IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

T.9/93

IN THE MATTER of an application by
TELEVISION NEW ZEALAND LIMITED

R E G I N A

v.

MARIE KEYS
GAYE JOCELYN DAVIDSON
JANICE VIRGINIA BUCKINGHAM

In Chambers
Hearing: 11th June 1993

Counsel: W. Akel for Television New Zealand Limited
B.M. Stanaway for Crown
G.H. Nation for Keys, Davidson and Buckingham
A.N.D. Garrett for Ellis

ORAL JUDGMENT (NO. 17) OF WILLIAMSON J.

Television New Zealand Limited has applied to lift a suppression order. This order was made on the 6th April 1993. It prohibits any report or account of the submissions or reasons for my decision on an application for discharge by Marie Keys, Gaye Davidson and Janice Buckingham until after Peter Ellis's trial was completed. A trial is completed when an Accused is discharged after acquittal, or sentenced after conviction. Accordingly the order which was made on the 6th April 1993 would apply until after Peter Ellis has been sentenced, that is on or after 22nd June 1993. The effect of an order under the present application would be to

allow publication of the relevant submissions and reasons for decision today, that is some 11 days ahead of the period stipulated in the order.

Since this application amounts to a variation of the order made on the 6th April 1993, I directed that it should be served not only on Counsel for the abovenamed women creche workers but also on Counsel for the Crown and for Peter Ellis.

The relevant submissions and reasons for decision (see oral judgment (No. 3)) relate to an application by the three women creche workers for a discharge pursuant to s.347 of the Crimes Act 1961. In the course of that judgment there is reference to other pre trial applications in respect of which judgments were delivered on the 22nd and 25th March. Those judgments dealt with severance, the mode of evidence, and questions of admissibility of evidence.

GROUNDS

In support of this application a number of grounds have been argued.

1. That the jury in the Peter Ellis trial has completed its deliberations.

2. That, apart from sentencing, the trial of Peter Ellis has been completed.

3. That there is no real likelihood that publication of the submissions or reasons for the judgment of the 6th April 1993 can seriously prejudice Peter Ellis.

4. Publication will not interfere with the fair administration of justice.

5. The balance is in favour of freedom of expression pursuant to the New Zealand Bill of Rights Act 1990.

6. The freedom of the press is not to be lightly interfered with.

7. It is in the interests of open justice that the press be allowed to exercise their right to report the judgment in full.

The order on the 6th April 1993 was made pursuant to s.138 of the Criminal Justice Act 1985. In view of the way in which this matter has been dealt with by Counsel this morning, it is not necessary for me to set out that section in this judgment or indeed to deal with the authorities referred to by Counsel for the Applicant in any detail. At the time of making the order I confirmed my acceptance of the explanation of the law given by Thomas J. in the case of ***Police v O'Connor*** [1992] 1 NZLR 87. That case specifically dealt with the Court's powers as contained in s.138(2). The learned Judge emphasised not only that Courts must not lightly inhibit scrutiny and supervision of the operation of the Courts, but also that it must balance the principle of open justice with the objective of doing justice in particular cases. In his judgment Thomas J. discussed how the interests of justice, as referred to in s.138(2), could be interpreted so as to include the administration of justice as such, as well as any particular interests that may require protection. He said (at p.96) that:

> "In line with the authorities, therefore, the requirement that criminal proceedings be open to the public can only

> be departed from if not to do so would frustrate the interests or administration of justice."

He held that the onus of demonstrating the necessity for such an order was upon the person seeking the order.

In this case the order was sought both by the Crown and by Counsel for Peter Ellis. It was made for two primary reasons. Firstly, to protect Peter Ellis in ensuring for him a fair trial; and secondly, to afford some protection to the child witnesses until they had given their evidence in Court. While those witnesses could not be identified, in view of the provisions of s.139 of the Criminal Justice Act 1985, publicity about the details of their evidence could have or may have influenced their ability to give evidence.

SUBMISSIONS

Counsel for the three women creche workers supports this application. Indeed he submits that the order for suppression should be lifted in relation to the previous judgments dealing with severance, admissibility and the mode of evidence. Counsel for Peter Ellis and for the Crown do not oppose or support the application. They are aware of the details of the application and the submissions made in support of it.

JURISDICTION

The first question for consideration is whether or not this Court has power to vary an order made under s.138(2) of the Criminal Justice Act 1985. No specific power to vary is given in the section. I am satisfied, however, that the nature of the power and the terms of s.138, and in particular the terms of s.138(4)(a), impliedly empower the Court to discharge or vary an order if it is of the opinion that the interests of justice

require such a course. I have been encouraged in that view by the decision of the Court of Appeal in the case of ***Re Wellington Newspapers Ltd's Application*** [1982] 1 NZLR 118 although that decision did not concern s.138 of the Criminal Justice Act 1985 but rather ss.375 and 396 of the Crimes Act 1961.

MERITS

On the merits of this application I am substantially influenced by the attitude of Counsel for Peter Ellis and by the publicity since the jury's verdict was reached in the case of Peter Ellis. That post verdict publicity has effectively swept away any claim for prejudice on his behalf. Many of the matters, which related to sexual preference, drinking or remarks about children's physical characteristics, the Court had carefully ruled as inadmissible at the trial or suppressed evidence of at the preliminary hearing. These matters have now been aired both on television and published in the newspapers. Indeed many of these matters have been discussed by the Accused himself on interviews which he gave prior to the verdicts but which have been screened or published subsequently. It would be unreal or artificial to continue the orders for the protection of Peter Ellis. The children, who are mentioned in the decisions by reference to letters only, have now given evidence and accordingly the interests of justice do not require any further protection so far as they are concerned.

The authorities which are relied upon by Counsel for the Applicant and which I now list in this judgment confirm the manner in which Courts have had to balance the rights contained in s.14 of the Bill of Rights Act 1990 with the need for a fair trial in particular cases.

Police v O'Connor [1992] 1 NZLR 87

Television New Zealand Ltd v Solicitor-General [1989] 1 NZLR 1

Auckland Area Health Board v TVNZ [1992] 3 NZLR 406

Re Central Independent Television plc and others [1991] 1 All ER 347

Re W (a minor) [1992] 1 All ER 794

Attorney General v Guardian Newspapers Ltd and another [1992] 3 All ER 38

R v Beck and others, ex parte Daily Telegraph plc and others [1993] 2 All ER 177

R v Harawira [1989] 2 NZLR 728

Broadcasting Corporation of New Zealand v Attorney-General [1982] 1 NZLR 120

In making an order varying the previous order I emphasise that s.139 of the Criminal Justice Act 1985 still applies. There must be no publicity which would identify or in any way lead to the identification of the complainants.

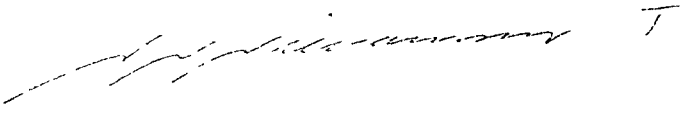
One other reason which prompts the making of this order is a need to ensure, so far as possible, accuracy in relation to the resolution of various pre trial applications and this application for discharge. It is sad to comment that some of the accounts of steps taken by the Court have been inaccurate and must create in the minds of some persons doubt about the manner in which the Courts administer justice. It is one thing to criticise the Court for steps it has taken. It is another to report on steps which have not been taken and then to base criticism on that inaccurate information.

For the reasons I have given, the orders made on the 6th April 1993 are now discharged.

COSTS

As to costs, no order is sought by Counsel for the three women creche workers. An order is sought by the Crown and to a lesser extent by Counsel for Peter Ellis. This hearing has been necessitated by the desire of the Applicant to publish these details prior to the expiry of the period of the order made on the 6th April. It is to the Applicant's benefit and in accordance with s.27 of the Bill of Rights Act 1990 the other parties were entitled to be present and to be heard if they desired to do so.

In those circumstances it is in my view appropriate to make an order for costs. I do so in the sum of $500 each to Counsel for the Crown and Counsel to Peter Ellis.



Solicitors:
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Crown Solicitor, Christchurch, for Crown
Wynn Williams & Co., Christchurch, for Keys, Davidson and Buckingham
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