

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN
[SQUARE BRACKETS]

**IN THE DISTRICT COURT
AT HUTT VALLEY**

**I TE KŌTI-Ā-ROHE
KI TE AWAKAIRANGI**

**CRI-2019-096-001173
[2022] NZDC 397**

NEW ZEALAND POLICE
Prosecutor

v

PHILLIP BRIAN BIRCHALL
Defendant

Date of Ruling: 14 January 2022
Appearances: E Scown for the Prosecutor
Defendant appears in Person
Judgment: 14 January 2022

RULING OF JUDGE B A GIBSON

[1] This is a re-hearing of a matter as a result of a successful appeal in the Court of Appeal from a decision of Cooke J in the High Court, itself a decision in relation to a conviction of the defendant by Judge Tompkins in this court in July 2020.

[2] Judge Tompkins convicted the defendant of the charge of assault of [the complainant], and an appeal was brought which was initially unsuccessful but successful before the Court of Appeal which remitted the matter to this court as a result of a decision given on 18 December 2020.

[3] In the meantime the complainant, who had given evidence before Judge Tompkins, died, he having suffered death on 19 August 2021. The police accordingly

seek, by way of application under the Evidence Act 2006, to have the complainant's evidence-in-chief and cross-examination put before the Court pursuant to s 18 of the Evidence Act 2006. Section 18 of the Evidence Act allows the admission of a statement which is a hearsay statement, if the circumstances relating to the statement provide reasonable assurance the statement is reliable and the maker of the statement is unavailable as a witness. Being unavailable as a witness is defined by s 16 as including someone who is dead and a hearsay statement is defined in s 4 of the Act as being a statement made by a person other than a witness and which is offered in evidence at the proceeding to prove the truth of its contents. The late [complainant] cannot of course be a witness in this re-hearing of the charge and so his evidence falls within the definition of a hearsay statement, if it can be admitted under s 18 of the Act.

[4] There is no dispute that the complainant is now dead. Mr Birchall opposes the application because he says that he would be able to run a more focussed cross-examination if the complainant were able to give evidence but cannot now do so and so he would be prejudiced in the event the evidence was admitted.

[5] Mr Birchall confirmed his defence is that under s 53 of the Crimes Act 1961, namely the defence of movable property with claim of right, which provides that everyone in peaceable possession of any moveable thing under a claim of right is protected from criminal responsibility for defending his possession by the use of reasonable force, even against a person entitled by law to possession, if he does not strike or do bodily harm to the other person.

[6] The matters to be considered in terms of admission under s 18 are whether there are any issues of veracity in relation to the evidence proposed to be admitted. I cannot see that there are any. The complainant gave his evidence on oath before a District Court judge, he was not cross-examined in any event on the basis of lack of veracity and there was nothing to suggest that the evidence was anything other than personal knowledge of a relevant act and accordingly, in that respect, together with the fact of the circumstances of the statement being evidence given on oath before a Judge, with the defendant having the opportunity to cross-examine the complainant, I am satisfied the evidence is admissible, unless I were to exclude it under the general exclusion rule in s 8 of the Evidence Act which enables me to exclude evidence if its

probative value is outweighed by the risk that the evidence will have an unfairly prejudicial effect on the proceeding or needlessly prolong the proceeding or whether the defendant's ability to offer an effective defence is compromised as a result of the evidence being admitted.

[7] In my view there is no issue of the hearing being prolonged by the admission of the evidence. A full transcript is available. Neither do I consider there is any risk of unfair prejudice on the proceeding. Mr Birchall accepted his defence is not necessarily compromised by the admission of the evidence, his point simply was that he thought he might be able to do a better job because he would be more experienced if he were able to cross-examine the complainant.

[8] In my view the evidence is highly probative and for that reason itself is undoubtedly prejudicial, but it is only evidence that is unfairly prejudicial that falls within the general exclusion provision and I cannot say that the evidence is such. Accordingly, the evidence is admissible as evidence in the case.

B A Gibson
District Court Judge