

NOT TO BE PUBLISHED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-30th April and 3rd-7th, 10th and 11th May 1993

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

Oral Judgment: 11th May 1993

ORAL JUDGMENT (NO. 10) OF WILLIAMSON J.

Child Q, a 7 year old, is the next witness to be called at this trial. Her evidence is to be given in part by the playing of a videotape of an interview with her. This tape is exhibit 6053. It records an interview between the child and Sue Sidey and was made on the 9th March 1992. The Crown have asked for three passages in that videotape to be excised upon the basis that the evidence contained within those extracts is not admissible as complaint evidence and also is collateral to the principal issues in the trial.

The relevant passages are these. First at page 10:

"S Who knows that happened, that he put his penis in your mouth.

B Marie

S Marie knows that happened.

B Yep.

S How does Marie know that happened.

B Because she um was just going into the door of the toilets to check what Peter was doing and she saw him putting um his penis, making children put his penis in their mouth.

S So how do you know she saw it.

B Because um I was, I ran out and I telled her that."

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"S Mym

B And it made us feel scared and we wanted to tell someone.

S Im hym and you told Marie

B Yeah

S What did Marie say when you told her.

B She said alright then I'll try and stop Peter doing that and she tried to but he pretended not to listen again."

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"S And who did you tell.

B Debbie and sometimes Marie and sometimes Jan and Gaye.

S How many times did you tell the creche workers.

B About lots of times.

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- S And when you told them what words would you use, what would you say, how would you describe it to the creche workers.
- B Peter is doing secret touching to us, could you please help us stop him and so we went in and he, and they tried to help us to stop him but he just kept on pretending not to listen and he kept on doing it."

As can be observed from a reading of these passages, the witness is saying that on occasions she told other named creche teachers of the Accused's conduct. While it is not entirely clear she also appears to say that the named teachers were present for part of the conduct complained of and that they took some physical action in relation to it. Counsel for the Accused has submitted that these passages ought not to be excised from the tape because they comprise part of the description of the event and not just a later statement of complaint by the witness.

As has become usual in this case, the roles of prosecution and defence in relation to some matters are reversed. Clearly the Crown would not be entitled, nor would it be proper, for evidence of a complaint to be called unless that complaint could be established. It is understood that the creche teachers who have been named would not support the evidence of any complaint having been made to them. Indeed clearly the part of the defence purpose in desiring this evidence to be called is to challenge it, if possible, and thus throw doubt on the reliability or credibility of the witness.

In my view the evidence would not be admissible as a complaint but is admissible as part of the circumstances in which it is alleged that the sexual conduct took place. For that reason I am not prepared to exercise the power given in s.23E(2) by which a Judge may excise from a videotape

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any matter that, if the complainant's evidence were to be given in person in the ordinary way, would be excluded either in accordance with any rule of law relating to the admissibility of evidence or pursuant to any discretion of a Judge to order exclusion of any evidence. Not only is the evidence descriptive of the incidents alleged but also it is an integral part of the interview.

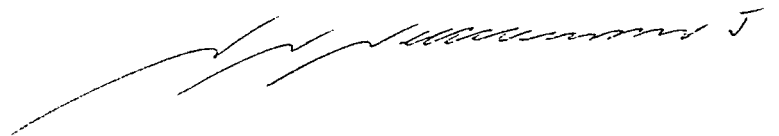
An alternative argument for excision was that the evidence should be excluded because it deals with collateral rather than a central issue. That topic has been one raised on a number of occasions. It is a difficult topic. It requires research. The question of relevance of evidence is one with which criminal Courts have struggled on many occasions. The view has been taken that unless evidence is legally relevant, that is related to the charges and to the essential elements of those charges, then it is not admissible. For that reason the rule is that if a witness is asked about a collateral matter their answer on that matter must be accepted and no further evidence can be called concerning it.

While the rule can be stated broadly in that way, there are exceptions to it and in view of the indications Counsel have given as to possible future steps in this trial, I would invite them to argue whether or not those exceptions might apply. I am aware that they are summarised in an old case of *Hobbs v Tirling* [1929] 1 KB 1 at page 51, and that they have been discussed in detail recently in the 1992 and 1993 English Criminal Law Review in articles dealing with the questioning of police officers as to previous alleged misconduct in the investigation of other cases. Reference is there made to a decision of English Courts in *R v Busby* (1981) 75 Cr App. 79, *R v Edwards* [1991] 2 All ER 266 and *R v Funderburk* [1990] 2 All ER 482. The difficulty of this problem is highlighted

by the unusual decision of the House of Lords in a case that is well known, that of *R v Blastland* [1986] AC 41 where a type of confession of a person to a crime was held not admissible in the trial of another person who was charged with that very crime.

In this case, in relation to the ruling now sought, it is not necessary to deal with the collateral argument since the evidence is contained within the evidence in chief of the witness and, as I have already ruled, it is part of the central fact being given in evidence or the *res gestae*. The matter, however, signals questions which may later arise if other witnesses are to be called with the intention of their contradicting witnesses on collateral matters. An example is the matter raised yesterday in connection with an allegation by the witness, child Z, that a plastic knife was placed in her vagina by Gaye Davidson.

For the reasons I have given, I rule against the excissions sought.

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

Solicitors:

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