IN THE DISTRICT COURT
HELD AT CHRISTCHURCH

POLICE

v

Peter Hugh ELLIS
Marie KEYES
Gaye Jocelyn DAVIDSON
Deborah Janet GILLESPIE
Janice Virgina BUCKINGHAM

Date of Ruling: 11 February 1993
Counsel: Mr B Stanaway and Mr C Langey for Crown
Mr R Harrison for defendant: Ellis
Mr G Nation for other defendants

JUDGMENT OF JUDGE E B ANDERSON

I first want to say that I am crateful to counsel, that is the Crown and Mr Nation for his clients and Mr Harrison for the way they have conducted these matters and for the submissions that they have made which undoubtedly makes the task of this Court a lot easier.

It is not usual in deposition hearings to give reasons why

there should be a committal or not and there is very good purpose behind that, for if matters proceed there should be no embarrassment to any other Tribunal or any prejudice that may arise against the defendant. This set of hearings has attracted considerable interest and it appears to me that this Court must, in the circumstances, give short reasons and they must be short as to the bases of its opinion.

The Court is not sitting as a Tribunal of fact. It is not sitting to decide guilt or innocence and whatever my decision is today it does not remove the presumption of innocence in relation to the defendants.

The hearing is conducted under part five of the Summary Proceedings Act and particular reference is to be had to the provisions of s167 and 168 of that Act. Reading from s168:

> "When all the evidence has been given, if in the opinion of the Court the evidence adduced by the informant is sufficient to put the defendant on his or her trial for an indictable offence the defendant shall be committed for trial or not as the case may be".

I want to emphasis first the expression within that section "opinion". It is not a judgment in respect of the defendants. Secondly, "evidence adduced by the informant". The test to be applied has been consistently stated as requiring no more than a prima facie case being established. By that is meant there must be such evidence that if it be uncontradicted at the trial a reasonably minded jury may, not probably will, convict on it.

I refer further to Thomas J decision in Attorney General v B (1992) 2 NZLR at p 351:

> "The learned Judge's approach to the issue of credibility must be considered having regard to the purpose of a preliminary hearing. By virtue of s167 of the Summary Proceedings Act, the test to be applied in deciding whether or not to commit the accused for trial is whether the evidence adduced by the informant is sufficient to put him or her on trial for an indictable offence.
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> In determining sufficiency, the Judge must consider whether the evidence is capable of belief, but he is not required to believe it. If it is capable of belief, the question of whether or not it is to be believed is a question for the jury."

In this particular case the evidence of the child complainants has been through videotape conducted by interviewers and alleged disclosures made. These tapes were made pursuant to s185C(a) of the Summary Proceedings Act which relates also to s185C pursuant to the provisions of s185C(i)(b)(1) and (2). There is provision for a complainant to be brought before the court to be cross-examined. No application was made in relation to the children to come before this Court for cross-examination by defence and secondly this Court did not of its motion require the presence of the children. I suspect that both the defence and this Court undertook not to do that for the very sound principles which have already been established by superior Courts. But, the fact remains that this Court has not seen or heard cross-examination of the complainants.

I would refer to the case of W v Attorney General (1993) 1 NZLR at p 9 starting at line 1:

> "It would require an unusually strong defence case, for reluctance to usurp the jury's function is appropriate, but the right to endeavour to make out such a case is a valuable one and should not be held to have been

> practically taken away by s185C. It would be practically taken away if the section were administered so as always to preclude cross-examination of the complainant on matters going to credibility, even though the defendant may well be in a postion to demonstrate that considered against his own and in the light of any other evidence and all the circumstances, the complainant's evidence is not reasonably capable of being accepted as credible. A Court would be most unlikely to accept that extreme proposition when the complainant had not been cross-examined."

His Honour then goes on to talk about the situation when evidence is called. Such was the case here. Evidence was called by Mr Nation in respect of all four female defendants and two others were called for their support. I have to say that in giving their evidence they emphatically denied any involvement in any wrong doing. Placed against that of the complainants it becomes an issue of the complainants words against the defendants words. It is my view, and I think it has been often pronounced by the High Court, that in such a situation such is best left to the jury to decide. I am not empowered at this hearing to make findings of credibility. It is not my function.

The attack by the defence against the complainants has come on the grounds of inconsistency, lying and numerous interviews of the child complainants and leading, coaxing and pressure from parents and interviewers.

As far as inconsistency is concerned I would refer to "Adams Criminal Law" where the learned authors clearly make the comment that prior inconsistent statements do not render the witness totally without credit. The case of R v Nakhala (No

(1) (1974) 1 NZLR at p 441 and 452 is again further proposition for the fact that because a complainant or a witness has been inconsistent that a jury or Judge of fact is prevented from accepting his credibility.

There has been strong attack in relation to the interviews, the length of them and what has been referred to as contamination of the complainants by the interaction of parents in relation to their children and others. It is not for me to say what I would consider to be a common sense situation relating to parents, but rather to restrict myself to the position as I see it in relation to the law and the judgments of the superior courts.

Whilst Mr Nation had some comment to make about the case of R v Lewis it is my view that what is said within that case is highly relevant in support of dealing with this type of situation. Casey J in the matter of R v Lewis 7 CRNZ at p 580 and quoting from p 584 where he refers to a previous judgment of the Court dealing with the same case said this:

> "It seems to us that, although it is open to the defence to suggest that the evidence inculpating the accused was obtained by suggesting to the children what might have happened, the interviewers did not act unfairly; but what is more important, any allegation of that kind is well within the competence of a jury to assess if they have the advantage of seeing the tapes played as a whole. There is nothing arcane about the methods used by the interviewers. There is, as we have said, a certain degree of patient coaxing, but whether or not that can reasonably be thought to have led to any untrue statements by any of the children is esentially a matter which a jury should be well capable of evaluating ... it does seem plain to this court that the general spirit of the changes made by the Evidence Amendment Act 1989 with reference to the child witnesses in this class of case points towards allowing the use of these tapes The broad purpose is clearly to ensure that the old

> technicalities of evidence and traditional approaches to the giving of evidence, even the contents of evidence in matters such as hearsay, shall not necessarily prevail against the desirability of getting at the truth and doing so by an effective machinery which enables children to give evidence without undue stress, while at the same time preserving the accused's right to a fair trial".

In New Zealand the child's evidence does not need to be corroborated. It stands for assessment together with the other witnesses and in this particular case there is, as has been submitted by the Crown, matters of similar fact. It is not a matter for this Court or this Tribunal to rule on the Question of admissibility of similar fact evidence. There is ample provision within the Crimes Act and the Evidence Act for applications attack in relation to that type of evidence to be dealt with by a trial Judge prior to the hearing of any trial.

It appears to me that the competence of a child is also a matter, if asked to give evidence, that can be adequately dealt with by a trial Judge under the necessary provisions of the appropriate Act. Whilst Mr Harrison referred to a particular complainant in his submissions in relation to lies, truth and promises I would not uphold his submission in relation to that particular matter but that is not the end of it as far as he is concerned if he wishes to take it further.

I wish to conclude my remarks by referring to Eichelbaum CJ who, dealing with a s347 application which has a similar ring about it to these proceedings in Napier last year, was faced with an application to dismiss a charge of rape:

> "The Court's ability to discharge under s347 is not confined to the case where there is no evidence that the

> crime alleged has been committed by the accused. As pointed out in R v Galbraith (1981) 2 All ER at p 1062 this case raises the difficulty where there is some evidence but it is a tenuous character for any one of several reasons, one of which may be inconsistency with other evidence. It was there held that where the Judge comes to the conclusion that taken at its highest, the Crown evidence is such that a jury properly directed could not properly convict on it, it is his duty to stop the case. However, a different category is where the Crown's evidence is such that its strength or weakness depends on the view taken of the reliability of witnesses or other matters generally speaking within the province of the jury; and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the charge has been proved, then the Judge should allow the matter to go to the jury."

I leave that at that point. That is the background to the task and duty that I have to perform in relation to these matters.

Pursuant to the provisions of s167 of the Summary Proceedings Act upon the evidence given by the informant I am not satisfied that sufficient evidence has been adduced in relation to the following matters:

Charge number 58, complainant number 18. I am not satisfied that sufficient evidence has been adduced by the informant in respect of the charge number 25, complainant number 9.

Yesterday in submissions, and as indicated by Mr Nation at the commencement of this hearing, there was to be an application that in respect of complainant number 8 in relation to the defendant Ellis and the defendant Gillespie, the charges being numbered in the schedule 23 and 24, that there was inadmissible evidence in order for these matters to proceed.

Mr Nation, as I understand his legal submission, submitted that as the complainant was not a victim or involved, but rather a witness of an alleged incident then there was no provision or authority for her evidence in this respect to be given by videotape. The Crown, on the other hand, submitted that the complainant was a complainant in the proceedings and if an offence was disclosed then her evidence was entitled to be taken through the videotape. It is my view that the Crown sumbission is correct and a reading of the section provides for that contention to be held.

That is not the finish of the matter either for Mr Nation, in his very full submissions, then went on to the facts of the matter that this was a situation where dolls were used to simulate, if that is the correct word, the particular act. The evidence of the interviewers was, to say the least, equivocal; Ms Crawford saying that she really had no expertise in the matter whatever. I am attracted to the argument of Mr Nation that if the Court is to have evidence that what is alleged is such that there is the use of dolls it must, in some way, be verified by a person who has qualifications to show with the situation. In my view that was not so and I am left with a concern and I think a deficiency in the Crown case in relation to that. Accordingly, pursuant to the provisions of s167 I am not satisfied. I am of the opinion that the Crown has not adduced sufficient evidence in relation to those two charges and they will be discharged on that matter.

In relation to all other charges I am of the view that the

informant has adduced sufficient evidence to put the defendants on trial for the charges that they are now faced with.

E B Anderson
District Court Judge

ADDENDUM

I mentioned at the commencement of the background to my opinion that it was unusual to give reasons. I have done so. I am minded and fully aware of the situation faced by these defendants and the emotion and the pressures upon them. I do not want anything that I have said in my decision to be prejudicial to them or in any way influence any person in respect of any further proceedings.

It would be grossly improper and unfair to the fair conduct of this matter to have the reasons that I have given published. Accordingly, I suppress the reasons that I have given for coming to my opinion in this matter. The only matters that will be published therefrom will be the committal orders or the discharge.

Throughout this hearing there have been numerous applications made to the Court, the Registrar, and direct to me through

counsel in relation to the publication of matters. I repeat with as much force as I can muster that this is not a trial. The defendants are presumed innocent. It is totally unfair to put them and others under pressure between the various hearings that they have to undertake. I remind those that have the ability to make publication of the prohibition of publishing any evidence. That relates to the videotaped evidence by the children and that extends to what may be said by parents in use by them of children's evidence. It is suppressed by regulation.

I would like to say also that I would call upon the good offices of humanity, in what is a trying ordeal for a lot of people, to think and allow the process of justice to be performed calmly and reasonably in these circumstances.

E B Anderson
District Court Judge