Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

7 October 2022

MEDIA RELEASE

PETER HUGH MCGREGOR ELLIS v THE KING

(SC 49/2019) [2022] NZSC 115

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest: www.courtsofnz.govt.nz.

Suppression

Publication of names or identifying particulars of complainants is prohibited by s 139 of the Criminal Justice Act 1985.

Publication of names or identifying particulars of witnesses under 17 years of age is prohibited by s 139A of the Criminal Justice Act 1985.

Background

The appellant, Peter Ellis, was convicted after a jury trial in 1993 on 16 counts of sexual offending against seven children who had attended the Christchurch Civic Childcare Centre (the Crèche), where he had been a teacher. He was acquitted or discharged on 12 other charges.

Since 1993, there has existed considerable public controversy surrounding the conduct of the investigation and trial. Much of the concern centred on the suggestion that the complainants' accounts might have been affected by contamination arising during the investigation process. As well, there has been long-standing public concern that Mr Ellis did not receive a fair trial. Because of the age and number of complainants and the setting of the complaints, the case was almost unprecedented in the complexity it presented to those investigating, prosecuting and defending the charges. It also posed significant challenges for the parents of the complainants who were naturally concerned upon hearing of the allegations against the appellant.

In the nearly 30 years between Mr Ellis' trial and the appeal before this Court, he has challenged his convictions in various forums. Initially he appealed to the Court of Appeal. In

1994, that Court set aside three of the appellant's convictions after one child recanted her evidence, but otherwise the appeal was dismissed. A Governor-General's reference led to a further hearing in the Court of Appeal in 1999. That appeal was unsuccessful. Besides those court processes, the appellant also applied several times (unsuccessfully) for the exercise of the Royal prerogative of mercy. One of those applications resulted in a Ministerial inquiry undertaken by a former Chief Justice. In 2002, the Ministerial inquiry determined that the appellant had not proved that his convictions were unsafe. Even after those decisions, the public controversy continued.

The Supreme Court appeal

In 2019, the Supreme Court granted leave to appeal, together with an extension of time for that to occur. Mr Ellis died before the appeal hearing. In 2020, the Court ruled that the appeal be allowed to continue. Reasons for that decision have been issued separately.

The Supreme Court has unanimously allowed Mr Ellis' appeal and quashed his convictions.

On appeal, the question for the Court was whether a substantial miscarriage of justice had occurred under s 385 of the Crimes Act 1961 such that the appellant's convictions should be set aside. Two principal issues arose for consideration:

(1) Did the expert evidence given at trial under s 23G of the Evidence Act 1908 exceed proper bounds by unfairly and improperly bolstering the complainants' evidence?

(2) Was the jury properly informed of the risk of contamination of the complainants' evidence and if not, in the absence of that assistance, was the risk of contamination of such a degree that a miscarriage of justice resulted?

Supreme Court decision

The Supreme Court's resolution of the two principal issues on appeal is as follows.

Section 23G of the Evidence Act 1908

The Supreme Court found that a substantial miscarriage of justice resulted from the expert evidence given at the appellant's trial under s 23G of the Evidence Act 1908 (now repealed).

Section 23G of the Evidence Act 1908 formerly permitted an expert witness to give evidence in cases involving allegations of sexual offending against children. One of the topics on which the expert could give evidence was any consistency between the behaviours of the child complainant with the behaviours of sexually abused children of the same age group.

Although evidence given under s 23G assisted juries by providing specialist information outside their ordinary experience and knowledge, experts were required to stay within the narrow bounds of the section. To go beyond the section risked improperly bolstering the credibility of the complainants' evidence, against which there existed a strict prohibition.

Over time, the courts articulated carefully calibrated safeguards to ensure s 23G witnesses did not overstep. Evidence given under s 23G needed to be balanced; where possible, alternative explanations for the relevant behaviours needed to be stated; and experts were not allowed to

suggest the presence of certain behaviours was diagnostic of sexual abuse, or to comment on matters relating to the credibility of the complainants in the particular case.

In 1993 at the appellant's trial, Dr Karen Zelas (a specialist psychiatrist) gave s 23G evidence for the Crown. Leading up to the trial, she was also involved in supervising the interviews of the complainants and assisted the Police during the investigation. Her evidence highlighted 20 behaviours exhibited by many of the complainants, all of which she testified were consistent with the behaviours of sexually abused children generally. They included relatively common childhood behaviours (such as bedwetting and sleeping problems) and uncommon behaviours, such as sexualised behaviour. The Crown produced a chart at trial summarising Dr Zelas' evidence — it was retained by the jury for deliberations.

The Supreme Court acknowledged that s 23G was an extremely difficult section for an expert to give evidence under while respecting the boundaries of permissible evidence. Nevertheless, the Court has found that Dr Zelas' evidence exceeded the proper bounds of s 23G in these material respects:

(1) Her evidence commented on the credibility and reliability of the complainants' evidence which was not permitted by s 23G.

(2) Her evidence lacked balance. She failed to fairly inform the jury of other possible explanations for the behaviours and discounted/minimised explanations offered by the defence. Dr Zelas' multiple roles in relation to the investigation and prosecution may have contributed to that imbalance in her evidence.

(3) Dr Zelas' evidence suffered from problematic circular reasoning. She suggested the fact a child had made an allegation of sexual abuse transformed normal childhood behaviours into behaviours indicative of sexual abuse.

(4) The jury may well have understood Dr Zelas' evidence as endorsing the credibility of the complainants' evidence by suggesting the presence of certain behaviours was diagnostic of abuse.

(5) The overall effect of Dr Zelas' evidence was to incorrectly suggest to the jury that "clusters" of behaviours supported a finding of sexual abuse. That impression was compounded by the chart the Crown produced at trial, which was itself an unbalanced and unfair representation of the evidence it purported to summarise.

None of those problems was overcome by the cross-examination of Dr Zelas at trial. Nor were they counteracted by the evidence of the defence's expert witness, submissions of trial counsel or the trial Judge's summing up.

Therefore, a substantial miscarriage of justice resulted. Given the extent of the inadmissible material, the significance of Dr Zelas' departure from appropriate standards, and the impact of the evidence on the trial, the s 23G evidence may well have affected the verdicts. Much of the evidence was also outside the boundaries of s 23G, making its admission an error of law.

Contamination

At trial, an important feature of the defence case was the argument that the complainants' evidence was contaminated by a number of influences, the most significant of which was direct questioning by parents. Both the 1994 and 1999 Court of Appeal judgments concluded that the risk of contamination was a factor that had been considered at trial — therefore there was no proper basis for second-guessing the jury's verdicts.

In the Supreme Court, the appellant relied on fresh evidence from memory experts to the effect that the risk of contamination was not fully recognised in 1993. Further, the appellant argued Dr Zelas' evidence at trial on the topic of contamination understated the level of risk and, in some respects, lacked scientific foundation.

The Supreme Court has concluded that although the risk of contamination was traversed at trial, the jury was not fairly informed of the level of risk.

There was a substantial measure of agreement between the experts for both the appellant and the Crown as to the level of the risk of contamination. Taking into account studies post-dating the trial, the experts said the risk of contamination was higher than the jury was led to believe and that contamination, if it had occurred, would not have been readily detectable. In particular:

- For the appellant, Professor Harlene Hayne gave evidence stating that the level of risk was high. She identified a number of sources of potential contamination such as: meetings between parents of the complainants during the investigatory phase; discussions between parents and complainants about the allegations; parent-to-parent discussions; and complainant-to-complainant discussions.

- For the Crown, Professor Gail Goodman expressed substantial agreement with Professor Hayne's analysis of the contamination risk. Professor Goodman said there was a high risk of contamination in relation to four of the complainants, while the risk in relation to the evidence of the remaining two was moderate or low.

Even on the basis of scientific knowledge at the time of trial, Dr Zelas' evidence understated or mischaracterised the risk of contamination. The effect of her evidence was not counteracted through cross-examination, the evidence of the defence's expert witness, counsel submissions or the trial Judge's summing up. Additionally, the Court considered it was significant that Dr Zelas had expressed concern about possible contamination of the accounts of two complainants before trial but expressed no such concern at the trial itself. From the jury's perspective, her evidence suggested (at least implicitly) that she did not detect contamination in the complainants' evidence, giving the jury a false sense of reassurance that the contamination risk was low. In addition, her evidence was to the effect that contamination could readily be detected.

If the jury had been correctly informed of the level of risk, that may have created a reasonable doubt about the allegations made, at least in relation to some of the complainants. As the evidence of the complainants was mutually supportive, the undermining of some of the verdicts necessarily calls into question all of the verdicts.

Other grounds of challenge

Counsel for the appellant raised several other grounds of challenge relating to the techniques used to interview the complainants, memory evidence, and subsidiary points regarding alleged unfairness in the conduct of the trial.

The Court's resolution of those grounds is dealt with in the substantive appeal judgment.

Final comment

The release of this judgment marks the end of a long and painful journey through the courts for the many people involved in this case. As noted previously, the case posed significant difficulties for the parents of the complainants. They were in an impossible position — parental love and concern would have made it very difficult to not ask their children direct questions about the alleged offending or discuss the case with other parents during the investigation phase. The delays in completing the investigation and the associated public controversy exacerbated these factors.

The Court stated that its judgment was not to be read as a criticism of the parents, the complainants or those involved in the investigation and trial.

The Supreme Court's focus in this appeal was solely on conducting a careful analysis to evaluate whether a miscarriage of justice had occurred. With the benefit of hindsight, the Court considered that the special care and attention required for a case of such unprecedented complexity was underestimated at the time of the investigation and trial and this resulted in a miscarriage of justice.

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