NZLR

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

24/10

T.56/91

HIGH PRIORITY

THE QUEEN

v

M. E. F.

2028

T.101/91

THE QUEEN

v

J. M. F.

Hearing: 30 September 1991

Counsel: L. Spear for Crown
D. J. McNaughton for M. E. F.
D.G.A. Reece for J. M. F.

Ruling: 30 September 1991

Reasons for Ruling: 30 October 1991

REASONS FOR RULING OF WYLIE, J. AS TO MODE OF COMPLAINANT'S EVIDENCE

The two accused, whom I shall call the husband and wife, are the parents of a boy now aged five years and six months. They face four counts alleging a variety of sexual abuse of this boy from the date of his birth until 30 April 1990.

The trial was due to commence on Monday, but because of difficulties which arose in relation to the evidence of the boy it was postponed until the following day and the whole of Monday was taken up with legal argument and listening to and watching a videotape of an interview with the boy carried out on 17 December 1990.

The Crown had filed an application under s.23D of the Evidence Act 1908 seeking directions that the boy's evidence-in-chief be presented by means of the videotaped interview and a further direction that for the purposes of cross-examination the boy be located in a room outside the courtroom and his evidence be given on closed circuit television. That application had been filed prior to an earlier date set for the trial, viz. 8 July 1991. On that day counsel then involved had conferred with the trial Judge who was then allocated to hear the case. A doubt arose as to whether an order could be made under s.23D as the videotape had not been shown in the sense of being viewed by the District Court Judge at the depositions hearing. That doubt arose from the provisions of s.23E(1)(a) and a then recent decison of the High Court in Christchurch, R v Allen, Christchurch T.12/91, 15 April 1991, which had held there was no jurisdiction to make an order unless the videotape had in fact been viewed at the deposition hearing. I interpolate here a reference to R v Lewis (Unreported, CA.11/91, judgment 24.9.91) in which the Court of Appeal has overruled the effect of that decision. But the concern that arose in the present case on 8 July was then completely

understandable. In the result the trial did not proceed and the matter was remitted to the District Court for the tape to be viewed by the Judge there, but in respect, I think, only of the charges against the wife. Thereafter there was a fresh committal in respect of those charges and the trial of both accused now comes before the Court again.

However, on 8 July some consideration was given to the Crown's application as to the mode of taking the boy's evidence and the Crown's application has recorded on it a minute of a consent order in terms of the application signed by the Judge. There is however some confusion as to whether in fact a consent order was made, or at the least in relation to what it was that was the subject of consent. Unfortunately counsel then acting for the wife is now overseas and she is represented by different counsel. Counsel now appearing for the Crown was not involved on 8 July. Whatever the cause of the confusion it is clear that counsel now acting for the accused have both been under the impression that the Crown's application remained to be dealt with. Indeed, efforts had been made by counsel to have the application brought on for hearing before Monday in anticipation of the trial commencing on that day. The Crown, however, was unaware of all of this and only learned of the opposition to the application on the night preceding the trial date. I was unable to speak to the Judge involved because he is not presently available in Auckland, and it may well be that in any event he would have been unable to recall the circumstances surrounding a consent order made

almost three months ago. Counsel for the Crown did not question the *bona fides* of counsel for the accused and accepted that there must have been some misunderstanding at the time.

In that unsatisfactory situation I considered it inappropriate to hold the accused bound by the "consent" order then made, especially as it is accepted that there was no examination of the application on its merits. Accordingly I set aside the order then apparently made and dealt with the application *de novo*.

There were two affidavits filed by the Crown in support of its application. As might be expected from the expertise and experience of the deponents the burden of their evidence was that with a child so young and with the nature of the questions which would have to be put to him in the ordinary way it would be highly undesirable for him to be required to give evidence in open Court or indeed, to give evidence-in-chief even in a separate room on a closed circuit television screen. I do not need to go further into that aspect because counsel for the accused conceded that if the videotape were not to be excluded for the reasons on which it was attacked by them, viz. for breach of the regulatory procedures, and because of the generally unsatisfactorily nature of the evidence contained therein rendering it appropriate to be excluded in the inherent jurisdiction of the Court, then it would be appropriate for the boy's evidence-in-chief to comprise the video interview

and for cross-examination to be conducted on closed circuit television.

Before hearing argument on the substance of the application I had read a transcript of the videotape and also viewed the tape itself. I have to say that even on a first viewing of the tape it was evident to me that the transcript was not entirely accurate and that it contained several omissions. One in particular to which I shall refer later may be seen as having considerable significance. I should also say that without the benefit of counsels' arguments I felt a very considerable degree of unease at the content of the transcript before seeing the video and an even greater sense of unease after I had viewed it. The tape ran for approximately one hour occupying 17 pages of typewritten transcript. In that time there were only four very brief statements by the boy which, taken at their face value, implicate his parents in the alleged sexual abuse. The first was made almost immediately after he came into the interview room. Thereafter on a number of occasions - counsel for the wife counted eight - the boy left the room, or at any rate the area of the room as seen on the screen and could be heard talking to others in the background. On one occasion after a lengthy absence he returned to the screen and after some prompting from the interviewer made the second main allegation against his parents. He again left the screen and returned later when the next series of statements were made implicating the accused, albeit that in one part at least the allegation was biologically

nonsensical, and he later amended it. There is at least a suggestion in the course of the transcript that the boy saw, and he may have spoken to, the foster parents with whom he is now living and who are the principal witnesses against the parents. The boy was unruly throughout the interview. He paid scant attention to what the interviewer said to him, appeared not to listen to questions and largely ignored them in spite of her every effort, and I think it was all done in a perfectly proper way, to lead him to give information of the kind that was required. He was noisy, uncontrolled (through no fault of the interviewer), and at times spoke so loudly as to be incoherent. It was a totally undisciplined performance, but in saying that I do not attribute the slightest blame to the interviewer who did the best she could in a very difficult situation. On one occasion it is recorded in the transcript, and could be heard on the video, she made a comment to the effect "it is hopeless" and although not recorded in the transcript I detected her making a similar comment to someone off screen. Nevertheless she controlled what must have been a considerable sense of frustration in a commendable way. Having said that it is unfortunate that I now have to deal with some criticisms of her conduct of the interview in a technical sense.

Both counsel for the accused drew attention to what they argued were defects in the video interview by reason of breaches of the Evidence (Videotaping of Child Complainants)

Regulations 1990. Regulation (4) so far as relevant and reg.(5) are as follows:

> **"4. Persons present during videotaping** - (1) Subject to subclauses (2) and (3) of this regulation, while the videotaping of the complainant's evidence is taking place, the only persons present shall be the interviewer, the complainant, and any person who is needed to operate the equipment.
>
> (2) Where the interviewer considers that it is in the interests of the complainant to have a person present to support the complainant, the interviewer may allow an appropriate person to be present for that purpose, but that person shall not take any part in the interview.
>
> (3) ...
>
> **5. Matters to be recorded** - (1) The videotape shall show the following matters:
>
> (a) The interviewer stating the date, and the time at which the recording starts:
>
> (b) Each person present (including the complainant) identifying himself or herself:
>
> (c) The interviewer -
>
> (i) Determining that the complainant understands the necessity to tell the truth; and
>
> (ii)Obtaining from the complainant a promise to tell the truth, where the interviewer is satisfied that the complainant is capable of giving, and willing to give, a promise to that effect:
>
> (d) The interview in its entirety:
>
> (e) Where, for any reason, a break is taken during the interview, the interviewer stating that fact, the duration of the break, and the reasons for it:
>
> (f) Where, for any reason, the interviewer decides to conclude the interview without asking all the intended questions, the interviewer stating that fact, and the reasons for the premature conclusion:
>
> (g) The interviewer stating the time at which the recording is finishing.
>
> (2) No particular form of words shall be necessary for the purposes of subclause (1)(c)(ii) of this regulation (either by the interviewer or the complainant) so long as the overall effect is a promise by the complainant to tell the truth.
>
> (3) In addition to the matters specified in subclause (1) of this regulation, an analogue clock,

> with a second sweephand, correctly recording the time shall be clearly visible throughout the videotape.
>
> (4) Where, in accordance with regulation 4 (2) of these regulations, a person is present during the interview to support the complainant, that person also shall be clearly visible throughout the videotape."

It will be convenient to go through the matters referred to in Reg.(5)(1). It was accepted that the requirements of (a) were complied with. As to (b) the evidence was somewhat inconclusive. Near the beginning of the interview the interviewer identified herself and then said, "And we've got Mary watching and Sarah". It seems to be accepted that Sarah was a Constable Su, or specialist interviewer, operating a second video machine recording the interview and it is probable that she was in an adjoining room. In her deposition the interviewer stated that the only persons in the interview room were herself and the boy. She described Constable Su's role in the adjoining room. She made no mention whatever of Mary and neither did Constable Su in her deposition describing the recording of the interview. It is evident that Mary was a Mary Dawson, a registered psychologist. Her deposition contains the following:

> "This was followed by the evidential interview at the South Auckland Video Unit <u>at which I was present as a support person for (the boy)</u>." (My emphasis)

On the other hand her affidavit in support of the present application, after referring to the boy's reluctance to enter the video room and the need to settle him down with

drawings and toys before he was ready to cope with being interviewed, contains the following:

> "Once he settled down (the boy) still needed a break at intervals from being questioned, and would join me in the monitoring room." (My emphasis)

On the occasions when the boy went away from the interview desk there appeared to be no opening or closing of doors and the voices "off stage" as it were, came through relatively clearly. Without having detailed evidence as to the structure of the interview room and the monitor room I would not be prepared on this application to conclude that those in the monitor room were "present" in the sense of reg.(5)(1)(b) but the deposition evidence of Mary Dawson does not readily reconcile with her affidavit and the complete absence of any reference to her in the depositions of the interviewer and Constable Su when describing in detail how the interview was conducted and the video recorded, is surprising. There is also a comment in the transcript noting "Sheryl's voice in background". She is likely to have been Sheryl Thomson, a clerical assistant in the Department of Social Welfare. Her deposition merely records the handling and security of the video tapes. It makes no mention of her having been in the precincts when the interview was recorded. Nor is her presence mentioned by any of the other witnesses. Although I do not found my decision on this point I am left with an uncomfortable feeling that reg.(4)(1) and (5)(1)(b) may not have been fully complied with.

Much more important, however, is the requirement of paragraph (c). Nothing whatever was said by the interviewer to show that she had determined that the boy understood the necessity to tell the truth. At no stage did she discuss the concept of truth with him. Certainly she asked him a number of routine questions such as his name, the composition and names of members of his family, the colours of various articles shown to him and the like. But I regard those questions as being addressed to his intelligence and understanding rather than to an inquiry into his truthfulness or his understanding of the concept. There was certainly no attempt to obtain from the boy a promise to tell the truth. The latter requirement only arises where the interviewer is satisfied that the complainant is capable of giving and is willing to give a promise to that effect. If, in the present instance the interviewer's failure to obtain such a promise was the result of her not being satisfied that the boy was capable of giving and willing to give a promise to that effect, then it must cast a real doubt on the quality of what the boy has said as well as a real doubt as to whether the interviewer had determined that he understood the necessity to tell the truth. But in any event the videotape did not show such a determination and the necessity for that determination is not conditioned as is the obtaining of a promise by any requirement that the interviewer be satisfied as to the ability and willingness to give such a promise.

I think it perfectly clear that the requirements of paragraph (c) were not met.

Counsel for the accused both argued that those requirements were mandatory and that failure to comply therewith disqualified the tape from use under s.23D. Counsel for the Crown however, argued that that requirement, as were the others in reg.(5), was merely regulatory or directory, that the interviewer may in her experience have deemed it inappropriate to attempt to obtain a promise from the boy, and that the overall purpose of the statutory provisions to relieve the stress of a complainant in cases of this kind should not be frustrated by the necessity for strict compliance with technical matters. I cannot accept that submission.

It seems to me that the provisions of paragraph (c) are designed to replace the steps that would normally be taken by a Judge before allowing a young child to give evidence in the ordinary way. No such opportunity for the Judge to satisfy himself as to the understanding of the child as to the concept of truth and the necessity for truthfulness in the giving of evidence exists where a videotape is to be the evidence of the witness. The interviewer is in effect put in the shoes of the Judge for that purpose. And the obtaining of a promise to tell the truth is a substitute for the requirement of s.13 of the Oaths and Declarations Act 1957. The entirely laudable desire to relieve the stress on a complainant and to shelter

him or her as far as possible from the traumatic experience of having to relive frightening or unpleasant experiences must not be allowed to override a fundamental requirement of evidence that is to be adduced against accused persons, nor must all prudent precautions to protect accused persons from the risk of conviction on untrue statements be cast aside. Nothing could be more fundamental than that if evidence is to be put forward against an accused person, that evidence must, before it can be regarded as evidence at all, be that of a witness who understands the concept of truth and the necessity that he shall tell only the truth because of the consequences of what he may say. That may have to be done in very simple, even rudimentary terms, with a child as young as this boy. But the attempt must be made. Moreover it is important that the jury should see the attempt made to establish the understanding of the witness. That is clear in the ordinary trial situation where the witness is in Court to give evidence *viva voce:* R v Reynolds [1950] 1 All ER 335. I think subparagraph (5)(1)(c) is designed to achieve as nearly as possible the same purpose. It is not enough that the interviewer may have formed in her own mind a conclusion that the complainant understood the necessity to tell the truth.

In R v Reynolds (supra) Lord Goddard, C.J. said:

> "No member of this court has ever known of a case in which a witness has been called to inform the court whether or not a child is fit to give evidence. I am not saying that there may not be cases - perhaps this is one - in which the judge or chairman may want some

> such assistance, especially if he hears that the child is at a particular sort of school. It is not on that ground that the court thinks that there has been a fatal mistake here. The reason why the court decided in *R v Dunne* that the evidence of the child must be given in the presence of the jury was because, although the duty of deciding whether the child may be sworn or not lies on the judge and is not a matter for the jury, it is most important that the jury should hear the answers which the child gives and see her demeanour when she is questioned by the court, for that enables them to come to a conclusion as to what weight they should attach to her evidence."

The breach cannot now be cured. The interviewer could not be permitted now to give evidence as to why at the time she thought the boy understood the necessity for the truth.

By the same token it would not be appropriate for any other witness to do so. Nor could the boy himself now be called to determine the issue. It is now more than nine months later. His understanding today has no relevance to his understanding then.

Compliance with this requirement is, I think, all the more necessary because of the provisions of s.23H of the Evidence Act which impose some limitations on the nature of the directions which a Judge may give to the jury in cases to which s.23D and E apply. In particular paragraph (c) of that section provides that the Judge shall not instruct the jury on the need to scrutinise the evidence of young children generally with special care nor suggest to the jury that young children generally have tendencies to invention or distortion.

For all of those reasons in my opinion the requirements of paragraph (c) of reg.(5) are mandatory and of fundamental importance. Whether the other requirements of that regulation are to be regarded as mandatory or merely directory I do not now need to decide, but in regard to paragraph (c) I am not in any doubt. These new rules of evidence relating to child complainants represent a radical departure from previously accepted principles. While their purpose is not to be frustrated by mere formalism and undue adherence to technicalities I hope the day has not come that the elementary concept that evidence must be given with a sense of understanding and solemnity is to be discarded.

There was no argument in terms of paragraph (d), but in relation to paragraph (e) counsel for the accused complained that the interviewer failed to state the required details of the "breaks" taken during the interview. If the occasions when the boy left the room or the screen area are to be regarded as breaks taken during the interview then the criticism would be justified. However, I do not accept that those occasions were "breaks taken". What is contemplated, I am sure, is a deliberate interval, for example so that refreshments can be taken or for other reasons of convenience. These were not "breaks taken", they were simply involuntary and unwanted interruptions caused by the restlessness of the child. Had the interviewer given the information prescribed by paragraph (e) nothing would have been achieved to allay any concerns about what may have been said to the boy during the intervals and nothing would have

been gained. The argument of counsel for the accused is, with respect, just the kind of technicality which should not be permitted to frustrate the object of the legislation.

No complaint was made in relation to paragraph (f) and paragraph (g) was complied with.

Clause (2) of the regulation needs no comment, other perhaps than to say that it adds emphasis in my opinion to the necessity for compliance with reg. (5)(1)(c).

No complaint was made in relation to clause (3) but in relation to clause (4) the same issue arises and with the same inconclusive result as I have already recorded in relation to regs.(4)(1) and (5)(1)(b).

On the ground of failure to comply with reg.(5)(1)(c) alone I would not be prepared to grant the application that this complainant's evidence be given by means of the videotape. However, counsel for the accused also advanced further arguments relating to the quality of the statements made. To a substantial extent those submissions echoed my own initial impressions of the transcript and the view of the tape which I have outlined earlier in this ruling. In addition counsel pointed to a number of matters in the interview which are capable of being seen as inconsistencies and inaccuracies. I will not go through those in detail. Counsel for the Crown responded to them individually and was able to advance contrary arguments which suggested a good

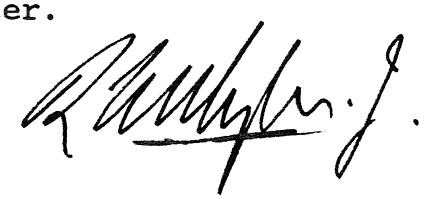
deal of care by the boy in correcting either his own mistakes or, in one instance, correcting a mistake made by the interviewer in summarising what he had earlier said. There is merit in both sides of the argument and in the end had the videotape been otherwise admissible the resolution of those differences may have best been left for the jury to weigh up, but the fact that apparent inconsistencies and inaccuracies can responsibly be put forward does not give confidence in the reliability of what has been said by the boy and when account is taken of the very limited scope of what the boy said and the seemingly casual and almost thoughtless way in which at least some of the remarks were made, the whole interview seems to me to have limited probative value while at the same time it could be highly prejudicial to the accused.

A further cause of concern as to the interview generally arises from some words towards the end of the interview not recorded in the transcript, but which could be heard in the background after the boy had left the screen area. They were a little difficult to pick up, but all counsel and I were agreed that the boy could be heard saying to one of those in the background words to the effect that he was in trouble, that "she" had made him talk, and when asked who was going to get him into trouble he identified the interviewer as having made him talk. I immediately absolve the interviewer from any improper pressure on the boy. I do not think she overstepped the mark at all in trying to get useful and intelligible responses from him.

However, obviously the boy had been the centre of enquiry for some time and must have known what he was expected to say. The remarks, the sense of which I have just outlined, indicate that he may have felt himself under some pressure to please the interviewer and perhaps then regretted it. Whatever significance is to be attached to those remarks they cannot do other than add another factor to the unsatisfactory nature of the whole interview. Those concerns all taken together persuade me that even were it not for the failure to comply with the regulation it would be unsafe to allow this interview to be used as the evidence-in-chief of the boy.

Accordingly the application is refused. It will now be for the Crown to decide whether the boy should be called to give evidence in which case counsel are agreed that it should be given from a separate room by means of closed circuit television. I will not, however, make an order to that effect until it is sought by counsel for the Crown after a decision as to the calling of the boy is made.

At the conclusion of the argument I ruled against the application, but because of the lateness then of the hour I said I would give my reasons later.



Solicitors: Crown Solicitor, Auckland
D.J. McNaughton, Auckland for M.E.F.
D.G.A. Reece, Auckland for J.M.F.