NOT TO BE PUBLISHED UNTIL TRIAL OF PETER ELLIS COMPLETED

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

T. 9/93

R E G I N A

v.

MARIE KEYS
GAYE JOCELYN DAVIDSON
JANICE VIRGINIA BUCKINGHAM

Hearing: 5th and 6th April 1993

Counsel: B.M. Stanaway and C. Lange for Crown
G.H. Nation and G. Lynch for Keys, Davidson and Buckingham

Oral Judgment: 6th April 1993

ORAL JUDGMENT (NO. 3) OF WILLIAMSON J.

A six year old child says that the three Accused Creche workers stood around and encouraged another Creche worker to sexually abuse children. The Accused deny any involvement. They now ask this Court to order that no indictment be presented against them.

This application is the fourth in a series of pre trial applications. Judgments delivered on the 22nd March and 25th March deal with the first three applications. I will not repeat all of the details already set out in those judgments but I am conscious of those matters when exercising my discretion on this application.

CHARGE

After a lengthy preliminary hearing the prosecution have filed a draft indictment containing one joint charge against the three Accused. It is in these terms:

> "that between 1 February 1989 and 1 March 1991 at Christchurch were parties to an indecent act upon (child X) a boy under the age of 12 years committed by Peter Hugh McGregor Ellis at an unknown address."

The allegation is that the Accused were parties to the crime committed by Peter Ellis. It is said that they actively encouraged him by their presence and by their actions in dancing around in a circle, taking off their clothes and pretending to have sex. I have already made an order directing that this charge against the Accused be tried separately from those against Peter Ellis because, in my view, there were risks of prejudice or oppression with a joint trial.

Stated shortly the facts upon which the Crown case is based are that child X was taken from the Creche to an unknown address. It may have been the house which is involved in other charges and which is mentioned by the witness, namely the house at 404 Hereford Street. At that address it is alleged that there were, in addition to the children, a number of adults, including persons called Andrew, Robert, Peter's mother and the Accused. It is said that there was a circle drawn on the floor and that the children were placed in the middle of that with the adults standing on the outside. Some of the adults were dressed in either black or white clothes; that the children in the middle of the circle had their clothes off; and that they were then told and encouraged to kick each other; that during the course of this child X was kicked in the genitals by other children; that

the female Accused were on the outside of the circle and that they watched these events and laughed. It is said also that subsequent to the kicking, an adult, referred to as Andrew, obtained a needle-like object and inserted it into child X's penis. They are the allegations.

EVIDENCE

The only evidence of the Accused's actions is contained in an evidential videotaped interview of child X. At the commencement of that interview the child promised to tell the truth.

I have viewed the relevant portion of that interview more than once. It covers some nine pages of the transcript. During the course of the evidence child X drew a circle on a piece of paper and showed the position of the adults who stood on the outside of the circle around the naked children. He also showed the position of two of the Accused who he said pretended to have sex. During this part of the interview the child also used two dolls to illustrate what he meant by pretending to have sex.

There is no supporting evidence from any other person who was named by child X. There is no evidence of any reasonably contemporaneous complaint by any child who was said to be present at this incident. There is no evidence of any physical injury being observed on child X at that time or later.

SUBMISSIONS

Counsel for the Accused argues first that no jury, properly directed, could bring in a verdict of guilty against them and secondly that it would be unfair and oppressive to put them on trial. In support of his first submission he contended that there were conflicts within the child's

evidence; that there was a lack of behavioural indicators consistent with the abuse that he said he suffered; that there is a lack of any evidence as to physical injuries consistent with such abuse; that there is a lack of credibility generally in the statements child X made in response to his mother's questioning; that there is conflict with the evidence of two other children named by him (I shall refer to these children as Y and Z); and that there is conflict with other evidence of witnesses called for the prosecution; and that there is complete conflict with the evidence given by the Accused at the depositions.

In respect of the second submission concerning fairness and oppression, Counsel for the Accused says first that there is a real and significant risk that child X's allegations against the three women Accused are total fabrication, primarily because of intense and confrontational questioning by his mother; and secondly, that there is a risk that the child's evidence and performance at the trial would be seriously affected by the continued pressure he has been under since March 1992 both from his family and from contact with a therapist; and thirdly, that as a matter of principle and policy, it is not appropriate for the criminal jury process to be used as a way of testing allegations of abuse by very young children in circumstances where experts indicate that there is a real risk that what the child might be saying is unreliable.

Each of those grounds which have been argued in detail are rejected in the contentions for the Crown. Counsel for the Crown contends that there are in fact other reasonable explanations for the many criticisms made of child X. He points to the need to judge this child's evidence in terms of the child's age and development. In this respect he also referred to the views of the two specialist psychiatrists who have made affidavits. In

effect he suggests that Counsel for the Accused is trying to turn the clock back and to reimpose a requirement of corroboration of children's evidence in child abuse cases. This formal provision in the law was repealed by s.23AB of the Evidence Act. Although Counsel concedes that child X has had personal problems he submits that this is a proper case for his evidence to be judged by a jury after they had seen and heard him giving evidence and being cross-examined. Counsel for the Crown emphasised that Judges should be slow to be seen interfering with what is really the proper role of a jury.

APPROACH TO APPLICATION FOR DISCHARGE

In essence the approach of a Judge to an application such as this for discharge must be an all embracing one. His discretion under s.347 of the Crimes Act is an unfettered one. There are no prescribed tests. In the past some Judges have formulated a narrow test, namely "if a Court considers that a jury, properly directed, could, even though not likely to, convict, the indictment should almost always proceed". I do not accept that opinion. Indeed it is not one argued for by Counsel in this case.

The law in relation to the proper approach of a Judge is set out, in my view correctly, in the decisions of the Chief Justice in the case of *Re Fiso* [1985] 1 CRNZ 689 and of Holland J. in a case of *R v E.T.E.* [1990] 6 CRNZ 176 at pages 180-181. In the former case referred to, Eichelbaum C.J. said at page 690:

> " Turning to the principles relating to the jurisdiction under s.347, in *R v Myers* [1963] NZLR 321 Wilson J. formulated a test in terms that it was unlikely that any jury properly directed would convict or (a fortiori) that it would be wrong for a jury to convict the accused. That decision was under subs. (1), that is at the depositions

> stage, but in practice the same approach has frequently been used in determining applications during the course of trial under subs. (3). On its faces the discretion given by subs. (3) is unfettered. However I think that some of the observations made by Somers J. in his ruling in *R v Jeffs* [1978] 1 NZLR 441 are pertinent notwithstanding that he was dealing with the different and rare case of an application after verdict. The learned Judge said (p.442) that the words of the subsection had to be read in the context of the general nature of a criminal trial including in particular the principle that matters of fact, which of course include inferences, are for the jury and not for the Judge. And on the following page, he cautioned against the usurpation of the role of a jury or the exercise of functions reserved to the Court of Appeal. The remarks of Sir Richard Wild CJ in *R v Rackham* [1975] 2 NZLR 714, like *R v Myers* an application at the depositions stage, are a further reminder that in the normal case acquittals should be at the hands of the jury. Nevertheless I accept counsel's submission that the existence of the discretion must be seen as one of the methods of control of a jury trial conferred upon the Court and that it should not shrink from the exercise of the power in proper cases."

The Chief Justice also referred to helpful passages from an English case of *R v Galbraith* [1981] 2 All ER 1060. In particular there is a passage that sums up the position in this way:

> "(1) If there is no evidence that the crime alleged has been committed by the defendant there is no difficulty. The Judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the Judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on submission being made to stop the case. (b) Where however the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one

> possible view of the facts there is evidence on which the jury could properly come to the conclusion that the defendant is guilty, then the Judge should allow the matter to be tried by the jury."

The learned author of the latest edition of ***Adams on Criminal Law*** refers to these various tests and at CA 347.04 rejects the formula given in the case of *R v Myers*. The author says:

> "The sometimes cited dicta of Wilson J. in ***R v Myers*** [1963] NZLR 321 to the effect that the Court should discharge an accused if it thought conviction would be 'unlikely' is, it is submitted, wrong in principle as well as inconsistent with later authority."

I think that this comment from the author indicates a confusion as to the significance of the word "unlikely". He no doubt has proceeded on the basis that probabilities have no part in criminal law; that proof must be beyond reasonable doubt. In my view it is the very strength of the onus of proof that prompted Wilson J. in the *Myers* decision to properly express the test in the way he did. There may well be some evidence of a crime but that evidence may not be sufficient to prove it beyond reasonable doubt. In such circumstances it is not correct to say that there is no evidence at all. It can, however, be said that while there is some evidence it is of such a type or such strength that a jury is unlikely to convict. Because the discretion is a broad and unfettered one, in my opinion, a Judge under s.347 should stop a trial when it is unlikely that a jury will convict the Accused because the degree of proof to the necessary standard is not available.

In the case of *R v E.T.E.* referred to, Holland J. recognised that there was a separate inherent jurisdiction which the Court had to prevent abuse of its own process. It may well be now that such jurisdiction is

encompassed by the broad statutory powers given in s.347. Certainly, however, I am conscious that the protective inherent jurisdiction of the Court has to be borne in mind. In a recent Court of Appeal decision in ***R v Accused CA 160/92*** [1993] 1 NZLR 385 at 394 the Court made reference to the position which has arisen in many child abuse cases. It comments that the former restrictive rules relating to cross-examination, corroboration, complaints, expert testimony, and summings up have been relaxed. The Court went on to consider those matters in the context of a fair trial and said:

> " It is possible to imagine a case in which allegations of sexual misconduct are so vague or relate to a time so long ago, without justification for the delay, that it would be unfair to place an accused on trial upon them. Then the possibility of exercising the protective inherent jurisdiction would fall for consideration in all the circumstances of the particular case."

CONSIDERATION OF GROUNDS

On the basis then of those matters of approach that I have set out, I have considered the specific grounds for this application. In order to do so I have just replayed the relevant portion of tape 6007. I have already reread the extensive affidavits of two psychiatrists and child abuse experts, Dr Keith Le Page and Dr Karen Zelas.

It is common ground that child X was spoken to at length and in detail by his mother about the abuse; that he was interviewed on a number of occasions, at least 5; that he had been subject to other pressures such as his parents' separation; that he has suffered from various mental health problems; and that he had received some therapy during and following the evidential interviews. When I say during I mean prior to and

not during the period covered by those interviews. The psychiatrists, however, disagree about the conclusions which can be drawn from those factors. While there are helpful observations made by each of them, I do not consider their evidence is in any way conclusive. In effect an overall reading produces arguments of the "which comes first, the chicken or the egg" variety. Symptoms can be explained, it is said on the one hand, by reference to this particular small child having been sexually abused in most strange and unusual circumstances and then gradually revealing these experiences as his memories surface or as he understands what happened. On the other hand it is said they can be explained as having been produced by personal pressures, stimuli from other sources such as children's books and television programmes, from over-anxious parents, from persistent suggestive and direct questioning or from therapy. An abused child of this age can be expected to have problems. A manipulated or pressurised child could also be expected to have problems. Similar general observations indeed may be made about many witnesses who give evidence in criminal trials. The effect of drugs, drink and other substances, the trauma of injuries, intellectual or physical disabilities may well affect the capability of a witness to give clear, precise or completely accurate accounts of what has happened to them. Such problems and such disabilities do not mean that the person cannot be a witness of truth. Under our system of justice the ultimate resolution of the credibility in such cases is for a jury. Credible witnesses may be unreliable or unsafe on some issues. It is well known and accepted that completely honest and genuine witnesses can be mistaken about the identification of persons and the relationship of particular incidents. Judges regularly warn juries of these phenomena.

In this application the vital evidence is that portion of the fourth interview of the child X which identifies the three Accused as being present

and participating when Peter Ellis carried out an indecent act on child X. It must be considered, of course, in its whole context but that vital evidence consists of these passages:

"S What's the easiest thing to start with, what's it about.

N The things Peter's friends did to me.

S The things Peter's friends did im hym. Whereabouts did Peter's friends do things to you.

N They had a circle all drawn on the floor and they um ..... and they all had tins round their necks and there was also um a Marie, Gaye and Jan were at the house, not Jan, well the lady was another one.

S Im who's Marie, Jan and Gaye.

N They're people at the creche and Andrew was there and Robert and Peter was there and he used to be at the creche.

S So um and which house are you talking about, where did that happen.

N The two storied house in Hereford Street.

S And and um so when Marie and Jan and Gaye were there, what was happening.

N Um they were all dancing around in a circle and um me and some other kids were in the middle.

S So what.

N Not moving ..... and then they told us to kick each other."

Then at page 7:

"S Okay. So okay so um and when when you were having to kick each other in the middle, where was Marie and.

N Gaye.

S Gaye and Jan.

N And Jan.

S Where was.

N Oh they were dancing around the circles there.

S What sort of clothes did they have on. Did they have their creche teacher clothes on or something else.

N .....

S Pardon.

N They they had normal clothes on.

S What about the what about the people playing guitars.

N They had normal clothes on. They all had normal clothes on and the kids were naked in the middle.

S So how how.

N And Marie Marie, Gaye and Jan pretended ah to sex.

S Who did she pretend to sex to.

N Um.

S Oh .....

N Jan.

S Oh Marie and Gaye did you say.

N Yeah they were going to sex and there was a photo taken and ah."

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"S Did they have their clothes on or.

N Off.

S Who took their clothes off.

N They did.

S And was that, did they do that inside the circle or somehwere out, outside the circle or somewhere else.

N They were doing it there.

S Inside the circle, is that right.

N Yeah about there. It wasn't about there, that wasn't where the kids were it was about there.

S So what were the kids doing when Marie and Gaye pretended to sex.

N Mymm just oh Marie and Gaye were trying to make the kids laugh."

That is the vital evidence. It was given in the interview on the 6th August 1992. Child X had been interviewed on the 4th May and on the 4th and 5th August and was also subsequently interviewed on the 28th October. Many of the matters relied on in support of the grounds for this application, such as the perceived conflicts within the interviews, the conflicts with the other witnesses and some of the stranger claims concerning trapdoors and ovens I do not find persuasive because they may be explained. It will be ultimately for a jury to assess those matters.

The three aspects which are significant in my opinion, however, are first that two of the other children who were named as being present and who refer in their interviews to vaguely similar incidents do not mention the Accused women as being present. These are the children I have previously mentioned as Y and Z. Child Z is particularly clear in many parts

of her interviews. In the interview with her on the 27th March, and a further interview on the 28th October, she does not mention the three Accused as being present when Peter Ellis sexually abused the children. On the 28th October, at the end of a somewhat tiring interview but when she was specifically asked about one of the group incidents that she was describing, she said that Marie, Gaye and Debbie had been at Peter's place but that they were not there or present when the children were abused.

The second aspect of the evidence is that the identification of the three Accused as being present and involved only came in the fourth interview of child X. Of itself the delay in making such an allegation by a young child may be explainable. Indeed the law recognises that there may be good reasons. (s.23AC of the Evidence Act.) In this case, however, the delay must be viewed and weighed in the context of the previous interviews, the parental questioning and the therapy. As to the latter aspect, I note that the Court of Appeal in its recent decision in ***Re Crime Appeal 402/92***, delivered on 29th March this year, has said that:

> "In our view, at least until some consensus has been reached by the professionals in the child sexual abuse field as to the extent to which the therapist's and assessor's roles can properly be combined, it must be preferable that the two functions be carried out by different persons. In the present case the appellants have copies of the records of interview between Ms Wood and A. But because the discussions at therapy, which overall must have been far longer and must from time to time have dealt with the same subject mztter, were not the subject of record, it can only be speculation what part they took in the development of an understanding between therapist and patient of the critical subject matter."

This case, of course, is very different from that one. The role of the therapist and assessor were not combined in this case. The affidavit of the therapist that has been filed in these proceedings goes a long way to eliminating any fears of distortion in child X's evidence arising from that source.

The third aspect of the evidence is that the fourth and fifth interviews of child X contain more bizarre and wilder type of allegations which do not have any firm base in common human knowledge or experience of child sexual abuse or even of perverted criminal activity. I do not suggest that such events cannot and do not happen, but they must be very rare and consequently may require a greater strength of evidence than usual to support them. In the fifth interview child X implicates two other female workers from the creche, ' ' and ' '. They and other persons named in that interview have not been charged.

OVERALL CONCLUSION

My overall conclusion in this case is that no indictment should be presented against the three Accused for this charge. There are three reasons which have persuaded me to that decision.

First, the evidence against them is of insufficient weight to justify their trial. I have already indicated the three aspects of the evidence which, even if the witness is truthful, affect the weight to a significant degree. In my opinion a verdict of guilty would be unsafe because there is insufficient evidence upon which a jury could properly reach a verdict of guilty.

Secondly, the potential for prejudice against the Accused is so great that they might be convicted for the wrong reasons. A criminal trial is all about proof. Criminal trials relate to specific acts and not to overall moral blameworthiness or professional incompetence. In this case it must be a real fear that a jury may judge the three Accused on the basis that they should have been alerted by Peter Ellis's sexual statements or activities, or by what the children had been saying to them or by the need to protect very young children who were in their care.

The third reason is that the unavoidable delay in their trial on this charge may result in hardship to the now 7 year old child X who would have to give evidence twice, and to the Accused who would have to wait until the other trial of Ellis is completed.

Not one of those three reasons that I have just set out would be sufficient in my view in itself. Considered in combination, however, I am of the view that they oblige me to allow this application. I must do so in open Court. Accordingly the notice closing this Court is to be removed from the door and I will then discharge the Accused.

PUBLICITY

As to publicity, I have already made an order forbidding publication of the submissions and the reasons for my decision until after the trial (and any appeal) of the co-accused are complete. For many reasons I would have preferred that the judgment I have just delivered was given publicity because it would explain to the public why this Court has acted in the way it has. However I am conscious of the importance of a fair trial for the Accused Peter Ellis; that is, a trial which is fair not only to him but to those witnesses who are to give evidence in that trial.

The Crown has invited the Court to make such an order under s.138(2) of the Criminal Justice Act 1985. The purpose, of course, is to ensure a fair trial of Ellis. Counsel for the Accused does not oppose such an order I confirm in making it my general acceptance of the law as explained by Thomas J. in the case of ***The Police v O'Connor*** [1992] 1 NZLR 87. There is always the need to balance the right to freedom of expression against the rights and interests of others, including the right of any person to receive a fair trial and for justice to be administered fairly. Accordingly I make an order forbidding publication of any report or account of the submissions or reasons for my decision until after Peter Ellis's trial is completed.

I also specifically draw attention to the law of contempt. I do so because of the submissions made by Counsel for the Accused. I do not accept his view of the position. Persons who are discharged under s.347 are acquitted but they are not entitled to then conduct themselves in a manner which affects the evidence to be given in a pending trial. I will not hesitate to recommend prosecution for contempt if there is any comment in breach of the order which I have just made or comment which reflects generally upon the witnesses who are to give evidence or Peter Ellis or other aspects of his trial.

ORDER

For the reasons that I have set out at length, the three Accused Gaye Jocelyn Davidson, Marie Keys and Janice Virginia Buckingham are now discharged. I order that no indictment be presented against them.

J

Solicitors:
Crown Solicitor, Christchurch, for Crown
Wynn Williams & Co., Christchurch, for Accused