NOT TO BE PUBLISHED
UNTIL TRIALS COMPLETED

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

T.9/93

R E G I N A

v.

PETER HUGH McGREGOR ELLIS
GAYE JOCELYN DAVIDSON
JANICE VIRGINIA BUCKINGHAM
MARIE KEYS

Hearing: 18th and 19th March 1993

Counsel: B.M. Stanaway and C. Lange for Crown
R.A. Harrison and Ms McNulty for Ellis
G.H. Nation for Davidson, Buckingham and Keys

Oral Judgment: 22nd March 1993

ORAL JUDGMENT (NO. 1) OF WILLIAMSON J.

Four former child creche workers are charged with sexual abuse offences. Their trial by jury is set to commence on Monday 26th April 1993.

Five pre trial applications have been made. These require prompt consideration and decision in order to avoid any delays which may create hardship and problems not only for the Accused but also the child complainants. Two of the five applications concern matters upon which there are rights of appeal to the Court of Appeal. So that these rights may be exercised if the parties wish to, this Court is hearing the two appealable

applications first. It has been necessary to deal with the applications in this way because additional information by way of affidavits and briefs, which is to be placed before this Court on the discharge applications, is not yet available or finalised. The need to hear these applications at this stage, however, has created a situation of some artificiality because the outcome of later applications may render pointless the decisions on these two applications.

Allegations of child sexual abuse are common. They occupy a very significant proportion of this Court's criminal jury trial lists. Pre trial applications in such cases must involve the manner in which the child or children are to give evidence and often also involve the admissibility of videotaped interviews of the children. All Counsel claim that this case is unique because of the number of children involved; the manner in which the allegations arose; the number and length of complainant interviews; and the variety of charges. Certainly the depositions were lengthy. In order to prepare for this hearing it has been necessary to view approximately 39 hours of videotaped interviews and to read over 1000 pages of evidence, as well as examine numerous exhibits.

CHARGES

The draft indictment which has been filed contains 28 charges against Peter Ellis and one joint charge against Gaye Davidson, Janice Buckingham and Marie Keys. Details of the circumstances relied upon for each charge are generally contained within its wording. These circumstances involve the alleged actions of Peter Ellis at the creche toilets and at a house to which he had taken some of the children. The eighteenth count, which is the only charge against Davidson, Buckingham and Keys, charges them as parties to an offence of doing an indecent act upon one

boy. It is contended that the three women Accused encouraged Peter Ellis in a type of sexual game in which creche children were placed naked in a circle of adults and made to kick and strike each other and were subjected to indecent touching of their private parts.

PRE TRIAL APPLICATONS

The five pre trial applications and their statutory bases are as follows:

1. Severance - s.340(3) of the Crimes Act 1961
2. Mode of evidence - s.23D of the Evidence Act 1908
3. Admissibility - s.344A of the Crimes Act 1961
4. Discharge - s.347 of the Crimes Act 1961
5. Judicial Review - s.4 of the Judicature Amendment Act 1972

For the reasons that I have already explained, judgment on these five applications will be given in parts. I will now rule in relation to the first two applications.

SEVERANCE

The application for severance is made by the Accused Davidson, Buckingham and Keys. It is not supported by Peter Ellis. The primary submission is that the counts involving three of the children should be separated from the others. It is contended that counts 13-21 should be tried first. Of these charges counts 14-18 involve a boy whom I shall refer to in this judgment as X. This child has said that Davidson, Buckingham and Keys were present when some of the creche children were made to stand within a circle in a room in a two storey house and when they were subjected to various indecencies. X names two other children who were

present at this circle incident. I will refer to them as Y and Z. Neither Y nor Z have said in their interviews that Davidson, Buckingham or Keys were present during such an incident. Indeed Z has said that these three women Accused were not present when the children were struck at this house.

In seeking to separate these 9 counts from the others, Counsel for Davidson, Buckingham and Keys desires to limit prejudice and hardship to them while avoiding the necessity for any of the children to give evidence more than once. He also wishes to have the evidence of Y and Z available to his defence and to have the opportunity to cross-examine these two witnesses rather than to call their evidence himself. As a secondary submission these Applicants seek an order separating the charges involving the child X from the indictment. In other words that counts 14-18 be tried separately.

The Crown resists both of these submissions. It argues that the application for severance should be refused and the trial proceed on all 29 charges in the indictment.

The law relating to separation of counts in an indictment, as is primarily sought in this application, is that a Court may make such an order if it thinks it is conducive to the ends of justice to do so. If count 18 involving the three women Accused were to be tried separately, the same test would apply although the Court would be dealing with separation of accused and would then be exercising its inherent jurisdiction rather than relying on the statute. (See s.379(1)(d) of the Crimes Act 1961 and ***R v Humphries*** [1982] 1 NZLR 353 at 355.) The Court has a broad discretion on such applications. There is no presumption that severance is appropriate. Ultimately each case must be determined upon its own circumstances.

Guidance to Judges exercising such a discretion is contained in numerous decisions, including those referred to by Counsel and attached as a schedule to this judgment. Severance is normally appropriate if there is a danger that despite directions a jury might improperly apply evidence on one charge to another charge or charges or if prejudice may arise because of the multiplicity of the charges or other circumstances. In part the interests of justice involve the obvious commonsense and convenience of including similar or related charges against alleged parties in the same trial. Prejudice, however, may be so strong in a particular case that it outweighs all other factors. Ultimately every relevant factor has to be considered. A Court must judge the weight to be given to the particular factors. As is so often the case, such judgment involves matters of degree in respect of which no more accurate measuring device than a Judge's human experience of criminal trials and society is available.

Counsel for the three women Accused accepted that a case could be made for the evidence against Peter Ellis on some of the charges to be relevant and admissible, as similar facts, to other charges including those in counts 13 and 19-21. It is significant that Counsel for Peter Ellis also wishes all charges against him to be tried together. He contends that such a course is vital to the defence which is based upon alleged contamination by the complainants and their families of other complainants and their families.

The position of similar fact evidence and its relevance to severance applications is summarised in the case of ***R v Accused*** CA 208/87 [1988] 1 NZLR 573 where the Court of Appeal stated bluntly that in cases alleging sexual offences on young children it would be needlessly artificial and contrary to the requirements of justice to deny a jury the advantage of

the full picture. In that case it permitted the joinder of a number of counts involving five complainants, three of whom were members of an accused's household and two who were near neighbours. Amongst other things the Court said that it was appropriate for all of the counts to be tried together since there was a theoretical possibility that the children may have collaborated in their evidence and at a joint trial that matter could be pursued if necessary. (See also ***R v Narain (No. 2)*** [1988] 1 NZLR 593.)

Reference was also made to the decision in ***Hsi En Feng*** [1985] 1 NZLR 222. Interestingly this decision and a further decision in ***R v Huijser*** [1988] 1 NZLR 577 were the subject of comment by the House of Lords in the case of ***R v P*** [1991] 3 All ER 337. Lord Mackay, with apparent approval, cites from the latter New Zealand decision.

In the case of ***R v P*** the House of Lords held that the evidence of an offence against one victim could be admitted at the trial of an allegation that the accused person had committed a crime against another victim if the essential feature of the evidence which was to be admitted was that its probative force in support of the allegations was sufficiently great to make it just to admit the evidence, notwithstanding that it was prejudicial to the accused in tending to show that he or she was guilty of another crime. It is, of course, significant to consider that approach in this case because if in law the evidence of one complainant may be admissible on the trial of charges involving another complainant, then it would be unnecessarily repetitious to have separate trials for charges involving each of the complainants and the same evidence given at each trial. It has been a common feature of trials for like offences over a number of years that, given sufficient relationship, the counts proceed together but with a strong direction ultimately being given by the Judge to the jury concerning the

manner in which they can apply the evidence of one complainant in relation to allegations involving another complainant or indeed allegations in relation to a particular charge as they relate to the trial of another charge.

The relevant passages in the case of ***R v P*** are to be found at page 346 as follows:

> "Once the principle is recognised that what has to be assessed is the probative force of the evidence in question, the infinite variety of circumstances in which the question arises demonstrates that there is no single manner in which this can be achieved. Whether the evidence has sufficient probative value to outweigh its prejudicial effect must in each case be a question of degree."

And further at page 348:

> " When a question of the kind raised in this case arises I consider that the judge must first decide whether there is material upon which the jury would be entitled to conclude that the evidence of one victim, about what occurred to that victim, is so related to the evidence given by another victim, about what happened to that other victim, that the evidence of the first victim provides strong enough support for the evidence of the second victim to make it just to admit it, notwithstanding the prejudicial effect of admitting the evidence. This relationship, from which support is derived, may take many forms and while these forms may include 'striking similarity' in the manner in which the crime is committed, consisting of unusual characteristics in its execution the necessary relationship is by no means confined to such circumstances. Relationships in time and circumstances other than these may well be important relationships in this connection. Where the identity of the perpetrator is in issue, and evidence of this kind is important in that connection, obviously something in the nature of what has been called in the course of the argument a signature or other special feature will be necessary. To

> transpose this requirement to other situations where the question is whether a crime has been committed, rather than who did commit it, is to impose an unnecessary and improper restriction upon the application of the principle."

Our Court of Appeal has considered this same approach in the cases of ***R v McIntosh***, CA 352/91, 13th November 1991, and perhaps more significantly in the case of ***R v Crime Appeal CA 247/91***, [1992] 2 NZLR 187.

The cases I have just been referring to strongly support a trial of Peter Ellis on all of the 28 charges against him. The only reason why Counsel for Davidson, Buckingham and Keys did not seek to sever count 18 alone is that he desires to have available to the defence the negative evidence of the complainants Y and Z and he did not wish the children X, Y and Z to have to give evidence twice. If count 18 is severed from the rest of the counts, then the evidence of Y and Z would still be available. Complainant X may well have to give evidence twice but only in respect to a relatively limited extent.

In my view concentration upon aspects of similar fact evidence and its relationship to severance tend to rather obscure the most significant grounds for this application. These grounds are ones based on prejudice and oppression. The number of charges against Peter Ellis and the nature of the allegations is such that inevitably some prejudice must arise to the Applicants. There is an obvious danger that they will be, to use a colloquial expression, "tarred with the same brush" because they have worked closely with him. On the evidence of a number of the children who are not witnesses relevant to count 18, the jury may conclude that these three women should have known what was happening and taken steps to stop it

or to properly supervise the Accused Ellis and the children. Indeed some of the children in their videotaped interviews specifically say that they told one or other of the women. Even if those passages were excised from the tapes, the weight of all the other evidence against Peter Ellis over all of the charges, if it is accepted, and indeed Ellis's defence itself may cause the jury to draw that same inference about the women. To be tried on one count with the 28 others against Peter Ellis would in my opinion create an undue prejudice.

I have concluded also that it would be oppressive for the three women Accused to be present and to have the expense, inconvenience and distress of a trial which involved 28 other counts and 13 complainants and may occupy 6-8 weeks or more when they are charged with one offence involving one child and their separate trial may occupy only one week. When I say involving one child I mean one child witness. Such considerations, although in a different context, were referred to by the Court of Appeal in the cases of *R v Tuckerman* CA 280/86, 31st October 1986, and *R v O'Connell* CA 274/92, 1st December 1992.

In my view it is also significant that the primary defence of the Accused Peter Ellis and the primary defence of the three women Accused are different in nature. With the former the defence is that the sexual acts did not take place at all; while for the latter the primary defence is that they were not present or were not parties to any such acts. Strong directions to a jury concerning matters of prejudice and the excising of some of the evidence may reduce the prejudice to the women Accused. On balance, however, I am satisfied that the proper course to avoid such prejudice and oppression arising is to order a separate trial for the Accused Davidson, Buckingham and Keys on count 18. I do so accordingly.