NOT TO BE PUBLISHED
UNTIL TRIALS COMPLETED

IN THE HIGH COURT OF NEW ZEALAND **T.9/93**
CHRISTCHURCH REGISTRY

R E G I N A

v.

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

Hearing: 18th, 19th, 22nd, 23rd and 24th 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: 25th March 1993

ORAL JUDGMENT (NO. 2) OF WILLIAMSON J.

This is the second part of a judgment concerning pre trial applications. The first part dealing with severance and the mode of evidence was delivered on the 22nd March.

ADMISSIBILITY

The principal evidence for the prosecution is to be given by 13 former pupils of the Creche. They are young children. In this application the Accused seek an order excluding the children's evidence. It is argued that the children's evidence has been unfairly obtained or that its prejudicial

effect outweighs any probative value it may have. Very detailed and thorough submissions with numerous examples from the deposition evidence have been presented in support of these arguments. The main thrust of them is a contention that the procedures followed in this case by the Police, the parents and the interviewers were so wrong and oppressive that the resulting videotaped interviews and the children's oral evidence should be excluded on the grounds of unfairness.

POWER

A Judge's power to exclude such evidence upon grounds of unfairness to accused is clear. The Judge has a discretion. The law is succinctly stated in the Court of Appeal decision of *R v Coombs* [1985] 1 NZLR 318. The relevant passage is:

> "New Zealand courts should follow such cases as *Police v Hall* [1976] 2 NZLR 678, *R v Hartley* [1978] 2 NZLR 199, *Police v Lavalle* [1979] 1 NZLR 45, *R v Menzies* [1982] 1 NZLR 40, and *R v Loughlin* [1982] 1 NZLR 236 which express the nature of the jurisdiction in this country. The principle stated in those cases is that evidence obtained in illegal searches and the like is admissible subject only to a discretion, based on the jurisdiction to prevent an abuse of process, to rule it out in particular instances on the grounds of unfairness to the accused."

Most of the reported cases relate to the admission of confessions or material derived from an accused. Many of them concern improper police conduct. Examples are contained in the references in the extract from *R v Coombs* referred to above and in the text of *Cross* 4th New Zealand Edition pages 32 and 33. A statement in the latter text that the categories of unfairness are not closed was accepted by all Counsel as a correct statement of the present position.

The jurisdiction to make an order that evidence is admissible prior to trial is given in s.344A(1)(b) of our Crimes Act 1961. There is no doubt in this case that the children's evidence of the offences charged is relevant and admissible. Indeed Counsel for the Accused have proceeded with their arguments upon the basis that while that evidence is admissible it should nevertheless be excluded in the exercise of the Judge's discretion.

Subsection (4) of s.344A provides:

> " Nothing in this section nor in any order made under this section shall affect the right of the prosecutor or the accused to seek to adduce evidence that he claims is admissible during the trial, nor the discretion of the trial Judge to allow to exclude any evidence in accordance with any rule of law."

It could be suggested that the exercise of a trial Judge's discretion to exclude evidence is not in fact covered by s.344A. Such a view, however, would not accord with decisions frequently made pursuant to this section or to the wide interpretation of admissibility preferred by the Court of Appeal in ***R v Accused*** CA 32/91 [1991] 7 CRNZ 230. In the absence of any detailed argument about this discretionary matter I intend to proceed to consider the application in the usual way.

ONUS

According to the judgment of the Chief Justice in a case of ***R v Dally*** [1990] 2 NZLR 184 at page 188, the burden of proof in such a matter is upon the Crown to negate unfairness to the exclusion of any reasonable doubt. His Honour said:

> " In relation to unfairness the position may be open to debate but I adhere to the approach I took in ***R v***

> *Noble* (1986) 2 CRNZ 583 to the effect that once the accused established circumstances raising a case for unfairness the burden thereafter rests on the Crown to negate unfairness again to the exclusion of any reasonable doubt."

In the Court of Appeal decision of ***R v Marsh*** [1991] 7 CRNZ 465 at 471 it was said that to exclude evidence in the exercise of a Judge's discretion is not a matter which readily succumbs to evidential rules about onus or standards of proof. The issue of onus was not explored in any depth in the Court of Appeal decisions of ***Marsh*** or in ***Williams*** CA 25/89, 18th May 1990, but it has been the subject of a detailed article by D. Mathias entitled "***Fairness and the criminal standard of proof***" 1991 NZLJ 159. He concludes that there are good reasons for a standard of proof of beyond reasonable doubt. In the interests of certainty, simplicity and caution I will apply that standard in this case although I am conscious that considerations of onus are not often helpful in deciding how to exercise a discretion. (See *R v Horsfall* [1981] 1 NZLR 116 at 122.)

Concepts of fairness, balance and reasonableness involve the weighing of multiple facts and factors. To decide that evidence has been unfairly obtained involves reaching a conclusion that the proved facts relating to the process by which that evidence has become available to the Court point to unfairness but in arriving at such a conclusion the facts which point to fairness must also be considered. Satisfactory factors must be balanced with unsatisfactory ones so that an overall view is reached as to whether or not this case raises circumstances of unfairness. It is only on the basis that this threshold mentioned by the Chief Justice in ***Dally's*** case has been reached that any question of shift of onus arises.

SUBMISSIONS

For the Accused Ellis the primary submissions made were that the quality of conduct of those who obtained the children's evidence warrants its exclusion on public policy grounds and that the manner in which it was obtained results in unfairness to the Accused. It was argued that the quality of conduct could be summarised in the following four propositions.

1. The manner in which the investigation was initiated by the police and was presented to the parents of children of the creche by way of a public meeting. In particular the way in which the subject of sexual abuse and Peter Ellis were presented to the meeting which made it clear that 'actual allegations' had been made but failed to advise the parents the allegation was of an innocuous and nebulous nature. The impact of the meeting was such that it generated a climate of fear about sexual abuse without clarifying the concerns which had arisen and also portrayed Peter Ellis as the abuser.

2. The direct and suggestive questioning of children by their parents, despite being cautioned against doing so. The direct questioning was specifically about Peter Ellis and specific alleged acts.

3. The collating and sharing of information between parents through support groups and the like which fuelled the climate of fear and was then used by parents to directly question children.

4. The manner in which the disclosure interviews were conducted by DSW in particular by the use of direct and suggestive questioning, multi-choice questioning, repeated questioning, repeated interviews and the use of anatomically correct dolls."

For the Accused Davidson, Buckingham and Keys it was submitted that the evidence of complainant child X in the interviews of the

4th, 5th and 6th August should be excluded in the exercise of discretion to avoid unfairness. Part of Counsel's argument was that the Court should maintain an effective control not only over the Police procedures generally but also, in child sexual abuse cases, the Social Welfare's Specialist Services Unit. It was contended that this control should relate not only to interviewing techniques but also to the interviewer's decisions to proceed with interviews despite previous questioning by parents and that the control should relate to police decisions to proceed with prosecutions based upon such interviews. In support of these submissions Counsel filed an affidavit by Dr Le Page, an eminent Australian psychiatrist with specialist qualifications in child sexual matters. There are a number of annexures to his affidavit which contain articles about child sexual abuse interviewing techniques and the well known inquiry in Cleveland as well as American and Australian examples of such complaints by children attending pre school institutions.

In reply to these submissions Counsel for the Crown has argued that the processes by which the children's evidence was obtained and is now available to the Court were not unfair. It was acknowledged by Counsel that some of the Accused's criticisms of the children's evidence are correct but it was contended that such criticisms went to the weight or the reliability of the evidence and not to its admissibility. Counsel for the Crown submitted that the application was more properly considered under the provisions of s.347 of the Crimes Act where the Court has an overall discretion and that, in effect, the Accused's Counsel had "dressed up" the application as one under s.344A in order to obtain a right of appeal to the Court of Appeal pursuant to s.379A.

In reply to the affidavit of Dr Le Page Counsel for the Crown filed a detailed affidavit by Dr Karen Zelas, also an eminent psychiatrist with specialist qualifications both in New Zealand and overseas in child sexual abuse. In general she does not accept many of the conclusions put forward by Dr Le Page. Her affidavit also confirms other evidence that she supervised some of the evidential interviewers of the children and that she was consulted by them and the Police about some of the procedures followed.

APPROACH

Both Counsel for the Accused urged me to conclude at this stage that the children's evidence should be excluded. They acknowledged that their applications for exclusion were unusual and they did not expect them to be readily granted. It was said, however, that this case was so unique and the prejudice to the Accused so great that this step should be taken.

Mr Nation referred to the manner in which cases involving potential contamination of a witness's evidence by previous hypnosis had been dealt with by Courts. He referred to the cases of ***R v McFelin*** [1982] 2 NZLR 750 and ***R v Horsfall*** (1989) 51 SASR 489. He acknowledged that in both of these cases the element of hypnotherapy having been used was a factor that influenced the final outcome. In ***McFelin's*** case the New Zealand Court of Appeal said that:

> " In our view the governing principle in New Zealand can only be that, whenever post-hypnotic testimony for the Crown is offered, the Judge should not admit it unless satisfied that to do so is safe in the particular circumstances. Regard should be had to the precautions taken in the hypnotic and associated

> sessions; ... regard should also be had to the strength of the other evidence. These considerations apply to all evidence proposed to be given by a witness who has been hypnotised, in connection with the subject-matter of the case, at some stage before the trial; but in practice it is likely to be more difficult to show that the evidence can be safely admitted if alleged recollections have emerged for the first time during or after hypnosis."

The concept mentioned in this case of whether it was safe to admit evidence is also one referred to by the Court of Appeal in a case of *Walters* [1989] 2 NZLR 33 and *Uea* (1989) 4 CRNZ 703. Another expression which has been used by members of the Court of Appeal recently in relation to the admission of complaint evidence is that of "unacceptable risk". In this I refer to the case of *R v Duncan* [1992] 1 NZLR 528. The researches of Counsel uncovered one case where a videotaped interview of a child has been excluded, that is the case of *R v B*, Rotorua Registry T.28/92, Doogue J. In that case he decided that the interview was fundamentally flawed and that it would be unjust to admit it. Essentially he did so because of persistent leading questions and because the child's motivation was based on a false premise.

Any consideration of the interviews of children and the techniques used in such interviews must have regard to our present statutory provisions and to the views expressed in the Court of Appeal decision of *R v Lewis* (1990) 6 CRNZ 350. At page 351 of that decision the Court said:

> " many of the questions asked were of somewhat leading or coaxing character. That was necessary to extract accounts from the children of what they say was done to them or to other children in the group. It was a process of patient probing which elicited, as well as a great deal of information of no direct relevance, a

certain amount of evidence which supports the charges."

Having regard to these legislative changes and to the views expressed in the case of ***Lewis***, it is clear that some latitude in the rules of evidence in relation to children is appropriate. Indeed in my experience that is not new. Such latitude has been allowed in Courts for many years in relation to the evidence of persons who are suffering from some disability in relation to the giving of evidence. The Court must consider whether the extent of any leading questions or the nature of techniques used during an interview give cause for concern and whether they go beyond the tolerance which is accepted in cases such as ***Lewis*** and which the Court has traditionally extended to the use of special questioning techniques whenever these seem appropriate in order to obtain information from persons under a disability whether that disability is one of immaturity or otherwise. Certainly direct questions or ones containing alternatives can in some circumstances be entirely reasonable and proper.

Because of the ultimate conclusion I have reached about this application I do not intend to deal with the many factual references made by Counsel for the Accused and for the Crown. It is sufficient if I comment generally on some of the matters raised.

The Preliminary Public Meeting

The first criticism made by Counsel for the Accused Ellis is that the investigations into offences now charged commenced with a public meeting called by the Police at the beginning of December 1991. It was contended that the calling and conduct of this meeting was totally inappropriate to the "nebulous and innocuous" remark which had triggered

it. The evidence, however, does not support this criticism or the more detailed ones associated with it. The meeting was called by an official group of parents after consultation with the City Council who had the overall responsibility for the Creche. The child of one of these parents had said to his mother that he did not like Peter's black penis. Naturally this had concerned the mother. There is related evidence that the Accused had said he had blackened another person's penis using a pen. The mother complained to the Creche controllers. She spoke to the Police and her son was then interviewed twice by the Specialist Services Unit of the Department of Social Welfare. It was at a time between these interviews that the parents called the meeting. Representatives of the Police and Specialist Services Unit were invited to this meeting to advise the parents. The purpose seems to have been to educate the parents. It was not a meeting called by the Police in order to commence their investigations.

Counsel for the Accused complained that the Police had in effect misled those present by referring to "actual allegations", but he accepted that these submissions were based upon an error in the original typing of the depositions which, unbeknown to him, had been corrected by the witness when he was having the depositions read back to him. In fact the Police Officer's evidence was that he had not told the parents that there were not any actual allegations, that is the complete reverse of what Counsel claimed.

Part of the complaint as to the procedures is that the Police should have reassured the parents at this meeting that nothing was amiss. In my view, it may well have been irresponsible for them to have done so without having had an opportunity to investigate the possibility in detail. Overall the evidence does not support Counsel's submission that the effect

of this meeting and the subsequent one in March 1992 was to create a climate of fear in parents so that they became such a group as is described in one of the articles attached to Dr Le Page's affidavit as "a hyper vigilant group of parents of pre school children". Indeed the suspicions which provided the real foundation for Counsel's submissions may equally be explained as arising from natural concerns of the parents and from entirely proper steps taken in alerting them to potential problems which may affect their children.

The Questioning by Parents

A feature of this case is the amount of written material, such as notes and diary records, kept by parents concerning things said to them by their children; questions they asked of their children; and information given to them by other parents. The items were produced at the depositions as defence exhibits. There is clear evidence in them that some children were asked leading questions by the parents prior to any disclosures being made of sexual abuse. Many were asked direct questions. Most of the children were probably part of discussions with their parents or other family members before the evidential interviews took place.

Two of the principal complainant children do not appear to have been questioned to any extent prior to the interviews. This latter fact may have some particular weight given the approach of the Court of Appeal to the question of other evidence in the case of ***R v Tamihere*** [1991] 1 NZLR 195.

Ideally the evidence of complainants in cases of this nature would arise clearly and precisely and without any previous questioning. Such a position, however, would be unreal. It just does not happen.

Victims of sexual crimes are affected by emotional and relationship factors to such a degree that, even entirely genuine and truthful evidence, may be given hesitantly and only when the right occasion presents itself. It would be a somewhat false and artificial standard for Courts to impose in such cases a requirement that parents should have had no detailed communication with their child about such matters prior to any admissible evidential interview. The need for the child to be interviewed only arises usually when some relevant information has been given to the parent or to another carer. Understandably parents would discuss such matters with a child who was worried or who was about to attend an interview. The problems may come, however, from the nature and extent of a parent child communication. As usual with such matters, it will be a question of degree Courts have to weigh, although not with fine scales, the effect that such communications may have had on evidential interviews. In the gross case where parents or investigators have effectively prepared briefs of evidence for children to memorise or recount later, then, of course, it would be unfair to allow that evidence to be given at a trial. When a child has been misled or tricked into saying things at an interview that also would be improper. (See ***R v B*** above.) On the other hand where parents have just asked natural and appropriate questions, even if they are direct or leading, prior to an interview, then such procedure may be fair since it would be unlikely to lead to false testimony. It is when more extensive questioning has taken place that decisions have to be made about whether a Judge should exercise the discretion to exclude evidence having regard to the extent of any risk that that evidence is untrue. There was extensive questioning of some of the children in this case and that is a factor which I must have particular regard to in considering this application.

Sharing of Information

After the initial meeting some of the parents of the Creche children set up a support group. Counsel for the Accused Ellis was critical of the activities of this group and particularly of steps taken by [redacted] and [redacted] in making information about some children available to the parents of others. This exchange of information clearly occurred. The extent and significance of it, however, does not appear to me to support the sinister picture drawn by Counsel. Generally the parents of the complainants who gave evidence at the depositions and who were extensively cross-examined do not appear to have been unduly influenced by the sharing of information. More importantly, the question for the Court is whether the children's evidence has been affected by this conduct. Again this question returns to the necessity for judgment about the reliability and truthfulness of the children's evidence. I am unable to determine on the depositions and the exhibits that the sharing of information between parents has had the effects contended for by Counsel.

Conduct of Interviews

There are a number of aspects to the criticisms made by both Counsel for the Accused about the conduct of the interviews.

For the Accused Ellis, Counsel referred to the use of direct and suggestive questions, multi choice questioning, repeated questioning, repeated interviews and the use of dolls. For the Accused Davidson, Buckingham and Keys, Counsel relied on those same matters but also on an alleged failure of the interviewers to adequately explore the child's background before the interviews; the continuing of those interviews after counselling therapy had been commenced for this child; and the continuing of further interviews when the child was unwell and his evidence may have

been contaminated by information from his parents or some other children. On this aspect Counsel called, in aid of his submissions, the affidavit evidence of Dr Le Page about the dangers associated with such interviewing.

These dangers have to be balanced by the evidence given by Dr Zelas. In the annexures to both affidavits there are fascinating views expressed about the techniques of interviewing young children. I have had regard to these matters. I am conscious that in some of the videotaped interviews there are clear examples of leading questions and indeed hearsay evidence. Such passages may be excised from the videotapes under the provisions of s.23D(2) of the Evidence Act 1908. Also a number of the tapes produced at the depositions do not relate to any of the charges in the indictment and were apparently included so that general submissions as to the conduct of the interviews could be made. The evidence of the interviews and of Dr Zelas and my own observations of the videotapes satisfies me that the interviewers who conducted these interviews were qualified, mature and trained women who were under the regular supervision of a psychiatrist with specialist qualifications in child sexual abuse cases. While there may be some legitimate criticism about some aspects of these interviews, I am not satisfied that there has been improper conduct which should be the subject of discipline or that there are circumstances of unfairness raised by the conduct of these evidential interviews.

CONCLUSION

Ultimately all of these matters raised lead me back to the children's evidence. In order to arrive at a decision as to whether or not evidence has been unfairly obtained it is necessary to consider the nature of

the challenged evidence. The combined effect of all of the circumstances by which it was obtained must also be weighed.

Since this evidence is vital to the case against the Accused, there is considerable force in the submission that the present application is more appropriately dealt with as one for discharge under s.347. I intend to proceed to hear the application under s.347 filed by Counsel for Davidson, Buckingham and Keys as soon as Counsel are ready to proceed with the application and Court time is available. In the meantime, after having read the depositions, viewed the videotapes and heard extensive submissions, I have concluded that I should not exercise my discretion and make findings in relation to fairness until I have had an opportunity to hear the evidence and to see the witnesses examined and cross-examined. At any stage of the trial I could exercise my discretion to exclude the evidence if I am then satisfied that the criteria already discussed apply. If the evidence admitted and allowed to go to the jury results in conviction, then the Accused still have rights of appeal about its admission.

For the reasons which I have given, this part of the application under s.344A is adjourned until the trial.

OTHER ITEMS OF EVIDENCE

There are other matters of evidence upon which rulings have been sought. I will deal with them now. Problem passages in the videotapes already referred to, will have to be considered and excised. I will hear further argument from Counsel about these matters.

Of the matters of evidence raised by this application, a number have been the subject of agreement between Counsel or conceded by the

Crown. The specific items (referring to the same numbers or letters which appear in the application) which remain in dispute are:

Item C The tapes of child Y.

It is submitted by Counsel for the Accused Ellis that the promise made by this child in his first interview, Ex. 6023, was not genuine and in breach of Regulation 5 of the Evidence (Videotaping of Child Complainants) Regulations 1990 and that the subsequent interviews of this child are also affected by this breach. The relevant passage in the transcript is:

"L Lie okay well what do you know about what do you know about promises, do you know anything about making a promise.

T Promises you're keeping secrets from somebody.

L Promises are keeping secrets. Is a secret and a promise the same or are they different.

T Different.

L They're different so what's a promise.

T Um it's when you don't tell anyone.

L Ah ha. And what's a secret.

T A secret means you don't tell anybody.

L So that's kind of the same is it.

T Yea it's a little bit.

L Yeah has anyone ever made you a promise.

T Yes.

L Yeah who makes you a promise.

T [illegible].

L so what did he promise.

T ..... boy.

L What did he promise.

T Um he promised to not tell , no done something, she done wees in the sand box.

L Yeah.

T And then um and then I ran and told the teacher.

L Yeah.

T And then she wasn't, she was angry but I then had to wash um wash um the wees out.

L Oh right.

T And now this ..... get washed.

L And so so T you're falling off that cushion already.

T Yeah.

L If I made a promise to you, if I said um or if mum said I promise to take you to the park to play after school, what would she have to do if she promised to take you to the park.

T Um she would um have to do it after school.

L So she'd have to do it.

T Yep

L And if she didn't do it, would she be keeping her promise or breaking her promise.

T Breaking her promise.

L Okay so a promise is something that when you say you're going to do it you have to do it.

T Yep.

L Is that right.

T Mym.

L Okay so while we're sitting in this room today you and me talking can you make me a promise today.

T No.

L You can't, can you wait and see what the promise is first.

T Naaa.

L Can you promise me to only tell me the true things, the truth.

T My little sister says swear words.

L So you know what true things are aye.

T Yeah.

L Yeah.

T And we and she's and she tells me to not say, not um tell her.

L Okay but you and me, while you and me are talking and I'm asking you lots of questions, can you make me a promise today only to tell me the truth and no made up stories. Can you make that promise.

T Umm I can't ..... do it.

L You can't what.

T I don't know how to do it.

L Oh okay well do you want me to help you.

T Yes

L Okay all I want you to do is agree that you promise to tell me the truth today so you just say I promise to tell you the truth today Morgan.

T I promise to tell you the truth today Morgan."

Later in the tape (transcript at page 19 and page 44) there are references to "fooling people" and a reminder by the interviewer that the child is to "tell the real things today". From these references Counsel argues that the Court should conclude that the interview is in breach of Regulation 5 and that no effective promise was made or indeed the subject of a proper determination required by the interviewer.

The law concerning such matters is contained in Regulation 5(1)(c) of the Regulations. It states as follows:

> "(1) The videotape shall show the following matters ...
>
> ..
>
> (c) The interviewer -
>
> (i) Determining that the complainant understands the necessity to tell the truth; and
>
> (ii) Obtaining from the complainant a promise to tell the truth, where the interviewer is satisfied that the complainant is capable of giving, and willing to give, a promise to that effect:"

This provision has been considered by the Court of Appeal in the cases of *R v Crime Appeal* [1992] 2 NZLR 673 and *R v S*, CA 105/92, 26th November 1992. Both of those decisions emphasise that the interviewer must undertake two specific exercises. First to determine that on the occasion of the interview the child understands the importance of telling the truth; and secondly, obtaining a promise from the child to do so. Both of these cases say that that process must be apparent from the videotape itself so that the Court can observe and assess the sufficiency of

the process and the weight that it should give to the child's evidence. In terms of Regulation 5(1)(c) the videotape must speak for itself.

Having reviewed this tape again I have no doubt that Regulation 5 was properly complied with. The child obviously understood what a promise is. He gave appropriate answers to the meaning of promise by an example in relation to his mother undertaking some activity with him after school. His only hesitation was to say that he did not know how to make the necessary promise, meaning he did not know the procedure or words to be used. The interviewer determined clearly that he did understand and saw that he duly made the promise. The fact that he later may have had to be reminded of his promise does not affect initial compliance with the Regulations.

For these reasons then, the objection to this videotape is not allowed and the evidence is ruled admissible.

Item E

This objection relates to the evidence of a number of witnesses in respect of which briefs of evidence have been supplied. As to the witness Newman, the evidence which he is to give concerns his observations of the Accused Ellis being at a distance away from the Creche with a group of young children. It is in my view relevant to issues which may arise at the trial. The brief of evidence will need to exclude reference to the actual place, that is an hotel. Any possible prejudice that may arise because one of the jurors may know that the witness is manager of a hotel does not in my view outweigh the probative value of the evidence which he can give.

The witness ^ gives evidence about the pulling of some drapes in the library of the same building occupied by the Creche. I am unable to see that this has any relevance to any of the charges before the Court. Accordingly I would rule it inadmissible.

The evidence of the proposed witnesses ' , ' and ' in some respects is relevant in so far as it establishes that the Accused Ellis had knowledge of and access to what may be significant areas in the building. Other matters in the briefs of evidence do not appear to be relevant and are not to be admitted. Amended briefs should be filed as to matters relating to access and these can be considered further at the appropriate time.

Item G

There is a dispute as to whether or not the witness ' ' should be permitted to give evidence concerning comments made by the Accused Ellis about some children's physical appearances or attributes. While this evidence may be relevant in a broad way to the charges, in my view, its prejudicial effect is greater than its probative value and I rule that it is inadmissible.

This witness also gives some evidence in depositions of complaints made to her by other children, complaints which she says now she appreciates may well have been complaints of possible sexual abuse. This evidence does not appear to relate to any of the complainants in the charges now before the Court and in my view is not relevant. Unless there is some other aspect to it that does not appear from the depositions, I do not consider it admissible.

Item H

The witness ' ' gives evidence in the depositions of the Accused Ellis keeping animals and the methods by which some of these animals were killed. In my view the evidence relating to the keeping of the animals and the nature of the animals is admissible. It confirms in part evidence given by some of the children who are complainants. The evidence of the killing of the animals, while it does have some relevance to matters spoken of by the children, is in my view so prejudicial in relation to any probative value it may have that it should be excluded. I rule it inadmissible.

The witness ' ' also gives evidence concerning children staying overnight at the Accused Ellis's address and on occasions to have been sleeping in his bed. It does not specifically relate to the children who are complainants in these charges. In my view the evidence or observations of young children being at his address and being in his bed on occasions is relevant and may be given in evidence. The matter, however, is one in which I direct that the Crown file an amended brief of the exact nature of the evidence which this witness can give concerning these matters. It may well be that the evidence will have to be reconsidered when the exact details of it are available.

The witness also gives evidence of an incident which took place at the toilets in the Creche. She says she observed the Accused Ellis bringing a child from the staff toilets when the children's toilets were not otherwise occupied. Counsel for the Accused says that too much may be read into that evidence and that it does not specifically relate to any of the children who are complainants. Many of the charges contained in the indictment do relate to alleged activities by the Accused with children in the

toilets. This evidence is in my view relevant to some of the issues which may be raised at the trial and therefore I would not now rule it as inadmissible. Again it is a matter which may have to be reconsidered depending upon the evidence given and available at the trial itself.

Item I

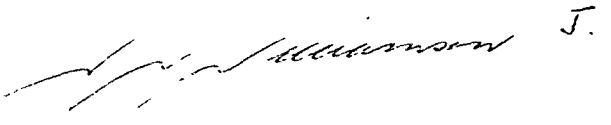
The evidence of ' ', insofar as it relates to comments made by the Accused about sexual prowess and about the sexual activities of a Chinese person and sticks or pieces of wood inserted in a penis, has been objected to. So far as this evidence relates to general sexual prowess and preference it is not in my view relevant and is inadmissible. So far as it relates to the sexual activities with sticks, it may be relevant to evidence given by some of the children. It is an unusual, unique and "kinky" type of sexual behaviour. It is that very uniqueness of the Accused talking about such behaviour and of children making allegations of similar behaviour having occurred to them that may make this evidence relevant. Again, I would not rule that evidence as inadmissible. It will have to be considered further depending upon what evidence the child complainants give about this aspect.

Item K

During the course of evidence called for the defence at the depositions, ' ' said certain statements had been made to her by the Accused, Ellis. These related to the names of children that he anticipated would be complainants if there were charges laid against him of sexual abuse and also his concern about the view that might be taken of what he called "toilet games". Since this evidence occurs in the depositions by way of cross-examination and is not fully described, I am not prepared to make any ruling at this stage about it. Again I direct that if the Crown

desire to call such evidence, that briefs of the exact evidence to be given by the witness are produced at which stage this matter may be considered further.

For the reasons which I have given in this judgment, the matters involved in the application under s.344A are ruled upon as indicated.



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