NOT TO BE PUBLISHED
UNTIL TRIAL COMPLETED

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

T.9/93

R E G I N A

v.

PETER HUGH McGREGOR ELLIS

In Chambers
Hearing: 21st April 1993

Counsel: B.M. Stanaway and C. Lange for Crown
R.A. Harrison for Accused

Oral Judgment: 21st April 1993

ORAL JUDGMENT (NO. 5) OF WILLIAMSON J.

Procedural issues and further evidential questions have been argued today. The following rulings have been made.

1. INDICTMENT

A further draft containing 28 counts was filed and the amendments explained. Counts 21 and 22 represent a division of the former Count 20. No further rulings in relation to it are sought.

2. ORDER OF WITNESSES

The Crown desires to call its evidence in blocks rather than in the normal manner. It is proposed that the child, parent, interviewer and

examining doctor give evidence and that in respect to each child the psychologist, Dr Zelas, and the police officer in charge, Detective Eade, also give evidence after each child. The result of such a procedure would be that the last two witnesses would give evidence on a number of occasions. There are 13 child complainants. The Crown contends that this unusual procedure will help to clarify the case for the jury because it will compartmentalise the evidence in relation to each of the charges. It is argued that it will assist in avoiding any slurring of the evidence between the charges and will facilitate the giving of the evidence by the interviewers, psychologist and detective who, unlike other witnesses, must cover a large number of charges.

Counsel have been unable to find any authority for such a procedure although reference has been made to drug cases where monitors have been called to give evidence in relation to a number of tapes of intercepted communications on the basis that the monitor is examined and cross-examined at the time of or immediately after the playing of the particular tape.

Counsel for the Accused objects to this procedure principally upon the basis that it is likely to have a prejudicial impact on the jury in that they will have the opportunity of seeing these important witnesses over and over again rather than on one occasion when both examination and cross-examination can be completed. Counsel points to the comparatively disadvantageous situation of the psychologist instructed by the defence who would have to give evidence relating to all the complainants on one occasion, in contrast to the Crown's psychologist. This latter factor, Crown Counsel argues must be balanced with the advantage Dr Le Page and Counsel for the Accused would have in the last say.

In my view the proposal made by the Crown would assist with clarifying matters to the jury. The suggested procedure has a great deal of common sense supporting it. However I am also of the view that it has the potential for considerable prejudice to the Accused in that the repeated calling of particular witnesses enables them to develop a rapport with the jury in a manner which could be of considerable disadvantage to the Accused. It is also significant, in my view, that the psychologist to be called for the Accused, and the Accused himself if he gives evidence, would have to deal with all the charges in block rather than having the opportunity to deal with them child by child. The Crown has, of course, chosen to present an indictment containing the total number of charges rather than to present separate indictments in relation to each child. They are not to be criticised for that. It makes good sense. But in an unsevered trial containing this number of counts, the Court must endeavour to ensure that both sides have to approach the calling of evidence on an even basis.

For that reason I rule against the proposed procedure and direct that the witnesses should be called in the normal way.

3. EVIDENCE OF VIDEOTAPED INTERVIEWS

Another unusual aspect of this case concerns the number of evidential videotaped interviews of child complainants. In a schedule of charges prepared by the Crown reference has been made in relation to each charge to the allegation upon which that charge depends and also to the exhibit number of the relevant videotape, as well as the relevant page of the transcript of that videotaped interview. The Crown desires to call as evidence only the videotapes of interviews where the relevant allegations are made. The defence wish all of the videotaped interviews of particular complainants to be played to the jury as a basis for the argument that there

are inconsistencies between statements made by the children on different interview occasions and that there is contamination of a child's evidence by other children, parents or others.

The procedural matters that arise are:

Firstly, at what point the child complainant should be required to make the necessary solemn promise prior to giving evidence.

Secondly, whether the child needs to be present and to view all of the videotapes concerning that child.

Thirdly, whether the child may have appropriate seating, toys and other personal items in the room from which the closed circuit television is transmitted and where the child would be watching any videotaped interviews.

On the first matter, I am of the view that before the child gives any evidence, either by way of evidential interview or otherwise, it is necessary to ensure that that child is competent and makes the necessary promise.

On the second point, I have heard the arguments of Counsel for both the Crown and the Accused. Counsel for the Accused submits that the child should either see all of the videotaped interviews that are relevant or not see any of them, and give evidence after playing of all of them is completed. He does so because he says otherwise the child's mind would be refreshed in relation to particular matters only. It would be more difficult, he contends, to cross-examine such a child about videotapes which the child

had not had the opportunity of seeing and having his or her memory refreshed.

The issue is not one that I have faced before. In my view it should be dealt with in the way in which Courts would normally approach evidence to be raised on behalf of an accused as to previous contradictory or inconsistent statements in writing made by a witness. (See ss.10 and 11 of the Evidence Act 1908.) On that basis the appropriate procedure, in my view, is that the child, after promising and after establishing his or her competence, should then be required to view the tape or tapes upon which the allegations are based. If the defence wish to cross-examine that child on other videotaped interviews then those tapes should be played but the child need not be present and view those tapes unless the child wishes to do so. Following the playing of the tapes the child can then be examined and cross-examined. That would be the normal procedure for a witness. The only abnormality would be that the videos would be played prior to the continued examination and cross-examination. I am unable to see that such a procedure would be of any disadvantage to the Accused since the child could be cross-examined about any inconsistent or contradictory statements, those statements already being in evidence before the jury. If anything this ruling is more advantageous to the Accused than the normal procedure where such contradictory statements would have to be put one by one to a prosecution witness and upon denial, or failure to distinctly admit, the proof of the previous statement would have to be given.

The other reason for this ruling is the nature, object or purpose of the changes which were made to the statute and regulations, namely, to enable evidence to be given by children in ways which minimised stress on them. The Court is required to balance such matters with a fair trial for the

Accused. In this case, because of the matters I have already mentioned, the age of the children, the length of the interviews, the appropriate procedure is as I have indicated.

On the third matter, Counsel for the Accused has said that there would be no objection to a child having any toys or other personal items with the child during the course of the playing of the videotaped interview or in the room where the child is giving evidence provided that such items are in no way related to the circumstances of these offences or such that they would be triggering the memory of the child. That concession, in my view, is one properly made and I direct accordingly.

4. DIRECTIONS FOR CLOSED CIRCUIT TV

Other matters relating to the room where the child is viewing the videotape can be dealt with as part of the special closed circuit television directions which a Judge is required to give under s.23E(3) of the Evidence Act 1908. Copies of the directions as discussed with Counsel are attached to this judgment.

5. DEFECTIVE VIDEOTAPES

Two of the videotapes of the interviews of child witnesses in this case are defective in that they do not comply with the provisions of Regulation 5 of the Evidence (Videotaping of Child Complainants) Regulations 1990. These are the tapes 6044 involving child N and 6055 involving child P. Neither of these tapes form part of the Crown's case against the Accused. The Accused, however, through his Counsel, has expressed the desire that these tapes be played as part of the complainant's evidence. It has been submitted that the tapes would illustrate to the jury the reactions of the child while being interviewed on these previous

occasions and show the process by which the evidence was given. It is contended that statements made by the children on these videotape interview records are inconsistent with or contradictory of the principal Crown evidence.

For the Crown it is submitted that the videotapes cannot be played as part of the evidence but that Counsel for the Accused may cross-examine on material contained in those tapes so far as it is inconsistent with the principal evidence of the complainant.

Under s.23E of the Evidence Act 1908, a Judge may permit a complainant's evidence to be admitted in the form of a videotape provided that videotape was shown at the preliminary hearing. The Judge must also be satisfied that the requirements of the above regulations have been met and that these requirements can be ascertained from a playing of the tape itself. (See ***R v S*** CA 105/92 26 November 1992 and ***R v S and S*** CA 400/92 and 404/92, 29 March 1993.) Since the two tapes concerned do not comply with the regulations or meet the test in the above case, they cannot be admitted as evidence. Counsel for the Accused is entitled to cross-examine the particular child complainants upon material contained within those videotaped interviews 6044 and 6055 in so far as it is inconsistent or contrary just as any witness may be cross-examined on such material. If a witness denies a previous contradictory or inconsistent statement, or does not distinctly admit to it, then such a statement may be proved, provided it is relevant to an issue in the case.

Accordingly, at this point the proper ruling in my view is one that these two tapes cannot be played as part of the evidence. Any other

ruling must wait until any contradictory matters are put to the particular child and his or her answer known.

When a series of evidential videotapes are played and there is no suggestion that the provisions of the Evidence (Videotaping of Child Complainants) Regulations have not been complied with, there is no necessity for those portions of the tapes which deal with the prerequisites under Regulation 5 to be played. The purpose of these matters is to confirm the child's competence as a witness and the interviewer's compliance with the precautions contained within the Regulations. It is a matter for the trial Judge as to whether or not the necessary standards have been met. In the absence of any special reason advanced in relation to a particular videotape, I rule that there is no necessity for the jury to view these initial matters in tapes other than the first one since it has no relevance to their task at the trial.

6. PERSONS PRESENT IN COURT (Crimes Act s.375A)

There are two matters of dispute in relation to persons who may be present in the Courtroom or with the child witness during the giving of the complainant's testimony. Counsel for the Accused objects to any parent of the child being present in the Courtroom while that child's evidence is given and to the presence of a social worker, Jan Louise Gillanders, in the room with any of the child complainants.

The presence of a parent in the Courtroom is objected to because of the emotional impact that such a presence may have upon members of the jury and because of a fear that the parent may pass on information to the parents of other child complainants. The Crown seeks the ruling that parents, who are not future witnesses, should be entitled to

be in the Court while their child's evidence is being given. In my opinion there are important reasons why a parent should be permitted to be in the Courtroom while his or her child is giving evidence. The parent has a genuine interest in ensuring the welfare of the child and a continuing responsibility in relation to the child's emotional security. There is no reason why the jury should know that the particular person is in fact a parent of the child. From time to time during criminal trials it may be a matter of speculation by the jury or Court officials as to the relationship of particular persons in the Courtroom with the witness, but I do not consider that these speculations would have such an effect on a jury as to influence their verdict. There is no evidence that any of the parents would be likely to influence other witnesses and the mere suspicion that this might possibly occur is in my view insufficient to prevent them from being present.

Jan Gillanders is a social worker employed by the New Zealand Children and Young Persons Service. Since the 18th May 1992 she has been acting as a support person to many of the child complainants and their families. She has not been involved in the investigation of these offences or in speaking to the children or their families concerning matters of evidence. Counsel for the Accused has submitted that she is too close to the families because of her continuing contact and that refusing her permission to be present with child complainants while they are giving evidence would protect her from any allegations of misconduct by way of passing information to other witnesses.

Section 375A(2) states:

> "While the complainant in a case of a sexual nature is giving oral evidence (whether in chief or under cross

> examination or on re-examination) no person shall be present in the courtroom except the following:
>
> ...
>
> (h) Any person whose presence is requested by the complainant.
>
> (i) Any person expressly permitted by the Judge to be present."

The section itself does not indicate that a Judge has any discretion in relation to the identity of the person who the complainant desires to be present. Clearly the purpose of the provision is to enable the complainant to have some support, comfort and reassurance during a time of stress. It is customary for Crown Counsel to advise the Judge of the identity of the person concerned. In my view, unless there are good reasons to the contrary, the person nominated by the complainant must be permitted to be present, even if that person is not one approved of by the Accused or his Counsel. There may be some situations in which the particular person nominated would be excluded for other reasons, for example if an order excluding witnesses had been made and the person nominated was a witness. In this case the Court has to weigh up the very real assistance that Jan Gillanders may be able to give to the complainants with the risk of any allegations of contamination of other witnesses. It is apparent that Jan Gillanders is in a unique position. She is known to the children and their families and has been supporting them over a considerable period of time. She is not involved in the facts of the case itself and is not to be a witness. She is an experienced social worker. Weighing all of the submissions made to me, I conclude that this is not a case where good reasons have been shown why she, as the nominated person, should not be permitted to be present with such children as nominate her.

Counsel are agreed that interviewers should be entitled to be present in Court when videotaped interviews over which they presided are played.

7. TRANSCRIPTS

Counsel for the Accused submitted that the jury should not be allowed to have or retain transcripts of all of the videotaped interviews. He contended that these transcripts were too long and would add to the jury's confusion. For the reasons which I have set out in my decision in the case of *R v Gordon and Taylor*, Dunedin Registry T.26/92, 24 September 1992, I am of the view that the transcripts should be available to the jury upon the basis that they are an aid to the jury's understanding of the statements made during the videotaped interviews. A direction as to their proper use will have to be given.

8. CROSS EXAMINATION OF PARENTS

During the course of the depositions parents of the complainant children had been examined and cross-examined concerning statements made to them by the children and notes which they had taken of such statements. After hearing argument, I have ruled that the Crown is not entitled to produce any evidence of prior statements made by the child to a parent unless it is established that the statement amounts to a complaint in law. I have indicated that the Accused's Counsel is to be given some latitude in regard to cross-examination about hearsay matters, but that if he wishes to pursue certain of those matters I would expect authority to be cited in support of such a course of conduct. He has also acknowledged that if he cross-examines concerning hearsay material, then the Crown may be entitled to re-examine in relation to that material.

9. CROSS-EXAMINATION OF INTERVIEWERS

Counsel for the Crown submitted that many of the matters which had been raised in the preliminary hearing during the evidence of the interviewers should have been directed at the psychiatrist Dr Zelas. He referred to matters such as interviewing techniques and the structure of interviews; background matters such as parental questioning; and the effects on the child of the interview.

After hearing the argument, I have ruled that Counsel for the Accused may ask whatever appropriate questions he chooses of the interviewers but that they should be based upon the interviewers' evidence, expertise and observations, rather than on matters of opinion concerning children or hearsay.

10. MISCELLANEOUS

Various other matters relating to a typed opening of the case, the final list of witnesses, copies of exhibits and computer disks were discussed but no specific directions were required in relation to them.

11. SCHEDULES

The Crown sought leave to produce to the jury a schedule summarising the charges contained in the indictment, the allegations and the reference to videotaped interviews. Counsel for the Accused was not opposed to the schedule in general terms but was concerned about some of the matters contained in the summary of allegations. He is to consider that aspect further and contact Crown Counsel as to any amendments which he requires.

In accordance with the cases of ***Menzies*** [1982] 1 NZLR 40 and *Wood* [1983] 1 CRNZ 176, I have granted leave and advised Counsel that I will be directing the jury concerning the use to which they are entitled to put the schedule. In particular I have said that I will emphasise to the jury that they must consider the evidence itself, rather than the convenient schedule, in order to decide whether or not the evidence establishes the allegations against the Accused.

12. UNUSUAL SEXUAL PRACTICES

Additional briefs of evidence have been supplied to the Court. These relate to [redacted], and Jan Buckingham, who were both former Child Creche workers. In the brief of evidence of Tracey O'Connor there are accounts of the Accused being involved in the making up of trick photographs including one where a spade was placed close to a child who was lying on the ground so that the photograph indicated that the spade was sticking out of the child. This witness also states that while she was working at the Creche the Accused spoke to her on a number of occasions about a sexual practice known as "golden showers" and said that he enjoyed such a sexual activity which involved being urinated on or urinating on other persons. He talked about indulging in it with his partners. The additional brief of evidence of Jan Buckingham concerns a conversation which she states she had with the Accused in which he related various sexual exploits concerning the use of wooden spoons, straws and other implements. This evidence specifies details of the person with whom this conduct was said to have been experienced.

For the Crown it is submitted that this evidence is admissible because it is confirmatory of evidence given by some of the child complainants in relation to implements being inserted or used and urination

upon them. In the absence of such evidence Counsel contends the jury will be invited to conclude that the evidence of the children is unreliable because the events deposed to are so bizarre that they are outside normal experience. Reference was made to the cases of ***R v Te One and Another*** [1976] 2 NZLR 510 and ***R v Harrison*** CA 117/83, 26th October 1983, and ***R v Pinkerton*** CA 342/92, 23rd March 1993.

On behalf of the Accused, Mr Harrison submitted that the conduct spoken of by the witnesses was not similar in its nature to the conduct alleged by the child complainants and that it amounted to no more than evidence of a propensity. It was argued that the prejudicial effect of the admission of such evidence was immense and that its probative value in this case was not great.

A similar item of evidence was considered by me in judgment No. 2 at page 23 in relation to Item I. There I discussed the proposed evidence of ' ,. I ruled that evidence in relation to general sexual prowess or preference was not relevant or admissible. So far as the evidence related to particular sexual activities with sticks, I stated that I was not prepared to rule the evidence as inadmissible because its unusual and unique nature made it relevant to similar topics adverted to by the child complainants. In respect to that matter, I indicated that it would have to be considered further depending upon the evidence the child complainants give. Both Counsel have asked for a determination of the admissibility of this evidence at this stage, although Counsel for the Accused has adopted a fall back position seeking a postponement of the decision rather than an affirmative decision in favour of the evidence.

In the case of ***Te One***, the Court of Appeal indicated that approach to questions of this type involve two questions, namely whether evidence was legally admissible which turns upon relevance and, whether although legally admissible, the evidence should be excluded by the Judge in exercise of his discretion. In the case of ***Harrison***, various photographs and paedophile material was permitted to be given in evidence in order to rebut a defence of innocent association and to confirm or corroborate the evidence of the witnesses. The other case referred to of ***Pinkerton*** is in a different category to this one.

I am in no doubt that the proposed evidence, so far as it relates to the Appellant discussing peculiar or unique sexual practices involving implements and urination as methods of sexual stimulation, has relevance to some of the evidence of the child complainants in this case. There is a special and strong relationship between this evidence and the allegations of the children as to the use of sticks or other implements in relation to their private parts and urination. It is evidence which (a) tends to confirm the children's evidence and (b) negatives a defence of innocent association.

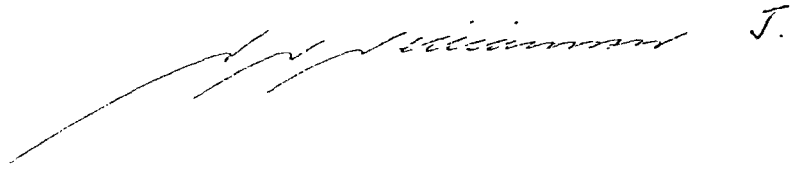
In approaching any decision concerning this matter, I am conscious that particular caution must be exercised in relation to the admission of such evidence because prejudice is a real issue in trials involving sexual offences. On occasions there may well be a fine line between evidence which points to a propensity of an accused person and evidence which confirms a complainant's credibility or rebuts innocent association. Indeed evidence such as that involved in this present case has elements of propensity, confirmation and rebuttal. As was said in the case of *Te One*:

> " Evidence must be excluded if it can do more than show that because of his previous criminal conduct or his character the defendant is likely to have committed the crime charged but notwithstanding that it shows such things it will be admissible if in some other way it has a sufficiently material and logical bearing on the charge."

In both the ***Te One*** and ***Harrison*** decisions the Court of Appeal confirmed the admissibility of evidence as confirmatory or corroborative of the evidence of the main Crown witnesses. In the ***Harrison*** case the evidence involved was of a similar nature to the evidence proposed in this case. In the Accused's statements he has not denied that he did have an association with the child complainants but he claims that the sexual activity alleged did not take place. A fundamental issue therefore is not one of identification but rather whether the sexual acts alleged occurred at all. In other words whether the association was an innocent one. On this issue the evidence contended for has strong probative force. In my view that force is sufficient to outweigh the prejudicial effect it will have. I record that in reaching my conclusion on this matter I have had regard not only to the cases mentioned but also to the Canadian decisions of ***R v Robertson*** [1987] 3 DLR (4th) 321, ***R v Wilson*** [1990] 59 CCC (3d) 432 and ***R v C (MH)*** [1991] 63 CCC (3d) 385.

I reiterate that the evidence that the Accused actually carried out such activities with partners or with a particular man is not admissible and that my ruling relates only to the statements made by the Accused to the witnesses Cherry, O'Connor, and Buckingham as to his knowledge of these unique sexual practices and his view of them as being sexually stimulating.

Before such evidence can be admitted there must of course be evidence from the child complainant of the unusual sexual activity contended for by the Crown. It is likely that this evidence will be given because it is contained within the videotaped interviews and will not be dependent solely upon the child's evidence given in Court. Since there may be events which could possibly mean that the relevant child witnesses do not give evidence of these unique practices or they may resile from them during cross-examination, I direct that the Crown prosecutor not refer to these items of evidence during his opening. A final ruling on their admissibility is postponed until such time as the witnesses involved are called to give evidence.



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