IN THE COURT OF APPEAL OF NEW ZEALAND CA 274/93

PUBLICATION OF NAMES OF COMPLAINANTS
OR PARTICULARS OF IDENTITY PROHIBITED
UNDER S139 CRIMINAL JUSTICE ACT 1985

THE QUEEN

v.

PETER HUGH McGREGOR ELLIS

Coram: Cooke P
Casey J
Gault J

Hearing: 14 February 1994, 25 to 28 July and 5 August 1994

Counsel: For Crown - B M Stanaway and C J Lange
For Appellant - K N Hampton QC and R A Harrison on 14/2/94
G K Panckhurst QC and R A Harrison thereafter

Judgment: 8 September 1994

JUDGMENT OF THE COURT DELIVERED BY CASEY J

On 26 April 1993 Peter Hugh McGregor Ellis faced a jury trial in the High Court on 28 counts alleging indecency with young children who attended a crèche at which he was employed between September 1986 and November 1991. The trial lasted six weeks. In respect of three of the counts he was discharged under s347 of the Crimes Act during its course. The jury acquitted him on 9 and found him guilty on 16, and on 22 June 1993 he was sentenced to a total of 10 years' imprisonment. His appeal against conviction and sentence commenced in this Court on 14 February last, but was adjourned shortly afterwards because of the illness of his then senior counsel. It was resumed on 25 July 1994 with present counsel advancing revised grounds of appeal, but there was a further adjournment during

the course of argument on 29 July to enable enquiry following advice that one of the child complainants had retracted her allegations against the appellant. After receipt of reports to the Court from an agreed independent barrister, the hearing was concluded on 5 August.

To preserve confidentiality the complainants are referred to in this judgment by a letter of the alphabet bearing no relation to their names, in accordance with a list annexed to the original judgment, which is not to be circulated.

Background

The Christchurch Civic Childcare Centre, the subject of these allegations, was established in the Arts Centre at Montreal Street some time before September 1986 when the appellant commenced employment there as a reliever. He was given a permanent position in February 1987 and commenced a 3-year course towards a "Childcare Certificate" which he completed and passed in 1990. In January 1989 the crèche moved from the Arts Centre to the former Christchurch Girls High School building in Armagh Street. There were an estimated 70-75 families using it weekly over the years from 1989 with a daily average of about 40 children, of whom 12 would be in the nursery part of the building with ages ranging from about 12 months through to 2½ years, and 28 in the larger pre-school room. The staff numbers were aimed to maintain a ratio of 1:4 for the nursery and 1:8 for the others and included a supervisor and an assistant. With the exception of the appellant, all of them were female.

He is now 36 (born on 30 March 1958) and is single with no dependents. The descriptions of him given by fellow workers and parents in their evidence would seem to support the following assessment in his pre-sentence report :

> "The overall picture gained of Peter Ellis is that of an outgoing, uninhibited, unconventional person given to putting plenty of enthusiasm and energy into his work and social activities, sometimes to the point of being risqué and outrageous."

He was also described as a colourful and ebullient student by his tutor who saw him frequently at the crèche where he was noisy and very visible; she said he was regarded as the "darling" of the Centre by parents and colleagues alike. He certainly engaged in boisterous games with the children and played tricks on them, not all of which were appreciated, according to their interview statements. The supervisor and other workers gave evidence that they saw nothing in his behaviour suggesting sexual abuse of the children.

In November 1991 a mother reported something her son had said about the appellant, following which he was suspended: a complaint was made to the police and the Specialist Services Unit of the Department of Social Welfare commenced interviewing crèche children. The management committee called a meeting of parents at the crèche on 2 December 1991 which was attended by police and Social Welfare representatives. There had been some media publicity and the object of the meeting was to advise parents that there were concerns, but no specific allegations. They were asked to look for any noticeable changes in their children's behaviour and any events which might explain them.

Ms Sidey, a psychologist with the Specialist Services Unit, talked to them about the interviewing process and what was involved with it and said that if parents did have concerns about their children they could be discussed with her and a decision made on whether to interview them. Ms Sidey then began a video-recorded interview process and by 30 January 1992 (when the first allegation of sexual abuse was disclosed) she had seen about six children.

Interviews continued with those children whose parents had concerns and Ms Sidey had the assistance of two other specialists. They were conducted in accordance with the Evidence (Videotaping of Child Complainants) Regulations 1990. Generally before an interview commenced there would be a short discussion between the interviewer and the parents covering any disclosure the child had made and their responses to it, and any behaviour they had noted, with possible explanations for it, and the child's background and friends and contacts with other crèche children. Appellant's counsel criticised this preliminary discussion, but we can see nothing wrong in a trained interviewer briefing herself in this way beforehand. Indeed, it is difficult to see how the interview could be competently done without it.

These interviews were conducted under the overall supervision of Dr Karen Zelas, a specialist child psychiatrist with international experience in the field of child abuse. It was a massive exercise and overall there were interviews of 118 children, most of them disclosing no abuse and serving to reassure parents. In some cases there was mention of abuse but the parents did not wish to put the child through the Court process. The interviews continued throughout 1992 with most of the present complainants being interviewed a number of times.

The appellant was arrested on 30 March 1992. He had been interviewed by Detective Eade of the Christchurch Child Abuse Unit and consistently denied any misconduct. On 31 March there was a meeting of crèche parents at Knox Hall, Christchurch, addressed by Ms Sidey, Dr Zelas and police representatives. It appears they spoke again in general terms about what had been happening and warned parents about questioning the children or other conduct which might interfere with the interview disclosure process. There had been a support group of parents set up in respect of the mother who had made the first complaint, with

circulation of a document she prepared setting out complaints about the appellant made by various children. It assumed some importance at the trial as a possible source of contamination of the children's evidence.

On 2 November 1992 the deposition hearing commenced, concluding on 4 February 1993, when the appellant and five other crèche workers were committed for trial on a total of 42 charges involving 20 children. The Crown elected to bring only the 28 charges relating to 13 children on which the appellant stood trial, and before it started the other crèche workers were discharged under s347 for various reasons.

Conviction Appeal Grounds

1. ***That the verdicts are unreasonable in that the evidence of the complainant children was not credible.***

Essentially this was a submission that the convictions were unsafe. In respect of each child the Crown played to the Court at the trial one or more of the video-recorded interviews in which the conduct forming the basis of a particular charge was described. The child's evidence was then given on close-circuit television with examination-in-chief and cross-examination. The jury were provided with transcripts of the tapes and were allowed to take them into the jury room. Not all the tapes in respect of a particular child were shown by the Crown, but there was an arrangement, subject to the Judge's direction, whereby other tapes or parts thereof as required by the defence were shown to the jury as well. The defence complaints about this procedure are discussed later in this judgment.

"Circumstantial" Improbability

Mr Panckhurst took us first through extracts culled from transcripts of videos played to the jury (and some which were not) to demonstrate the improbability of what the children were saying when viewed against independent evidence of place and circumstances in which the conduct was supposed to have occurred. Much of the offending was said to have happened at the crèche. The evidence indicated that a total of about 20 children were abused or were present during those episodes. Mr Panckhurst emphasised that over the 5-year period involved in the charges no sign of such abuse was seen or reported to any adult, although some of the children gave evidence of making complaints to crèche workers about the appellant's conduct which the workers said in evidence they did not recollect. If made, they may have been understood only as objections to his tricking or boisterous play.

He also pointed out that the staff/child ratios referred to above were usually maintained throughout the period and in addition there would be the coming and going of parents dropping and collecting children and random visits by others during the day, all of this making the opportunity for abuse unlikely. However, the appellant conceded that there were occasions when he would be by himself with the children, although Mr Panckhurst stressed that this was not an acknowledgment that he was able to abuse them.

The crèche toilets were at the centre of some serious allegations. There were three of them in cubicles with separate doors off a lobby adjacent to the pre-school room with direct access from the staff room, and there was evidence that the door between the school room and toilets was almost invariably open, except perhaps on very cold days and in the early morning. One toilet was generally understood to be for adults and the other two for children, all of whom were

supposed to be toilet-trained before entering the pre-school room. Some of them left the door open at toilet; others would close it.

The only adult evidence of anything untoward in the toilet area came from a former worker who said she saw the appellant emerge from the adult cubicle with a little girl while she was waiting in the lobby, and she described him as looking surprised and on the defensive. There was nothing to indicate that the girl (who should have been fully toilet trained) required any attention. She asked him what the girl was doing in there and he replied that all the toilets were full. She said it was a summer day and most of the children and staff would be outside in the yard. Although she thought the matter strange she did not mention it to anybody, but realised its significance after hearing of the charges and then told the police.

Another worker said she was aware of the appellant remaining in the adult toilet for sometimes up to 5-10 minutes, but he explained that he was a smoker and used it at times for that purpose. The assistant supervisor confirmed she was aware of this practice. Another worker also referred to a remark made by Ellis after his arrest to the effect that the games in the toilets could look bad. She did not know then what he was talking about and he explained that on occasions when children were washing their hands before lunch he would shut some of them in the staff toilet and they would bang on the door shouting to be let out.

The matters advanced by Mr Panckhurst about the design and operation of the crèche do not persuade us that the abuse described by the children as occurring there, and particularly in the toilets, could not have happened, or that their evidence of it cannot be relied on. Nor do his submissions about lack of opportunity for abuse away from the crèche when the children were taken on walks by the appellant. A maximum ratio of about one adult to five children was aimed at on these expeditions, which were meant to be recorded in a book by the staff member

before setting out, but this may have been more honoured in the breach than in the observance.

The appellant gave unchallenged evidence that on 75 percent of the time he went on walks with another adult, the maximum duration averaging about one hour ten minutes, but one worker said his walks were a minimum of an hour and frequently up to two and a half hours. There was no evidence that any of the children returned from such walks in a distressed state or made complaints concerning them: rather they were a popular activity and children were keen on them. There was, however, the time and opportunity for abuse.

A house at Hereford Street featured in some of the charges. This was a large 2-storeyed older house where the appellant lived as a boarder from 30 December 1985 to 23 May 1987. For two weeks in December 1986 he looked after complainant A while the crèche was closed for the holidays, and she said that he touched her vagina at the house and this formed the basis of the first count on which he was found guilty. Four other children complained of being taken to the appellant's home where various forms of abuse occurred, some of their disclosures being consistent with it occurring at the Hereford Street house where he had formerly lived, although the appropriate counts referred to an unknown address.

The owner of the house gave evidence of almost continuous occupancy and had no recollection of any crèche children visiting, apart from one occasion when a group came with another worker and the appellant to see the latter's animals which he kept at the back. He was unaware of the appellant returning after he vacated, while the Crown did not suggest that any of his subsequent addresses were involved in the abuse described, as they did not accord with the children's descriptions. There seems to have been no problem about travelling between the crèche and this house within the time expected for a normal group walk from the crèche.

Four complainants said they were driven by Ellis in a car to places where abuse had occurred but his evidence was that he did not own one and people who knew him said they had never seen him driving. There were allegations of abuse by several people on those occasions and it is possible that the children were confused in describing a trip in a car driven by someone else, with the appellant as just a passenger.

Two of the complainants said that Ellis and a woman they called his mother were involved in photographing episodes of sexual abuse. A search of his house did not reveal a camera although there was one at the crèche which had been used on occasions to photograph special events. One of the crèche workers related a discussion in which Ellis said he had used a borrowed Polaroid camera to take photographs of adult sexual activity. In cross-examination he said he had an old Polaroid camera which did not work properly, and he denied taking any photographs of sexual activity, although he agreed he may have told his fellow-worker just to shock her, in the same way as he explained making other comments about unusual sexual activities to these women.

Medical evidence was given by two doctors who examined the complainants, but it took matters no further. There was no evidence of anyone observing signs of injury on the children consistent with the use of sticks, needles, or burning paper, as described by some of the complainants. Six of the complainants in respect of whom the appellant was found guilty (the exception was child A) said that other children were directly involved as fellow victims in their abuse. Of these, ten were complainants at the trial, but the remainder were not called as witnesses. In some cases children who gave evidence of abuse against them did not refer to those other episodes in which they were also said to have been abused.

To sum up on this aspect of the case, therefore, although it called for careful consideration by the jury, there is nothing in the foregoing material placed before us by Mr Panckhurst which of itself renders the accounts given by the various complainants inherently improbable or unworthy of belief. That, of course, does not end the matter and we now turn to consider against this background the submissions about the content of the children's evidence and the other major ground of appeal alleging unfairness in the way it was obtained.

The Interview Process

The professionalism of the three women who conducted the interviews is obvious from the transcripts and they gave evidence of their training and extensive experience in this field. There was criticism about some of their questions and of the way some evidence was elicited, but we are satisfied that this is of no real moment. As the Courts have said in a number of cases, when dealing with young children some coaxing and guidance is necessary to bring them to the point of disclosing abuse which many of them find embarrassing or distasteful and would rather forget. It is unreal to expect them to behave as mature adult witnesses and launch into their evidence with only minimal guidance in examination-in-chief. What this Court said about the use of evidential videos in child abuse cases in *R v Lewis* (1990) 6 CRNZ 350, 352 bears repeating :

> "....although it is open to the defence to suggest that the evidence inculpating the accused was obtained by suggesting to the children what might have happened, the interviewers did not act unfairly; but, what is more important, any allegation of that kind is well within the competence of a jury to assess if they have the advantage of seeing the tapes played as a whole. There is nothing arcane about the methods used by the interviewers. There is, as we have said, a certain degree of patient coaxing, but whether or not that can

> reasonably be thought to have led to any untrue statements by any of the children is essentially a matter which a jury should be well capable of evaluating. .....the general spirit of the changes made by the Evidence Amendment Act 1989 with reference to child witnesses in this class of case points towards allowing the use of these tapes. The broad purpose is clearly to ensure that the old technicalities of evidence and traditional approaches to the giving of evidence, even the contents of evidence in matters such as hearsay, shall not necessarily prevail against the desirability of getting at the truth and doing so by an effective machinery which enables children to give evidence without undue stress, while at the same time preserving the accused's right to a fair trial."

The interviewers in the present case were well aware of the need for a neutral approach and knew the dangers of asking leading questions (i.e. questions which suggest the appropriate answer). The jury had the advantage of listening to and observing them and the children throughout the many hours the tapes were played in Court, and they were able to assess the spontaneity and genuineness of the child's reactions and disclosures, and the effect of the interviewer's attitude and questioning. From the extracts of the transcripts to which we have been referred, the interviewer can be seen in some cases to be following up information received from a parent, but without inappropriate persistence or leading, and we do not accept the submission that they were working under an agenda with the object of obtaining disclosure of abuse in the belief that it had occurred.

We were informed by counsel that at depositions the interviewers were closely cross-examined over some days about their methods and attitudes, but at the trial cross-examination on these matters was relatively limited. The history of this investigation tells against any suggestions of a deliberate manipulation or slanting of the disclosure process to obtain evidence of abuse. As stated above, a total of 118 children were interviewed and in the end the number of complainants involved in the charges which went to trial was reduced to 10. This points to a responsible

winnowing-out process rather than to one in which confirmation of sexual abuse was being sought by a person who accepted it had happened.

One of the features relied on to demonstrate the allegedly unsatisfactory nature of the interview process and the lack of credibility of some complainants was the increasingly bizarre nature of the conduct they described in successive interviews, some of which were not shown by the Crown to the jury. It is claimed that the defence was handicapped by the Judge's ruling limiting the playing of those tapes and cross-examination of the complainants thereon.

All but one of them were interviewed a number of times ranging from two to six, with the majority of sessions extending from close to an hour upwards, one or two taking almost two hours. As part of its case the Crown played only those tapes containing allegations of the specific sexual offences charged, and these numbered 22 out of a total of 44. On a pre-trial application the Judge ruled that if the defence wished to cross-examine on any matters in a taped interview not played by the Crown, it could ask for that tape to be played, but only insofar as it was relevant to the charges being considered by the jury. He indicated that his ruling was of a general nature at that stage and it would be necessary to look at each of the tapes at the appropriate time. Appellant's counsel criticised the qualification about relevancy to the charges, contending that this did not allow the jury to see the full picture of the interview process undergone by these children, in order to judge whether it led them into making the allegations which formed the basis of the charges.

There was discussion between counsel at the outset of the trial about the showing of the other tapes (called the defence tapes), all of which were made available by the prosecution, and the entries in the Crown book demonstrate that the defence was able to have played those parts it wanted in order to cross-examine.

Even without their being played, some of the complainants readily admitted in cross-examination to making the more bizarre allegations about sexual activity described in tapes not shown to the jury.

The Judge acknowledged that his ruling was a 'hybrid' one expanding the approach to be taken under ss10 and 11 of the Evidence Act towards prior inconsistent statements, to meet the concerns of the defence about the interview process. He was clearly right in seeking to prevent the trial becoming enmeshed in all the collateral and peripheral matters covered in the tapes not relied on by the Crown, and about exposing the jury to the playing of many hours of irrelevant material, thereby distracting them from consideration of the real issues. After being taken through the Crown book and shown the relevant entries, appellant's counsel accepted that in general the defence was not denied the opportunity of playing whatever tapes they requested, but contended that his counsel at trial had felt constrained by the Judge's insistence on relevancy from seeking more extensive playing, in order to demonstrate the way the interview process had led the children into making these extreme allegations.

We do not accept this as a valid criticism. The jury had ample opportunity to judge that process from the extensive material played to them. There was little cross-examination of the interviewers or of the children themselves about how these more bizarre statements came to be made, or of possible reasons for them. They tended to come out only in later sessions and the expert evidence from both Dr Zelas and Dr Le Page (called by the defence) suggested that the more reliable interviews tended to be early ones: repeated interviewing, while it could help children recall further detail or other incidents of abuse, carried the risk of confusion and imaginative reconstruction. Where later bizarre or seemingly improbably accounts of abuse formed the subject of charges, Ellis was acquitted.

Mr Stanaway discerned a general pattern of convictions mainly in respect of disclosures made at earlier interviews, or in a single series occurring close together.

We are satisfied that the ruling about the tapes was one which the Judge was entitled to make in the circumstances of this trial and that it caused no prejudice to the defence. His ruling that the children need not be present during the playing of defence tapes was also one given in the proper exercise of his discretion and any impact this had on the effectiveness of cross-examination seems to us more theoretical than real.

Nor is there any more substance in the complaint that the Judge wrongly applied the rule against collateral attacks on credibility to disallow evidence or cross-examination of other witnesses or to discredit the complainants. Indeed, Mr Stanaway's analysis of the relevant evidence satisfied us that in fact the defence was able to make in one way or another most of the important points of credibility it wanted to raise against the complainants and other Crown witnesses.

The Children's Evidence

The following is a brief summary of their evidence. In a number of cases the appellant was said to have told the children not to say anything and to have made threats if they did.

Child A (female) - born May 1983; commenced at former crèche May 1985 and moved to pre-school May 1986.

There were three interviews. Her first of 7 April 1992 was not played because of a technical defect but the second of 9 April and the third of 28 May were

played by the Crown. In the second she reported that the appellant squeezed her vagina at the house at Hereford Street referred to above and this was the basis of count 1 on which he was found guilty. In the third she described an incident at the crèche when he made her touch his penis (count 2) and several occasions when he touched her vaginal and anal areas in the toilet (count 3). He was found guilty on these two counts also. This girl gave more general descriptions of other indecencies in the toilet area and at the house. She said he told her to say nothing about it.

In all three tapes the child indicated that she had spoken to her mother who confirmed that she had asked her daughter in general terms about the crèche in early 1992 around the time of the Knox Hall meeting when she decided to ask for an interview. She denied attempting to influence her, or any probing into the content of the interviews.

Mr Harrison submitted that the interviewer should have elicited more from the child about the conversations she had with her mother, and should have made further enquiries about the source of the information she gave about the abuse to see whether it emanated from someone else rather than from her own experience.

The child gave a deal of circumstantial detail and on the face of the material in the transcript we do not think there was any call for the interviewer to divert the discussion into a cross-examination of what passed between the child and her mother, or about other sources. What she was saying was quite straightforward indecent touching; at the time of the interview she was nearly 9 and was well aware that this was "bad" touching.

This is the child noted above who indicated during the hearing of the appeal that she retracted her allegations. We deal with this later.

Child B (female) - born September 1984; started at the crèche January 1987 and moved to pre-school in February 1988.

There was only one interview with her on 12 May 1992 which was played at the trial. She referred to an incident on Guy Fawkes night 1990 when she became very upset over her parents parking the car at the crèche to see a fireworks display, and they confirmed this. She said she told them then that Peter had been mean to her. After the Knox Hall meeting they asked whether she wanted to speak to the police about any bad touching that might have happened to her; they were sure that before then the child did not know that allegations of misconduct were being made against him.

The girl told the interviewer that Peter tickled her and another girl lots of times and that he would poke her crutch and she asked him not to do that. She said it happened "inside, when other teachers were at the other end looking after the deaf children", and that it had happened six times; although in Court she said it happened 10 or 16 times "I couldn't remember exactly". She said it was always on top of her clothes and that it hurt a weeny bit and when she got home she saw a little cut on her vagina and that his nail was long. (The uncertainty about the number of times is of no particular concern; the experts explained the problems very young children have with concepts of numeracy.) The appellant was found guilty of indecent assault (count 4) in respect of this conduct.

Appellant's counsel focussed on her reference to the "deaf children", it being common ground that at school this girl's class exchanged with the corresponding class in the deaf school at Sumner. She was closely cross-examined on this point but was adamant that the touching had occurred at the crèche. She said her reference to "deaf" children was a mistake and that she meant the "nursery end" children. In the end we think the jury could have been left in no doubt that her use

of "deaf" was just a slip of the tongue. The question of contamination of the child's recollections by information from other sources was also thoroughly explored and the jury was entitled to accept the evidence from the girl's parents that they had done nothing to influence her or to suggest indecent touching beyond their first neutral enquiry.

Child D (male) - born October 1986; started at crèche September 1988 and after a break away in England with his mother left the crèche in October 1991.

There were three interviews, the first and third on 3 April 1992 and 28 October 1992 being played by the Crown. There was no defence request to play the second interview of 27 April 1992. In the first he described how the appellant urinated on children's faces into their mouths, and on one occasion he did it to him in the toilet and put his penis in his mouth. This was the basis of doing an indecent act in count 6, on which the appellant was found guilty. He was found not guilty of indecent assault on count 7, in respect of which the child said at his third interview in the following October that the appellant had taken him and other children into a room in the adjoining Cranmer Centre and there with other curiously dressed men he poked a stick up his anus. His description of these events and the people involved reads like pure fantasy, but curiously enough he described openings onto the roof where he said he had been taken on these occasions, which could only have been seen by somebody standing up there.

Counsel criticised the techniques used in the first interview suggestive of prompting and attempting to get corroboration of offences on other children. We do not think there is anything of substance in these criticisms or in the fact that the boy's mother asked him early in 1992 whether Peter had ever touched children's bottoms; he then told her about the urination and the stick incident which she had

not heard of before. She was closely cross-examined about discussions with others and with the child, and about his association with other children, from which the jury would have been able to make an informed judgment on the existence and extent of any contamination of her son's evidence. There is nothing in her testimony to give us cause for concern on this aspect.

We note in respect of the count involving urination that Ellis was also found guilty of the same conduct in the toilet with child F, and that there was evidence from one of the crèche workers that on three occasions he had talked to her about a sexual practice known as "golden showers", involving an activity where persons urinated on each other in turns. She said he appeared to be interested in it and that other adult sexual practices were discussed as well. In cross-examination the appellant denied talking about "golden showers" but explained that he sometimes spoke of unusual sexual practices as described by several crèche workers to shock or "get a rise" out of them.

The Judge was clearly correct to allow evidence of his interest in these unusual practices to be given: the jury could see in the reference to "golden showers" support for his conviction on the two counts involving that unusual practice, especially as it seems unlikely that the two children could have made it up or learnt of it from other sources.

Child F (female) - born November 1985; commenced at crèche November 1987 and ceased 17 November 1990.

There were three interviews, the first and third being played to the jury by the Crown, dated 1 May 92 and 3 August 1992; there was no defence application to play the second of 28 May 1992. In the first she described "wees coming from

Peter's bottom" which she did not have to drink like other children did, because she kept her mouth shut. She said the urine was yellow and went over her face. This was the subject of count 9 (doing an indecent act) on which the appellant was found guilty. He was also found guilty on count 10 of inducing an indecent act as a result of her statement in the first interview that she had been taken to a house with other children where Ellis got her to have a bath with him and washed her all over, touching her vagina with his hands. She also claimed that he defecated in the bath.

Mr Harrison submitted that the interviewer was guilty of repairing "a glaring inconsistency" the child made when saying that the wees came from Peter's bottom; in response to further questions in reference to a body outline sketch she corrected this to "penis". We can see nothing of substance in this objection. With young children, whose language and perceptions are not those of adults, it could be natural enough to refer to the whole genital area as a person's "bottom".

The child had a number of discussions with her mother, who also described some sexual conduct she displayed while having a bath with her, which could have been very relevant to the child's account of bathing with the appellant. There were some obvious difficulties with her evidence about which she was rigorously cross-examined. The jury were entitled to accept her explanations, particularly as they enjoyed the advantage of seeing and hearing her.

She was also examined about the discussions she had with the child, including helping her to produce two booklets of drawings called "The Way to Peter's House" and "What did Peter do?" which the girl took with her to the interview. We think this was a permissible help in refreshing her memory. In spite of her mother's concerns giving rise to reservations about whether she may have unduly influenced or suggested matters to the child, in the end the jury must have been satisfied beyond reasonable doubt with the essential truth of the accounts

forming the basis of the charges. We would not be justified in setting aside the convictions in the face of their advantage in seeing and hearing the witnesses - a fortiori on the first count, in the light of the accused's discussions about "golden showers" to which we have already referred under child D.

The jury acquitted the appellant on the next two counts involving this child - attempted sexual intercourse (count 11) and indecent assault (count 12). These disclosures were made in the third interview which took place some three months after the first. In it she said that Ellis had put his penis in her vagina a little bit at the house, and at the crèche had put a needle up her bottom. These interviews were apparently prompted by further information obtained by the girl's mother and passed on to the interviewer. Mr Harrison emphasised the bizarre statements she made in the later sessions and criticised the methods and technique involved in obtaining all the disclosures. These matters would have been clear to the jury, and for the reasons given above his submissions in respect of these two counts do not take us to the point of regarding as unsafe the two earlier convictions involving this child.

Child G (male) - born March 1986; started crèche March 1989 and left in February 1991.

There were five interviews, the first on 14 May 1992 followed by 4, 5 and 6 August, with the fifth interview on 28 October. The Crown played those of 4 and 6 August to support four counts. The appellant was convicted on the first three - inducing an indecent act at an unknown address when bathing with the complainant who touched the accused's penis (count 16); indecent assault at an unknown address where the appellant put his penis against the boy's anus (count 17); and sexual violation at an unknown address when he placed his penis in the boy's mouth

(count 18). He was acquitted on count 19 of doing an indecent act at an unknown address where children stood in a circle and were sexually abused by a group of people including the appellant.

The first tape of 14 May was also played in part, in which the child described a dubious episode at the crèche when he was very young, involving the appellant. In the second interview of 4 August three months later he described being taken to a house where other children were present and gave a detailed description of masturbating the appellant which he said occurred twice at his house and twice in the crèche toilet. The former was the basis of count 16. In response to a further question by the interviewer he said the appellant put his penis up his bum when he was standing in the bathroom of his house (count 17), and then he took the children back to the crèche and told the other teachers they had a good walk.

He also described going to the appellant's house in a car which Peter drove with two adults in it. He said there were others waiting in the house when they arrived and he described it as two-storeyed with a ladder and belonging to one of the appellant's friends. Other men took part in anal intercourse with him and Ellis took photos. There were other children there as well. He also said that Ellis put his penis into his mouth in the bedroom where they did most of the bad things and white sticky stuff went into his mouth. This was covered by count 18.

In the third tape of 5 August, which was not played, he described a visit to a library and then apparently to a house and described a trap-door and a maze. He mentioned there were friends of the appellant at the library wearing black clothes, giving much the same description as D had given, and that one of them stuck a sharp stick up his bum and a burning piece of paper which made it bleed. When

they went back to the crèche they were too scared to tell the teachers. There were some further descriptions of indecencies which are very hard to follow.

The next day on 6 August the boy gave a more detailed description of the things Peter's friends did to him and identified the place where these occurred as a two-storeyed house in Hereford Street, stating they were all dancing around in a circle with him and some other children in the middle. He named several from the crèche, including three of the female staff, two of whom he said simulated sexual intercourse with Peter taking photographs. A circle was painted on the floor in the dining room and the children, who were naked, were made to kick and punch each other in the middle. He said one of the men put needles up the boys' penises causing them to bleed and in the girls' vaginas. He then described being tied up and being put in an old oven after which the adults pretended to eat the children; he also described a trap-door where they were made to fall down in a room where there were books.

In the 28 October interview there were further descriptions of the trap-door and of cages in which they were hung from the ceiling and he also described going through a tunnel and a secret door in the wall, and going up into the ceiling of the crèche and down through a trap-door in the supervisor's office. (Such a trap-door existed.) There were features in the house at Hereford Street which could have been in the child's mind when he was describing some of these events, including a hidden door which gave access to a large space inside the internal walls of the house and which the owner said previous occupants had set up to grow marijuana. He said visitors were sometimes shown it as a curiosity. There was a big cupboard in the kitchen which had once held a coal range, and a more modern stove opposite. Both this complainant and child D spoke of group abuse in very broadly similar terms. This complainant also mentioned being taken into a maze in the building with the trap-door, and in cross-examination he described it as containing pipes. He

could have been referring to the basement boiler room of the crèche building. As they did with child D, the jury acquitted the appellant on count 19 involving this more bizarre conduct.

This child's mother had been in touch with other parents about the crèche from an early stage and she was closely cross-examined about the information she had obtained and about the resulting discussions with her son. She agreed that she had asked him direct questions but that he had volunteered the account of masturbating the appellant and she had to explain to him what the white sticky stuff was. The jury had a full opportunity to assess the influence she may have had on his disclosures and must have been satisfied that they were reliable.

The main criticism directed at the interviewer regarding this child was of her failure to make any in-depth examination of the more bizarre episodes he described, but it is very much open to question whether a detailed enquiry would have achieved anything in pinning this child down to a more coherent explanation. It is not surprising that the jury acquitted the appellant on those matters, but felt able to convict him on the other three counts which dealt with specific episodes of more easily understandable abuse.

Child H (female) - born August 1986; started at crèche mid-1988 leaving August 1991.

There were six interviews, the first four of which were relied on by the Crown to support counts on which the accused was found guilty - namely count 20 of sexual violation by putting his penis in the complainant's mouth; 21, indecent assault by touching the complainant's vaginal area with his penis; 22, indecent assault and touching the complainant's anal area with his penis (these three in the

crèche toilets); and 23, indecent assault when an unknown man placed his penis on the complainant's vagina at an unknown address. These four interviews took place on 27 and 28 February 1992 and 18 and 27 March 1992. In two other interviews of 28 and 29 October 1992 she spoke vaguely of the appellant and his friend touching her bottom or vagina with a knife at the crèche and of assaults when a group was present including other crèche workers.

In the first tape (count 20) she described incidents in the crèche toilets when Ellis put his penis in her mouth and "baby stuff" came out of it. Her mother told her it was baby stuff. She said she told one of the teachers who didn't believe her. On the next interview she said he had touched her vagina with his penis in the toilets (count 21). Then, in the 18 March interview, that he touched her bottom with his penis in the toilets (count 22). Nine days later during the 27 March interview she said she was at the appellant's house and there were a group of people engaging in some kind of sexual behaviour in the presence of herself and other children, and a man she called Joseph teased her by putting his penis on her vagina, and Ellis was there laughing (count 23). She named another crèche worker who came and collected the children. The latter denied any knowledge of such an incident.

The child was cross-examined about these matters and stuck to her story, adding some circumstantial detail. This girl's mother had frequent contact with other parents and the support group and was a friend of the woman who had first complained. There was no doubt that she was aware of a lot of the things the children had been saying about abuse by Ellis and she was cross-examined at length about the discussions she had with her daughter over the period before and during the disclosure interviews. She agreed that she had asked the girl whether Ellis had ever touched her vagina or had touched her with his penis, but said that before she had any knowledge of it, her daughter told her of "yucky stuff coming out of his

penis". Counsel submitted that after this questioning the child had clearly been "primed" to talk about Ellis at the first interview, where she must have repeated the suggestion put to her by her mother the week before, about Ellis showing her his penis in the toilet.

This and the other criticisms made by Mr Harrison were matters for the jury to assess. His further submission that the interviewer should have explored alternative reasons for the child's statement about "yucky stuff coming out of his penis" is far-fetched. He criticised what he saw as suggestive and leading questions by the interviewer and persistence in carrying on with the discussion after the child wanted to finish. (She evidently had a limited attention span, requiring a number of short interviews). Counsel's criticism ended with the sweeping submission that the interviewer had a preconceived agenda and had in essence found Ellis guilty and was not interested in obtaining any material from the child other than that which supported her theory that the things she described had actually happened.

We note, however, that while this interviewer was cross-examined at length about her general approach and technique (which left no doubt about her professional competence), she was not asked anything about the matters now so roundly criticised by counsel in his submissions. For our part, we see nothing of any consequence in the transcript extracts made available to us to cause concern about the way the interview was conducted. The jury were quite capable of making their own assessment after seeing the four tapes relevant to the convictions.

Child K (female) - born January 1986; started at crèche mid-1987.

Three interviews, the first 9 March 1992 in which she said he put his penis in her mouth at the crèche toilet, and that he touched her vaginal area with his hand.

The first supported count 27 of sexual violation and the second count 28 of indecent assault, the jury finding him guilty on both.

In the second interview of 6 October 1992 she repeated these allegations in more general terms and said that the supervisor and other workers knew it was going on but did not stop him. They denied this. In this and the last interview of 9 December 1992 she described an occasion when they were taken to a building with escalators and Ellis did some "secret touching" in a carpeted room which had desks in it. After that they walked back to the crèche. She named children who had been subjected to this touching. Then she started talking about three other men who were in a room with them along with Peter and indulged in indecencies including touching the complainant's private parts with their hands and their penises. There were no charges in respect of these incidents. These last two tapes were apparently not shown to the jury.

This child had a brother who was also a complainant, but Ellis was acquitted on a charge of doing an indecent act with him. Their mother was a member of the support group and had discussions with the original complainant, and was aware before the disclosure interviews of statements made about Ellis by some other crèche children in which her own were mentioned. She was cross-examined at length about what had taken place between her and the child before the interviews. Once again the jury had ample opportunity to assess the effect her involvement may have had on her daughter's credibility. Mr Harrison repeated his criticisms of the interview's failure to explore with the child the sources of her information about Ellis' conduct, and our earlier comments on submissions of this nature apply here.

It would seem from the cross-examination of the interviewers that there is some force in Mr Stanaway's proposition that the thrust of the defence case changed on appeal. At the trial it focussed on the possibility of contamination of the

children's disclosures as a result of previous questioning by parents and the flow of information between them. He said the emphasis had now shifted towards demonstrating that the interviews were conducted in a manner which was ultimately unfair to the appellant, by persons who had a preconceived agenda concerning what they wanted to obtain, and who at no stage seriously tested alternative hypotheses about the source of the children's information and largely ignored inconsistencies.

The passages from the transcripts referred to us by counsel did not support that sweeping condemnation made by Mr Harrison, who subjected them to a microscopic examination. The interviews accorded with the evidence of Dr Zelas about the way such exercises should be carried out, and it must be remembered that she was generally supervising the process. Certainly we do not gather from the cross-examination any suggestions being put to the interviewers themselves or to Dr Zelas that their technique and approach were flawed in the way now suggested.

In dealing with the possibility of contamination of the children's evidence from other sources, the interviewers would attempt to 'validate' a child's account of sexual abuse by seeking to elicit circumstantial detail. Ms Morgan summed it up in cross-examination in this way :

> "If we felt in an interview situation that there was a possibility perhaps a child has been told something to just repeat, we suspect there may have been some sort of coaching or we weren't getting a lot of detail, they maybe yes we would explore where did this information come from, it's a very difficult complex sort of situation."

We think it would be asking too much to expect them to embark on a cross-examination of the child to eliminate the possibility of contamination or influence from other sources in respect of every allegation of abuse made.

In assessing what weight to give the children's evidence the jury had the benefit of the expert assistance given by Dr Zelas for the Crown and Dr Le Page for the defence under s23G of the Evidence Act. They gave their opinions under subsection 2(a) about the intellectual attainment, mental capability and emotional maturity of the complainants, which included an account of the way young children perceive, remember and recount events affecting them. Under subsection 2(c) these witnesses expressed their opinion on whether the complainants' reported behaviour was consistent or inconsistent with the behaviour of sexually abused children of the same age group. On this aspect there was a divergence between Dr Zelas and Dr Le Page: the former was clearly giving her evidence in accordance with the provisions of the subsection, limiting her opinion to the consistency with child abuse of the behaviour reported by the parents and others, and acknowledging that it might be consistent with other causes as well. On the other hand Dr Le Page clearly thought his task was to express an opinion about whether the reported behaviour indicated child sexual abuse - i.e. tended to prove it. He was adamant it did not but, as his approach did not conform with subsection 2(c), his evidence on that aspect had to be discounted.

Parents reported behavioural changes around the time the children were at the crèche, the most common being regression in toileting habits in the case of children who were supposed to have been fully toilet-trained by the time they moved into the pre-school section. Those changes were accompanied in the majority of cases with sleeping problems, nightmares and night terrors, and there were other difficulties. While Dr Zelas acknowledged that they could be consistent with domestic and other upsets disclosed in the evidence, she considered that what she saw as "clusters" were consistent with sexual abuse.

Appellant's counsel criticised the action of the Crown in introducing at the end of its case a chart made up by the police listing the problems reported about

each complainant. The Judge allowed it to be produced, noting the defence objections about its failure to cover the full range of surrounding circumstances or the individual differences between the children. He thought that any criticisms could be covered in counsel's closing addresses and that its production would not be unfair, and he gave the jury the normal direction about the use to which such schedules could be put, emphasising that they were not in themselves to be regarded as evidence of their contents.

We gather that there was no issue taken of their accuracy but in this Court Mr Panckhurst submitted that they gave the Crown an unfair advantage by focussing the jury's attention on conduct that occurred during the five year period without any distinction or reference to its duration or timing, thereby giving this evidence an unwarranted emphasis.

We accept the validity of this criticism. On the other hand, this was a legitimate and convenient way to focus the jury's attention on the evidence of this behaviour which had been given over the preceding weeks and enabled them to relate it to the particular child concerned, thereby avoiding the risk of confusion with other children. That the jury saw the schedule in its proper perspective is borne out by the fact that they acquitted the accused on the charges involving four of the complainants named in the schedule. We are not prepared to differ from the Judge's ruling that it could be admitted.

Conclusion on First Ground

We have traversed at some length the salient features in the submissions by appellant's counsel on the first and most important ground questioning the integrity

of the verdicts because of doubts about the credibility of the children's evidence, and because of the way the interviews were conducted. We acknowledge that there must always be room for concern where the guilt of an accused depends on the testimony of young children presented to the Court in the form of recorded interviews, now accepted as the most appropriate and perhaps the only feasible way in which allegations of sexual abuse against them can be tried. The dangers have led to the special regime for the presentation of evidence in child sexual abuse cases contained in s23A-I of the Evidence Act 1908. We refer again to the extract cited above from ***R v Lewis*** about the spirit and broad purpose of this legislation and we are satisfied that the conduct of the interviewers accorded with it, and that the trial Judge had these matters and the added risk they presented to the accused very much in mind in the rulings and directions he gave.

There is nothing in the material placed before us on the appeal or in the wide-ranging submissions of counsel leading us to disagree with the following comments made by the Judge in sentencing :

> "The jury were in a unique position in this case. Unlike almost all of those who have publicly feasted off this case by expressing their opinions, the jury actually saw and heard each of the children. They also heard your own evidence and that of the other former Christchurch Civic Creche workers. They disbelieved you. They believed the children and I agree with that assessment."

Child A's Retraction

As noted above, during the course of the appeal hearing advice was received through the Registrar that this child's parents had reported she was now saying she had lied during the interviews about Ellis. We adjourned the hearing for enquiries

to be made and for a report to be submitted to the Court by an agreed independent barrister. After lengthy interviews with the child and her parents he submitted two detailed reports, the first of an interview on 26 July which was the day following the retraction the child had made to her mother. She had been away from school with 'flu the preceding week and had received a nasty phone call from a fellow pupil indicating that she would not be welcome back. When she returned on the Monday before the interview that girl and others were not nice to her and she was really upset. Her mother rang the other mother to complain and there was an argument in which child A was described as a liar and this also upset her. That evening after this conversation she told her mother she had lied about Ellis because she had decided that she would not tell any more lies. When interviewing counsel asked her why she had chosen that occasion to tell her mother, she replied that she had thought about it for a long time and had been waiting for a good time to tell her parents. When he asked her if she thought she had been telling the truth when in Court, she replied

> "I suppose I thought I was telling the truth in court. I can't remember anything about creche or Peter's house. If I can't remember anything, then I must be lying."

In response to further questions she stated she could not remember the things she had said about Ellis in the video or being in the toilet at the crèche with him, and that when she watched a video in Court she did not think she was telling the truth in it. At the end of this interview she said she was not sure why she told lies on the video, and that she felt confused about it and that she could not remember Ellis.

Counsel then reported, with a statement from the girl's mother confirming she had been unhappy at school, and summarising the conversation with the parent of the other child, in which it was said that her daughter told lies all the time and that she was not popular at school because of this. She said she then had a general

discussion about lies with the child who became upset and eventually said she had been lying about the Civic Crèche.

Counsel saw the child again with her mother in his chambers on 2 August 1994 in which she maintained that she gave the answers she thought the interviewer wanted. She said she could not remember the interviews, but when pressed could recall them but not what was said; and when specific points were put to her she accepted she had said them, but they were not true. She stated her reason for choosing this time for telling her mother of the lies was her wish to make a new start, to stop lying, and to work harder at school, where she was doing well but was unhappy because a number of children did not like her. She was worried about Ellis because she did not want him to spend any longer in gaol. When asked if she wanted to see the video-tapes she quickly replied she did not, and would not give any reason for her unwillingness.

Counsel summarised the position by stating that despite the consistency of her claim she had lied, the girl was quite inconsistent about a number of surrounding factors. Having seen the videos himself, he did not find her explanation that she had made up the details of her complaints convincing. If she had lied in the interviews and in Court he could discern no reason for it, and was unable to draw any broad conclusions as to the part the interview process may have played in encouraging or inducing lies. In the end he said :

> "I find myself remaining in a position of doubt. This may not be sought from me, but my conclusion despite that doubt is that [A] is a very unhappy, confused young girl, much troubled by her part in this case. I think she has chosen to withdraw her allegations as a means of removing the case and its effects from her life, coupled possibly with the wish to help Peter who undoubtedly was a close friend. She is probably troubled by the haziness of her recollections of her time at creche 6 and more years ago."

This is a conclusion to be respected having regard to the careful and obviously intelligent enquiries he made.

The child's mother had given evidence (confirmed by the appellant) that this child was a particular favourite of his: she said he was very open in his admiration, talking about her eyes and how pretty she was and how special she was to him. He came to her 5th birthday party and gave her a quite valuable gold bracelet with three stones, which surprised her because it was obviously not a child's bracelet. When she queried him the appellant replied that he would very much like to see her wearing it again when she was 16. He explained that his sister had given him the bracelet after she had got tired of it for the crèche dress-up area, but he chose to give it to A instead.

It is not uncommon for child complainants in sexual abuse cases to withdraw their allegations or claim they were lying, although more usually there are obvious family pressures on the child to do so. That is clearly not the case here, but the matters mentioned in counsel's reports indicate that A was a confused and troubled girl at the time she made the retraction. There is some relevance in the statement by one of the interviewers (Ms Sidey), in cross-examination about another complainant, that a retraction will often indicate a high level of anxiety and fear of the consequences of the disclosure.

We share the doubts expressed by counsel who saw the child. However, having regard to the content of his report and to the extensive circumstantial detail given by this child, we are by no means satisfied that she did lie at the interviews, although she may now genuinely think she did. With such doubts, we think it would be unsafe to let the convictions on the counts involving her stand: Mr Stanaway informed us that if this should be the case, the Crown would not be seeking a new trial on them.

Giving the appellant the benefit of the doubt on these counts does not affect our view of the correctness of the other convictions, and we see no substance in Mr Panckhurst's submissions to the contrary. Accordingly the first and major ground of appeal fails in respect of all but the first three counts.

Miscarriage of Justice

2. *There was a general miscarriage of justice arising from any one or more of 6 specified grounds.*

Several of these grounds have already been dealt with under the first relating to the unreasonableness of the verdict. Of those remaining we deal first with the complaint that the jury were allowed to retain and use transcripts of the complainants' video-recordings of evidence-in-chief. The Judge considered they would be an aid to their understanding of the recordings played and we think this could hardly be disputed, especially when it is borne in mind that the trial occupied a total of five weeks, with the complainants' evidence lasting from 26 April to 12 May 1993, followed by a further two weeks of other testimony. Mr Stanaway pointed out that by the time the jury came to consider the evidence of the first child, they would have had to cast their minds back to the start of four and a half weeks of concentrated evidence.

The provision of transcripts to assist the jury has now become commonplace, with both audio and video-recorded evidence adduced in criminal trials. The practice has been acknowledged or approved in many cases which have come to this Court. We see no merit in the submission that with the transcripts in front of them, the jury would concentrate on the written word rather than on the appearance of the complainant on the screen and his or her reaction to the questions being asked. There is no suggestion of that happening here. Indeed, it can be expected that

members of the jury would be switching their attention between the two sources as it became necessary to check the voice record against the written word. Mr Stanaway informed us that it was sometimes hard to follow what the child was saying, especially during early stages of the interview.

Nor do we think that in a trial of this length, containing many hours of screening, it was inappropriate for the jury to have the transcripts with them during their deliberations. They were supplied with still photographs of the different complainants in order to relate the child they saw to the evidence they were considering. They had a proper record, rather than having to rely on sometimes indistinct and possibly vaguely remembered screenings, and that record enabled their verdicts to be given on accurate information. They were told in the summing-up that the transcripts were merely an aid and that the evidence they had to consider was what they saw and heard during the interviews. That they took this seriously is demonstrated by the fact that they asked for two tapes to be replayed, and they were also read relevant portions of the child's examination-in-chief and cross-examination.

Mr Panckhurst submitted that it was unfair to the accused for the jury to have transcripts of only the tapes produced by the Crown, and not of those defence tapes which were played. As to this, there was some difference between counsel, Mr Stanaway maintaining that transcripts of all the tapes played were available and the others could have been given to the jury if the defence had requested it. There was nothing in the Judge's ruling limiting availability to only those tapes on which the Crown relied. However, the fact remains that the jury did not have the transcripts of the defence tapes; nor did they have a record of the cross-examination. We accept that this could have resulted in an advantage to the Crown, but its effect is a matter of degree. In the overall context of the case we do not think it effectively prejudiced the accused, particularly as in instances where the

defence was able to make real inroads in cross-examination there were verdicts of not guilty.

The next ground was a complaint that the extent of the evidence permitted from Dr Zelas in terms of s23G of the Evidence Act occasioned a miscarriage. Mr Panckhurst opened on this by criticising (albeit with some delicacy) Dr Zelas' conduct in undertaking a supervisory role in the interview process and then appearing as an expert expressing the opinions authorised by s23G of the Act. Those opinions were about the consistency of each complainant's behaviour with that of sexually abused children of the same age group; the intellectual attainment, mental capability and emotional maturity of the complainant; and the general development level of children of the same age group.

Counsel did not suggest that she was disqualified from giving such evidence because of her prior involvement, but said she was in an "uneasy" position when it came to drawing the fine line between evidence allowed under the section and the expression of an opinion on the credibility of particular complainants. It is, of course, a line which may be difficult to discern in some situations, particularly when dealing with a group of young children, some of whom have given similar accounts of the appellant's behaviour. It is inevitable that general statements about young children's mental capacity etc may be seen as applying specifically to these children - for example, the way young children use magical thinking; their tendency to give unusual or bizarre description of events of which they have had no previous experience; their ability to recall central details more readily than peripheral ones; and the stages of memory development and ability to recollect past matters.

All these were features very relevant to the accounts given by the complainants in this case, and they were the matters on which the jury would

clearly be assisted by expert opinion. As Mr Stanaway pointed out, Dr Le Page (called by the defence) gave the same kind of evidence, although perhaps not in full agreement with Dr Zelas. There may have been one or two unimportant exceptions, but in the very extensive evidence given by both these experts we detect nothing to substantiate the suggestion that they overstepped the limitations imposed by s23G and started expressing views on the credibility of individual complainants.

The final ground we deal with under this heading is that in summing-up the Judge failed to put the defence case adequately and adopted a prejudicial treatment of its approach. Acknowledging that any summing-up must necessarily be tailored to meet the demands of the particular case, Mr Panckhurst pointed to three aspects which required consideration and emphasis. The first was that the jury must guard against the extraordinary pressures of opinion in relation to this case, which had generated extreme media interest about allegations which were repugnant in nature, and where the parents were strongly committed to supporting the prosecution. Counsel submitted that there should have been an emphatic direction to the effect that the accused was entitled to a dispassionate consideration of the case and that the standard directions to juries covering sympathy or prejudice were inadequate in the particular circumstances. He also claimed that it was not enough to mention the direction about onus of proof only at the beginning of the summing-up.

At the outset of the trial on 26 April the Judge gave a preliminary direction to the jury in which he was at pains to urge them to reach their decision on a calm and dispassionate consideration of the evidence, and to put out of their minds all that they had read, seen or heard in the full media coverage of the affair. He repeated this direction at the beginning of his summing-up on 3 June, emphasising again that they must decide the case solely on the evidence unaffected by the

publicity or their feelings in the matter, and that their concentration must be centred on the charges against the accused, since it was not a public enquiry or a trial of the crèche.

He then told them the onus of proof on each charge was on the Crown from beginning to end of the case, characterising it as an important matter which had also been mentioned by both counsel. He then referred in conventional terms to the standard of proof being beyond reasonable doubt. Twenty-five pages later he again brought up the question of onus and proof beyond reasonable doubt when dealing with the effect of evidence given by the accused.

The summing-up ran to 41 pages. The Judge had to deal with a multiplicity of charges, in accordance with his direction to the jury that each had to be considered separately; and it was delivered against the background of extensive closing addresses by counsel. These commenced in the late afternoon of 1 June and continued all day on the 2nd, with the defence address concluding at 11am on 3 June. The summing-up then followed from 11.25am until 2pm with a short break. The need was obvious to keep the directions reasonably concise if they were to be of any value in these circumstances. With respect, we think the Judge covered the salient features of the case admirably. There was no need for him to continue harping on the onus and standard of proof, as by that time the jury must have been well aware of the situation. It was adequately covered in the summing-up.

Nor do we see any substance in the next complaint about the Judge's failure to point out the need for care in the evaluation and acceptance of the children's evidence. As required by s23H(c) of the Evidence Act he had to avoid telling the

jury to scrutinise young children's evidence generally with special care, or suggest that they generally have tendencies to invention or distortion. He dealt at some length with assessing the reliability and worth of each child's evidence, advising the jury to take into account all relevant circumstances and to pay regard to the inconsistencies as pointed out by counsel in determining whether the essential allegations could be relied on. He summarised the important points made by Dr Zelas and Dr Le Page, about which he suggested there was a substantial measure of agreement about the development of young children .

After making some further general observations about the way different witnesses can have different recollections of the same event, he concluded with the statement that neither counsel really suggested that the children were being deliberately or maliciously dishonest, the defence inviting them to conclude that they were telling untruths because they had been consciously or unconsciously misled into doing so. He added that the jury's decision about their evidence was of fundamental importance, and it was prudent to proceed with caution, but he rightly told them there was no presumption against children as witnesses. He suggested that they apply a large measure of commonsense and their own personal human experience in deciding whether they believed a particular child about the essential elements of the charge. He then advised them to look for any evidence which might support or contradict what the child said, especially if it came from an independent source. **We think counsel's complaints about the way the children's evidence was dealt with cannot be supported.**

The next complaint was that the defence case was not adequately put to the jury. This submission started off with the proposition that the Judge's opening comment was destructive of the entire line of the defence and unfair. He said -

"According to the Crown each child has told the truth about the central matters. According to the accused all of the children have told lies because of pressures on them from parents, other children, or authorities". This was condemned as an emotive distortion of the defence case, made at a time when it was likely to have the greatest impact on the jury.

In the section above about the way the children's evidence was dealt with, we have already referred to the Judge's statement about the defence claiming that the children were telling untruths because they had been misled into doing so. With respect we think that counsel are displaying an over-sensitivity in the present complaint. The Judge was simply and starkly making the point that the case turned on credibility, and the central issue was whether or not they believed the complainants. We do not think any member of the jury would have thought that the Judge was saying in effect that each of these little children had set out deliberately and consciously to tell falsehoods.

It is also claimed that the Judge should have drawn the jury's attention to the bizarre content of some of the children's interviews. There was no reference to this in the summing-up and it was said to be an omission of a relevant feature on which the defence relied in seeking to make its case that the whole interview process was flawed. Nevertheless it is impossible to escape the conclusion that those allegations must have been very much at the forefront of the jury's mind, simply because they would have been so far outside the ordinary experience of jurors. No doubt they would have been emphasised by defence counsel. The acquittals on those counts in which such conduct featured tend to confirm these conclusions.

Finally it was submitted that in telling the jury the case was not a trial of the other crèche workers' conduct, nor of the conduct of the police, parents, or special interviewers, and in emphasising that their concentration or focus must be upon the charges, the Judge deflected their attention from a proper consideration of their conduct. However, he did tell the jury that aspects of those persons' evidence may well have an effect upon the decisions they make in the case. As with his earlier rulings about collateral matters, he was correctly seeking to limit their consideration of the evidence to those aspects which were of relevance to the charges themselves.

We think the jury had sufficient information about the way the interviews were conducted to make a proper assessment of the children's evidence. In summarising the general points made by counsel for the accused at the trial, the Judge was presumably reflecting the way the defence case had been put, concentrating on the reliability of the children's evidence rather than on the way it had been obtained. There was particular reference to the defence contention that ideas had been put into their heads by parents and others and by the publicity which had been given to the case. If the Judge had got the defence case so badly wrong as counsel are now suggesting, it seems strange that there was no request at the close of the summing-up for him to rectify the omission.

We are satisfied that there is nothing of substance in the grounds raised under miscarriage of justice causing us any concern over the guilty verdicts. We now turn to the alternative ground that the verdicts on some counts were unreasonable or resulted from a miscarriage of justice because they were inconsistent.

The first related to child D, in respect of whom Ellis was convicted on count 6 of doing an indecent act when he urinated on his face and put his penis in his mouth, but was found not guilty on count 7 of indecent assault involving putting a stick into his anal area. From the evidence about these counts summarised above, it is obvious that there were substantial differences which led the jury to accept the earlier interview disclosure but reject the more bizarre one described at the third interview. Juries are always told that it is over to them to decide which parts of a complainant's evidence they accept and which to reject, and simply from the fact that they acquitted the accused on the second charge, it does not follow they were wrong to believe the child's evidence on the first.

Counsel raised an ancillary matter in submitting that this boy's statement to his mother that Ellis did "wees and poos on the children" should not have been admitted under the recent complaint rule. We disagree, and are satisfied that the Judge gave an appropriate direction as to the use the jury could make of this evidence. It is clear that the person to whom the complaint is made can give evidence of it, notwithstanding that the complainant himself said nothing about it in his evidence - see *R v Nazif* [1987] 2 NZLR 122, 125.

The next allegation of inconsistency relates to child F, where guilty verdicts were brought in on counts 9 and 10 of committing an indecent act by urinating on her face in the crèche toilets, and of inducing an indecent act by having her bathe with him. He was acquitted on counts 11 and 12 of attempted sexual intercourse and indecent assault involving touching her bottom with a needle. The first two charges were based on the first interview in May 1992 while the other two episodes were disclosed in August 1992. Once again there are sufficient differences in the

surrounding circumstances and the timing of the interviews to enable the jury to accept the complainant's earlier accounts and reject the later ones.

Finally the accused's acquittal on count 19 of doing an indecent act on child G was contrasted with his conviction on counts 16, 17 and 18 involving indecencies and sexual violation. Again, the not guilty verdict was given in respect of disclosures at a later interview describing bizarre events. It is not surprising that the jury acquitted there, but convicted on the charges which could be more readily comprehended.

Our overall judgment of the case is that after this long trial the jury were fully justified in their conclusion that charges against the accused had been established beyond reasonable doubt. It is significant that the trial Judge in his sentencing remarks expressed his agreement with the verdicts, describing them as 'obviously correct'. There were some particularly telling pieces of evidence - such as the references by children to 'white sticky' or 'yucky' stuff and 'Peter calls it secret touching'; and the evidence of the accused's unusual interest in 'golden showers'. Great risks of detection may have been run, but that is not uncommon in cases of indulgence in a perversion. The jury deliberated for more than two days and brought in carefully discriminating verdicts which can be seen as conservative. The claims that the evidence of the children was contaminated by interviewing techniques, parental hysteria or the like lack any solid basis. The whole matter has been very thoroughly and competently examined by counsel at the appeal hearing, and as a result we have no misgivings about the outcome of the trial.

Conclusion on Conviction Appeals

For the foregoing reasons we are satisfied that none of the grounds of appeal has been made out, but because of the doubts raised by child A's subsequent retraction, the appeal is allowed in respect of counts 1, 2 and 3. In respect of the other counts it is dismissed The Crown does not seek a new trial on those counts, reflecting our view of the undesirability of submitting the child and her parents to the trauma of another hearing. We therefore direct a judgment and verdict of acquittal be entered on counts 1, 2 and 3.

Sentence Appeal

Mr Panckhurst informed us that his client had instructed him that he does not wish to argue that the conduct of which he stands convicted (although he still denies it) does not warrant the sentence of 10 years imposed, and this applies even though the convictions involving child A have now been set aside. We recognise this as a responsible - and inevitable - attitude which correctly reflects the gravity of such offending, and the sentence appeal is also dismissed.

Solicitors: *Crown Solicitor, Christchurch*