LOW PRIORITY

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY 11/2 T74/93

R E G I N A

18

v

A

Hearing: 3 February 1994

Counsel: P Shamy and Ms S Clark for Crown
G Glover for A

Judgment: 3 FEBRUARY 1994

RESERVED JUDGMENT OF HOLLAND, J.

An application has been made before the court under s.344A of the Crimes Act 1961 for rulings as to the admissibility of certain evidence on the trial of the accused which is scheduled to take place on Monday week. There is some urgency in the decision because I shall be on circuit from tomorrow onwards and I have a full day tomorrow.

The offences are alleged to have occurred between 1 September 1990 and August 1992. It is obviously desirable that the trial be not delayed unless the interests of justice absolutely require it.

The accused faces an indictment containing ten counts alleging indecent assaults and sexual violation of four complainants. Some of the matters raised by way of objection to the admissibility of evidence have been resolved or agreed to and can be speedily dealt with in this judgment.

The application related to the evidence of seven witnesses:

1) U .

This matter has been resolved between counsel and the evidence of the alleged admission of the accused to be given by Mr Unwin has been edited so as to eliminate matters objected to by counsel for the accused.

2) E .

This witness was to produce a videotape of a documentary made by the accused about Emmanuel House. The Crown have agreed not to produce the videotape but will call evidence from Erson that such a tape was made. It is proposed that this evidence may be read by way of a brief but there may be difficulties in that because the brief will require amendment. It is a matter that can be resolved by counsel.

3) Johnson

This is evidence of similar facts falling short of amounting to a crime. There has been no application for severance of trials and such an application would be inevitably doomed to failure. The Crown's evidence is that the accused, who described himself as a pastor of religion, conducted a shelter home and counselling services to assist young persons who for one reason or another were in need of help and in many cases had no fixed abode. In the case of the four complainants the Crown submits that the accused used his position as a counsellor and a pastor of religion to extract admissions of misconduct or sexual abuse involving the complainants to persuade each of the complainants, regardless of their sex, that they had homosexual tendencies and to force them to submit to indecent assaults or sexual violation, threatening the complainants that if they disclosed the sexual assaults by the accused he would expose them for their previous misconduct or

sexual abuse. It is the Crown case that he also expressed a consistent pattern of indicating that if there came to be a dispute it would be his word against theirs and that his word as a pastor of religion would be believed.

On the deposition evidence I am in no doubt that the evidence given by each complainant is admissible as being probative of each alleged crime having occurred, in accordance with what was said in Director of Public Prosecutions v P [1991] 2 A.C. 447 and R v Huijser [1988] 1 NZLR 577.

Mr Glover submitted that the evidence at trial might not be the same after cross-examination as that disclosed in the depositions. If that should be the case and there are substantial deviations it will be for the trial Judge to rule at the time as to whether the evidence of each offending is probative and admissible in considering the guilt or innocence of the accused on each charge. On the present state of the evidence that is the case.

The particular evidence concerned from Mr Johnson is evidence short of amounting to a crime but the circumstances are so similar to those alleged by the complainants, which presumably will be challenged by the accused, that the evidence of Mr Johnson must be probative and admissible in determining the guilt or innocence of the accused on each charge. No doubt the Crown will call the evidence of the complainants first. If at the conclusion of their evidence the case is such that the evidence of Mr Johnson has become inadmissible the trial Judge will no doubt so rule. In the meantime and on the existing evidence, the evidence of Mr Johnson is admissible.

4) The evidence of McKenzie, Harvey, Summerfield and Williams is challenged.

In the depositions McKenzie gives quite a lengthy and detailed account of events leading up to sexual violation by the accused upon him. This evidence led to a charge against the accused in 1992 of sexual violation of McKenzie. The accused pleaded guilty to the charge, has been sentenced and served his sentence.

Had there been no previous prosecution and conviction there can be no challenge to the admissibility of McKenzie's evidence and no doubt a joint trial with the other charges faced by the accused. It is submitted that the evidence of the conviction of the accused on this count and the admissions that he has made to detectives in relation to the allegations when interviewed on the current charges should be excluded on the basis that such evidence is highly prejudicial and discloses no more than a propensity to commit a crime.

In my experience I had not been aware of any case where evidence of previous convictions was introduced in prosecution evidence under the "similar fact" principle. It appeared to me that there might be some danger in allowing this because the jury, knowing of the accused's conviction, might well not properly carry out their obligation to consider the evidence of the events in an independent way. Once the jury was aware of the conviction there may be a tendency simply to accept the facts giving rise to the conviction as being established facts.

Counsel drew my attention to the decision of the Court of Appeal in R v McIntosh 8 CRNZ 514. That was a case where the Ccrown desired on multiple charges of burglary to produce evidence of earlier convictions for burglary under the similar fact principle. The Court did not appear from the judgment to be in any way troubled by the fact that

the accused had been convicted of these earlier offences when considering the admissibility issue. There was some difference in that case from the present case in that the issue before the Court was not whether burglaries had been committed but whether the burglar was the accused. Clearly the Crown wished the jury to infer that it was the accused because of the pattern of his offending in the past. The issue in the present case is not one of identification of the offender but is a straightout issue as to whether the offences took place or not.

I originally thought that there might be some ground of distinction but I am satisfied that no valid ground exists. I am, of course, bound by the decision of the Court of Appeal but was initially troubled by it. On further consideration, and with respect to the higher Court, I am happy to have reached a conclusion which is in accord with R v McIntosh independently of the reasoning in that judgment.

The issue in the present case is whether the complainants are telling the truth. The accused denies that the events related by them occurred. While I am satisfied that evidence of conviction as such standing alone would be inadmissible, I am of the view that the evidence of the complainant in that case is relevant and admissible because what occurred to him is so similar to the events complained of by the complainants as to be highly probative of the guilt of the accused. What is more important is that in the case of McKenzie the accused admitted his guilt. While I have said that the conviction as such is not admissible the fact that the accused admitted his guilt is relevant and admissible.

I acknowledge that by allowing the evidence of McKenzie to be given it may well lead to the jury knowing that the accused has been convicted of it and dealt with. That is even more obvious when I allow, as I do, the evidence to be given of the plea of guilty of the accused.

What must be considered is the question of prejudice to the accused. The only prejudice to the accused is that he has admitted doing a similar act in similar circumstances and in a similar way to the crimes he is alleged to have committed. I am not persuaded that the fact that he pleaded guilty and was convicted has any more prejudicial aspect attached to it beyond its legal probative value than the evidence of similar conduct relating to criminal activity.

I am concerned that this decision might lead to applications, particularly in sexual cases, for evidence of previous convictions or the facts relating to them to be introduced on many occasions. Obviously the timing of the offences will be relevant. The greater the gap in time and the greater the change in circumstances the less probative such evidence will be. Each case will have to be considered on its own facts. In the present case the conduct leading to the earlier conviction all occurred at about the same time and in the same sort of circumstances as existed for the relevant charges.

Like all preliminary rulings relating to evidence the final issue will have to be determined by the trial Judge but on the present state of the evidence before me the evidence sought to be called by the Crown in relation to the witness McKenzie is admissible.

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

T74/93

R E G I N A

v

A

ORAL JUDGMENT OF HOLLAND, J.
