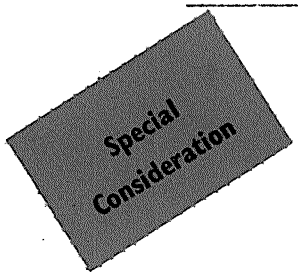
IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY



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T. 100/83

REGINA

v

P C
D C
W M
A B

PUBLICATION OF NAMES OF ACCUSED AND WITNESSES PROHIBITED

Hearing : 27th February - 5th March 1984

Counsel :

Ruling : 28th February 1984

ORAL RULING OF CHILWELL J. (No. 2)

W M by her counsel, has objected to the oral and written statements made by her to Detective Sergeant John Arthur David Purkis on the 12th September 1983. The background to this matter is recorded in my judgment delivered this morning with reference to the admissibility of the oral and written statements made by a co-accused A

B

It is clear from the evidence taken in respect of

the present application that the four accused were at the police station at the same time, each being interviewed by a separate police officer, with Detective Senior Sergeant Takitimu in overall control available for consultation and generally supervising the taking of the statements.

There were several stages involved in the interview with Miss M . The first stage occurred at some time around about 8 a.m. when three policemen called at her home and took her and her co-accused, who appears now to be her sister, that is Miss C to the police station for the purpose of being interviewed. The second stage occurred when Detective Sergeant Purkis, who had been assigned to Miss M by Detective Senior Sergeant Takitimu, commenced his interview with her at 8.30 a.m. That was, of course, at the police station. That part of the interview lasted for half an hour. At 9 a.m. the Detective Sergeant left the interview room, returning some 5 minutes later. There then commenced the second part of the interview, that is to say, the third part of the day's proceedings. Miss M was cautioned at that stage. At 9.30 a.m. Detective Sergeant Purkis again left the room, returning in about 5 minutes. There then commenced another part of the interview in which the Detective Sergeant brought to Miss M attention a list of allegations which had been made by the complainant. Those allegations were duly answered by the accused in question and answer form as recorded in the officer's notebook. It remains to be said that at all stages throughout the

interview the Detective Sergeant recorded in question and answer form the various stages of the interview. The last part of what might be called the oral interview ceased at about 10 a.m. when Miss M was requested to make a statement. It was clearly signalled to her that a written statement was contemplated. Such a statement was in fact taken down on the typewriter in the ordinary way and ultimately produced in the District Court at depositions as Exhibit 8. Asked in evidence in chief the method of taking the statement Detective Sergeant Purkis said :-

> "I typed the statement myself. The accused sat opposite me. I would ask the accused questions and she would answer them. And I then typed the replies down in the form of the statement." (page 29)

When the typewritten statement had been recorded Miss Mitchell was asked to read it and to sign it. She informed the Detective Sergeant that she did not sign statements. He then requested her to read it and acknowledge in some way that she had read it. Her reply was that she did not sign statements. He then informed her that the statement could be admitted in Court proceedings unsigned. Then he left her and discussed the matter with Detective Senior Sergeant Takitimu.

At this stage I turn to the evidence in chief of the Detective Senior Sergeant which is recorded as follows :-

> "I then went with him to his interview room and I spoke myself to the girl M I told her that it was likely that the statement would be produced in Court in any event and that it was in her interests as well as our interests that at least she read the statement and after reading the statement she could make a decision as to whether she wanted to sign it. This the accused M agreed to do. At the conclusion of reading the statement she said that she never signs statements. I then indicated to her that I would like her to indicate in some way on the document that she had read the statement and that it was true. The accused M on the first page of the statement put a line across the bottom of the page. (Exhibit 8 handed to witness) indicated line. Closest to the last line of typing. At the time of putting the line on the paper the accused made some comment that this would stop Detectives adding more to the statement. In my presence this defendant also wrote the words "I have read this but refuse to sign it as I do not sign statements'. Apart from the material to which you referred did she wish to alter any other part or add to it? No sir." (page 36)

In her evidence Miss M said in cross-examination that she had been told not to sign statements. She had been told that by a lot of people. When asked if that was the only reason she did not want to sign she said in cross-examination that there was another. That was because she had been told that sometimes policemen change them around.

I am quite satisfied from the evidence that this young woman had no intention whatever of signing any statement when she went to the police station and, although she purported to deny it, she stuck to her guns and held to her advice given by unknown persons. She was, of course, not obliged to sign any statement. The typewritten statement comprises some three pages. It is in narrative form, that is to say, not in question and answer form. By and large it

corroborates the complainant's version of the events as recorded in her depositions and it amounts in other parts to a confession by Miss M of participation in the alleged rape and indecent assault upon the complainant. In her own handwriting, at the end of the statement, are the words to which reference has already been made.

I should say at once that, while it might seem to be unkind to express of a young woman of years of age what I am about to express, it is necessary so to do for obvious reasons. Her cross-examination, the answers given by her and in particular with respect to the words written by her at the foot of the statement, were entirely unsatisfactory. I am satisfied that she lied about it. My general impression of her as a witness is that she is entirely to be disbelieved on all matters in which she is in conflict with the police officers. So far as the two police witnesses are concerned their evidence I find to be entirely satisfactory. I accept their evidence as a correct account of what transpired.

It was submitted by Mr. Rogers that the Court is required to apply much higher standards in considering the rules with regard to the admission of statements of the type involved here. He observed that what may be quite fair and unoppressive for adults can be the exact opposite in the case of young interviewees. He referred me to what Edmund Davies L.J. had to say in R v Prager [1972] 1 ALL E.R. 1114 at 1119. I have no doubt that the dictum of Sachs J. adopted by Edmund Davies L.J. is the proper approach. Indeed, I hope

that I indicated in the judgment given earlier this morning with regard to Miss B that was the approach I had taken. There is no reason for taking a different approach in the case of this particular application. The submission proceeded that there was an element of compulsion about this particular case. It was submitted that it began at the home in the way in which the police went round there and took these two young women to the police station and further there was an element of compulsion in the way their statements were taken, and, finally, elements of unfairness, in particular unfairness on the part of the police, in failing to follow the Police General Instruction with regard to the interviewing of young persons, that is to say, instruction C.42 as reproduced in [1980] N.Z.L.J. at 351.

I am satisfied beyond any doubt whatever that the oral and written statements made by this particular accused were made voluntarily in the legal sense. In saying that I am stressing that I am satisfied not merely beyond reasonable doubt but beyond all doubt. So far as the general aspects of unfairness are concerned here, as with Miss B the police were faced with a young woman very much more mature in years than her actual age. For example, when Detective Sergeant Purkis was asked why he had not insisted upon having the mother present, he replied that Miss M had refused to give him her mother's work telephone number; in any event he took the view, having regard to his assessment of her maturity and demeanour, that she did not need her mother present. Accordingly, he went ahead with the

interview on the basis, as he understood it, that he was complying with the spirit of Instruction C.42. He expressed the opinion, when I put it to him, that Miss M was as mature as a 20 year old. He then volunteered the view that she was the most aggressive young woman he had ever had the occasion to interview. That, too, was the impression created in the mind of Detective Senior Sergeant Takitimu who described her as being, from the outset, extremely hostile, arrogant and cheeky. Now, when the police have that sort of young person to deal with they are not dealing precisely with the type of young person envisaged in the instruction although account ought always to be taken of the fact that young people in a situation such as this may well develop aggressive tendencies. Some allowance ought to be made for that.

It was further advanced, more particularly by Miss M in evidence, that the whole of the interview took place in circumstances of extreme fatigue on her part, hunger and while feeling unwell due to her inability to take certain prescribed drugs that morning. As Mr. Morris correctly observed, that sort of thing does not go to voluntariness from the legal point of view. But matters such as fatigue, lack of sleep, emotional strain and similar things are, of course, relevant to the question of the exercise of discretion and, in particular, when a Judge comes to review the whole of the relevant evidence in order to satisfy himself whether or not there was any element of unfairness. The law is succinctly stated on that particular matter in

Garrow and Caldwell Criminal Law in New Zealand 6th Edition 490.

I am in no doubt whatever but that the interview with this particular accused was handled in a proper fashion. There was no element of oppression or unfairness or anything which failed to take into account the fact that the young woman was a little over years of age.

There is, however, one possible exception to the foregoing series of observations and findings. It relates to the introduction of the unsigned statement. When it comes to considering the admissibility of such a document it appears, from my understanding of the authorities, that the Court has to have regard to several factors. The first is whether the document is to come in as an exhibit. The second is whether, if it does not come in as an exhibit, it can be used as an aide-mémoire. The third relates to the general question of fairness. Fourthly, there is always the need to draw a distinction between notes taken by a Detective in question and answer form in his notebook and a written narrative taken down on the typewriter which is not in question and answer form and presented to the interviewee.

The authorities seem to be relatively sparse in this area but one of the leading cases is the decision of the High Court of Australia in Driscoll v R [1977] 15 A.L.R. 47. The majority decision on the point appears to be that of

Gibbs, Mason and Jacobs JJ. delivered by Gibbs J. He deals with the principles at pages 66 to 68. It ought to be said that that was a case in which the unsigned statements were produced as exhibits. It seems to me that the following propositions can be extracted from his judgment.

1. Such statements are admissible as exhibits if the accused has acknowledged or adopted the document.

2. Nevertheless the trial Judge has a discretion to exclude such a document.

3. It is for the jury to decide whether they are satisfied that the accused adopted it.

4. The Court ought to consider whether, when the jury retire to consider their verdict, the written document may have an influence out of proportion to its weight.

5. There may be cases where the admission of an unsigned record would, in some cases, tip the scales unfairly against the accused.

6. The desirability of using the document as an aide-mémoire rather than as an exhibit.

In dealing with general principles the Judge said at page 68 :-

> "..... in all cases in which an unsigned record of interview is tendered, the judge should give the most careful consideration to the question whether it is desirable in the interests of justice that it should be excluded."

Barwick C.J. appears to have adopted similar views to the majority although, it seems, he indicated a preference for the use of an unsigned record to refresh recollection unless by clear evidence the accused has made it his or her document. It is not precisely clear what Murphy J. was intending to say but he would appear to regard the discretion as being exercised generally more favourably to an accused by excluding such statements than the reverse.

The problem came before the Court in England in R v Fenlon [1980] Cr. App. Rep. 307 where, in the circumstances of that particular case, it was considered that it may have been preferable not to have admitted the particular unsigned statement but, nevertheless, the appeal was dismissed.

Mr. Morris contended that the evidence, looked at as a whole, particularly that of the police officers, establishes that Miss M gave an acknowledgement of the written statement sufficient for its admissibility as an exhibit but that, in any event, the Court ought to permit the contents to be given orally by Detective Sergeant Purkis using the document to refresh his memory which, from a

practical point of view in this case, would require that he read it in much the same way as he would read from his notebook, if given permission to read, as distinct from refreshing his memory.

Mr. Rogers opposes the introduction of the written statement in either fashion. He founds his submissions on the general principle that statements of this type are hearsay but can be regarded as a recognised exception to the hearsay rule. In stating that he is referring to the usual form of interview statement. It is his submission, however, that the general rule and not the exception to the hearsay rule should apply to the type of written document here either in its capacity as a potential exhibit or as an aide-mémoire. In support of his contention he submitted that a statement such as this, which has been typed out verbatim, is not in the same field as notes recorded in a policeman's notebook which are usually recorded in question and answer form. By contrast the present statement is something converted into narrative form and is quite probably not in the order or in the precise words of the accused. I have already referred to the method adopted by the Detective Sergeant in taking the statement. It was then submitted that the evidence does not establish that Miss M . adopted the statement at all, that when one examines the evidence of Detective Senior Sergeant Takitimu on the point it is, at best, equivocal and not sufficiently clear for the Court in paying regard to the Court's obligation to be very careful in this field. It is sufficiently equivocal for the Court

to exclude the statement for either purpose.

I have already referred to a passage in the evidence of Detective Senior Sergeant Takitimu at page 36 which is relied on by Mr. Morris. At page 38 in his cross-examination, when being asked by Mr. Rogers about the writing of the lines by the accused, it was put to the Detective Senior Sergeant at the foot of page 38 and top of page 39, and continuing down page 39, that she was persuaded to put the lines there by the Detective Senior Sergeant, it being his idea that she should do so because then the contents of the statement could not be changed. I accept the evidence of the Detective Senior Sergeant that that version is not correct, that his own version is the correct one.

When it is recollected that Miss Mitchell did in fact read it, in addition to saying so in her own handwriting at the end of the statement and that she put those particular lines on the document, those lines must mean something. In my judgment they are tantamount to a mark in the same way as her written notation at the end of the statement is tantamount to a mark. Those are marks, in my judgment, of recognition by her sufficient for the document itself to go before the jury as an exhibit. However, the evidential basis for the acceptance of the statement as hers must, in the end, be a jury matter as stated by Gibbs J. in Driscoll (supra). If the document becomes an exhibit it will ultimately be for the jury to decide whether, on the evidence, this accused did adopt it. If they so decide then the document itself becomes

evidence. If they decide to the contrary then it will be necessary for me to give the jury a clear direction as to what use, if at all, they can make of it. Prima facie, therefore, I have reached the point where I am satisfied that the document could go in as an exhibit.

The question now arises whether in the exercise of my discretion I should exclude the document either as an exhibit, or, alternatively, as an aide-mémoire, or alternatively again, exclude it altogether. Having regard to the need for special caution in this area with regard to adults, let alone the special caution with regard to young persons, and, having regard to the fact that a narrative as distinct from question and answer can sometimes give the wrong impression, it is my judgment that the document ought not to be produced as an exhibit. But I can see no grounds based on unfairness as to why it should not be used by Detective Sergeant Purkis as an aide-mémoire. That I will permit him to do. For purely commonsense and practical reasons I will permit him to read the statement and not adopt the rather time wasting and inaccurate method of refreshing memory.

One reason which has persuaded me not to permit the document to be tendered as an exhibit is the fact that the jury might well pay too much attention to the precise words of the document which will be continually before them and, notwithstanding such warnings as the Court may give, the jury might be inclined to regard the actual words in the statement as the precise words of Miss M which I think, in

fairness, ought not to be the case where she refused to sign the document, albeit that she has, in my judgment, sufficiently acknowledged it as her own.

MEMORANDUM

At a subsequent stage of the trial I was referred to Sections 30 and 61A of the Police Act 1958. Had I known of those provisions when I considered and delivered the above ruling I may not have allowed reference to Police General Instruction C.42. It appears to me to be a matter exclusively for regulating and disciplining members of the Police and prohibited from production in Court. If publication in the New Zealand Law Journal had the written permission of the Commissioner of Police it may be that the Instruction C.42 is now in the public domain. The matter was not argued. It will require investigation and argument in a future case in which it is intended to ask the Court to consider the Instruction.

6th March 1984.

PARTIAL LIFTING OF INTERIM ORDERS

The interim order made under Section 375 of the Crimes Act 1961 forbidding publication of any report or account of the whole or any part of the evidence adduced and submissions made does not apply to the publication of this ruling but the interim order forbidding the publication of the names of the accused and the witnesses remains until further order of the Court.

Thorpe J

6th March 1984.