NOT TO BE PUBLISHED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

In Chambers
Hearing: 23rd April 1993

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

Oral Judgment: 23rd April 1993

ORAL JUDGMENT (NO. 6) OF WILLIAMSON J.

Excission of portions of a videotape of a complainant's evidence may be ordered under the new procedures by which complainants under the age of 17 years may give evidence. Section 23E(2) of the Evidence Act 1908, provides:

> " Where a videotape of the complainant's evidence is to be shown at the trial, the Judge shall view the videotape before it is shown, and may order excised from the videotape any matters that, if the complainant's evidence were to be given in person in the ordinary way, would be excluded either:
>
> (a) In accordance with any rule of law relating to the admissibility of evidence; or
>
> (b) Pursuant to any discretion of a Judge to order the exclusion of any evidence."

On the face of it these provisions, while providing for an unusual method by which a child complainant may give evidence, otherwise preserve the rules of law which would apply to any witness's evidence. The fact that the Court is obliged to consider that evidence as if it were "given in person in the ordinary way" appears to demand such an approach.

CROSS-EXAMINATION ON COLLATERAL MATTERS

The question that has now arisen and which relates to excission of the videotapes in this case is the extent to which the defence may legitimately cross-examine child complainants on matters other than the central issue concerning a particular charge. Reference has already been made in previous judgments to ss.10 and 11 of the Evidence Act 1908 relating to witnesses being cross-examined on previous inconsistent or contradictory statements. This morning the matter has been argued with particular reference to the situation which applies in cases involving young children and the new provisions contained within s.23.

The Crown has submitted that those videotape interviews which are not relied upon by the prosecution should not automatically be played but that the playing of them should be restricted to occasions where a particular witness, upon being cross-examined about a matter, either denies the previous statement or does not distinctly admit the fact of the previous statement. Reliance has been placed upon the case of ***R v Potter*** [1984] 2 NZLR 376. At page 377 of that judgment the Court of Appeal said:

> "There is a sound general rule, based on the desirability of avoiding a multiplicity of issues, that the answers given by a witness to questions put to him in cross-examination concerning collateral facts must be treated as final. They may or may not be accepted by the jury

> but the cross-examiner must take them for better or worse and cannot contradict them by other evidence: *Cross on Evidence* (5th ed, 1979) p.262. If it were otherwise, litigation would be unduly prolonged and there would be a risk that issues central to the case could be submerged in those which were only peripheral."

Other illustrations of an application of the same principle are the Court of Appeal's decisions in ***R v Katipa*** [1986] 2 NZLR 121 and ***R v Stockman*** CA 377/90, 13th May 1991.

While a statement of principle such as that contained above may be formulated, it is difficult to apply the tests in any particular case. There can be no doubt that cross-examination may be conducted on matters of credit although such cross-examination is normally restricted. (See *Cross on Evidence* 4th New Zealand Edition para. 9.52.) It is important to observe that the defence is not only entitled but also under a duty to put to a witness the case for the Accused. In this respect the decision of Tipping J. in *Hewinson v Police* AP 244/86, Christchurch Registry, 5th February 1987, is of interest. That case and others referred to support this passage in *Phipson on Evidence* 13th Edition, paragraph 13-69 page 806:

> "Where it is intended to suggest that the witness is not speaking the truth upon a particular point his attention must first be directed to the fact by cross-examination, so that he may have an opportunity of explanation; and this probably applies to all cases in which it is proposed to impeach the witness's credit. Such questions are rendered by statute a condition precedent to proof of a previous contradictory statement by the witness. Failure to cross-examine, however, will not always amount to an acceptance of the witness's testimony, e.g. if the witness has had notice to the contrary beforehand, or the story is itself of an incredible or romancing character, or the abstention arises from mere motives of delicacy, as where young children are called

> as witnesses for their parents in divorce cases, or when counsel indicates that he is merely abstaining for convenience, e.g. to save time."

An explanation of just what is involved in challenging a witness's credit in cross-examination is contained in the judgment of Windeyer J. in *Wren v Emmett Contractors Pty Ltd* 1969 43 ALJR 213. The learned Judge there traces the history of this evidential ruling. He refers to a case of *Harris v Tippett* (1811) 2 Camp. 637 where the foundation proposition of the modern rule is said to be the Judge's ruling:-

> " 'I will permit questions to be put to a witness as to any improper conduct of which he may have been guilty, for the purpose of trying his credit': but, if those questions were 'entirely collateral' to the issue 'you must take his answer'."

Windeyer J. comments about the rule:

> "Its justification is that it may elicit facts tending to show that his evidence is not worthy of belief."

He, also quoting from various texts, says that facts which show the motives and temper of a witness in a particular transaction may be relevant.

On the one hand the Crown desires this trial to proceed on the basis that the defence is restricted to cross-examining child complainants by reference to the videotapes as though the tapes were merely previous contradictory or inconsistent statements. On the other hand the defence desire to have as part of the examination in chief of the child complainants all of the particular evidential interviews of that child.

The arguments in support of those contentions require stating in order to understand the ruling that I am about to give.

First, Counsel for the Accused has submitted that there is a need for all of the tapes to be produced as part of the evidence so that the expert psychiatrists can have a basis for opinions expressed pursuant to s.23G of the Evidence Act 1908. It is argued that the behaviour and demeanour of children during the interviews will be a significant part of such assessment. The development of the child's evidence is also claimed to be in that category. On the other hand Counsel for the Crown points to the limited nature of s.23G and to the fact that in most cases psychiatrists do refer to material other than that contained within the evidence itself for the opinions upon which they rely. On this point I consider that the merits lie with the Crown's argument and that playing of all of the tapes is not an essential prerequisite for the psychiatrists to properly give an opinion under s.23G.

Secondly, Counsel for the Accused, as a principal argument, has submitted that this is particularly a case in which the jury are entitled to have the whole picture of what occurred since the defence is based upon a proposition that it is the process undergone by these young susceptible children which has led to them making the allegations which form the basis of the charges. Counsel urges the view that unless the jury have a chance to observe what that process consists of and the sequence of events by which the allegations have arisen, then an undue restriction is being placed upon a proper line of defence. He refers to the way in which Courts in recent times have permitted evidence of patterns of behaviour to be given in the one trial so that a jury can have an overall understanding. (See *R v Accused (CA 208/87)* [1988] 1 NZLR 573.)

Balancing these submissions are contentions by the Crown that while it is important for the jury to have the whole picture the trial should not be conducted as though it were an inquiry into the merits of the prosecution but rather should concentrate on what are the issues that the jury ultimately have to determine. It is submitted that the fact that portions of the videotaped interviews can be cross-examined upon does not mean that those tapes have to be played to the jury. Counsel emphasised that cross-examination of the witness can legitimately make those points which would form a basis for the defence indicated by Counsel.

In my view the Crown is obliged as part of its case to produce those videotaped interviews upon which it relies. It is not obliged as part of its case to produce the other videotaped interviews of the complainants in the same way as the prosecution is not obliged to produce as part of its case all statements made by a particular witness. The obligation on the Crown is rather to make available to the defence such material so that the defence can then determine whether or not to use that material or portions of it in cross-examination of the Crown witnesses.

The course of cross-examination to be followed in the ordinary case is that contained in ss.10 and 11 of the Evidence Act. In view of s.23E(3), the ordinary course should be followed. In cases which involve young children, however, and in which the defence is based upon a need for a jury to consider that evidence in the context of other evidential interviews of those children, I am of the view that the appropriate procedure is to permit the defence, if it wishes to cross-examine on any matters in a particular interview which has not been produced by the Crown, to ask for that interview to be played and, subject to any matters of excission and

relevance, that interview should be played in its entirety and then the witness may be cross-examined.

It could be said that this ruling is somewhat of a hybrid so far as the past practice has been concerned, but in my view it is the appropriate manner in which to fairly allow the defence to raise its contention that the evidence of the particular child complainant is not reliable, not merely because of a previous contradictory statement, but also because of the process undergone in arriving at the particular evidential interview. I accept that there is weight in the submission that the jury should be aware of the total picture but only in so far as it is relevant to the charges they are considering. Where the whole picture is shown to the jury it should have an appropriate frame which restricts the trial to the matters raised in the charges.

At present the ruling I have given can only be one of a general nature. It is now necessary to look at each of the tapes to see in what category it comes. It may well be that there are matters within particular tapes which are inadmissible or which it would not be proper to allow to be given since they could not legitimately form a basis for any cross-examination.

J.

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