

NOT TO BE PUBLISHED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

Hearing: 26th, 27th, 28th, 29th, 30th April 1993
Counsel: B.M. Stanaway and C. Lange for Crown
R.A. Harrison and Ms Siobhan McNulty for Accused
Oral Judgment: 30th April 1993

ORAL JUDGMENT (NO. 7) OF WILLIAMSON J.

Objection has been made to the admissibility of complaint evidence which was given by ' . during the course of the depositions. In this evidence she said that her son had complained to her on one occasion that at the Creche on a particular day Peter had "done wees and poohs on the children". He said to her "he did wees and poohs on the children today and the children did poohs and wees on the floor". This portion of the evidence was referred to by the Crown Prosecutor during his opening. It has not been the subject of a previous application during the pre trial evidence applications under s.344A. Consequently there can be no criticism of the Crown opening on it.

The question that has now been raised by Counsel for the Accused, as he is entitled to do, is whether or not this evidence is admissible as a recent or contemporaneous complaint made by the victim of

an assault. The argument is that the statement by the child was not a complaint of something actually happening to that child but is in the nature of a hearsay comment about what had occurred to others. In support of that contention Counsel has also referred to portions of the cross-examination of this witness at the depositions where she said that her son had not actually said that the wees and poohs had gone on him.

The only relevance of hearsay material in the nature of a complaint is that it may show that a witness has acted consistently at the time with what the witness now says happened. It is the consistency aspect, rather than the truth or otherwise of the statement itself, which is significant.

The approach to questions of this nature has been altered recently by a Court of Appeal decision in *R v D* (1991) 7 CRNZ 446. While that decision is dealing principally with questions of leading questions to a child who makes a complaint, the decision also describes the manner in which Courts should now approach matters of complaint. In some respects it may relax what were formerly stringent rules concerning admissibility. While that case does not deal with the same point as is raised here, it is a guide.

The evidence objected to is evidence which, on the face of it, could have referred to this complainant child as well as to other children in the creche. In its terms the evidence is not restricted only to other children, that is other than himself. In giving the evidence the mother is recounting no more than what her child said to her on and about a particular day. The meaning, truth or otherwise, to be attached to that is ultimately a question which may be argued, although the question that the jury may put it to is

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whether or not the child was acting consistently with what he now says happened to him at the time. Counsel for the Accused contends that the child turned the statement into a joke with his mother so that it no longer amounts to a genuine complaint. In my view that is a matter which goes to the weight of the complaint evidence and not to its admissibility.

For the reasons that I have outlined, in my view this complaint evidence is admissible on the basis that it is a recent complaint which was made by the child and which the jury would be entitled to consider for the purpose that I have already outlined.

There are other passages included in the tapes which deal with questions which the mother asked and the child answered in relation to this topic and others at a later time. On the basis of *R v D*, there could have been an argument that some of that material might be admissible. The Crown does not wish to raise that argument and accordingly it is not necessary for me to formally rule upon it.

A handwritten signature in black ink, appearing to be 'R. A. Harrison', written in a cursive style.

Solicitors:

Crown Solicitor, Christchurch, for Crown
R.A. Harrison, Christchurch, for Accused