NOT TO BE PUBLISHED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, 10-14th, 17th, 24th-27th May 1993

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

Oral Judgment: 27th May 1993

ORAL JUDGMENT (NO. 15) OF WILLIAMSON J.

Two matters have arisen which require rulings at this stage. They are first whether a Crown witness should be recalled so that she can be cross-examined further; and secondly, whether the Crown can produce, through the detective in charge of the case, a schedule.

RECALLING A WITNESS

The witness concerned in the first application is the mother of one of the child complainants Child S. This witness gave evidence some days ago and was cross-examined concerning contact which she had with

other parents and the manner in which she had spoken to her daughter in relation to these allegations. Counsel for the Accused desires her to be recalled so that he can cross-examine about two matters:

> First, a suggestion that she invited the mother of another Creche child to co-operate with a meeting between the two children so that they could discuss what had happened at the Creche.
>
> Secondly, about a phone call which it is suggested was made by the witness to the mother of this other child prior to a meeting.

The law is that a Judge has a discretionary power to recall or allow the recall of a witness at any stage of a trial prior to the summing up. (See *Archbold Criminal Pleading Evidence and Practice* 1993 Vol. 1 8-250.) The situation which has arisen in this trial is not referred to in either of the textbooks, *Garrow and Turkington* or *Adams*. There is a reference in those books to the position where a Judge exercises a power to direct the calling of a witness who has not given evidence, that is in s.378(2) of the Crimes Act 1961 or the calling of a witness at a late stage. In relation to that discretion, namely the calling of an additional witness, the Judge's discretion has been said to be one which should be exercised carefully and sparingly since the normal procedure is that one side calls its witnesses, the other cross-examines and after any re-examination then the reverse procedure takes place. In order to be fair those rules apply to both sides and it is not normal practice for persons to give evidence more than once.

For the Accused it is argued that in relation to this application that the information about the above two matters was only partly available to the defence at the time when the witness was giving evidence and that the defence was not aware then that evidence would be available from the mother of the other child, if necessary and admissible, in relation to these two matters. Consequently it is contended that this is in the nature of fresh material which it is important to put to the witness as part of the defence contention that the mother of Child S was intentionally encouraging her to talk about the Creche and was taking steps to ensure that evidence, possibly supportive of her daughter, would be available.

Counsel for the Crown opposes this application. He argues that the material upon which it is desired to cross-examine is not new but rather arose clearly at the time of depositions in evidence that was given then. He submits that the application is really an attempt to gain an advantage by emphasising a point already made often enough during the cross-examination of other witnesses and indeed of this witness, at a late point in the trial where it will have more effect upon the jury. He submits that in any event the evidence is of little weight because the alleged invitation was made after the significant evidence had already been given by Child S and indeed by Child Z.

Counsel for the Crown submits that the test that should be applied is the same test as would apply if the Crown was desiring to call evidence of a fresh nature, namely whether or not such evidence was reasonably obtainable at the appropriate time and whether or not the position was reasonably forseeable.

In my view the discretion given to a trial Judge is a broad one. The only limits so far as they relate to calling a witness in a situation such as this are dictated by the interests of justice. I do not accept that the restrictions which apply in other circumstances necessarily apply in relation to this application. In my view there is force in the argument that this application concerns a topic which had already been partly covered with the witness during her cross-examination and that material was available upon which she could have been questioned about these matters. However, that argument does not end an exercise of a discretion such as this because if, for whatever reason, the witness has not been cross-examined about a matter which could be relevant to her credit; or to her overall attitudes; and the defence desires to, then I consider a Judge, in the interests of justice, may properly exercise his discretion to allow it.

The Crown case is not finished. The defence wishes to ask these questions. In my view it is in the overall interests of justice to permit the defence to do so. That does not mean the defence has a right to cross-examine this witness generally. It permits the witness to be recalled for the sole purpose of putting to her the two matters that have been raised by Counsel for the Accused as those which were omitted during her previous cross-examination. The Crown is entitled to re-examine in relation to such matters and any questions which put those matters into proportion can be asked of the witness. The question of whether evidence may be given if the witness denies such conversations is one that can, if necessary, be dealt with later.

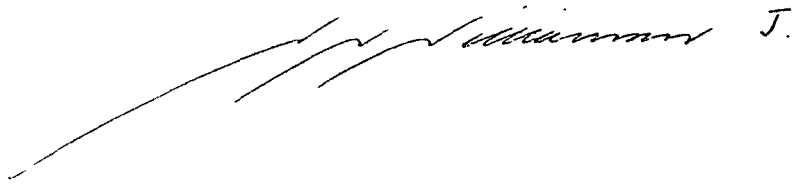
SCHEDULE

As to the second matter concerning a schedule, the law in relation to such schedules was summarised and re-stated in a case of ***R v***

Menzies [1982] 1 NZLR 40. The particular passage is at page 49. The Court there expressed the view that the use of time saving schedules and charts to assist a jury in complicated cases can be very desirable and is not improper provided that the contents are proved and that the Judge is satisfied that there is no unfairness. Further the Court said that the correct procedure, if such a schedule was to be used, was for it to be put in by a witness rather than by Counsel during an address. Obviously the reason for this is that if a witness produces a schedule then there is an opportunity for cross-examination regarding its contents, whereas Counsel during an address may make submissions about evidence without being cross-examined or factually challenged. That, of course, only emphasises the responsibility which Counsel have in making addresses to do so accurately upon the evidence. (See *R v Wood* 1983 1 CRNZ 176.)

In this case the defence object to the schedule because it is argued that it does not cover the full range of surrounding circumstances in relation to behaviours shown by the children and that it does not deal with the detail of individual differences between the children and the ways in which those differences may affect a behaviour or symptom shown by them. Those matters go, of course, to the weight of the schedule. They do not in my view establish in this case that it is unfair to present a summary of what has been said. The question of whether what has been said is reliable, or accurate, is a matter ultimately for the jury upon which Counsel may make their views or submissions known during their addresses. In this application Counsel for the Accused suggests that the Crown is endeavouring to gain an advantage by putting this material in this form towards the jury. Again, as with the similar allegation on the first issue, they are matters a Judge has to resolve in his discretion on the basis of general or overall fairness.

For the reasons that I have already outlined, this schedule is in my view admissible.



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