IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

23/3

T. 8/83

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REGINA

v

A NEPIA

Hearing : 13th, 14th February 1984

Counsel : G.A. Rea and G.C. Lang for Crown
P.A. Williams and D.C. Reid for Accused

Ruling : 14th February 1984

ORAL RULING OF CHILWELL J.

Objection has been taken by counsel for the accused concerning the evidence proposed to be called of N Place and R Nelson. These witnesses were not called at the previous trial in May 1983.

An explanation has been given for not calling the witness, Place. She did not come forward at the time. Indeed, when first interviewed on the day of the alleged offence she told the interviewing police officer a lie, that she had not seen the stabbing. It would appear, however, that she has since had a change of mind, is now prepared to give evidence and came forward for the purpose after it came

to her notice that the other witnesses had received their witness summonses for the present trial.

With regard to the proposed witness Nelson, counsel for the Crown has candidly conceded that he was aware that the evidence was available, that the witness was willing to give it. He was aware of these factors before the depositions were taken and also before the first trial. He also anticipated that a possible defence could be provocation although he was not sure in his mind as to the precise form it would take. He made the conscientious judgment not to call the witness either at the depositions or at the previous trial.

Having regard to the way in which provocation was raised at the first trial it is his present submission that the evidence ought to be adduced in fairness to the Crown in order to rebut what might be the defence case on provocation that the accused was a caring, loving husband and father wanting a reconciliation.

In the case of both witnesses the opposition is put generally on the basis of fairness. In connection with the general submission, it is the lateness of the delivery of the briefs some thirteen months after the offence was committed, the fact that the briefs were delivered only on Thursday of last week, and the fact that with regard to Place proper police enquiry persisted in ought to have brought her to light as a witness for the first trial and with regard to the witness Nelson the Crown made a judgmental evaluation and

decided not to call the witness Nelson.

So far as Nelson is concerned the Crown put to me that if I rule the evidence out at this stage there may be a submission made at a later stage, depending on how the defence of provocation is run, that he be called in rebuttal. Mr. Williams, in reply to that suggestion, commented that that may well have been a possibility so far as the first trial was concerned but, of course, the question was not reached because the Judge excluded the defence of provocation. It is one of the Crown's contentions that the Crown ought to be able at this stage to tender the evidence of Mr. Nelson having regard to the obligation on the Crown to rebut the defence of provocation and the matter ought not to be left for an application to be made to call him in rebuttal.

The primary factor which weighs with me on this application is that this is a re-trial consequent upon the decision of the previous trial Judge to exclude completely the defence of provocation, a decision which was not accepted by the Court of Appeal and which accordingly resulted in the appeal being successful and a new trial granted. While new trials are, as the appellation suggests, precisely that, there are authorities which indicate that a Judge is entitled, in considering the overall question of fairness, to consider whether the Crown ought to be able to make a different case at a subsequent trial. Had the trial Judge on the occasion of the first trial put the question of provocation to the jury the then jury would have considered the issue in the

light of the evidence then before them which did not include the evidence of the proposed witnesses Place and Nelson.

So far as the evidence of the witness Place is concerned it does not, with respect, seem to me to add a great deal to the volume of eye witness evidence concerning the homicide with the notable exception that the witness appears to adopt a more emoticnal approach to her evidence than do the other eye witnesses.

With regard to the witness Nelson he is the step-father of the deceased. It is clear, if the whole of his evidence goes in with the exception of the hearsay portion already excluded, that he desires to create the impression that the accused made frequent threats to his wife and on one occasion threatened to kill her. While this type of evidence may well be relevant to the issue of provocation it is Mr. Williams' essential contention that it tends to introduce an element of pre-meditation into the case. The Crown have never approached the case on that basis nor did the Crown open this trial on that basis nor is it the intention of Crown counsel to press the case on that basis. However, there is always the possibility that once the evidence of pre-meditation is in the jury might make use of it in considering state of mind in the primary sense for murderous intent.

It is my view that this case ought to proceed factually from the Crown point of view as closely as possible

to the way it proceeded at the first trial, particularly so far as evidence is concerned. For that reason, coupled with the fact that the witness Place takes the matter little further and indicates a sense of emotionalism and that the fact that the evidence of the witness Nelson was available at all times but a conscientious judgmental decision was made not to use it, persuades me to the view that in the exercise of my discretion I ought to exclude the evidence entirely of both witnesses.

I cannot, of course, pre-determine any question of rebuttal evidence except that Crown counsel will realise that having excluded the evidence of Mr. Nelson at this stage he may have an extra difficulty in any subsequent application to call him in rebuttal but I am not to be taken as having ruled against him until such application, if made, is heard and dealt with.

Counsel for the Crown has properly drawn my attention to the use of the word "lie" in reference to the witness Place. For the sake of the record I incorporate the passage in the brief :-

> "The woman was still being attended to when my supervisor called me and told me to come upstairs. While upstairs I was spoken to by Constable YOUNG. She said to me, 'Did you see the stabbing?' and as I hadn't I said no. So therefore my name was not obtained and nor did I make a statement at that time."

In respect of the witness Nelson the Crown will desire to adduce in evidence the fact that the witness knew of the address of the accused and his wife when they lived in Auckland, that is to say, It has been agreed that that evidence may be given in a hearsay fashion by the officer in charge, Detective Sergeant Hewett.