NOT TO BE PUBLISHED
UNTIL TRIAL COMPLETED

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

R E G I N A

v.

PETER HUGH McGREGOR ELLIS

Hearing: 15th, 16th, and 19th April 1993

Counsel: B.M. Stanaway and C. Lange for Crown
R.A. Harrison and Ms Siobhan McNulty for Ellis

Oral Judgment: 20th April 1993

ORAL JUDGMENT (NO 4) OF WILLIAMSON J.

Children's evidence in sexual abuse cases is often given by way of videotaped interviews. Such a procedure has been permitted since 1989. During the interviews children are spoken to and questioned in a relatively relaxed setting by trained and supervised interviewers. Frequently there are toys, books, papers, pencils or crayons available for the children, who are encouraged to talk as they play.

In this case it is claimed that the videotaped evidence of a number of children is so defective that the charges against the Accused, Peter Ellis, should not be permitted to proceed to trial. The defects contended for are inconsistencies within the children's evidence; contamination by parents or other children; faulty procedures; and a lack of supportive testimony. It has also been submitted that a combination of

prejudicial media treatment and other circumstances prevents the Accused from now obtaining a fair trial and that consequently he should be discharged completely.

The Crown has filed a draft indictment containing 28 counts against the Accused, Peter Ellis. A copy of this draft is attached to this judgment. On behalf of the Accused two applications for orders that no indictment be presented in relation to specific counts in this indictment and a general application that no indictment for any charge be presented have been made. This judgment deals with those applications.

NATURE OF COURT'S POWERS

The applications call for consideration of this Court's powers to discharge accused persons under s.347 of the Crimes Act 1961 as well as its powers conferred by an inherent jurisdiction to prevent unfair trials. On the 6th April this year, in judgment number 3, I considered the correct approach to an application under s.347. I do not need to repeat those matters.

I remind myself that in exercising the Judge's unfettered discretion it is usual to consider whether a jury, properly directed, is unlikely to convict or that it would be wrong for them to convict. I accept that where a Judge does come to the conclusion that the prosecution evidence, taken at its highest, is such that a jury could not convict, then he should stop the case. (See ***Re Fiso*** [1985] 1 CRNZ 689 and ***R v E.T.E.*** [1990] 6 CRNZ 176.) If a fair trial of an accused is not possible then the Court may exercise its discretion under s.347 or it may act under its general power to prevent unfairness or oppression and so maintain public confidence in the administration of justice.

In a recently reported decision of the Court of Appeal of New Zealand the relevant Court's jurisdiction is described in this way:

> " On the general question of the fairness of criminal trials in New Zealand it is not to be overlooked that other developments, some of them with no particular bearing on sexual charges, have also moved the balance towards the prosecution. These include statutory provisions for electronic surveillance; DNA testing; a more liberal judicial attitude to 'similar fact' evidence and hearsay evidence. But they have been accompanied, at least since ***Police v Hall*** [1976] 2 NZLR 678 and *R v **Hartley*** [1978] 2 NZLR 199, with affirmation of the Court's inherent jurisdiction to prevent unfair trials; and that jurisdiction would be available if truly needed in a case in the present field.
>
> 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."

R v Accused (CA 160/92) [1993] 1 NZLR 385 at 392.

Obviously there is a need for greater caution in exercising such a jurisdiction prior to trial when the facts may not be fully appreciated. This need is emphasised in the judgments of Richmond P. and Woodhouse J. in the case of *Moevao v Department of Labour* [1980] 1 NZLR 464. Undue or prejudicial media coverage of a case is frequently relied upon in applications for change of venue. If there is a real risk that a fair and impartial trial might not be possible in a particular centre, then the trial may be transferred. (See *R v Davis* [1964] NZLR 417; *R v Tuckerman* CA 48/86, 18th April 1986; *R v Holdem* 3 CRNZ 103; *R v Brown* 3 CRNZ 136.)

Counsel have not referred me to any case where an accused has been discharged altogether because of a risk that a fair trial might not be possible at all. In my view such a situation could arise, particularly in a case which involved extremely prejudicial or slanted media coverage and comparatively weak evidence. To decide the issue in any particular case the Court has to consider whether a fair trial of that case is possible. Fairness is such a broad concept that any consideration of it demands attention to any relevant factor and to a balancing of all of those factors in order to arrive at some overall conclusion.

Bearing in mind these principles I turn to consider the applications made in relation to special counts. I will do so in the order in which these counts appear in the indictment. It is not appropriate in this judgment to deal with all of the factual matters raised in the detailed submissions that have been presented or to express in detail my own views about these factual matters.

Counts 5-9:

These charges involve a girl whom I shall refer to as child S. The initials do not relate to her name. In general terms Counsel for the Accused submitted that there was insufficient evidence upon which a jury could convict on these counts because the disclosures made by the child were brought about by direct or suggestive questioning of her so that her evidence is unreliable and unsafe. In particular it was argued that this child's evidence was contaminated by her contact with another child complainant already referred to in previous judgments as child Z. Counsel also emphasised that child S's evidence was not corroborated and that it involved some aspects of a bizarre nature. The features he drew attention to were allegations of children having hot pies smashed in their faces; riding

horses; a tennis court at Peter's house; a child driving a van to Orana Park; and visiting a bach in the country with poohs in the bed. He also pointed to contact between this child's parents and the parents of child Z.

In weighing up these particular submissions and the other points made in relation to child witnesses, I have been conscious of the evidence of Dr Zelas as to general propositions relating to children which, if accepted by the jury, would point to the following:

> First, that children may tell others about embarrassing or sexual matters by degrees, that is they may reveal the evidence slowly.
>
> Secondly, that some latitude must always be expected and given when very young children are being questioned.
>
> Thirdly, that inconsistencies in children's evidence need close examination because they may be more apparent than real.
>
> Fourthly, that inconsistencies may not necessarily point to a lack of credibility and indeed, on occasions, may confirm truthfulness on essential matters.
>
> Fifthly, that there may be contact between parents or between children without risk of one necessarily influencing the other.

In relation to these five charges (counts 5 to 9), the circumstances vary from allegations of urinating in the complainant's face in the toilets, to touching her private parts while bathing together and touching

her vagina with a needle. The complainant child has said that the Accused did these things. Her evidence can be criticised. Counsel has done so in a thorough and detailed manner. The question of whether her evidence is ultimately believed despite any legitimate criticisms is, in my view, one for the jury. After viewing the relevant videotapes and weighing all of the matters raised by Counsel, I do not consider that this child's evidence is so unsafe or unreliable that the Accused ought to be discharged on these counts.

There are two special arguments about these counts which must be considered further. They are first that the evidence on count 7 arose only as a result of a blatantly leading question. The Crown has conceded this obvious matter and accepts that the evidence is consequently inadmissible. The Crown does not intend to proceed with count 7 and consequently no further direction is required.

The second matter is that Counsel for the Accused contends that child S during her interviews was improperly permitted and encouraged to consult two booklets which she and her mother had completed prior to these evidential interviews. The booklets are Ex. 6009/4 and 6011/3. They contain coloured pictures drawn by the child with some words by her and other words written by her mother. They are titled "The Way to Peter's House" and "What did Peter do". Counsel submits that these booklets have the same effect as a prepared brief of evidence which had been handed to a witness while giving evidence. He accepts that the booklets do not contain, within themselves, explicit sexual allegations, but he argues that they would have had special significance to this child and in effect would have enabled her to bring to mind what her mother had said at the time when the drawings were being completed and the booklets made. Counsel also urged

the Court to make it clear that in future cases such aids should not be used or made available to children. He said that a discharge of the Accused in this case would bring that point home to all future interviewers.

For the Crown, Counsel argued that these booklets do not amount to a brief of evidence. He says that at the very best they would involve the child in refreshing her memory about what she had previously told her mother.

In this case the evidence is that the drawings and words and booklets may have prompted the child to remember some things. The mother described the process by which they were compiled in her depositions evidence at page 297. In general terms the evidence is that this material originated from the child herself. On that basis, in my view, the booklets are not in the nature of a brief prepared by some other person but rather amount to no more than a note or reminder prepared by a witness in circumstances where the witness was entitled to use such a note to refresh her memory. A close examination of these books, the pictures and the words, certainly does not give them the sinister context placed on them by Counsel for the Accused. In law, there is nothing improper in a witness referring to written statements prior to giving evidence. I refer to the cases of *Rooke v Auckland City Council* [1980] 1 NZLR 680 and *R v Jennings* [1985] 1 CRNZ 618. If a witness has done so then the statement or material should be made available to Counsel for an accused who would be entitled to cross-examine on them. It is not essential that such a statement or material was actually composed by the witness themselves. In some circumstances a witness may be permitted to refresh memory from a statement made nearer to the time of the evidence in question even though it was not a contemporaneous one. (See *R v De Silva* [1991] WLR 31.)

For the reasons that I have outlined, the specific application in relation to counts 5 and 6, 8 and 9 is refused.

Count 10:

This charge involves allegations that the Accused induced a child, a boy whom I will refer to as child P, to drink from a cup containing the Accused's urine. It is submitted that the evidence of this boy is not reliable because first he did not disclose any sexual abuse in the first interview and then not until some 3 months later after his sister had made disclosures. Further it has been submitted that this child was unable to provide details surrounding the alleged event and that what detail he did provide was not consistent with what his sister had said occurred.

Consideration of this count should be made in the context of overlapping submissions in relation to counts 11 and 12. These two counts involve child P's sister, whom I will refer to as Q. It has been contended that Q's evidence is also unreliable because first there are inconsistencies within her disclosures and between her allegations and those of her brother. Secondly, that neither child made any disclosures until they had had read to them by their mother a book entitled "A Very Touching Book". Thirdly, child P and child Q's disclosures occurred only after specific allegations had been put to them by their parents. In this respect it was claimed that the parents of these two children were affected by contact which they had with ' · r ., and the parent of child Z. It was contended that P and Q's disclosures only came after the reading of the book and after the specific allegations had been put to them by their parents.

For the Crown it is submitted that the book referred to is significant only because it enabled these children to tell the truth; that it

equipped them with the necessary language to explain. Counsel also placed reliance on the evidence of Dr Zelas concerning the abilities of children of this age and the understandable evolving nature of disclosures made by such children.

I have reviewed the videotaped interviews of these children, read the book submitted, and a further book submitted by Counsel for the Accused, namely "Whats Wrong With Bottoms", and I have considered the parents' evidence as given at the depositions. In my opinion there is evidence of the offences charged. The questions, doubts and criticisms of it will, in my view, have to be considered by the jury. I do not accept that the evidence is unsafe or dangerous. I reject the application in relation to these three counts.

Counts 14-17:

The child involved in these charges is the boy previously referred to in other judgments as child X. It was his evidence upon which the charge against the three women, Marie Keys, Gaye Davidson and Janice Buckingham was based. Counsel now invites me to discharge the Accused Ellis on these counts for the same reasons which were advanced by Mr Nation, Counsel for the three women.

In considering that application I have reached the conclusion that the evidence of identification of the three women as being present at the time of the offence was insufficient for the reasons which are set out in judgment no. 3. The effect of the degree of insufficiency would not have been enough in itself but it was decisive when coupled with the other factors of potential prejudice and unfairness. I did not reach any conclusion that the evidence of child X was generally incredible or unreliable or that the

evidence was necessarily contaminated. As explained in the previous judgment in more detail, this child had suffered some mental strain during the course of 1992. During the last interview he made bizarre allegations. There is no need to repeat these or to set out all of the criticisms as well as the competing opinions about him that have been placed before the Court by Doctors Le Page and Zelas. Most of the charges against the Accused Ellis in relation to this child rely on the second interview of the child. Although some aspects of these allegations are unusual, I have not been persuaded that the complaints made are false or that it would be unsafe or dangerous to allow the trial to proceed in relation to them.

Count 17 involves the circle incident. The issue for the jury in relation to that count, so far as the Accused Ellis is concerned, is not only whether the events occurred but also whether he was participating in any way. The jury are entitled to have regard to child X's evidence of other incidents involving him and the Accused Ellis and, depending on its final nature, the evidence of other children concerning group sexual activities.

In my view in this respect the Accused Ellis's position on this charge is considerably different from that of the three women. Child X does give evidence of other sexual activity with the Accused Ellis. Some of the other children do give evidence of group sexual activity. It will be for the jury to decide just what they make of this evidence, and in particular what they make of child X's essential allegations and whether it satisfies them beyond reasonable doubt.

Counts 19 to 21:

Contamination by the complainant child's mother is the principal contention in relation to these three counts. It is argued that the child

already referred to as Z was influenced by her contact with her mother and ´ ı. The most serious of the charges, count 19, alleges that the Accused put his penis in this child's mouth. Child Z gives clear evidence of this event but Counsel submits that the evidence originated from a suggestion made by her mother and that it was given during the interview only because of direct and persistent questioning by the interviewer.

Watching the relevant videotaped interview confirms that the interviewer was persistent, even when the child wanted to stop the interview. The child had become tired of it. I do not consider that what happened necessarily amounts to undue pressure or inducement or that the circumstances were likely to produce false evidence. In many respects the validity of the criticisms and sinister suggestions of substantial parental influence depend upon the attitudes of the viewer. There is more than one possible point of view that can be advanced in relation to these interviews. Ultimately a judgment about them has to be made but that can only be done by considering the opposing points of view. It is better made when the child and her mother have been seen and heard while giving evidence and being cross-examined.

I have concluded that these counts are also properly matters for consideration by a jury. Consequently the application is refused.

Counts 22 and 23:

Very lengthy submissions were made in support of the allegations relating to these two counts. They involve a child I will refer to as child U. In the sixth interview she described sexual abuse on her by an uncle, not by the Accused. It is this unique factor which has formed the

principal basis for many of the Applicant's arguments. It has been contended that her evidence about the Accused Ellis is unreliable because:

Firstly, she did not disclose any abuse by him until her fourth interview.

Secondly, she had been abused by her uncle, and there is danger of confusion about the abuse.

Thirdly, she was subjected to direct and suggestive questioning in relation to the Accused Peter Ellis.

Fourthly, there is a lack of supporting evidence, thus detracting from her credibility.

In reply Counsel for the Crown made submissions supporting her evidence. He pointed to the fact that this child had been clearly able to distinguish between events affecting the Accused and her uncle.

I have considered all of the points which were well made in 26 pages of submissions concerning these counts. I am satisfied that valid points can be made from both sides of the argument. In my view there is evidence which is sufficient for these matters to go to the jury, so that the various criticisms can be considered by them.

Count 27:

The child referred to in this charge, child T, says that while the Accused was babysitting her he made her drink his urine. Counsel for the Accused has put forward interpretations of this girl's evidence to show

inconsistencies in it. In particular he points to the fact that even on her own evidence at one point she says she was fast asleep when this event took place.

For the Crown, Counsel argues that there are other interpretations. He pointed to the child's mother's evidence about the Accused's embarrassment when she arrived home early while he was babysitting.

Some aspects of this child's evidence are not easy to follow. In the first interview she gave a clear account of a serious matter which forms the basis for the allegations of sexual interference in count 26, but it was not until her third interview that she told the interviewer about the urine incident. During her evidence about this incident she starts by saying that she did see the Accused's penis while he was babysitting her at her home. This fact does not fit with her later evidence that she was asleep. She may well clarify these matters during her oral testimony.

At this stage I am satisfied that there is some evidence which, if a jury accepted, would support the charge. Accordingly the specific application in relation to count 27 is also dismissed.

UNFAIRNESS

The combination of a large volume of what are described as sensational media reports, and the effect of widespread and emotional community reactions severely restrict the Accused's opportunity of a fair trial, submits Counsel for the Accused. He argues that no indictment at all should be presented against the Accused. He says the Accused cannot receive his minimum right of a fair trial by an impartial and independent jury.

For this submission Counsel relies upon this Court's inherent jurisdiction which I have already described, as well as the following provisions contained in s.25(a) of the New Zealand Bill of Rights Act 1990:

> " Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:
>
> (a) The right to a fair and public hearing by an independent and impartial court."

There was no dispute from the Crown about the Court's jurisdiction to consider such an argument as this. The provisions of s.25(a), so far as they relate to fairness, do not add to the rights already protected by this Court's general discretion. I have described that position in broad terms. In the case of *Moevao*, which I have already referred to, the Court warned that any consideration of fairness must relate to the fundamental purposes or objects of Courts and not just to their collateral procedures.

I anticipate that there may be a future occasion when unfairness arising from publicity will have to be explored at considerable depth since fairness demands a multi-faceted analysis of particular circumstances. Publicity may, in certain circumstances, mean that a person can not receive a fair trial. In this case Counsel for the Accused has submitted that inflammatory materials and prejudice within the community means that under our system of jury trial it would not be possible to select a jury which was independent and impartial.

Various relevant information has been placed before this Court under s.347(1)(c) of the Crimes Act. The information was not in affidavit form, as it should have been, but I have accepted it because of the wording

of the section itself (that is the reference to "matter") and because of the practical difficulties for the defence in obtaining evidence on affidavit. The materials I have considered include a summary of all news coverage of the charges in the form of a chronological schedule; some particular news clippings; notes made by ´ . which have been distributed to some parents; and photographs of graffiti, which has been placed in a number of areas in Christchurch since the discharge of the three women. This graffiti all reads in a similar way:

> "These" (symbol for female) "are guilty. What about the children."

In addition I have viewed general television coverage of the case against the Accused and his former fellow co-accused.

Three major points were drawn out of the material during the submissions of Counsel for the Accused. These are:

> First, that there is a danger of a jury inferring that the Accused Ellis is guilty as a reverse consequence of nationwide publicity concerning the discharge of the four women Creche workers.
>
> Secondly, because 118 children were interviewed and they have extended family networks, the potential for a significant effect on a large number of prospective jurors arises.
>
> Thirdly, the nature of these sexual charges and the age of the children create a climate of antagonism to the Accused resulting

in emotions within the community which are so strong that justice could not be done.

The first of these three points is strange but it may have some force. Newspapers, radio and television have given wide and, at times, somewhat unbalanced treatment to the discharge of the three women. The reports have tended to present the position only from the point of view of the women and to suggest that the whole process was a mistake. Counsel for the Accused says that because of that coverage, in the public mind, the fact that the Accused was not also discharged must point to a conclusion that a Judge thinks that the Accused Ellis is guilty. He referred to this as "guilt by dissociation".

It is a theory, but I do not accept it as necessarily a valid one. Most of the publicity of recent times has been implicitly disparaging of the Crown's evidence. It has been suggested, that the children's evidence was unreliable. In that respect the publicity will probably have assisted the Accused Ellis's case since it may have planted a view in the minds of some persons that the Social Welfare Department and the Police have somehow made a tremendous error and that the prosecution never had any justification. Obviously a direction would have to be given at the commencement and during any summing up in the trial urging the jurors to start afresh; to put aside anything that they have seen or heard and to make decisions based on the evidence. Recent experience in other high profile trials is that juries have a capacity to do just that.

The second point also has some validity. The fact that 118 children have been interviewed does not, of course, mean that they and their families are all anti former Creche workers. Indeed all of the parents

shown on the television clips spoke in favour of the Creche workers. Only one, a grandmother, expressed any possible contrary views and then not strongly.

It is not unusual that sections of a community have widely different views about relevant issues. Also it is not uncommon that some persons may have knowledge or some connection with some person involved in the trial. It is for that reason that s.22 of the Juries Act 1981 enables the Judge, after a jury has been empanelled but before the case is opened, to discharge any juror who is personally concerned in the facts of the case or closely connected with one of the parties and to require the selection and swearing in of a further juror.

The third point made by Counsel for the Accused also has some strength but must be balanced with widespread public knowledge of unsuccessful prosecutions or public inquiries overseas which have resulted from hysteria or the actions of hyper vigilant parents. Events in Coventry or the Orkney Islands for example have received a great deal of publicity. Counsel says the Accused Ellis has been the subject of assaults, some verbal abuse and a bullet in the mail. Such inexcusable events, however, do not mean that a fair trial is impossible before a jury. Criminal and violent behaviour is often accompanied or met with other violent behaviour. It is a fundamental part of the Court's purpose to ensure a proper forum for allegations to be calmly, dispassionately and properly considered in an atmosphere where all of the parties, that is the Crown or community and the Accused, have an opportunity to question and cross-examine witnesses and place their respective arguments before a representative panel of factual judges, namely the jury.

Weighing these three major points, I have measured them against the following factors:

First, the fact that ' .'s notes had a limited circulation.

Secondly, the most recent media coverage has not been directed at the Accused Peter Ellis but, if anything, is anti the prosecution case.

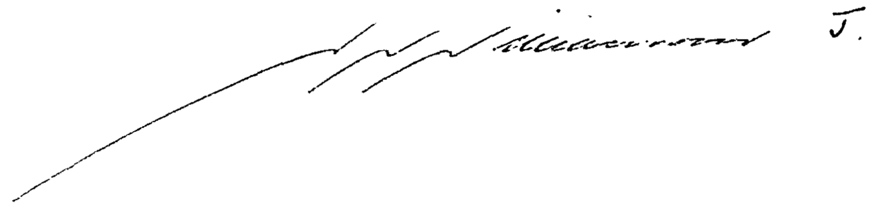
Thirdly, that much of the pre trial publicity is now many months old and may not have had any substantial effect upon the jurors at the trial.

Fourthly, that various of the articles and news clippings relate to varying aspects in which the publicity seems to have swung one way and the other about the issues involved.

Fifthly, directions given at the trial and during the summing up should be sufficient to warn the jury about the very problems which this part of this application highlights.

Upon an overall consideration of all these factors, I have concluded that the Court should not interfere and that the application for a general discharge should be refused. The Crown Solicitor may present an indictment on the 27 charges, although there may be a need for slight amendments as discussed during the course of the argument.

The trial of the Accused is to commence on Monday next, 26th April. He will be bailed until that date on the same terms that apply at present.



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