NOT TO BE PUBLISHED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

Hearing: 26th-30th April, 3rd-7th, 10th-14th, 17th, 24th-26th May 1993

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

Oral Judgment: 26th May 1993

ORAL JUDGMENT (NO. 14) OF WILLIAMSON J.

Counsel for the Accused wants to lead evidence to contradict answers given by a complainant during cross-examination. The answers do not relate to any charge against the Accused. Counsel contends that this evidence is relevant and admissible because it reflects upon the complainant's credibility. The prosecution disagrees. Its Counsel argues that the proposed evidence does not concern any fact in issue in this trial.

The answers which are the subject of the proposed evidence were given by Child X at pages 161 and 162 of the notes of evidence. When cross-examined he was asked if he had been taken away from the Creche on occasions other than the circle incident when bad things had

happened. He said he had. He was asked whether he had on occasions been taken out with Peter, Jan and Marie. He also agreed with that. He was asked whether bad things had happened on those occasions and he said that they had. He was also asked about some specific things that had happened while he was away from the Creche with Peter, Jan and Marie or Peter, Marie and Gaye.

The evidence that Counsel for the Accused wishes to lead is from Jan Buckingham to say that she did not participate in such incidents and had not taken Child X away from the Creche when bad things had happened to him. There is no dispute that Counsel for the Accused can lead evidence from her of a denial of involvement in the circle incident which is the basis for count 19 in the indictment. The admissibility of collateral matters affecting a witness's credibility is a topic which has already been briefly mentioned in judgments 6 at page 4 and 10 at page 4.

The only authority relied upon by Counsel for the Accused in relation to this application is the case of *R v Funderburk* [1990] 2 All ER 482. It is a decision of the Criminal Division of the English Court of Appeal. In that case an appeal was allowed because the trial Judge had refused to allow the defence to challenge in cross-examination a complainant's evidence that she had been a virgin prior to the Accused's alleged act of unlawful intercourse on her. In delivering the Court's judgment, Henry J. said:

> " We are disposed to agree with the editors of *Cross on Evidence* (6th edn, 1985) p.295 that where the disputed issue is a sexual one between two persons in private the difference between questions going to credit and questions going to the issue is reduced to vanishing point. I read from that work:

> 'It has also been remarked that sexual intercourse, whether or not consensual, most often takes place in private, and leaves few visible traces of having occurred. Evidence is often effectively limited to that of the parties, and much is likely to depend upon the balance of credibility between them. This has important effects for the law of evidence since it is capable of reducing the difference between questions going to credit and questions going to the issue to vanishing point.'

Similar problems arise when considering what facts are collateral. Again, we cite from ***Cross*** p.283:

> 'As relevance is a matter of degree, it is impossible to devise an exhaustive means of determining when a question is collateral for the purpose of the rule under consideration; Pollock CB said in the leading case of ***A-G v Hitchcock*** ((1847) 1 Exch 91 at 99, 154 ER 38 at 42):"... The test, whether the matter is collateral or not, is this: if the answer of a witness is a matter which you would be allowed on your part to prove in evidence - if it have such a connection with the issue, that you would be allowed to give it in evidence - then it is a matter on which you may contradict him." '

The difficulty we have in applying that celebrated test is that it seems to us to be circular. If a fact is not collateral then clearly you can call evidence to contradict it, but the so-called test is silent on how you decide whether that fact is collateral. The utility of the test may lie in the fact that the answer is an instinctive one based on the prosecutor's and the court's sense of fair play rather than any philosophic or analytic process. Applying the test in argument before us, Morland J put to counsel for the Crown the hypothetical question, 'If the defence had medical evidence that this child was not a virgin before the date on which she gave her account of losing her virginity, would the defence be allowed to call such evidence?' On reflection, counsel accepted that they would be allowed to call such evidence, and we think that answer to the question not only right but inevitable. Otherwise there would be the danger that the jury would make their decision as to credit on an account of the original incident in which the most emotive, memorable and potentially persuasive

> fact was, to the knowledge of all in the case save the jury, false."

Since the ***Funderburk*** decision the Criminal Division of the English Court of Appeal have given further consideration to this topic in a judgment in the case of ***R v Edwards*** [1991] 2 All ER 266. ***Edwards*** had been charged with robbery. He was convicted partly because of alleged admissions made by him to a police officer. Prior to his trial his Counsel had asked the Police for information which would have linked one of the police officers who had interviewed ***Edwards*** with other cases where fabrication of evidence had been alleged in disciplinary proceedings against the same police officer. The Court allowed the appeal because of the failure of the prosecution to supply the requested information. The failure prevented Counsel for the defence from cross-examining the police officer about the disciplinary proceedings. In the course of the judgment the Chief Justice, Lord Lane, clearly, and relatively succinctly, summarises the present law about the topic in this way:

> " Issues are of varying degrees of relevance or importance. A distinction has to be drawn between, on the one hand, the issue in the case upon which the jury will be pronouncing their verdict and, on the other hand, collateral issues of which the credibility of the witnesses may be one. Generally speaking, questions may be put to a witness as to any improper conduct of which he may have been guilty, for the purpose of testing his credit.
>
> The limits to such questioning were defined by Sankey LJ in ***Hobbs v C.T. Tinling & Co. Ltd, Hobbs v Nottingham Journal Ltd*** [1929] 2 KB 1 at 50-51, [1929] All ER Rep. 33 at 56, as follows:
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> > 'The Court can always exercise its discretion to decide whether a question as to credit is one which the witness should be compelled to answer ... in the exercise of its discretion the Court should

> have regard to the following considerations: '(1.) Such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies. (2) Such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies. (3.) Such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence." '
>
> The distinction between the issue in the case and matters collateral to the issue is often difficult to draw, but it is of considerable importance. Where cross-examination is directed at collateral issues such as the credibility of the witness, as a rule the answers of the witness are final and evidence to contradict them will not be permitted (see Lawrence J. in ***Harris v Tippett*** (1811) 2 Camp. 637 at 638, 170 ER 1277 at 1278). The rule is necessary to confine the ambit of a trial within proper limits and to prevent the true issue from becoming submerged in a welter of detail."

The judgment went on to identify two exceptions to the general rule: First, to show bias on the part of a witness (see ***R v Busby*** (1981) 75 Cr App R 79); and secondly, to show that the police are prepared to go to improper lengths to secure a conviction (see ***R v Funderburk***).

Similar statements about the law are contained in ***Adams on Criminal Law*** Chapter 2.10.03, ***McGechan on Evidence*** page 5, and ***Cross on Evidence***, 4th New Zealand Edition, page 226. The test referred to in a number of the texts is that taken from the previously referred to case of *Attorney General v Hitchcock*. It has been expressly adopted by the New Zealand Court of Appeal in the case of *R v Katipa* [1986] 2 NZLR 121. The

topic has also been considered in the cases of ***R v Potter*** [1984] 2 NZLR 376 and ***R v Stockman*** CA 377/90, 13 May 1991.

The English decisions of ***Funderburk*** and ***Edwards*** which I have noted prompted articles in the 1992 Criminal Law Review pp 549 and 863 and in the 1993 Criminal Law Review at p.114. The last of these articles speaks of "a somewhat artificial distinction between primary issues of fact and witnesses' credibility". The learned author of ***Cross*** 4th New Zealand Edition at page 228 puts the same point in this way:

> " Questions going only to credit may have such a major impact on a complainant's credit that they can be said to be directly relevant to facts in issue."

An example given in the text is one related to consent in sexual violation cases. In effect I apprehend that Counsel for the Accused in this trial is making a similar submission, namely that the credibility of the witness Child X is a primary issue and consequently that any connected matter which relates to credibility must constitute itself a primary issue in the case.

Isolating the issue or issues in a trial can only be achieved in the context of the facts of that particular trial. It is for that reason that the Court has a discretion. As Lord Lane said in the ***Edwards*** case at page 273:

> " Issues are of varying degrees of relevance or importance. A distinction has to be drawn between, on the one hand, the issue in the case upon which the jury will be pronouncing their verdict and, on the other hand, collateral issues of which the credibility of the witnesses may be one."

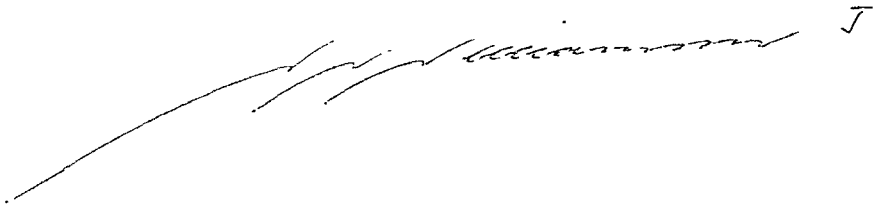
When Henry J. in the ***Funderburk*** decision says that the difference between questions going to credibility and questions going to an issue in a case was reduced to vanishing point, he is in effect commenting upon the nature of the facts involved in the case and their close connection with the fact which was at issue.

Some distinction can be made in my view between facts which are in issue and a method of proof of those facts. In this instance the facts in issue in the trial in relation to counts 16-19 of the indictment are whether the Accused did bath with the complainant during which a number of indecent acts took place, including the touching of the Accused's penis; whether the Accused did put his penis against the complainant's anus; whether the Accused did place his penis in the complainant's mouth; and whether the Accused was a party to activities affecting the Accused's genitals during an incident referred to as the circle incident. The method of proof ot those facts in issue is the evidence of Child X. By challenging the child's cross-examination answers on other facts, although related in a broad way, the Accused is directly putting in issue the method of proof of the facts, namely Child X's evidence, and indirectly the facts which are in issue.

In the ***Funderburk*** case, a fact which the prosecution relied upon was that the complainant had been a virgin at the time of the first act of intercourse. It was an integral circumstance of the alleged criminal act and in such a context questions relating to credit were also interwoven with a basic fact in issue. This case, in my view, is different. Very lengthy and wide ranging evidence was given during the preliminary hearing of this case. It involved other alleged sexual acts by the Accused and others upon children who are complainants in this trial and some who are not. Other

evidence in the same depositions could legitimately be claimed to reflect seriously upon the credit or reliability of possible defence witnesses. The prosecution would not be permitted to call that evidence upon a claim that it would be evidence which would reflect on the issue of a witness's credit. Also if evidence were to be led from a witness which was related only to the credit of a complainant witness, then it would be proper to allow questions to be asked of that witness which would go to his or her credit since that credit would then also be an issue in the trial.

In my view it is truly necessary in the interests of justice to firmly confine this trial within proper limits and to avoid a multiplicity of side issues. For these reasons I rule that Counsel for the Accused may not lead evidence to contradict the complainant's answers in cross-examination on collateral issues.



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