

NOT TO BE PUBLISHED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, 3rd-7th and 10th-13th May 1993
Counsel: B.M. Stanaway and C. Lange for Crown
R.A. Harrison and Ms Siobhan McNulty for Accused
Oral Judgment: 13th May 1993

ORAL JUDGMENT (NO. 11) OF WILLIAMSON J.

Medical evidence which has some logical relevance but which does not prove an essential element of any offence is objected to. Counsel for the Accused has submitted that evidence which the Crown proposes to call from a medical practitioner, Margaret Metherell, in relation to the child S and child Z, is inadmissible. This submission is based on two propositions:

First, that the charges in relation to these two children do not require proof of any penetration;

And secondly, that the evidence in the circumstances of this case is so prejudicial that it ought to be excluded in the exercise of the Judge's discretion.

Count 11 charges the Accused with attempting to have sexual intercourse with child S. In her evidential interview, which has been produced as an exhibit, the child says that during a bath the Accused placed his penis at her vagina and that it may have gone in a little bit. During her evidence in Court she agreed with a question from Counsel for the Accused that at the time this incident had occurred her legs were together and the penis had been alongside or at her vagina.

The charge of attempted sexual intercourse does not require, as an essential ingredient, proof that there was penetration of the girl's vagina by the Accused's penis. The evidence given in Court, however, by the child on one view of it, is that some penetration did occur. The fact that Dr Metherell says that she found an anterior hymenal defect which was traumatic in origin and which supports a history of vaginal penetration is clearly relevant to the child's evidence in that it tends to confirm the evidence which she gave. There are criticisms which can be made of the weight to be given to that evidence. Counsel for the Accused has highlighted some of these in his submissions. Clearly this evidence does not prove a specific perpetrator of the injury and nor does it prove the exact nature of the injury. A considerable time has elapsed from the alleged incident until the medical examination. The fact that there are criticisms which can be made and that the weight that may attach to evidence is affected by those criticisms does not make that evidence inadmissible. Rather those are factors which have to be taken into account by the tribunal of fact when determining the value of the particular evidence. It is

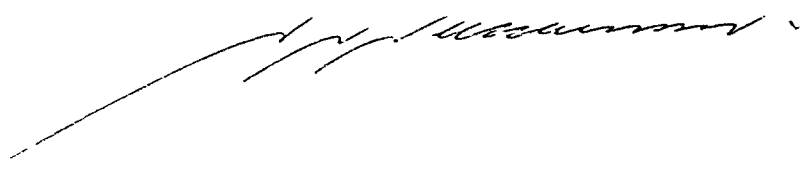
prejudicial, as all relevant evidence may be. The task for the Judge is to consider whether its prejudicial effect, given all of the evidence and the criticisms of it, outweighs any probative value it may have. In this case I am not prepared to exercise my discretion to exclude it on that basis.

So far as the child Z is concerned, the Accused is charged with four offences, including an indecent assault in count 22 which consists of an allegation that he touched her anal area with his penis. In her evidence the child says on a number of occasions in relation to this allegation that the Accused "hurt her bottom". The child does not give any specific evidence that she was penetrated. Dr Metherell's evidence is that she observed a lateral verge defect in the anus. She says that the significance of this is uncertain but it does raise a suspicion of scarring due to trauma in this area. That evidence tends to confirm what the child says, namely that her bottom was hurt. It also may be subject to a number of criticisms in that the evidence as to the defect is qualified by other possible causes of such trauma and by the uncertainty in relation to its significance.

For the same reasons that I have endeavoured to explain in relation to the medical evidence about child S, I am of the view that this evidence is admissible and that the criticisms go to its weight. In a similar way, I am not prepared to exercise my discretion to exclude the evidence on the basis that it is more prejudicial than probative.

Decisions such as this are always ones of degree that have to be made in the context of the entire evidence given during the course of a trial and having regard to the nature of the allegations, the age and evidence of complainants and those other factors which bear one way and the other on matters of prejudice.

For the reasons given then, I rule that the evidence of Dr
Metherell in relation to these two children is admissible.

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

Solicitors:

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