedure Act 2011. In order to protect her identity, we make an order suppressing the appellant's name, address, occupation and identifying particulars pursuant to s 200(2)(f) of the Criminal Procedure Act 2011.

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