

AUSTRALIA / JUDGMENT

R v Askarou [2024] NSWDC 552

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District Court

New South Wales

Medium Neutral Citation: R v Askarou [2024] NSWDC 552

Hearing dates: 14, 15, 16 October 2024

Date of orders: 23 October 2024

Decision date: 23 October 2024

Jurisdiction: Criminal

Before: D Barrow SC DCJ

Decision: The Crown's Notice of Motion is dismissed.

Catchwords: CRIME - Pre-trial - Unavailability of persons – "All reasonable steps" – Factors to be taken into account – Evidence Act 1995 (NSW), s 63 – where witness is overseas in another country

Legislation Cited: s65(3) Evidence Act 1995

s5B Evidence (Audio and Audio Visual Links) Act 1998

Crimes Act 1900

Cases Cited: Askarou v The King [2023] NSWCCA 246

R v Macdonald; R v Edward Obeid; R v Moses Obeid (No 4) [2019] NSWSC 1286

R v Geeves (No 4) [2024] NSWSC 938

R v Hawi (No 2) [2011] NSWSC 1648; 216 A Crim R 64

Huang v Wei [2022] NSWSC 222

AJW and 2 ors v State of New South Wales [2003] NSWSC 803

Mindshare Communications Ltd v Orleans Investments Pty Ltd [2007] NSWSC 976

Quintano v B W Rose Pty Ltd [2008] NSWSC 1012

ZL v The Queen (2010) 208 A Crim R 325; [2010] VSCA 345

Tasmania v Dolega (2016) 26 Tas R 312; [2016] TASSC 65

Inc v John Deere Ltd (No 2) (2000) 181 ALR 108; [2000] FCA 1903

Seafood Imports Pty Ltd v ANL Singapore Pte Ltd (No 1) [2009] FCA 435

R v Sarbandi (2012) 229 A Crim R 39; [2012] ACTSC 180

Texts Cited: Odgers 'Uniform Evidence' 19th Ed at p1839

Category: Procedural rulings

Parties: Crown

Accused (Mr Askarou)

Representation: Crown

Counsel: Crown Prosecutor, DPP

Solicitor: Solicitor 1, DPP

Accused

Counsel: Mr M Kalyk

Solicitor: Ms Bannister

File Number(s): 2018/00012583

JUDGMENT

Introduction

1. Mr Askarou, ('the accused'), is to stand trial at the District Court of Parramatta on 11 November 2024 charged with an offence contrary to section 29 of the Crimes Act 1900 that:

On 28 July 2016, in Prairiewood in the State of New South Wales, he did shoot at Zia Kryo with intent to murder the said Zia Kryo.

1. In the alternative, he is charged that on the same day and place, he discharged a firearm with intent to cause grievous bodily harm. This offence is contrary to s33A(1)(a) of the Crimes Act 1900.
2. The matter for resolution in this judgment is whether WL, an important prosecution witness, is unavailable to give evidence at the upcoming trial, such that his evidence at the accused's earlier trial can be admitted as part of the prosecution case pursuant to s65(3) of the Evidence Act 1995.

History of the proceedings.

1. At about 10:20 PM on 28 July 2016, the victim Mr Kryo was shot as he approached the front door of his home, with a bullet puncturing his lung and severing his spinal cord, rendering him a paraplegic.
2. Although it seems the accused was a person of interest in the ensuing police investigation, he was not charged until WL approached the police on 9 January 2018 and nominated him as the individual responsible for shooting the victim.
3. The accused stood trial from 23 July 2019 in the District Court of Parramatta on the above-mentioned charges. He pleaded not guilty to both counts. WL gave evidence in the prosecution case from a remote location.
4. On 21 August 2019, the accused was found guilty of the offence of shooting with intent to murder. He was sentenced to serve a lengthy term of imprisonment.
5. On 11 August 2022, WL left Australia and has not returned. He resides overseas. His place of residence is known to the Office of the Director of Public Prosecutions ('ODPP') and NSW Police but not to the accused.
6. On 6 October 2023, the accused's conviction was quashed by the Court of Criminal Appeal and a retrial was ordered. *Askarou v The King* [2023] NSWCCA 246 The accused was soon after released to bail, having spent just over six years in custody.
7. On 27 October 2023, the retrial was listed to commence on 12 August 2024.
8. From 12 August 2024, there were pre-trial applications, including an initial application that the Court find that WL was unavailable for the purposes of s65(3) of the Evidence Act 1995. That application was opposed and did not proceed.
9. By 15 August 2024, the Officer in Charge (the 'OIC') had provided a statement to the effect that WL was prepared to return to Australia to give evidence if certain terms were met, he could give evidence remotely and his expenses were met. [1]
10. On 16 August 2024, the Crown made application that WL give evidence from a remote location. On that day his Honour Judge Ingram SC made an order pursuant to s5B of the Evidence (Audio and Audio Visual Links) Act 1998 that WL give evidence at the upcoming trial from a remote location within Australia.
11. The trial was listed to commence on 23 September 2024.
12. On 12-13 September 2024, WL wrote two emails to the Officer in Charge of the case and said that he was no longer prepared to give evidence in the trial.
13. On 16 September 2024 the Crown filed a Notice of Motion seeking orders pursuant to s65(3) Evidence Act 1995.
14. On 23 September 2024, the trial was unable to commence because of the unavailability of a trial judge.

15. The trial is now listed to commence on 11 November 2024.

The unavailability of WL

S67 Notice issued

1. As detailed in the chronology annexed to this judgment (Annexure 1), after the accused's conviction was quashed on 6 October 2023 and a retrial ordered, the Officer in Charge ("OIC") made contact with WL on 8 November 2023 and told him that he was the OIC and asked: "May I speak to you about whether you are willing to give evidence again?"
2. On 23 January 2024 WL replied, seeking his options about going back to Court. That evening the OIC replied "... You can return to Sydney with safety measures, we will reimburse your costs or provide evidence remotely, subject to court application. Can I provide your email to the DPP to see if there are more options?"
3. On 24 January 2024 WL agreed that the OIC could provide his contact details to the ODPP.
4. On 29 January 2024 the ODPP were in communication with WL, who advised where he was living and said: "I do not mind coming back to Australia if I cannot give evidence from [redacted] but do not want to come to Sydney."
5. Despite these communications, on 19 February 2024, the ODPP issued a notice pursuant to section 67 of the Evidence Act 1995, stating:

"Notice is hereby given that the Crown may seek to adduce evidence of a previous representation made by a person who is unavailable to give evidence. The unavailable person is [WL]."

1. The Notice purported to set out the substance of the evidence of the previous representations which the Crown intended to adduce. Those representations were detailed to be the transcript of WL's evidence at the first trial on 29-30 July 2019, together with an audio recording of his evidence. The audio recording was not served upon the accused and as at 23 October 2024, it is not available to the parties or the Court.
2. In the s67 Notice, the solicitor who had carriage of the matter at that time [2] on behalf of the ODPP, stated, in part:

"7. [WL] is not available to testify concerning the fact to be proved by adducing evidence of the prior representation because:

All reasonable steps have been taken by the Crown to find that person or to secure their attendance, but without success.

All reasonable steps have been taken by the Crown to compel that person to give the evidence, but without success."

1. These statements were not an accurate representation of the situation. Later in this judgment I will return to this Notice.

2. In the period from 19 February 2024 until 12 August 2024, the Notice remained dormant, possibly because the ODPP understood WL was prepared to travel back to Australia, subject to pre-conditions being met. In his telephone call on 13 August 2024 with WL, the OIC (at page 3 para [7] of his statement) [3] raised the possibility of WL giving evidence from his country of residence. WL was enthusiastic about this prospect.
3. As noted, an initial Notice of Motion seeking orders consistent with the s67 Notice, was made on 12 August 2024, and then discontinued after the OIC was able to speak with WL.
4. On 16 August 2024, the Crown was successful in obtaining an order that WL give his evidence remotely from a location within Australia. There is no suggestion in the evidence that any application was made for WL to give evidence from his country of residence.
5. It appears that communication from WL on 12-13 September 2024 to the OIC for NSW Police to the effect that he was not prepared to give evidence at all, revived the s67 Notice.

The Notice of Motion

1. On 17 September 2024, the ODPP filed a Notice of Motion, consistent with the February 2024 s67 Notice, seeking orders:
 1. That the transcript of evidence (revised in accordance with the CCA judgement Askarou v The King [2023] NSWCCA 246) of WL given at Parramatta District Court on the 29th and 30th of July 2019 be tendered in the trial pursuant to s65(3) of the Evidence Act 1995.
 2. The audio recording of the same evidence to be played in the trial.
 3. Such further or other order as this Honourable Court thinks fit.

Crown evidence in support of the Notice of Motion

1. An affidavit dated 16 September 2024, under the hand of a Solicitor for the DPP ("Solicitor 1"), the solicitor currently with carriage of the case, was filed in support of the Notice of Motion as Exhibit A.
2. Solicitor 1's affidavit annexed:

* An email trail between the OIC and WL between 8 November 2023 and 24 January 2024. Annexure A.

* Advice from the OIC that WL had departed from Sydney Kingsford Smith Airport on 11 August 2022 and had not returned to Australia since that date. Annexure B.

* Documentation from the Commonwealth Department of Home Affairs reproducing an incoming passenger card completed by WL on 15 September 2009 (the point of this is not obvious), together with a summary of the movement records regarding WL. The last recorded movement record was his departure from Australia on 11 August 2022 from Kingsford Smith Airport. Annexure C.

* An email from the ODPP to the accused's solicitor dated 19 February 2024 that advised of the Crown's intention to rely upon the transcript of WL's evidence at the first trial and attached the Section 67 Notice and a transcript of WL's evidence. Annexure D.

* An email chain between the OIC and WL between 6 February 2024 and 31 July 2024. Annexure E.

* A statement from the OIC dated 15 August 2024, wherein he documented the content of the audio call he had with WL utilising WhatsApp on the evening of 13 August 2024. I note that this was at a time when the retrial had been listed to commence on 12 August 2024. During that conversation, WL, who was residing overseas, told the OIC: "I'm willing to come back to Australia to give evidence but it has to be by video, not at the same Court." Discussion ensued about arrangements, including where he might give evidence and who would be covering costs. The conversation also covered the possibility of WL giving his evidence from the country in which he was residing. WL communicated that this would be his preferred option. Exhibit F.

* A copy of an earlier Notice of Motion dated 15 August 2024, returnable on 16 August 2024, wherein the ODPP had sought an order pursuant to section 5B of the Evidence (Audio Visual Links) Act 1998 that WL be permitted to give his evidence in these proceedings from a remote location by way of visual link. Annexure G. This application was granted by his Honour Judge Ingram SC on 16 August 2024, on the basis that WL give his evidence from a remote location within Australia, as he had done in the 2019 trial.

* An email from the OIC to Solicitor 1, the solicitor with carriage of the matter for the ODPP, dated 12 September 2024, extracting a message the OIC had received from WL at 9:04 PM on 11 September 2024 that read:

"Hey [OIC]

I'm sorry to inform you, but I've made the decision on not coming back to court. It's too much for me. Reliving the situation, coming back Court. I already have sleepless nights since I first came. And now I have to do it all over again? I can't put myself through that. Took me years to feel comfortable and again and put that behind me and I just can't do it all over again. I hope you understand and I'm really sorry." Annexure H.

* A further email from OIC to Solicitor 1, this time dated 13 September 2024, that extracted a text message sent by WL on 13 September 2024 at 4:31 PM that read:

"Hey [OIC], sorry I didn't see that you sent an email. I do not want to give evidence at all."
Annexure I.

1. The Crown relied upon other material in support of the Notice of Motion that included an affidavit of another solicitor for the DPP ("Solicitor 2") dated 16 August 2024, prepared in support of the ODPP's Notice of Motion on 15 August 2024, seeking the order that WL give his evidence from a remote location. Solicitor 2's affidavit became Exhibit B. Solicitor 2 previously had carriage of the case for the ODPP.

2. Solicitor 2's affidavit annexed:

* WL's statement to the police dated 9 January 2018 that set out the evidence he could give at the accused's trial, together with statements made by WL to the effect that he was frightened of the accused and frightened for his personal safety. Annexure A.

* A statement of Police Officer 1 dated 25 June 2020 that set out his conversation with WL on 22 June 2020 regarding his unwillingness to attend and give evidence in an unrelated trial involving the accused, listed to commence on 27 July 2020. In that conversation, WL explained his refusal to attend as being a consequence of his fear of the accused. Annexure B.

* A further statement from WL dated 8 July 2022, relating to the same unrelated proceedings, that at that point were set down for trial on 11 July 2022. WL again raised the fear he had for his safety but indicated a preparedness to give evidence by audio visual link. Annexure C.

* A further statement from WL dated 11 July 2022, regarding the same proceedings, repeating that he was not willing to attend court in person but would give evidence by video link. In this statement he repeated that he was worried about his safety and raised the state of his mental health. He considered that his personal attendance at the trial would adversely affect his mental health. Annexure D.

* An email chain between WL and the OIC between 6 February 2024 and 31 July 2024. Annexure E.

1. I note that the unrelated proceedings related to allegations made by WL that the accused and another man had 'kidnapped' him. Ultimately, on 12 July 2022, the ODPP's application that WL give evidence from a remote location was refused by his Honour Judge Colefax SC. The proceedings were then discontinued.
2. WL left Australia soon afterwards and has not returned. At the time of WL's departure, the accused was serving a lengthy term of imprisonment consequent to his 2019 conviction.
3. Annexure E to Solicitor 2's affidavit was an email chain, relating to the current proceedings, between the OIC and WL between 6 February-31 July 2024.
4. At the hearing of the Notice of Motion, the ODPP also tendered as Exhibit C, emails between NSW Police and the ODPP between 11-13 September 2024.
5. Communications between NSW Police and WL, by email and Whatsapp calls and messages between 30 July 2024 and 13 September 2024 were tendered as Exhibit D.
6. To make the various communications set out above understandable, they have been extracted in chronological order and are annexed to this judgment.

Accused's evidence on the Notice of Motion

1. Evidence relevant to the issue of the unavailability of WL was also tendered on the accused's behalf during the application.

2. Exhibit 1 was an affidavit from Abigail Bannister, solicitor for the accused, dated 14 October 2024, that set out a chronology of the proceedings, including the efforts made on behalf of the accused to obtain evidence of the steps taken by NSW Police and the ODPP to secure WL's attendance. The affidavit addresses other issues, not relevant to the s65 Evidence Act issue. It also annexed a series of documents also tendered on the Notice of Motion by the ODPP.
3. Ms Bannister's affidavit also annexed communications between NSW Police and WL in 2019 regarding the first trial, and in 2020-2022 regarding the prosecution of the accused for unrelated alleged offending against WL.
4. Exhibit 2 was an earlier affidavit of Ms Bannister dated 12 August 2024, that detailed the history of the unrelated prosecution of the accused for an offence of taking and detaining WL, contrary to s86 of the Crimes Act 1900. The affidavit annexed the transcript of an application made by the Crown for the evidence of WL to be given remotely in those proceedings, together with evidence of how WL had avoided being served with a subpoena in 2020, statements from him dated 8 July 2022 and 11 July 2022 wherein he asserted he was fearful of attending the trial in person. As noted, his Honour Judge Colefax SC refused the application. Shortly afterwards the proceedings were no billed.
5. Exhibit 3 was an email chain, only made available to the accused after I did not accept that it was the subject of legal professional privilege, between WL and the ODPP on 29-30 January 2024. The content of that communication is included in the chronology annexed to this judgment.
6. Both parties filed written submissions and made oral submissions.

Evidence Act provisions

67 Notice to be given

- (1) Sections 63 (2), 64 (2) and 65 (2), (3) and (8) do not apply to evidence adduced by a party unless that party has given reasonable notice in writing to each other party of the party's intention to adduce the evidence.
- (2) Notices given under subsection (1) are to be given in accordance with any regulations or rules of court made for the purposes of this section.
- (3) The notice must state—

the particular provisions of this Division on which the party intends to rely in arguing that the hearsay rule does not apply to the evidence, and if section 64 (2) is such a provision—the grounds, specified in that provision, on which the party intends to rely.

- (4) Despite subsection (1), if notice has not been given, the court may, on the application of a party, direct that one or more of those subsections is to apply despite the party's failure to give notice.

- (5) The direction—
 - (a) is subject to such conditions (if any) as the court thinks fit, and
 - (b) in particular, may provide that, in relation to specified evidence, the subsection or subsections concerned apply with such modifications as the court specifies.

65 Exception: criminal proceedings if maker not available (relevantly)

- (1) This section applies in a criminal proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.
- (3) The hearsay rule does not apply to evidence of a previous representation made in the course of giving evidence in an Australian or overseas proceeding if, in that proceeding, the defendant in the proceeding to which this section is being applied—
 - (a) cross-examined the person who made the representation about it, or
 - (b) had a reasonable opportunity to cross-examine the person who made the representation about it.
- (6) Evidence of the making of a representation to which subsection (3) applies may be adduced by producing a transcript, or a recording, of the representation that is authenticated by—
 - (a) the person to whom, or the court or other body to which, the representation was made, or
 - (b) if applicable, the registrar or other proper officer of the court or other body to which the representation was made, or
 - (c) the person or body responsible for producing the transcript or recording.

Dictionary to the Evidence Act:

4 Unavailability of persons (relevantly)

For the purposes of this Act, a person is taken not to be available to give evidence about a fact if:

- (f) all reasonable steps have been taken, by the party seeking to prove the person is not available, to find the person or secure his or her attendance, but without success, or
- (g) all reasonable steps have been taken, by the party seeking to prove the person is not available, to compel the person to give the evidence, but without success.

In all other cases the person is taken to be available to give evidence about the fact.

Crown submissions

1. In written submissions the Crown noted that the section 67 Notice had been served on the accused on 19 February 2024 and there had been no response from the accused until July 2024, at which point the accused had advised that the course proposed would be opposed. In this regard, I note the evidence suggests that the ODPP did very little to progress the matter until July 2024 and had apparently assumed WL would be giving evidence remotely in Australia.
2. The Crown asserted that all reasonable steps had been taken to secure the attendance of WL. Reference was made to R v Macdonald; R v Edward Obeid; R v Moses Obeid (No 4) [2019] NSWSC 1286 at [18] where Justice Fullerton observed "despite what I am satisfied were concerted attempts by officers of the DPP ... I am satisfied that as at 18 June 2019 Mr Fang is unwilling to return to Australia, voluntarily, to give evidence."
3. I did not find this judgment helpful because the "concerted attempts" referred to by her Honour were not particularised. I do not know what they were. I cannot compare the efforts made in that case to have the prospective prosecution witness Mr Fang return to Australia with those made here.
4. The Crown also referred to R v Geeves; R v Geeves (No 4) [2024] NSWSC 938 where her Honour Justice Loneragan considered s65(3), however in the context of the substantive issue to be resolved here, that case was of no assistance.
5. In oral submissions, the Crown noted that the contact made by the OIC with WL in the period after the quashing of the accused's conviction was informed by an awareness of his lack of cooperation in the unrelated 2022 trial proceedings and that the communication was thus carried out in a non-alarming and "diplomatic" way up until August 2024. The communication with WL took place with the OIC because the officer had engaged with WL before and had some rapport with him. The Crown noted the importance of not manipulating WL. It was accepted that after the receipt of WL's messages on 12-13 September 2024 nothing further was done to try and persuade him to give evidence.
6. The s67 Notice had been issued as an "insurance policy".

Accused's submissions

1. The accused opposed the Notice of Motion and submitted that the Court would not be satisfied that the ODPP, either directly or through NSW Police, have taken all reasonable steps to secure the attendance of WL.
2. In written submissions, the accused emphasised that the onus was on the Crown to establish that all reasonable steps had been taken to secure the witness' attendance. The very limited evidence relied upon by the Crown fell well short of what was required in a criminal prosecution for an extremely serious offence.

3. It was also noted that WL's evidence was crucial to the prosecution case. Reference was made to the various observations of the Court of Criminal Appeal in this respect, see per Beech-Jones CJ at CL at [1]-[2], [25], [29]; Weinstein J at [73], [201], [207]-210], Cavanagh J at [34]-[35]. [4]
4. The accused relied upon an observation in R v Hawi (No 2) [2011] NSWSC 1648; 216 A Crim R 64 by R A Hulme J at [111] that in cases involving serious crime with accused persons who are perceived to be a danger, the cooperation of prospective witnesses "poses a particular challenge for police investigators but it is often the case that a professional and resourceful officer is able to reassure such witnesses sufficiently to secure their testimony."
5. In this case it was submitted that there was a marked absence of such an effort.
6. In oral submissions, it was noted that as at 30 January 2024, WL had communicated he would come to Australia. Nothing was substantively done to facilitate this until 13 August 2024, the day after the trial was due to commence. Given WL's poor track record, there needed to be engagement with him from a much earlier point in time. No effort had been made by the ODPP or NSW Police to address WL's concerns regarding his work, his personal security, his asserted mental health issues, his broken leg or whether because of this injury he could travel to Australia in business class.
7. It was noted that the record of communication between the OIC and WL was incomplete. Exhibit D was difficult to interpret, with portions of the written dialogue between the OIC and WL not produced and at least one instance when there was voice call made between the OIC and WL, about which there was no evidence. The WhatsApp dialogue also referred to at least one email emanating from the OIC that has not been produced. Further, despite requests, the ODPP had not called any evidence on the application from the OIC or Solicitor 2, the solicitor who previously had carriage of the matter. Upon the receipt of the advice of WL on 12-13 September 2024, all communication with him came to an end and the s65 application was relied upon.

Consideration

(a) The section 67 Notice

1. On the accused's behalf, submissions were made regarding the validity of the section 67 Notice, given the obviously incorrect assertion contained within that Notice, as at 19 February 2024, that all reasonable steps had been taken to secure WL's attendance.
2. The email communication that became Exhibit 3 was not disclosed to the accused by the ODPP and a claim of privilege was made over those communications. The communications between NSW Police and WL only came to light because of a subpoena issued by the accused.

3. Those email communications make it clear that at the time of the issuance of the section 67 Notice, the ODPP and NSW Police apprehended that WL would attend the trial. There had been no unsuccessful efforts made to secure his attendance.
 4. Although the Crown sought to explain away the issuance of this Notice in February 2024 as a form of insurance against the possibility that WL may not appear, in my view there was no basis for the Notice to be issued at that time. Disturbingly, the representations within the Notice that all reasonable steps had been made to secure WL's attendance without success were entirely incorrect and at odds with what the ODPP and the OIC understood to be the case.
 5. Even worse, the communications that did occur between the police and the ODPP with WL were not disclosed to the accused and became available only because of persistent efforts on the accused's behalf to gain access to this material.
 6. The accused also submitted that the Notice was defective because it failed to particularise the representations that would be relied upon. In light of the conclusion I have reached regarding the 'unavailability' of WL, and the limited time available to me, I have not seen the need to resolve this issue.
- (b) Have all reasonable steps been taken to secure WL's attendance without success?
1. There is no issue raised as to the compellability of WL, given his residence overseas. There is no issue as to his location.
 2. Essentially, the meaning of 'unavailable' contained within the Dictionary to the Evidence Act 1995 at s 4(1)(f) that is of application is: has the Crown taken all reasonable steps to secure the attendance of WL without success?
 3. WL is a crucial witness to the prosecution. There is no dispute about this. Without his evidence, the prosecution case may not be viable. It was only after he approached the police in 2018 that the accused was charged. The proceedings are criminal in nature and relate to an extremely serious allegation. The victim was shot in a public place outside the door of his house and was rendered a paraplegic. There is a significant public interest in a trial such as this proceeding. The accused, if convicted, will inevitably return to custody to serve a further lengthy term of imprisonment.
 4. In respect of cl 4(1)(f), whether "all reasonable steps" have been taken will depend on the particular circumstances of the case. [5] The onus is on the party seeking a finding that a person is not available to establish that all reasonable steps have been taken to find or secure the attendance of the person.
 5. In *Huang v Wei* [2022] NSWSC 222, ('Huang') Kunc J observed at [41] that "authorities and the Court's experience generally suggest that at least some of the following will be of relevance in considering whether 'all reasonable steps' have been taken to find a witness or secure their attendance":

- (1) The nature of the case. For example, the higher standard of proof and the importance of the liberty of the subject may justify a higher bar than in a civil case (see *ZL v The Queen* (2010) 208 A Crim R 325; [2010] VSCA 345).
 - (2) The importance of the evidence (see *ZL v The Queen* and *Quintano* [6]).
 - (3) The inquiries that have been made and their outcome. For example, a definitive statement of non-cooperation from the witness, or an inference that the witness does not wish to co-operate, may mean no further steps are reasonable (see, for example, *Mindshare* [7]).
 - (4) Who the party is that is making the inquiries and about whom the inquiries are being made (see, for example, *AJW v NSW* [8]).
 - (5) The likelihood of any specific step yielding useful information. Where a party wishes to contend that particular steps should have been taken that were not taken, depending on the nature of the step it may be incumbent on that party to adduce evidence that the proposed step had some prospect of yielding useful information (see *Quintano* at [27]).
 - (6) The cost and delay that a particular step might cause (see *Mindshare* and *ZL v The Queen*).
1. Kunc J added at [42] that "[a]part from considerations of the kind identified in the preceding paragraph, it will also be necessary to consider the particular factual circumstances of the case at bar" and these may include:
 - 1) Is the identity of the potential witness known?
 - (2) Are the location or other contact details for the potential witness known?
 - (3) What, if anything, is known about the person's attitude to giving evidence?
 - (4) The practicability of compelling the witness to give evidence.
 - (5) When did the party applying for the benefit of the exception become aware of the existence of the witness and the evidence the witness could give? The discovery of a witness shortly before trial, assuming it is not the basis of an adjournment application, may be relevant to determining the universe of reasonable steps.
 - (6) The ability of the other party to respond to the evidence.
 1. Kunc J concluded at [44] that "all reasonable steps" had been taken in that case because it could be inferred that the potential witness "no longer wished to provide evidence", "[h]er evidence was not sufficiently important to warrant further steps being taken" and the defendant "had responded to the evidence in his affidavit in reply".
 2. Although not all of the above factors are relevant in this instance, noting Huang involved civil litigation, the most significant considerations in this matter are the nature of the case and the significance of WL's evidence.

3. In *ZL v The Queen* 208 A Crim R 325; [2010] VSCA 345 ('ZL') the Court (Nettle and Bongiorno JJA, Ross AJA) noted, in the context of the prosecution's failure to locate an important witness:

"it was only reasonable to expect that very extensive enquiries and efforts would have been made to locate her and ensure that she was available for trial. To date, however, ...such attempts as have been made to find the witness strike me at best as superficial and by and large decidedly half-hearted." (at [32])

1. In my assessment, the same level of effort was required in this case regarding securing WL's attendance. This did not happen.
2. Similarly, in *Tasmania v Dolega* [2016] TASSC 65, Brett J held at [14]–[16] that delays in attempting to find two witnesses when the prosecution must have been aware that there might be a problem securing their ultimate attendance at trial meant that "all reasonable steps" had not been taken, given that "it is impossible to say that reasonable steps taken" without delay may not have been effective in securing attendance. At [14] his Honour stated:

The focus of the enquiry under s 3B(1)(f) is not on whether the steps which could have been taken would or would not have been actually effective in securing attendance. The potential outcome of a step is relevant to an assessment as to whether it is a reasonable step to take, but the section clearly requires that all reasonable steps be taken to find and secure the attendance of a witness before the witness will be considered unavailable, with the consequence that a previous representation will be admitted in proof of the facts asserted in that representation.

1. In my view the same applies to the circumstances here, given WL's known track record of reluctance to give evidence in the related proceedings and the very limited steps taken to secure his attendance.
2. The issue of securing the attendance of a witness was considered by Heerey J in *Caterpillar Inc v John Deere Ltd (No 2)* (2000) 181 ALR 108; [2000] FCA 1903. His Honour concluded that the requirements of paragraph (f) were not satisfied because the party had not taken all reasonable steps to secure the attendance at the trial of a person living in the United States. The written invitation to him to come to Australia was "unappealing", the party failed to establish personal contact with him and did not offer to pay his expenses (at [17]–[19]).

- [19] The reasonableness of the steps taken by Deere in the present case can be assessed by comparison with a hypothetical example. Let it be assumed that Deere wished to secure the attendance of some other important American witness, but without any pre-conceptions as to whether or not the witness might be co-operative. It could be expected that Deere would write to the witness asking if he or she would be prepared to come to Australia to give evidence and offering to meet all expenses and compensate for the interruption of his or her business, including payment of professional fees if appropriate. If no response were received, especially where the address was three years old, it might also be expected that Deere US would try to make personal contact with the witness, ascertain whether the

witness had changed address or whether there were any impediments such as health or previous commitments, and, if so, try to work out mutually satisfactory arrangements. None of this was done in the present case.

1. Similarly, Ryan J in *Seafood Imports Pty Ltd v ANL Singapore Pte Ltd (No 1)* [2009] FCA 435 held that an "assumption, or intuition, that" a person in Japan would not co-operate in being called to give evidence by means of video link did not discharge the onus imposed to show unavailability.
2. In *R v Sarbandi* (2012) 229 A Crim R 39; [2012] ACTSC 180 a person in Saudi Arabia had not been offered financial assistance to travel to Australia and Refshauge J considered at [19] that it could not be assumed the person understood such assistance would be provided.
3. In *ZL and Huang* the issue of 'unavailability' focused upon failure to locate an important witness and not 'securing' their attendance. Even so, cases do assist when considering the situation here.
4. The Crown characterised the approach taken with WL, both by the OIC and staff at the ODPP, as "diplomatic" and "non-coercive" and whilst that may be accurate, what is lacking in support of the application is evidence of a concerted effort to appropriately persuade WL to again give evidence in the prosecution case. There was only the most limited effort in this regard during February 2024, with no evidence to confirm whether WL and the OIC ever spoke to one another. There is then no communication from the OIC or the ODPP with WL until 30 July 2024, when the OIC asked WL if he had booked his flights and made plans to return to Australia. Between 13 August – 11 September 2024 the OIC interacted with WL, mainly by Whatsapp and email in an attempt to arrange flights. Once WL communicated on 11 September 2024, seemingly out of the blue, that he would not give evidence at all, there was no further engagement with him.
5. There is substance in the accused's submissions that there was very limited communication with WL in the period following the quashing of the accused's conviction in November 2023 and that this of itself may well have contributed to his decision in September 2024 to decide to not give evidence at all.
6. One can see from the chronology the repeated unanswered requests by WL on 29 April 2024, 1 August 2024 and prior to 22 August 2024 for access to his statements, all presumably made in 2018. Apart from the early communication from the OIC up to 15 February 2024, there is no communication with WL at all until 30 July 2024, at which point no arrangements were in place and the trial was listed to commence on 12 August 2024.
7. On 30 July 2024, after no contact since 15 February 2024, the OIC emailed WL and asked: "Are you still overseas? Court commences 12 August 2024. Have you made plans to return? Have you booked flights?"

8. It is not until 13 August 2024, a day after the trial was listed to commence, and the day after the Crown's initial Notice of Motion seeking orders pursuant to s65(3) was made but not pursued by reason of the lack of evidence of WL's unavailability, that the OIC spoke with WL. On the evidence, this appears to be the first verbal contact with him, by anyone involved in the prosecution, with all earlier contact by way of very limited emails. The evidence reveals there was a second voice call between the OIC and WL on 22 August 2024, however there is no evidence about what was discussed at that time.
9. Despite OIC raising with WL on 13 August 2024 the possibility of him giving evidence from his country of residence, this possibility appears not to have been canvassed with WL again, despite the concerns he expressed, apparently from late August 2024, of the difficulty of travelling with a broken leg, the impact on his employment, his security concerns and his professed issues with his mental health. The material before me on the Notice of Motion did not include whether or not the application made on 16 August 2024 pursuant to s5B of the Evidence (Audio and Audio Visual Links) Act 1998 canvassed the option of WL giving evidence from his country of residence.
10. When WL seemingly abruptly communicated on 11 September 2024 that he did not want to come back to Court, the only subsequent interaction he had with the OIC was by Whatsapp message:

"I got your email about not wanting to give evidence. Can you confirm that you do not want to travel to NSW but will give evidence remotely? Or do you not want to give evidence at all?"

1. When WL replied on 13 September 2024 "I do not want to give evidence at all" the only further response, five minutes later, from the OIC was "OK thanks for letting me know."
2. I am not persuaded that all reasonable steps have been taken to secure WL's attendance. Very little was done in the period between January and 13 August 2024 to provide the prospective witness with accurate information of what was required of him. No-one engaged with him or sought in a professional and resourceful way to secure his testimony. The interaction that did occur was perfunctory prior to 13 August 2024 and then it was focussed only on arranging his flights to Australia.
3. The evidence placed before the Court in support of the NOM is also incomplete, with no oral evidence from the OIC or the solicitor who until recently had carriage of the matter. When WL broke his leg, no further thought appears to have been given to him giving his evidence from his country of origin. This possibility was not discussed further with him. Instead, it was communicated definitively that he was required in Australia. If the option of him giving evidence from his country of origin was impractical or unachievable, this needed to be explained to him.
4. At no point did the ODPP seek to conference WL, despite him telling the OIC during their Whatsapp call on 13 August 2024 that he had access to Wi-Fi and had no difficulty with remote contact.

5. In addition to much greater engagement with WL between January and 13 August 2024, I would have expected there to have been evidence of actual engagement with WL after 13 September 2024, with an effort made to identify what ameliorating measures could be taken to alleviate the concerns he raised relating to his employment, his concerns about security in Australia, his mental health and the impact of a lengthy aeroplane flight on a recently broken leg. I do not agree that it would be improper for there to be communication from the ODPP with WL that appropriately stressed how important his evidence was to the prosecution case.
6. If WL could not have been persuaded after such an effort, consideration needed to turn to a close examination of the possibility of WL giving evidence from his country of residence.
7. For these reasons I am not persuaded, on balance, that WL is unavailable. The Crown's notice of motion is dismissed.
8. During the oral hearing, I indicated that I would arrive at a conclusion regarding the accused's submission that even if it was determined that WL is unavailable, his earlier evidence should be excluded pursuant to s137 of the Evidence Act 1995. On reflection, the potential application of that section only arises if I am satisfied that the hearsay rule does not apply to the evidence. As I am not so satisfied, it is unnecessary for me to consider the application of s 137, and, in my view, it is not appropriate that I do so.

Annexure 1 - Chronology of communications with and about WL

Endnotes

1. The statement of Officer in Charge dated 15 August 2024 is Annexure F to the affidavit of Solicitor 1 dated 16 September 2024.
2. The Court has been informed that the solicitor with carriage of the matter in February 2024 is no longer employed with the ODPP.
3. See Affidavit of Solicitor 1, DPP, Annexure F
4. Askarou v The King [2023] NSWCCA 246
5. A discussion about the basis for the conclusion that all reasonable steps have been taken appears in Odgers 'Uniform Evidence' 19th Ed at p1839
6. Quintano v B W Rose Pty Ltd [2008] NSWSC 1012
7. Mindshare Communications Ltd v Orleans Investments Pty Ltd [2007] NSWSC 976
8. AJW and 2 ors v State of New South Wales [2003] NSWSC 803

Amendments

11 December 2024 - Catchwords edited

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