

ORDER PROHIBITING PUBLICATION OF THE JUDGMENT AND ANY PART OF THE PROCEEDINGS (INCLUDING THE RESULT) IN NEWS MEDIA OR ON THE INTERNET OR OTHER PUBLICLY AVAILABLE DATABASE UNTIL FINAL DISPOSITION OF TRIAL. PUBLICATION IN LAW REPORT OR LAW DIGEST PERMITTED.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA288/2023
[2023] NZCA 555**

BETWEEN THOMAS AWATERE
Appellant
AND THE KING
Respondent

Hearing: 2 November 2023
Court: Miller, Brewer and Osborne JJ
Counsel: H J Croucher and E V Kennedy for Appellant
Aysser Al-Janabi and KFR Karpik for Respondent
Judgment: 7 November 2023 at 10.00 am

JUDGMENT OF THE COURT

- A The application for leave to appeal is declined.**
- B In order to protect the appellant’s fair trial rights, we make an order prohibiting publication of this judgment and any part of the proceeding (including the result) in news media or on the internet or other publicly available database until final disposition of trial. Publication in a law report or law digest is permitted.**
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REASONS OF THE COURT

(Given by Miller J)

[1] This is an application for leave to appeal a pretrial decision ruling admissible the hearsay statements of a complainant who is unable to give evidence at the appellant's trial on charges of causing her grievous bodily harm with reckless disregard, and wilful damage.¹

[2] This Court directed by minute of 26 June 2023 that leave and merits be heard together. Since then this Court has revised its approach to leave in *W (CA624/2022) v R*.² Counsel were invited to address the current leave criteria before us.

[3] The complainant is the appellant's mother-in-law. She is 84. The appellant and his partner formerly lived with the complainant at her home in Pukekohe. She likes country music and was in the habit of loudly playing it on her stereo. This was a cause of some friction in the household.

[4] The Crown case is that on the evening of 30 August 2021 the complainant went into her room and turned on the stereo. She refused to turn it down when the appellant went to the door and asked. He entered the room, cut the power cord to her stereo, and poured boiling water down her back from a kettle she kept in the room. She suffered significant burns for which she was immediately hospitalised.

[5] After the incident the complainant made statements to other witnesses who were in the house at the time. On 31 August she gave an evidential interview. The following day she made a formal written statement to a police officer. The sting of these statements is that the appellant did the things complained of. The other witnesses will also depose to the argument between the appellant and the complainant immediately before she was injured in her bedroom. It seems unlikely that there will be any dispute about the kettle being the mechanism of injury.

[6] The complainant was diagnosed with dementia in early-mid 2022. She is in care. It is common ground that she is unavailable to give evidence.

¹ *R v Awatere* [2023] NZDC 10571 [pretrial judgment].

² *W (CA624/2022) v R* [2023] NZCA 397 at [52].

[7] The ruling under appeal was delivered on 1 May 2023. Judge S D Otene found that the circumstances gave reasonable assurances of their reliability: some of the statements were formal, they were near-contemporaneous, and they are consistent.³ The complainant's subsequent diagnosis indicated she may have been cognitively impaired to some extent when she made her statements,⁴ and there was evidence that some weeks later she was unsure what had happened to her.⁵ She may also have been affected by intoxication at the time. However, the statements and circumstances together indicated she had adequate capacity when she made them.⁶

[8] The Judge considered that the hearsay statements did not prevent the appellant from offering an effective defence.⁷ The dementia diagnosis will be in evidence along with evidence that the complainant was confused some weeks later about what had happened to her. The jury will be given the usual directions.⁸

[9] The trial has a firm date of 18 December 2023.

[10] On 6 December 2023 the District Court is to hear an application to reconsider the pretrial ruling. The application relies on new evidence from a geriatrician to the effect that the complainant likely was suffering from mild dementia from the start of 2021. The Crown does not oppose a rehearing in the District Court.

[11] In the circumstances it is premature for us to decide the issue. It should be left to the trial judge and addressed in a conviction appeal, assuming the evidence is ruled admissible on 6 December and the trial ends in convictions.⁹ In a conviction appeal the Court will have the advantage of the evidence actually led at trial, including accounts of the complainant's condition and its implications for the reliability of her statements. We were also given to understand that there may be some evidence about delay between the argument and the injury, and perhaps about delay between the injury and her statements to others in the house; these considerations may bear on the

³ Pretrial judgment, above n 1, at [15] and [17]–[18].

⁴ At [16].

⁵ At [19].

⁶ At [18].

⁷ At [21]–[22].

⁸ At [23].

⁹ *W (CA624/2022) v R*, above n 2, at [52(h)].

reliability assessment. The trial record will settle these matters. It will also establish whether the other evidence led at trial excludes the only alternative explanation, an accident caused by the complainant herself.

[12] The application for leave to appeal is declined.

[13] In order to protect the appellant's fair trial rights, we make an order prohibiting publication of this judgment and any part of the proceeding (including the result) in news media or on the internet or other publicly available database until final disposition of trial. Publication in a law report or law digest is permitted.

Solicitors:
Public Defence Service, Auckland for Appellant
Crown Solicitor, Manukau for Respondent